

GRAIN MARKETING BOARD
t/a COUNTRY FEEDS
versus
HYPERVALUE INVESTMENTS (PVT) LTD
and
LOICE BARE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 10-11 & 26 September 2018

Civil Trial

P Makuwaza, for the plaintiff
F Gijima, for the defendants

MUREMBA J: On 27 July 2015 the plaintiff and the first defendant entered into a credit facility agreement for the sell and delivery of stock feeds by the plaintiff to the first defendant on credit. The second defendant Loice Bare bound herself as surety and co-principal debtor for the first defendant's debt. Payments were supposed to be made within 30 days of the date of invoice. The plaintiff alleges that between July 2015 and May 2016 the first defendant took delivery of stock feeds and accumulated a debt which it failed to pay thereby prompting it to issue summons on 13 December 2016. In their plea the defendants denied owing the plaintiff whatsoever. They disputed delivery of the stock feeds by the plaintiff.

Apparently when a delivery of goods is to be made to a customer, a delivery note is generated and a fast copy thereof remains in the book and it is kept for audit purposes. The plaintiff's driver making delivery to the customer takes with him two copies of the delivery note, a white copy and a pink copy. Upon delivery being made, the customer signs the copies to acknowledge delivery. The customer retains the white copy and gives back the pink copy to the driver. The driver returns with the pink copy to the plaintiff as proof that delivery of goods has been made to the customer.

The plaintiff's claim against the defendants initially was for US\$39 503.66. After evidence was given and in cross examination, the plaintiff's witness amended the claim to \$39 500.66 as shown on exhibit 6 which is a consolidation of all the unpaid invoices by the first

defendant. It is common cause that in the midst of the trial the defendants admitted liability in the sum of \$17, 678.66 leaving a balance of \$21, 822, 00 in dispute. The issue that then fell for determination after the admission was now whether or not the defendants are liable in the sum of \$21 822,00 arising from 3 invoices namely invoices÷ 302 exh 13; 307 exh 19 and 308 exh 21 which remained disputed by the defendants. It is pertinent to note that the defendants only admitted liability in respect of invoices for which the plaintiff was able to produce the pink copies of the delivery notes. Of the 3 invoices that they continued to dispute, the plaintiff was unable to furnish the court with the pink copies of the delivery notes for invoices 302 and 307. For invoice 308 a return copy of the delivery note was produced but the defendants were challenging its authenticity.

It appears that in respect of invoices 302 and 307 the defendants are taking advantage of the circumstances that the plaintiff finds itself in, the circumstances being the non-availability of the pink copies of the delivery notes. The plaintiff's witness and Financial Accountant, Elizabeth Makumbe testified to the effect that the plaintiff was unable to locate the pink copies of the delivery notes. The defendants took the position that the non-availability of those pink copies is the end game. The plaintiff's witness however provided the court with evidence of the fast copies of the delivery notes thereof. These are the copies that remained in the book when delivery was made. To supplement this there is the evidence that was led by both the plaintiff and the defendant. From this evidence there are following key issues. On 28 April 2017 the first defendant received a detailed statement of account (exh 3) from the plaintiff. This was well after the plaintiff had issued summons. The statement shows the invoices of stock feed delivered, the date of the invoice, the payments made by the customer and the balance that is owing. The above 3 disputed invoices were on the statement. The first defendant through its witness and Administrative Manager, Mr. Parirenyatwa Mano raised queries to the statement of account and these were contained in exh 4. What is critical on exh 4 in paragraph 6 is that the query of delivery of stock feeds was only raised in respect of 2 invoices, namely 281 and 41574. No queries were raised in respect of the 3 invoices that the defendants now dispute. What it means is that the first defendant had gone through the statement of account, its invoices, and its files and was satisfied that deliveries were made on all the other invoices appearing on its statement of account except for just these two invoices that it queried. On a balance of probabilities what it means is that as at the time the first defendant got the statement from the plaintiff, it had received the stock feeds that it is now disputing to have received. The failure to raise queries of deliveries on invoices 302, 307 and

308 was an acknowledgement that delivery was effected. It can only be an afterthought for the first defendant to allege that it did not receive the stock feeds in question. It is an attempt to avoid liability notwithstanding that delivery was made.

