

AMEN SITHOLE
versus
RINNEX OIL (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 5, 6 & 13 September 2013 & 21 January 2015

D. Muzawazi, for the plaintiff
S. Simango, for the defendant

Civil trial

ZHOU J: The plaintiff issued summons claiming against the defendant payment of a sum of US\$28 350-00 together with interest thereon at the prescribed rate from the date of summons to the date of full payment, and costs of suit. The money, according to the plaintiff's declaration, was paid to the defendant pursuant to an agreement concluded in September 2009 in terms of which the parties would purchase fuel for resale and share profits realised from the business. The plaintiff's case as pleaded was that the defendant paid him a total of US\$41 714-43 as his share of the profits but subsequently failed to pay the profit shares. As a result of the failure by the defendant to pay him his share of profits the plaintiff cancelled the agreement and demanded back the money he had invested in the business.

The defendant in its plea denied that it entered into the alleged agreement with the plaintiff. It contended that the agreement was between the plaintiff and one Patrick Vudzi who was a director of the defendant. The defendant therefore took the point that it was improperly joined in the proceedings. The defendant further averred that Patrick Vudzi had repaid the loan of US\$28 350-00 advanced to him by the plaintiff together with the plaintiff's share of profits.

Three issues were referred to trial, namely:

1. Whether or not there is a misjoinder of the defendant;

2. Whether or not the plaintiff and defendant entered into any agreement and terms thereof; and
3. Whether or not the plaintiff is entitled to refund of its capital sum advanced to the defendant.

The plaintiff gave evidence himself. His evidence was as follows: He is resident in the Republic of South Africa. He got to know the defendant through its director Patrick Vudzi who was a friend of his young brother. He entered into an agreement with the defendant represented by Patrick Vudzi in terms of which he was to invest money for the purchase of fuel products for resale in Zimbabwe. Pursuant to that agreement he invested a capital sum of US\$28 350-00. The money was paid directly to a supplier of fuel based on a proforma invoice which was in the name of the defendant. According to him Patrick Vudzi was the defendant's "director or sole proprietor". His evidence was that the parties would share the profits. The sharing ratios depended on whether the fuel had been sold to an "end user" or to a dealer. If the fuel was sold to an end user, by which was meant a person who purchased the fuel for his own use as opposed to for resale, the plaintiff would get 37% while the defendant received 63% of the net proceeds. If the product was sold to a dealer the plaintiff would receive 40% while the defendant received 60%. The plaintiff was entitled to receive back the capital amount which he had invested in the business upon the termination of the agreement. In accordance with the contract he did receive certain sums of money which totalled US\$41 785-00 as his share of profit. He terminated the agreement in June 2011 when the defendant was having difficulties meeting its obligations to him. The defendant's testimony is contradicted by some of the documents which he produced. He insisted that there were no interest payments made to him yet he or his representatives acknowledged payments expressed in writing as for interest.

Patrick Kombayi Vudzi gave evidence that he is the Chief Executive Officer of the defendant company. He and one Sithokozile Sibanda were the directors of the defendant. He denied that the defendant contracted with the plaintiff on the terms alleged. His testimony was that he personally entered into the agreement with the plaintiff in terms of which the plaintiff provided a sum of US\$28 350-00 for the purchase of fuel for resale in Zimbabwe. The money was the plaintiff's contribution to the business. He, Patrick Vudzi, would be responsible for selling the fuel. Profit was shared between the plaintiff and him personally. The defendant's name was only used for convenience. Some of the fuel was sold to the defendant or sold to

third parties through the defendant. The witness stated that initially the plaintiff was entitled to a share of profit from the joint business. Later on the US\$28 350-00 paid by the plaintiff became a loan to him which he was obliged to pay back together with interest. He stated that he repaid the capital amount together with the interest due to the plaintiff.

The question of whether the defendant was improperly joined in these proceedings depends upon the court's finding as to the parties to the contract. The documentary evidence produced by the parties shows that the capital sum of US\$28 350-00 was paid based upon a proforma invoice which was in the name of the defendant. The documents from the suppliers of the fuel reflected the defendant as the purchaser of the fuel. The defendant's stationery was used in the transactions for the purchase of the paraffin and other fuel for resale. Some documents signed on behalf of the plaintiff to acknowledge payment record the money as being "paid by Rennex Oil", the defendant. These appear in Exh 2 at pp 1, 2, 3, 4, 5, 6, 7, 8, 24, 25, 27, 28, 29, 30, 31 and 32. Forms for requisitioning the payments to the plaintiff also appear on the defendant's letterhead. But there are other documents which record the sharing of the profits as between the plaintiff and Patrick Vudzi. A handwritten document at p 1 of Exh 1 bears the names of the plaintiff and Patrick Vudzi.

From the evidence it seems to me that no real distinction was made between the defendant and Patrick Vudzi in the dealings with the plaintiff. For that reason, I do not accept that the defendant was not properly cited in this action. The business was essentially being conducted by the defendant. Tax liabilities arising out of the business were to the account of the defendant. Patrick Vudzi accepted that fact. The capital payment was made on behalf of the defendant and not Patrick Vudzi. Having regard to the totality of the evidence, it does not matter to me whether the plaintiff cited the defendant or had cited Patrick Vudzi, as it is clear that the defendant was the one that was accountable for all the purchases which were made using the money invested by the plaintiff.

