

BOARDER TRANSPORT
versus
TECTRANS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26 January, 19 & 24 & 31 March & 14 April & 29 July 2015

Trial Cause

Z Macharaga, for plaintiff
P S Jonhera, for defendant

TSANGA J: In this trial matter the defendant has applied for absolution from the instance at the close of the plaintiff's case. The plaintiff Boarder Transport, (herein after referred to as Boarder), seeks to have declared null and or alternatively voidable an agreement of sale involving specified vehicles to the defendant (hereinafter referred to as Tectrans). Boarder further seeks the return of these vehicles or payment of their market value. Interest on the market value of the vehicles is also sought from date of purported sale to date of return of vehicles. Costs of suit are sought on an attorney client scale.

The factual averments

The facts upon which the action was founded and evidence was led are these. Boarder was in the transport business. Around year end of 2010 into 2011 it downsized its operations by leasing some of its tankers. Defendant, Tectrans was leasing one of its tankers with registration number ABS 1305. In 2011 Boarder is said to have decided to pay its workers their outstanding salaries by depositing of some of its vehicles. It was at this point that it realised that some of these vehicles were missing from its premises.

According to the plaintiff's declaration, following an investigation into the missing vehicles that was carried out mid-year in 2012 it was discovered that the Tectrans was using its vehicles described in the summons as follows:

- i. A vehicle double CAB ISUZU of chassis number ADMTFSSDIA99001 of original registration number AAG 9154 of year 2001.
- ii. A tanker chassis number MLB 5569A of otherwise registration number ABB 0971
- iii. A TANKER Chassis number TLB 1088 of otherwise registration number AAZ 0858 of year 1982.
- iv. A tanker with chassis number GT 195529 of otherwise registration number ABS 1305 of year 1986.
- v. A tanker with chassis number GT 195529 of otherwise registration number AAZ 0862 of year 1993.
- vi. A tanker of chassis number STP 0609 registration number AAZ 0861

Tectrans managing director Mr Webster Samhembere, is said to be a former employee of Boarder. The investigation is said to have looked into how the vehicles had been acquired and it was established that Tectrans had purported agreements with the plaintiff's late Managing Director, Mr B Chikumbo, who committed suicide on the 8th of September 2011. It is Boarder's allegation that logo on the agreements shows that it was forged. It also says that the signature of the late managing director Mr Chikumbo based on a comparison of signatures he signed before he died. Furthermore, Boarder says that the purchase price was never deposited into its account. It is thereof also on this basis that it argues any purported agreement in respect of the above vehicles is forged and a nullity or should be declared voidable. It also says it never authorised any change of registration numbers which was done in 2012.

The defendant Tectrans admits in its plea to leasing the tanker with registration number ABS 1305 between 2010 and 2011 in terms of an oral agreement under which it was paying \$1500.00 per month, it says it was later sold to it. The sale is said to have been in 2011. As regards all the other vehicles in its possession, its position is that it entered into valid agreements for their acquisition. It denies that Mr Chikumbo's signature was forged and that the agreements were witnessed by Boarder's officials. As regards payment its position is that the money was paid to Mr Mandizvidza who was Boarder's Finance Manager in the presence of its Managing Director, the late Mr Blessing Chikumbo. It is also defendant's position that some of the vehicles were sold as non-runners and that they were sold for their fair market value. Tectrans accordingly maintains that the agreements are valid and that there is no need to set them aside. It also states that the vehicles have since been sold to third parties.

The evidence

The evidence upon which the application for absolution from the instance was made is from three witnesses. called by the plaintiff. The first witness was Mr Dalend Chikukwa a

former workshop manager who said he joined the company in in 2007. He described his job there as having been to ensure the roadworthiness of vehicles and that documents for all vehicles were in order. He said in this capacity there was no possibility that a vehicle could be disposed of without his knowing. He said he discovered the illegal sale at a time when he had decided to leave Boarder. He had written a letter in November 2011 but not yet resigned. He had stopped going to work in February 2012. He was approached by the workers as one of the company representatives. They wanted to be paid as they had gotten wind that the company was winding up. He however, stated in cross examination, that he was representing Boarder Transport and not just reporting what he had been told by the workers. Asked in what capacity he had sent the agreements of sale for forensic examination he reiterated that it was in his capacity as a former manager. He also stated that at the time Mr Mandizvidza the finance officer was being sought by the police and that he remains on the run. A docket had however been opened against him under CRB 242 /08/11 upon a report having made by the late Mr Chikumbo against him. His evidence was also that all rentals for vehicles would be handled by Mr Mandizvidza.

