

ROSELT MITCHELL ENTERPRISES (PVT) LTD
t/a METAL COMPONENTS
versus
HAYGOLD ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 14 March 2017 & 24 January 2018

Civil Continuous Roll

GRJ Sithole, for the plaintiff
Z Chadambuka, for the defendant

FOROMA J: Plaintiff has sued defendant for payment of the sum of \$379 345.00 being the balance due and owing in respect of the cost of mining equipment sold and delivered to defendant by plaintiff. In the summons defendant was cited initially as Haygold Enterprises t/a Nzee Mining P/L and plaintiff as Roselt Mitchell Enterprises t/a Metal Components Manufacturers. As a result of the said citation defendant raised a point in limine that there is no proper plaintiff or defendant before the court as a non registered entity cannot trade as a private limited company and that a non legal entity cannot have a trading name. In response to the point *in limine* taken plaintiff in its replication averred the following – “the plaintiff is Roselt Mitchel Enterprises and it trades as Metal Components Manufacturers. Defendant is Haygold Enterprises P/L which trades as Nzee Mining. The alleged defect is not material and in any event the defendant has counter claimed to the summons. The point taken therefore is of no legal moment and subject to the rules of court the same can be competently remedied. Plaintiff prays for the dismissal of the preliminary point.” At the pre-trial conference the issue whether or not the parties were properly before the court in respect of the claim in reconvention was adopted as an issue to be determined at the trial.

At the trial the parties agreed to deal with the point in limine before going into the merits of the matter.

After hearing the parties I granted the plaintiff's application to amend its summons and declaration in order to rectify the citation of the parties and indicated that the reasons would be given in the final judgment in the matter. Briefly these are they.

In terms of the correspondence in the bundles of documents filed by the parties the plaintiff is invariably referred to as Metal Components Manufactures. This is apparent from the quotation, job cards and delivery notes. It is also apparent from the said documents that the defendant is referred to either as Nzee Mining or Nzee Mining P/L (see the quotation, receipts and report on Haygold 31 Mine prepared by C Dzingai dated 12 March 2015 as well as the Solinol Private Limited report dated 15 February 2017). As between the plaintiff and defendant it is common cause that reference to Nzee Mining P/L prior to the issue of summons is a reference to defendant.

The rules of this court namely rule 8C of Order 2A provides as follows – 8C “Subject to this order a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association and rules 8A and 8B shall apply *mutatis mutandis* to any such proceedings. For purposes of rule 8C aforesaid the legal status of a party to civil proceedings as cited is not material. It is rather the identity of a party that matters. Clearly therefore nothing turns on the fact that defendant may have wrongly been named when citing it in the style or name used in carrying on business. What is certainly important is that as between the parties the name used in identifying a party does not confuse the other as to who is being brought or who has brought the other before the court. There is no doubt that the defendant on being served with the summons by plaintiff was neither surprised nor was it in any doubt as to the cause of action in regard to which it had been brought before the court. It was for these reasons in addition to the fact that order 20 rule 132 does authorise the court or a judge at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. I was satisfied that the defendant would suffer no prejudice on account of the amendment sought by plaintiff as defendant had already been able to file a claim in re-convention which in itself was a concession that it was aware of the factual and legal background of the dispute which plaintiff had sued on.

I now proceed to deal with the substantive issues as agreed upon at the pre-trial conference. At the pre-trial conference the following issues were jointly agreed upon by the parties.

1. whether the plaintiff in convention supplied equipment in terms of the contract.

2. what sum has been paid by the defendant and how much if any is outstanding?
3. whether the parties mutually rescinded the agreement?
4. whether or not the parties entered into an alternative agreement in or around April 2015 and the terms of such agreement?

The following factual background is common cause between the parties.