The second issue which was referred to trial is inelegantly formulated. It is not in dispute that the parties entered into an agreement in terms of which the plaintiff invested an amount of US\$28 350-00. It is not in dispute that that agreement involved the purchase of paraffin and other fuel for resale. The parties shared profits pursuant to that agreement. There is a dispute as regards whether the agreement mutated into a loan agreement in terms of which the defendant was required to pay interest on the invested money to the plaintiff. Some documents produced by the defendant record some of the payments made to the plaintiff as

interest". But there is no need for the court to inquire into the dispute regarding whether the agreement later became a loan agreement given the fact that Patrick Vudzi, the defendant's only witness, admitted that the capital amount was to be paid back to the plaintiff upon termination of the agreement. Indeed, some of the payments made by the defendant to the plaintiff are recorded as for capital. The issue to be considered, therefore, is whether the capital sum of US\$28 350-00 has been paid in full as per the agreement between the parties. The defendant's witness stated that he repaid the amount in full. The plaintiff disputes that and claims that no payment was made at all for the capital. The documents produced in evidence show four categories of payment, namely, profits, interest, capital as well as those that are not classified. The oral evidence of the witnesses was not very helpful as no attention was paid to the details contained in the documents and in some instances the witnesses gave evidence which contradicted the facts averred in their pleadings. The payments that are not classified show different amounts and reveal no consistent pattern. I will therefore treat them as payments towards the capital sum unless there are circumstances suggesting that they were for interest or profit share. It should therefore be possible for the court to assess the total amount paid in respect of the capital by reference to those documents. I do not accept the plaintiff's assertion that no payment was made at all for the capital. Those who received the payments on his behalf accepted the payments as being made towards the capital sum by appending their signatures to acknowledge receipt.

In its schedule at p 33 of Exh 2 the defendant listed the following payments as the ones appropriated towards the capital:

<u>DATE</u>	<u>AMOUNT (US\$)</u>
24 September 2009	2 084
10 November 2009	2089
8 February 2010	1 560
23 February 2010	110
3 March 2010	3 000
4 March 2010	1 000
12 May 2010	500
7 June 2010	2 530
15 June 2010	600
23 June 2010	500

5 July 2010	1 500
8 July 2010	1 000
8 August 2010	3 000
24 September 2010	1 000
25 October 2010	1 350
30 November 2010	1 000
24 December 2010	800
4 May 2011	600
7 June 2011	5 000
TOTAL	<u>29 223</u>

The above figures would give the impression that the defendant actually paid to the plaintiff more than what was due in respect of the capital. I do not accept that to be the correct position. A sum of \$2 084-00 is stated by the defendant as a capital repayment made on 24 September 2009 based on a requisition form No. 4023 at p 15 of Exh 2. But an e-mail from the defendant at p 6 of Exh 1 shows that that amount represented the plaintiff's share of profit as calculated in that e-mail. An amount of US 2089-00 is listed as having been paid in respect of the capital on 10 November 2009. What is attached as proof of payment is in fact a requisition form No. 4576 at p 13 of Exh 2. The document at p 12 of Exh 1 shows that that payment was for the plaintiff's share of profits. A document relied upon by the defendant to prove a payment of \$1 000-00 on 24 September 2010 is a requisition form No. 677 which appears at p 18 of Exh 2. That form is not signed on behalf of the plaintiff to acknowledge receipt. Instead, there is an acknowledgment of receipt of that sum of \$1 000-00 at p 20 of Exh 2 which is signed on behalf of the plaintiff by one T. Sithole. The cash received voucher is dated Friday, 24 September 2010 and is clearly stated as for "Amen (Interest)". It is clear to me that that is the same amount which the plaintiff had apportioned to capital based on a requisition form. The same observation applies to a sum of \$1 000-00 contained in a requisition form No. 506 at p 17 of Exh 2. The cash received voucher for that amount is at p 22 of the same Exh 2 which shows that it is in respect of interest. A payment of \$800-00 contained in a cash payment voucher No. 303 dated 24 December 2010 is not signed for. There is no name written where it states: "Collected by:." There is therefore no proof that it

was paid to the plaintiff or received by him or by some other person on his behalf. Thus a sum of \$6 973-00 must be deducted from the sum of \$29 223-00. A balance of \$22 250-00 remains, which amount I am prepared to accept as having been paid in respect of the capital. Subtracting the sum of \$22 250-00 from the total capital figure of \$28 350-00 leaves a balance of \$6 100-00 outstanding. That, to me, is the only amount which the plaintiff is entitled to recover from the defendant in respect of the capital.

In the result, judgment is given in favour of the plaintiff against the defendant for:

1. Payment of a sum of US\$6 100-00;
2. Interest on the sum of US\$6 100-00 at the prescribed rate from the date of service of the summons, 18 May 2012, to the date of full payment; and
3. Costs of suit.

Mtombeni Mukweshu Muzawazi & Associates, plaintiff's legal practitioners
Nyikadzino Simango & Associates, defendant's legal practitioners