Having bought a vehicle from Boarder Transport himself he was asked if he had the agreement of sale as an example of what the proper agreement would look like. He had not brought the agreement nor a copy of the resolution authorising the sale to him. His position was that though the sale was facilitated through Boarder, the vehicle was in fact bought from a Mr Ryan Botha, a former employee of Boarder who had his own company although the vehicle was sold through Boarder Transport. He had entered into this agreement with the late Mr Chikumbo. He also confirmed being given another vehicle by Boarder in lieu of benefits that would have been due to him of \$15 000.00. He was however not able to produce a resolution regarding this arrangement with Boarder. It was therefore put to him in cross examination that Mr Mandizvidza would come to testify having acquired a vehicle using this same arrangement in lieu of payment.

His evidence was also that no police report to his knowledge had been filed against Tectrans regarding the six vehicles it is said to have illegally purchased. He said he was unable to say why as he had left the company at that time. He was unable to say why the late Mr Chikumbo did not make any report that the vehicles were stolen neither could he confirm nor deny that the late Mr Chikumbo gave directions for the release of the vehicles to the security guard. He also said that the decision whether or not to sell any vehicles was made by

the Directors of the company although the managers were involved in making recommendations.

It was also put to him in cross examination that Mr Webster Samhembere who formed Tectrans will state in his defence that the monies for the vehicles were paid to Mr Mandizvidza and some to the late Mr Chikumbo and that the vehicles were brought by Mr Chikumbo and Mr Mandizvidza as they entered into the various agreements.

The plaintiff's second witness was the forensic expert, Mr Leonard Tendai Nhari who gave his qualification and experience to the court which need not detain is here. The gist of his evidence was that a signature is an individual thing. Although a person can have variations in his signature his point was that what does not change is the way one designs and constructs his or her signature. As a basis for comparing the alleged forged signatures against the genuine ones, he said he used signatures on a copy of the passport of the deceased Mr Chikumbo and a letter of appointment relating to one Mr Katanha against the signatures in the contracts in question. He however stated that he had not looked at all the contracts as that would have been repetitive.

His evidence was that he noted differences in design and construction which he said could not be attributed to natural variation in the deceased's signature. He emphasised that having looked at the signatures as a forensic scientist, all he could say was that they were differences between the standard signature and the questioned signature. His conclusion was that the physical evidence produced as the deceased's signature was not consistent with the deceased having signed the documents in question - that is the contracts. He also noted variations in the logo which were different from the company's standard logo.

The third witness called was Mr Gideon Shongatu who worked for Boarder transport as a Buyer and Stores Supervisor. His work entailed dealing with spares on the stores side, and buying and supervision of stores. He also kept a register of the vehicles. He explained that the owners of the company had moved to South Africa and had instructed that assets were to be collected and sold. His evidence was that the workers had taken the issue of the payment of their benefits to the labour court when Mr Chikumbo was still alive and it had been agreed that they should be paid. He said following the labour court's decision they had been advised to contact Mr Honywill, a director of the company, who had in turn said that they should look for the company's tankers and get money from there for settling payments to the workers. It was in the process of looking for the company's tankers that it had been discovered that some were with Tectrans while others were with a company in Bulawayo. He further explained that

the workers obtained a writ of execution against Tectrans and that was when Tectrans instituted an interpleader that the trucks were theirs arising from the agreements of sale. A check with Central Vehicle Registry showed that the vehicles had changed ownership. Asked who could have authorised this change of ownership he stated that he did not know but thought that it would be the owner or directors of the company. In cross examination he stated that although management made decisions as to which vehicles to sell, these resolutions would filter down to various departments.