- a) In 2013 defendant approached plaintiff seeking to purchase some mining equipment and the construction of a gold processing plant.
- b) Save for a 7 tonne steel balls and amalgam retort and 2 slurry pumps the parties are agreed that the rest of the equipment as listed was supplied by plaintiff.
- c) Plaintiff designed the flow chart of a Gold Processing plant at defendant's mine at Lalapanzi using the purchased mining equipment.
- d) It was plaintiff which assembled the gold processing plant
- e) Some of the equipment used in the installation of the processing plant was new and the other equipment was pre-used.
- f) The following equipment was manufactured by plaintiff namely (i) receiving hopper (ii) 4 x 12 m conveyers (iii) storage hopper (iv) frames for the crushers .

The following equipment was pre-used ball mill, crushers and Knetson Concentrator.

- g) Receipt of all the equipment supplied and delivered by plaintiff to defendant was duly acknowledged.

None of the equipment was queried either on account of being pre-used or wrong size or incorrect equipment.

Plaintiff called three witnesses in support of its case namely Winston Mitchel, Rogers Musekiwa and Reginald Chidzvondo. The first witness called by plaintiff was Mr Winston Mitchel who is plaintiff's director and operations manager. He testified that defendant and plaintiff entered into an oral agreement in terms of which defendant purchased from plaintiff certain mining equipment which defendant required for the installation of a gold processing plant at its gold mine at Lalapanzi. Plaintiff duly supplied the equipment ordered some of which had to be manufactured by plaintiff and some of which was pre used and which defendant selected from plaintiff's sales department when placing an order for the equipment. Plaintiff had prepared a quotation dated 13

March 2013. The quotation reflected the total cost of equipment including VAT as \$485 645.00. Mr Mitchel further testified that although the agreement was that the purchase price had to be paid by way of a deposit of \$220 000.00 and the balance by instalments of \$16 000 when the plant commenced operation defendant only paid the sum of \$163 800.00 leaving a balance of \$379 345.00 which is the subject of the court action. According to Mr Mitchel more than 6 months passed from the date of plant commissioning and defendant had not paid anything towards the balance of the purchase price. He testified further that defendant was not operating because it did not have enough stock and that defendant had never raised any issue regarding serviceability of the processing plant. He also denied having agreed to rescind the agreement or agreeing to a disposal of the equipment in order to raise the deposit paid by the defendant.

Rodgers Musekiwa was the plaintiff's second witness. He corroborated Mr Mitchel's evidence on what was outstanding and due by defendant.

Mr Reginald Chidzvondo was the third and last witness called by the plaintiff. He is a mechanical engineer having qualified as an engineer and graduated in 2012 and joined plaintiff in 2013. He drew the initial flow chart on the instructions of Mr Mlambo as directed by Mr Mitchel. He did not take instructions directly from Mr Mlambo. Mr Chidzvondo confirmed that some of the equipment sold to the defendant was pre used and he was responsible for the manufacture of the other equipment required which was not sourced from other suppliers by or on behalf of defendant. Specifically the witness testified that the following equipment was manufactured – one receiving Hopper, 4 x 12 conveyors, a storage hopper and frames for the two crushers. The witness also testified that the rest of the equipment was pre-used.

He commented on the two reports by Dzingai of the Ministry of Mines and Solinol (Pvt) Ltd. Broadly he considered that the Dzingai report was not a competent report it having been prepared by a metallurgical engineer whereas the reports ought to have been prepared by a mechanical engineer. He did not find any significant language differences between Dzingai's report and the Solinol (Pvt) Ltd report despite the time difference contrary to expectation. According to Chidzvondo the Solinol (Pvt) Ltd report did not indicate who prepared the said report and their qualifications. He could not say whether the plant was ever used post commissioning and he did not attend the commissioning of the plant. His role as mechanical engineer was to draw the

flow chart guided by the plant design as prepared by Mr Mitchel and to manufacture the necessary equipment. Plaintiff's case was closed on completion of the testimony of Chidzvondo.

