

FACT COVER ENGINEERING (PVT) LTD  
versus  
UNITED BUILDERS MERCHANT (PVT) LTD

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 10 February 2016 & 19 October 2016

**Civil trial**

Ms *O T Sanyika*, for the plaintiff  
Ms *C N Midzi*, for the defendant

MUREMBA J: The plaintiff's claim is for the payment of US\$5 423.00, interest on this amount and costs of suit.

It is the plaintiff's averment that on 20 April 2011, the defendant placed an order with it for the manufacture and delivery of 2 commercial trolleys. The plaintiff averred that it manufactured the 2 trolleys according to the defendant's specifications in accordance with a sample provided by the defendant. The trolleys were delivered to the defendant in April 2011, but the defendant refused or failed to pay for them thereby prompting the plaintiff to issue summons on 31 January 2012.

The plaintiff averred that when delivery of the trolleys was made the defendant accepted delivery. It said that in terms of the quotation it issued to the defendant any returns would not be accepted after 7 days from the date of delivery. The defendant neither returned the trolleys nor paid for them.

In its plea the defendant stated the following. It denied placing an order for the two trolleys with the plaintiff. It stated that the plaintiff indeed delivered 2 trolleys by leaving them at its premises. The defendant attempted to return the trolleys, but the plaintiff refused to accept them back. The defendant has never used the trolleys and is keeping them in storage pending the return of same to the plaintiff. The defendant said indeed the plaintiff indeed demanded payment for the 2 trolleys, but it has refused to pay because it never entered into a contract with the plaintiff for the purchase of the 2 trolleys.

The issue for determination is whether or not the defendant placed an order for 2 trolleys thus making it liable to pay US\$5 423.00 to the plaintiff.

The plaintiff led evidence from Masimba Mudhege who is its Director. His evidence was as follows. He has been working for the plaintiff since 1998. The plaintiff is into the business of general engineering. It does almost everything that deals with steel including manufacturing windows, door frames, gates and machining motor vehicle spare parts. It manufactures items on demand. In April 2011, he personally dealt with Mr Mandinga who was the defendant's Director of the Timber Department who placed a verbal purchase order for the manufacture of two trolleys. Mr Mandinga, on placing this order, said that he wanted these trolleys to carry trusses as the defendant was opening a strategic business unit in timber and it was setting up a truss plant for making roof trusses. Mr Mandinga gave him details of what exactly he wanted and the two of them went to PG to see a sample of the trolley Mr Mandinga wanted done. After that the plaintiff made the trolleys and delivered them as evidenced by the delivery note the defendant signed on 21 April 2011. The defendant should have made payment soon after delivery, but none was made. The defendant did not return or attempt to return the trolleys. Even if the defendant had attempted to return the trolleys the plaintiff would not have accepted them back because they had been made at its request and to its specifications.

Masimba Mudhege said that the plaintiff had always dealt with the defendant's Mr Mandinga and he had always placed verbal purchase orders. He went on to produce a number of invoices to confirm such orders. One invoice related to burglar bars which he said the plaintiff was requested to supply and fit. Another invoice was for the repair of the defendant's fence. Mr Masimba Mudhege said that these verbal orders had been placed by Mr Mandinga and the defendant had paid for all these invoices in 2010. Masimba Mudhege said that it was on the strength of the previous dealings with Mr Mandinga that he accepted a verbal purchase order in respect of the trolleys. He said he had no reason to doubt the purchase order. He also said that the plaintiff could not have manufactured the trolleys from nowhere without anyone having requested them especially if one considers the high value of the trolleys.

Masimba Mudhege said that when Mr Mandinga ordered the trolleys, Mr Muzondo who was the defendant's logistic director responsible for all procurements approved the order. Mr Masimba Mudhege said that he was aware of all of this because he was dealing with these 2 personnel. Masimba Mudhege said that he had always believed that this is how the defendant operated since he was not privy to its internal policies. He further said that in

the previous dealing the defendant had never refused to pay the plaintiff. Masimba Mudhenge said that for small retail goods like those sold in the hardware the defendant's buying department would place orders, but (he) Masimba Mudhege did not know the personnel or actual people involved.

The defendant led evidence from Solomon Huvaya who is its Risk and Loss Control Manager who has been with it for 25 years. His evidence was as follows. He confirmed that the plaintiff delivered 2 trolleys to the defendant on 21 April 2011, but the defendant could not accept them because it had not ordered them. The procurement department had not placed a purchase order for same as is required in terms of the defendant's procurement policy. He produced the defendant's procurement policy manual which he said came into effect on 31 January 2011. He said that in terms of this document no procurement of goods for resale and capital expenditure is done without following procurement procedure. He said procurement is done by those in the procurement department.

Solomon Huvaya said that upon receipt of the trolleys the defendant attempted to return them in the same week by phoning the plaintiff and asking it to come and get its trolleys, but it refused. Solomon Huvaya said that the defendant wanted to return the trolleys because it had not ordered them. He said that there was no purchase order from its procurement department and the defendant did not even know the intended use thereof. He said that Mr. Mandinga who was said to have ordered the trolleys by the plaintiff had left employment with the defendant on 30 June 2010 due to bad performance as the director of the timber department. He said that Mr. Mandinga could not have placed the order for the trolleys because he was not in the procurement department and he had left employment on 30 June 2010. He said that Mr. Muzondo who is said to have approved the verbal purchase order which was made by Mr. Mandinga was suspended from employment on 1 September 2011 due to bad performance as well. He said that Mr. Muzondo was the Procurement and Logistics Director but he would not have approved a verbal purchase order done by Mr. Mandinga because, firstly, purchase orders are supposed to be in writing and secondly, even after approval the proper procedure for procurement ought to have been followed. This entailed first getting 3 quotations. Then Mr Muzondo would then authenticate the best supplier and get authorisation by way of signatures by the Managing Director and the Finance Director. He said that Mr Mandinga would not have been involved in any of this process because he was not in the procurement department at all.

