

CITY OF HARARE
versus
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 7 June 2017 & 26 July 2017

Civil Continuous Roll

Mr Drury, for the plaintiff
Mr D Mwonzora, for the defendant

MATANDA-MOYO J: The plaintiff sued the defendant for payment of the sum of \$541 217.84 being outstanding balance, as at 2 December 2013, on defendant's account for the supply of treated water. Plaintiff also sought interest on the above amount at the prescribed rate, costs of suit and collection commission. On the date of hearing plaintiff amended the figure claimed to \$528 614.85.

Defendant in its plea alleged that it is an agent of the plaintiff responsible for onward supply of treated water to Norton residents. Defendant averred that the amount above is only payable upon collection of payments from the residents of Norton and other water consumers. Secondly defendant pleaded that the plaintiff breached the agreement by failing to supply agreed quantities of water, failure to maintain water pipes from Morton Jeffrey to defendant's water reservoirs. Much of the water billed was lost before reaching defendant's reservoirs. Defendant also challenged the accuracy of figures presented as such figures represented estimated bills and not actual. Defendant averred that government policies of write offs had affected its capacity to collect monies from residents. Judgments by courts declaring cut offs of water suppliers as illegal have dwindled collected revenues. However at the end, defendant averred that it would tender payment against collection of payment from residents.

At Pre-Trial conference the issues referred to trial were the following;

1. Whether or not the defendant is liable to the plaintiff in the amount claimed
2. Whether or not the bills presented to the defendant represent actual readings or they are estimated bills
3. Whether or not the defendant was an agent of the plaintiff
4. Whether or not plaintiff was responsible, either jointly or severally for the maintenance of water pipes from Morton Jeffrey Plant to defendant's reservoirs
5. Whether or not the payment for water by the defendant to plaintiff was conditional on defendant's customers
6. Whether or not it was impossible for the defendant to perform in terms of the agreement; and
7. Issue of costs.

The plaintiff led evidence from two witnesses, Engineer Hosea Abraham Chisango and Engineer Shame Chisango. Engineer Chisango testified that he is the Director of Harare Water Department. He has been employed in that capacity from September 2016. Previously he had been the Water Supplies Manager. He testified that the defendant is one of their bulk water customers. City of Harare sells treated water to the defendant. Such water is supplied from Morton Jaffrey. There is a meter for the defendant which is situated at Morton Jaffrey. Defendant's account number is 8006165 G. Between July 2013 and December 2013 the defendant was supplied with treated water to the tune of \$528 614.85. Despite demand the defendant has failed to pay. He explained that the figure is less the write offs which were authorised by the Minister of Local Government on 23 July 2013. He denied the existence of an agent-principal relationship between plaintiff and defendant. He also denied that there is an agreement which requires plaintiff to maintain water pipes between Morton Jaffrey and Norton. It was his evidence that defendant was a separate council with full fledged departments run separately from plaintiff. The relationship between plaintiff and defendant is that of supplier and customer.

He insisted the amount is due and payable. He testified that even in the past when a similar suit was instituted against defendant, a deed of settlement was done. No issues of principal and agent relationship were raised. He denied that the defendant is expected to pay after collecting from its consumers. Plaintiff bills defendant who is expected to pay on presentation. Invoices were produced which in total showed that from July 2013 to December 2013 defendant owed plaintiff \$528 614.85.

Under cross examination this witness admitted he was not privy to the terms of agreement entered into between plaintiff and defendant. However he insisted the system operating since then had been a system where plaintiff billed defendant for water consumed and defendant paid. Such payment has never been based on collections from Norton residents. He denied that plaintiff had a duty to maintain water pipes between Morton Jaffrey and Norton reservoirs.

He was taken to task on figures written off and he accepted that date for writing off was 30 June 2013. This witness saw nothing wrong with the figures written off.

Shame Chidodo testified that he is employed as the late payment officer. His duties include following up on plaintiff's debtors. This witness testified that plaintiff supplied treated water to defendant. Defendant receives bills every month for water consumed. The claim before the court covers the period 1 July to December 2013. He took time to explain the billing process. He testified that defendant is the one supplying water to residents and is responsible for the billing and collecting from such resident. Whenever plaintiff is involved it would be at the request of defendant.

Under cross-examination this witness accepted that he was not present during the initial agreement between the parties. He could only testify on the relationship between plaintiff and defendant during their interaction. The defendant is treated as one of the bulk customers of plaintiff. Ever since he joined the billing department, the defendant gets a bill like any other customer and is expected to pay by the due date appearing on the invoice. Payment by the defendant is not dependent on defendant collecting from its consumers. This witness was taken to task on amounts written off. He maintained the correct figure was written off. He explained the figure to be written off was the one appearing on 29 June 2013 and not the \$2 209 961.00 maintained by defendant. On why a team was sent from plaintiff to assist defendant in collecting from residents, he said he understood that a request for assistance had been made by the defendant.

On the amounts owing he insisted the readings appearing on invoices were actual. For bulk consumers they thrive to send actual as opposed to estimated bills.