Defendant called 3 witnesses namely Ms Patience Chihuri (Mrs Mulambo) and one Elijah Mugiya and Mr Mulambo. Ms Chihuri's testimony was centered on proving that she paid the sum of \$15 00 to Mr Mitchel. Her evidence was hotly contested. The document allegedly given to her as a receipt was disputed by plaintiff as it was not on plaintiff's letter head. In the course of her evidence she testified that the plant was not in use and she had never seen it running. She further testified that there had been no processing purification at all as the miners said they had not yet come across a gold belt. The second witness was Elijah Mugiya a holder of a High National Diploma in Mineral Processing and Extracting Metallurgy. He said he is a consultant and works with two others in a company called Solinol (Pvt) Ltd. He was engaged by plaintiff Mr Mulambo to do an audit of the processing plant at Nzee Mine in Lalapanzi. He had extensive experience in processing acquired from 1999 when he qualified. He has worked in various capacities in various mining entities. He considers himself as an expert in metallurgy or process engineering. He prepared the Solinol (Pvt) Ltd report the effect of which is to show that the plant was not suitable for the purpose for which it had been made. Mr Mugiya's evidence in chief was very impressive but turned out to be quite misleading. He did not test run the plant as there was no feed. As a result of a detailed cross examination it turned out that Mr Mugiya had plagiarized Mr Dzingai's report. He conceded that he copied not less than 50% of Dzingai's report into his own

Taken to task on why the court should believe his evidence when he copied from the report prepared by Dzingai, Mugiya said he did the report in a hurry and Mr Mlambo had said he wanted the report urgently that day. He could not measure vibrations as he did not have the equipment with which to do so. It is important to note that Dzingai's report in defendant's bundle of documents is referred to as Ministry of Mines report). Under purpose of visit the report says – "Preliminary assessment of yet to be commissioned gold processing plant {underlining is mine for emphasis}. The report shall highlight shortcomings and areas of improvement." Mr Dzingai the author of the report from which Mr Mugiya extensively copied was not called to testify on behalf of defendant. What is clear is that the Dzingai report did not condemn the plant as not being suitable for the purpose for which it was made contrary to Mr Mugiya's findings. It is significant to note too that Mr Mugiya's evidence and report was prepared and given in February 2017 a long

time after the plant had been commissioned. I do not find Mugiya's evidence to be reliable at all given that he did not run the plant to determine its operational efficacy and also that he prepared the report in a hurry resulting in him copying extensively from Dzingai's report in preparing his own. Regrettably Dzingai's report is not properly before the court. Plaintiff's counsel can be excused for the conclusion he reached namely that the Solinol (Pvt) Ltd report was conveniently prepared to tell defendant's case and not to place an objective expert view before the court. I do not accept the Solinol (Pvt) Ltd report to be a credible report which can assist the court in making a finding on the quality of the plant. I accordingly reject it. Mr Mugiya deserves treatment of a hired gun. CRESSWELL J in *National Justice Companies Navieva S.A v Prudential Assurance Company Ltd. The Karian Reefer 1993*.

Mr Mulambo was the last witness called by the defendant. He testified that he wanted to venture into gold mining even though he claimed that he had no knowledge with regards mining and he relied entirely on Mr Mitchell of plaintiff on the equipment he needed to purchase for the installation of a gold processing plant.

He confirmed that the parties entered into a verbal contract in terms of which plaintiff would supply equipment and install a plant. He also testified that the plaintiff supplied defendant with pre-used equipment contrary to the agreement that it would supply new equipment. He entirely relied on the plaintiff's guidance on what would be appropriate equipment as he was ignorant in this field. Although he had initially decided to have a 5 tonne ball mill plant he and his son Bayen was persuaded by Mr Mitchell to take a 10 tonne ball mill plant. Defendant accepted the equipment delivered at his mining location by plaintiff without query. This equipment consisted of second hand ball mill, jaw crushers and Knelson concentrator.

Mr Mulambo did not dispute the evidence of Mr Mitchell in regard to the agreed cost of supply and installation of plant equipment but only argued that he had paid Mr Mitchell of plaintiff substantially more than admitted by Mr Mitchell. It does not require a rocket scientist to tell between a pre-used equipment and brand new equipment. Besides not once did Mr Mulambo raise alarm that he suspected some of the equipment delivered was pre-used contrary to the parties agreement as now claimed. Mr Mulambo's evidence that the equipment supplied was pre-used and therefore not suitable for the purpose for which it was acquired is difficult to reconcile with the contents of his e-mail of 8 November 2014 authored by himself. Indeed in that e-mail he

acknowledged that the plant was still new i.e. as it was at installation. Mr Mulambo's evidence is a hard sell. While he acknowledged the oral agreement he did not place any price to the agreement.