Solomon Huvaya said that after the plaintiff had refused to come and collect its 2 trolleys the defendant attempted to return the trolleys as evidenced by a debit/credit voucher dated 16 June 2016 which he produced as exh 9. He said that still the plaintiff refused to accept the trolleys back. As a result the defendant could not dump the trolleys at the plaintiff's premises. It took them back to its premises and kept them in the storeroom. Solomon Huvaya said that the invoices that were produced by the plaintiff showing previous dealings between the plaintiff and the defendant related to repairs and maintenance work which is not done by the procurement department but by the repairs and maintenance department. He said that the procedures adopted in the 2 departments are different. For repairs and maintenance, the procurement procedure is not followed and no written purchase orders have to be issued first. He said that this explains why invoices to do with repairs and maintenance have been honoured by the defendant.

#### Analysis of evidence

The defendant's argument was that Mr. Mandinga could not have placed an order for the purchase of the trolleys because at the material time he had left employment with it. It was further arguing that even if Mr. Mandinga had placed the order he had no authority to do so because he was not in the procurement board. The position at law is that if an employee purports to act on behalf of a company, the company is estopped from denying liability unless it can show that the party dealing with the employee was aware of the company's internal policy. S12 (a) of the Companies Act [*Chapter 24:03*] reads as follows.

#### **"12 Presumption of regularity**

Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—

(a) that the company's internal regulations have been duly complied with;

(b) .....

(c) .....

(d) .....

(e) .....

Provided that—

(i) a person shall not be entitled to make such assumptions if he has actual knowledge to the contrary or if

(f) he ought reasonably to know the contrary;"

In *Walen Holdings (Pvt) Ltd v Intergrated Contracting Engineering (Pvt) Ltd and Anor* 1998 (1) ZLR at 333 the defendant sought to argue that the internal arrangements of the company had not been complied with. The court held that a binding contract had been entered into and commented as follows.

“If the internal arrangements of R1 company had not been complied with, the rule in the *Turquand* case applied. Mugabe had held himself out as having the authority to negotiate on behalf of R1 company. The negotiator for WH had negotiated in good faith and was entitled to assume that all the required internal formalities of R1 company had been complied with and that G Mugabe was entitled to negotiate on behalf of the company. If Mugabe was not authorised by the constitution of R1 company to bind the company, the negotiator of WH was not aware of these internal arrangements. The negotiator for WH was not obliged to inquire into these matters of internal management.”

In *casu* for the defendant to be liable all that is necessary is for the plaintiff to show that Mr. Mandinga, the defendant’s employee placed an order for the purchase of the trolleys and that it had no knowledge of the defendant’s procurement policy. That Mr Mandinga was not in the procurement department is neither here nor there. A party who alleges the existence of a contract is the one with the burden to prove that averment. So in this case it is the plaintiff which has that burden, which burden is supposed to be proven on a balance of probabilities.

The plaintiff is relying on a verbal contract which was entered into by way of a verbal purchase order given by the defendant’s employee. The obvious disadvantage of an oral contract is that it is not easy to prove. Masimba Mudhege said that Mr Mandinga placed a verbal purchase order. In the absence of a written purchase order it is difficult to simply take Masimba Mudhege’s word for it. It was necessary for the plaintiff to do more to convince the court that indeed Mr. Mandinga placed a verbal purchase order. The plaintiff could have led evidence from Mr Mandinga confirming that he indeed placed a verbal purchase order for the 2 trolleys on behalf of the defendant. Mr Muzondo whom Masimba Mudhege said approved the verbal purchase order which was made by Mr Mandinga, should also have testified confirming that he indeed approved the verbal purchase order. Seeing that the two were no longer employees of the defendant I do not see how they failed to testify on behalf of the plaintiff. The plaintiff never made an attempt to call the two as witnesses. In the absence of a written purchase order and evidence from the then two employees of the defendant confirming the placing of the purchase order, the plaintiff’s claim remains unsubstantiated. The plaintiff’s case is even worsened by the defendant’s averment that Mr Mandinga who is said to have placed the order on behalf of the defendant left employment on 30 June 2010, well before April 2011 when the verbal purchase order was placed. It is unfortunate that the plaintiff was under the mistaken belief that the duty is on the defendant to prove when Mr. Mandinga left employment. The plaintiff is the one which is alleging that at the time material

to this case in April 2011 when the purchase order was placed, Mr Mandinga was still employed by the defendant, so it is the one with the burden of proving that averment.

The invoices that Masimba Mudhege produced as proof that there had been previous dealings with the defendant through Mr Mandinga in 2010 are not enough proof because the defendant's witness did not dispute them. He even confirmed that the plaintiff was paid for those invoices. He however went on to distinguish them from the invoice of the present matter saying that those invoices relate to the repair and maintenance department whose procedure is totally different from that of the procurement department. The procurement department deals with the procurement of goods for resale and capital expenditure. He said that the purchase of trolleys falls under the procurement department because it involves capital expenditure. In view of the foregoing the plaintiff failed to prove that Mr Mandinga placed an order for the trolleys with it. As such the defendant is not liable to pay the US\$5 423-00 to the plaintiff.

The plaintiff's claim is therefore dismissed with costs.

*Matipano and Matimba*, plaintiff's legal practitioners  
*Wintertons*, defendant's legal practitioners