Kwayedza Batai testified on behalf of the defendant. He joined defendant on 1 December 1997 and was not present when the agreement between plaintiff and defendant was initially entered into. However he explained that he was aware that plaintiff supplied water to defendant and charge for such water supplied. The defendant then adds a slight mark up to cater for employees' salaries and maintenance. He testified that on two occasions employees

of plaintiff assisted them in collections of revenue from the Norton residents. He understood that plaintiff and defendant were in a joint venture. He also explained how it was difficult to collect from residents ahead of elections as residents look forward to another write off. This witness was shown the bill from plaintiff dated 30 June 2013. He confirmed billing is done after consumption. It was also his testimony that that particular bill was covered by the Ministerial directive of write offs. He explained that such bill was not written off until sometime in December 2013 but it continued to accrue interest. He insisted that the total amount which was supposed to be written off as per the Ministerial directive was \$2 209 961.00.

Under cross examination he conceded bills to Norton residents were done and collected by defendant. It is defendant who determined the amounts to be charged. He also conceded that according to bills raised by the plaintiff, the defendant was the debtor. It was defendant's responsibility to settle the bills and not the responsibility of Norton residents. He accepted that a previous similar matter where plaintiff had sued defendant for arrear bills was settled between the parties. He also admitted no defence of principal-agent relationship was raised in that case. He also said there were council minutes which showed the amount of water to be supplied and other issues raised in paragraph (b) of defendant's plea. However he conceded such minutes were never produced before the court.

From the evidence led there is no agency relationship which was established before the court. All the witnesses were not present during the initial engagements by the parties. Whatever they said amounted to hearsay.

Plaintiff's case is simple and straight forward. Plaintiff testified that it supplies water to Norton City Council. Defendant has an account with the plaintiff and such account number is 80061656. Every end of month the plaintiff calculated the amount of water supplied through a reading of the meter which is situated at Morton Jaffrey water works. After meter reading the bill is generated and sent to defendant for payment. As at 2 December 2013 according to plaintiff's records produced the defendant owed the plaintiff the sum of \$528 614.85.

From the evidence led by both parties it is not in issue that certain amounts of monies are owed by the defendant. Firstly the parties differ on the amount owing. The difference emanate from the write offs authorised by government in 2013. Plaintiff testified that it wrote off the figure which reflected on 29 June 2013. The defendant testified that the figure to be

written off was the figure as appearing on 30 June 2013. In order to resolve the factual dispute the court should look no further than the Ministerial directive. The directive reads;

“It has become apparent that the economy has not been operating optimally and in the process relentlessly unloading severe hardships on the citizenry. Thus, from 2009, rate payers have not been able to meet their obligations in terms of payment of taxes, rentals, levies and related charges resulting in enormous and crippling debt burden frustrating the majority of the population.

Given the above circumstances, all Local Authorities are in terms of s 133 of the Rural District Councils Act [*Chapter 29:13*] as read with s 303 of the Urban Councils Act [*Chapter 29:15*] directed to write off debts in respect of rentals, unit tax, development levies, licensees and refuse charges owed by rate payers as at 30 June 2013.....”

From a reading of the above the write offs were for bills appearing on 30 June 2013. Plaintiff’s witnesses testified that they effected write offs up to 29 June 2013. That means the defendant’s figures are the correct ones. The defendant took into account 30 June 2013. Plaintiffs had left out 30 June 2013 hence an error in their calculations. The sum to be written off was \$2 209 961.00. It follows then that the amount claimable for the period in question becomes \$437 363.43.

The defendant had raised the defence that it is an agent of the plaintiff and that the amount is only payable after collecting from consumers. The defendant’s only witness was not available at the time the initial contract was entered into. The defendant could therefore not prove its allegation. Defendant’s witness and indeed plaintiff’s witnesses testified on occasions whereby plaintiff would assist defendant in collections. The defendant argued that those assistance point to an agency relationship.

The law of agency is settled. An agent is a person authorised to act on behalf of another (principal) to create legal relations with third parties. The principal confers his or her rights on the agent to act on the principal’s behalf. The relationship is based on an agency contract. The rights and duties of the agent are as provided for in the contract. See *Chartaprops 16 (Pvt) Ltd and Anor v Michelle Siberman* (2008) ZASCA 115, *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412. Applying the above principles to the present case the respondent has failed to provide the contract whereby it was appointed agent of the plaintiff. No agreement between the parties has been proven either in writing or orally. The defendant could not establish who on behalf of the plaintiff appointed the defendant to act as plaintiff’s agent. In view of the existence of a previous matter where defendant was sued for arrears, and no issue of agency was raised, I am of the view that this issue was simply raised in order to delay payment.

On the amount owing the plaintiff erred in writing off debts up to 29 June 2013 when the directive was quite clear that the debts were to be written off as at 30 June 2013. As a result plaintiff's figures were incorrect as they included the amount owing as at 30 June 2013.

However the issue of liability is quite obvious. The defendant has been provided with treated water. An amount of \$437 363.43 remains owing as at 2 December 2013. The water was supplied to the defendant and the defendant is liable for payment. I am satisfied that the plaintiff proved on a balance of probabilities that it's owed the amount.

Accordingly I order as follows:

1. That defendant be and is hereby ordered to pay to the plaintiff the sum \$437 363.43 together with interest at the prescribed rate from 30 January 2014 to date of full payment.
2. That defendant pays costs of suit.

Honey & Blackenberg, plaintiff's legal practitioners
Mwonzora & Associates, defendant's legal practitioners