The suggestion that he placed an order for new equipment is not readily acceptable given that he was not that well-endowed financially. Mr Mulambo accepted that he was required to deposit the sum of \$200 000.00 which he could not raise in full at once. It is more likely that he would have considered reducing the cost by taking serviceable pre-used equipment where ever possible. At any rate he did not challenge Mr Mitchel's evidence which was corroborated by Mr Chidzvondo that defendant took an order of both pre-used and new equipment which Mr Chidzvondo had to manufacture.

Mr Mulambo's suggestion that the plant was not suitable for the purpose for which it was installed was not seriously made as no evidence was led that the plant failed to perform to capacity or at all. On the contrary the undisputed evidence is that the plant was never run because of lack of stock (ore).

While Mr Mulambo sought to suggest that the parties eventually agreed to cancel the deal and have the plant equipment sold in order to recover his deposit, a close analysis of the evidence puts serious doubt to this testimony. Firstly it is unlikely that the burden to find a buyer would have fallen on Mr Mitchel as opposed to both of them if at all. Secondly as the suggestion is that the equipment was pre-used its selling price does not appear to have been considered or agreed and no provision was made for a situation where no one might offer to buy the equipment and how the amount (if any) realised would be distributed bearing in mind that defendant had not fully paid for the equipment. Surely plaintiff who did not consider itself at fault would not have considered taking the risk of incurring the loss in any equipment disposal. It is also strange that defendant would not have insisted on the recording of the alleged new arrangement replacing the abortive original agreement for its own protection bearing in mind the disputed breach of the earlier oral agreement by plaintiff.

Sight should not be lost of the e-mail dated 28 December 2014 through which Mr Mitchel's complaint to Mr Mulambo that 5 months had passed after completion of the plant and yet no mining was taking place at the mine and meanwhile no effort towards payment of the balance outstanding was being made a clear indication that the defendant did not want to honour the agreed instalment. In that e-mail Mr Mitchel put it to Mr *Mulambo* that he had indicated that he did not

want to waste money on running the plant and Mr *Mulambo* did not refute these allegations. Indeed it is settled law that what is not disputed is deemed to be admitted- *Nhidza v Unfreight Ltd SC 27/99*. *Min of Lands v Commercial Farmers Union SC 111/2001* at p60.

Mr *Mulambo* was not truthful in suggesting that the plant (equipment) was not suitable for the purpose for which it was acquired. This is apparent from his e-mail to Mr Mitchel dated 8/11/2014 where he says “We also both know that since the installation or completion of the plant no production took place due to lack of viable stock, which we are trying to make ways of solving and the machinery are now as they were.” Clearly it is not possible to comment on the suitability of the plant if it had not been run due to lack of viable stock.

It would appear that Mr *Mulambo* only decided to raise issues with the standard quality of the plant as a way of getting some leverage when he could not pay the outstanding balance of the cost of the plant installation. This is clearly the case as in the correspondence exchanged between the parties i.e. Mr Mitchel on behalf of the plaintiff and *Mulambo* of the defendant the issue of the plant not being suitable for the purpose that it was never cropped up. In fact in Mr *Mulambo*'s e-mail of 8 November 2014 he Mr *Mulambo* said “Believe me I would very much like to own the equipment and have not yet given up in mining but I really don't have a choice at this stage my brother”. Firstly it does make sense that the defendant would want to own a plant (equipment) which is not suitable for its purpose. Secondly reports are only sought after defendant had realised the dilemma namely that he needed the plant but was not in a position to pay for it as no production was possible owing to lack of viable stock. Clearly therefore the Dzingai report was an attempt to hide behind a finger. This is further confirmed by the fact that the plant had been commissioned in 2014 and yet Mr Dzingai in his report indicated that the plant was still to be commissioned. Mr *Mulambo*'s evidence that in April 2015 Mr Mitchel and him agreed that the plant be sold so that he could be refunded what he had paid does not seem to make sense. Mr *Mulambo* would not likely have agreed to the disposal of a condemned plant (plant) which had been considerably criticised by Dzingai in his report of 12 March 2015 without further ado). Sight should not be lost of the suggestion made by Mr *Mulambo* in the email to Mr Mitchel dated 8 November 2014 in which Mr *Mulambo* was proposing disposal of the plant as a complete unit which disposal was occasioned not by the condemnation of the plant but by the defendant's failure to pay the balance of the purchase price. If indeed the plant was not suitable for its purpose surely its disposal would not