He also gave evidence relating to the letter head. This was to the effect that he was the one responsible at Border Transport for having them made and therefore was very familiar to what is on the letter head. He also stated that there was one stencil at the work place with the letter head. He stated that with reference to the agreements some did not contain the dog which is a material characteristic of the real letter head.

He also stated that the change of ownership of the vehicles was carried out by Tectrans in 2012 in full awareness of the dispute that had already arisen regarding their acquisition. He also questioned why the late Mr Chikumbo would have reported Mr Mandizvidza for fraud if he had witnessed him receiving the money. He also stated that they had moved premises and that it was in this movement that it was not clear where some of the vehicles ended up. He confirmed the evidence by Mr Chikukwa that only one vehicle had been leased to Tectrans. He also confirmed the evidence regarding the police report made by the late Mr Chikumbo against Mr Mandizvidza involving general finances of the company. His view however, was that although the report may not have been about the vehicles, it was about the finances of the company which is overall the subject matter before the court.

In cross examination he confirmed that the reason the trial had been brought was to recover monies owed to workers by the company. He however highlighted in his re-examination that he would have testified to meet the ends of justice in any event. He also stated that Mr Samhembere and Mr David Mandizvidza knew each other from having worked together at Border Transport.

Application for absolution from the instance

The principles upon which absolution is granted have been well stated and canvassed in our law. The essence from these cases is that an application for absolution from the instance will not be granted where there is evidence upon which a reasonable man *might* give judgement in favour of the plaintiff. (See *Gascoyne v Paul & Hunter* 1917 TPD 170 whose principle is discussed in local cases such as *Supreme Service Station (1969) Pvt Ltd v Fox*

and Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A); *Lourenco v Raja & Steam laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S); *United Air Charter v Jarman* 1994 (2) ZLR 341(S) at 343). Notably, the test is not whether the court should or would find for the plaintiff but whether it *might* do so applying its mind reasonably. Furthermore, as a general principle, the courts generally lean towards a case continuing. (See *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) 547 (H).

This application has been made primarily on the ground that the plaintiff has failed to make out a case that necessitates a defence. The defendant's counsel, Mr *Jonhera*, argues that from the evidence there is none upon which a reasonable court might conclude that plaintiff did not enter into valid agreements of sale with the defendant. He points to the failure to lead any evidence from the board as a material fissure in the evidence placed before the court. He also points out that none of the witnesses were directors and that the two witnesses who testified on behalf of the company led what was basically circumstantial evidence. It is argued that where circumstantial evidence is led, then it must be the only reasonable inference, which he says is not the case in this matter. He argues that the possibility remains that in the absence of any direct testimony from the company's directors that they did not sell the vehicles, they could have done so.

His further argument is that the evidence led came from employees with a vested financial interest in having the agreements of sale between the plaintiff and the defendant set aside. However, I do not see how this reality alone can disqualify their evidence since ultimately a case is decided on its full facts.

The failure to lodge any police report is siphoned from the evidence led as yet another indicator of the lack of merit in the allegations that the vehicles were taken from the plaintiff without authority. Given that some of the vehicles according to the agreements that were produced in court were sold in June 2011, it is stated as odd that Mr Chikumbo who died in September 2011 would not have noticed that vehicles were missing from the company. It is also argued that evidence of the expert witness Mr Leonard Nhari remains speculative and does not establish a prima facie case given the failure of the board to lead evidence that it did not conclude the agreement in question.

It is therefore argued on the basis of all of the above that at this stage it is safe to infer that the court has heard all the evidence which is available against the defendant and that any evidence to be led would only operate against the plaintiff. It is Mr *Jonhera's* position that the defendant must at this state be exonerated from the inconvenience of leading evidence to

bolster a hopeless case. This is said to be particularly so as the onus was on the plaintiff to prove that it did not enter into the agreements. It is his view that what was led was evidence that the plaintiff might not have entered into the agreements with the defendant as opposed to evidence that plaintiff did not enter into the agreements with the plaintiff.