have been easy. It is clear that Mr Mulambo's story that the parties entered into a new agreement in April 2015 does not add up and I reject it out right.

There is a dispute as to how much defendant paid to the plaintiff as a deposit. It is not disputed that the parties agreed that a deposit towards the cost of supply of equipment and installation of equipment had to be paid. The plaintiff's evidence as can be gleaned from Mr Mitchel's evidence which was corroborated by Rogers Musekiwa established that the agreed cost of both equipment and installation of the plant was US\$543 145.00 and that a deposit of \$200 000.00 was required with the balance being payable by monthly instalments of \$15 000.00 or \$16 000 per month with effect from completion of the plant installation on commencement of production. It is common cause that whatever the correct balance was after the payment of the amount towards deposit, no instalment was ever paid. Therefore there is need to determine the correct amount paid by defendant as deposit. The plaintiff's evidence is that the defendant paid the sum of US\$163 800.00 as summarised on p 20 of the plaintiff's bundle of documents. The defendant on the other hand claims that it paid the sum of \$214-00.

The defendant's evidence in support of the amount paid to the plaintiff was adduced from Mr Mlambo and his wife Ms Chihuri which regrettably is conflicting. Mr Mulambo claims that Mr Mitchel issued to the defendant a receipt for the sum of \$200 000, 00 when he was asked to issue a composite receipt taking into account all previous payments as at the date of such receipt i.e. 27 November 2013. Mr Mulambo could not explain why or how Mr Mitchel acted out of turn by not signing the said receipt yet in all previous acknowledgements of payment Mitchel had signed to authenticate the receipt. Mr Mitchel of course disputed this document which defendant produced as a receipt. It is worth noting that on one occasion Mr Mitchel issued a composite receipt for \$150 000.00 for payments made. It is common cause that when the composite receipt was issued it was backdated to the 23rd March 2013. What however is significant is to note that the document was signed by Mr Mitchel. If one considers that the defendant was actually not that much endowed financially an explanation would be necessary as to why the defendant overpaid the deposit by paying \$214 000.00 i.e. \$14 000.00 more than the deposit stipulated before commencement of production. I find the defendant's claim that it paid anything more than the amount the plaintiff acknowledged to be dishonest. The plaintiff's testimony is also corroborated by the job card which summarized how the sum of \$163 800,00 is arrived at. It is relevant to note

though that in the breakdown of payments per job card there is a payment of \$15 0000 of the 27 November 2013 the very day the unsigned receipt of 200 000 composite receipt was allegedly issued. I have no hesitation in dismissing the claim that the defendant was issued an unsigned composite receipt for the sum of \$200 000.00 by plaintiff. In fact the plaintiff's evidence on the deposit paid i.e \$163 800.00 is more probable and I have no basis for disbelieving same. In the circumstances 'plaintiff's claim for the balance of \$379 345-00 has been proved on a balance of probabilities. I accordingly make the following order. It is ordered that the defendant pay the plaintiff:-

- (1) The sum of \$379 345.00 together with interest at the legally prescribed rate with effect from the date of issue of summons i.e 8th July 2015 to date of payment.
- (2) The costs of suit.

Venturas & Samkange, plaintiff's legal practitioners
V S Nyangulu & Associates, defendant's legal practitioners