Mr *Macharaga*'s response to the application on behalf of the plaintiff is that the evidence led by its 1st witness regarding what its Director Mr Honywill stated is admissible in terms of s 27 (1) the Civil Evidence Act [*Chapter 8:01*]. Furthermore, he argues that evidence has been led in this court as to Mr Honywill's position regarding the sale.

Analysis and disposition

I will deal first with the issue of there being no direct evidence from the company's directors since that is the nub of the matter for both counsel. From the evidence it was the 3rd witness Mr Gideon Shongatu rather than the 1st witness Dalend Chikukwa who spoke most directly to his interactions with Mr Honywill on this matter and who was cross examined by defence counsel on the matter of Mr Honywill. He explained that the owners of the company who had moved to South Africa and had instructed that assets were to be collected and sold. Mr Shongatu's evidence was also to the effect that after the labour court's ruling they had been advised to contact Mr Honywill who in turn then advised that they should look for the vehicles. It is also true that the defendant made reference to the affidavit by Mr Honywill but this has not been formally admitted as evidence.

Section 27 (1) of the Civil Evidence Act provides for first hand hearsay evidence being admissible in civil proceedings if the direct oral evidence by that person of the fact in question would be admissible in those proceedings. It provides as follows:

"Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings."

Section 27(3) then provides as follows:

If a statement referred to in subsection (1)

- a) is not contained in a document, no evidence of the statement shall be admissible unless it is given by a person who saw, heard or otherwise perceived the statement being made.
- b) is contained in a document, no evidence of the statement shall be admissible except the document itself, or a copy of the document if such copy is admissible in terms of this Act or any other law.

In *Hiltunen v Hiltunen* 2008 (2) ZLR 296 H at p 301G-H Makarau J (as she then was) explained the import of s 27(1) in relaxing the import the legal position on hearsay evidence as follows:

“For first hand evidence to be admissible under the Act, the evidence must be about a statement made orally or in writing by another person. The person who made the statement must be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he or she present and testifying.”

On the whole I am of the view that the statement made to the witness falls under the ambit of s27 (1) & (3) (a) of the Act.

I am cognisant of the fact that part of the difficulty that the plaintiff encountered in leading the kind of conclusive evidence that defendant says it did not produce being that it did not enter into agreements in question, was firstly because of the death of Mr Blessing Chikumbo. Secondly, it could not do so because of its finance Director Mr Mandizvidza whom it had reported for financial impropriety was said to be on the run. However, the same Mr Mandizvidza who witnessed the agreement is said to be able to come and give evidence on behalf of the defendant.

Since it is a fact that the evidence led was to the effect that the Director who was hands on and would have been conversant with the facts had committed suicide, ultimately the court in seeking to do justice must be guided by the peculiar circumstances of each case. Courts generally shy away from taking an armchair approach in determining matters before it. In *casu* I am of the view that would be the effect of granting absolution at this point in light of the facts of the matter. Granted it is not the duty of the defence to bolster a plaintiff's case but under the peculiar circumstances of this case, this court also takes note of the fact that the sales emanated from agreements of sale where the other party to the contract Mr Webster Samhembere is available to give evidence and be cross examined albeit for the defence, as is one of the witnesses and a key player to the agreements, namely Mr Mandizvidza. Also an application for absolution appears should not be spurred by the desire to protect the defendants from cross examination. Therefore whilst I am alive to the fact that the plaintiff's case does not stand on the firmest ground, what is required is not evidence that the court should or would find for the plaintiff but that the court might find for the plaintiff. In this case a prima facie case has been made out that justifies the matter being heard to its logical conclusion in order to arrive at a just and informed decision in this matter. There is a possibility that if taken through cross examination on the agreements, this court might still

find for the plaintiff. I am also not able to discount the expert's evidence at this point in the context of a partial hearing of the matter.

This court is therefore not able to come to the conclusion that were it to hear further evidence, there is no basis upon which it would find for the plaintiff.

The application for absolution from the instance is accordingly dismissed with costs and the defendant is put to its defence.

Mugiya & Macharaga Law Chambers, Plaintiff's Legal Practitioners
Wintertons, Defendant's Legal Practitioners