In respect of delivery note 0367 for invoice 308 Elizabeth Makumbe testified that it is not the plaintiff who delivered the stock feeds in question. The stock feeds were delivered by E.C. Trucking as shown on exh 23 because the plaintiff does not have a 30 tonne truck to make a huge delivery. E.C Trucking was hired by the plaintiff to make the delivery to the first defendant. Evidence from Elizabeth Makumbe showed that the delivery note has a direct link with a purchase order which was raised by the first defendant on the 8th of June 2016. Although the quantities of stock feeds appearing on the purchase order are not the same quantities that are appearing on the delivery note, Elizabeth Makumbe clearly explained the discrepancy. She said that they were only able to supply the stock feeds they had in stock. This explained why the delivery note bore fewer quantities on some of the stock feeds the first defendant had ordered. Some feeds were not supplied at all because there were none in stock. The nexus between the purchase order and the delivery note discredits the first defendant's defence. The first defendant tried to deny that there was a link between the purchase order and the delivery note. Its witness Mr. Mano said that although the first defendant had generated the purchase order in question no delivery was made by the plaintiff. His explanation was that this was because the plaintiff indicated that it was not going to make any further deliveries to the first defendant until it had cleared the debt that was owing as at that time. I found this evidence to be incredible for the reason that this was never put to the plaintiff's witness in cross examination. It is evidence that was being said for the very first time in the defence case. Moreover, if delivery was not effected for such a big order and the statement of account that was later sent to the first defendant in April 2017 was showing that delivery was made, the first defendant ought to have raised a query with the plaintiff when it responded to the statement, but as already stated above no query was raised. This invoice had 2 huge amounts of US\$10,602.00 and US\$6,732.00 totalling US\$17 334.00. The amounts are so huge that they could not have escaped Mr. Mano's attention when he raised a query in respect of invoice 41574 of 30 April 2016 which had a smaller amount of US\$ 2,945.00. Moreover, the plaintiff had already issued summons and these 2 figures constituted part of the highest figures on the statement. If the first defendant had not been supplied with these stock feeds it would have raised queries.

In addition, the delivery note by E.C Trucking was produced as exhibit 23. It bears a signature and a national identity number. The plaintiff's witness said that these belong to a representative of the first defendant who acknowledged delivery of the goods. Other than simply denying that these particulars belonged to the first defendant's employee, the defendants adduced no evidence to rebut the evidence. They did not place anything before the court which shows that it is not their employee who signed for the goods. The fact that the delivery note was not stamped with the first defendant's stamp is not proof that the person who signed the document is not the first defendant's employee. The absence of the stamp alone is not proof that delivery was not made. There is a national identity number on the delivery note. The defendants could have made investigations about the person who bears it and placed evidence before the court showing that this person is not the first defendant's representative or employee. The defendants just decided that they would deny everything and let the plaintiff prove everything. The denial had nothing to do with the stock feeds not having been delivered. It had everything to do with the attitude that if the plaintiff is not able to furnish proof of delivery we deny delivery. I say this because the total claim by the plaintiff was US\$39 500.66 made up of 9 invoices. The defendants did not admit to a single invoice despite the fact that all these invoices were discovered on 8 August 2017 before the pre-trial conference was held on 27 August 2017. In terms of procedure whenever the first defendant received delivery it would remain with a white copy of the delivery note. It therefore had all these delivery notes in its possession and it knew fully well that it had not made payment, but the defendants just chose to deny owing the plaintiff completely. Such dishonesty is shameful especially for such a substantial amount. The first defendant having failed to query invoice number 308 when it was served with the statement of account on 28 April 2017 and the plaintiff having produced a delivery note by E.C Trucking which the defendants did not rebut, I am satisfied that the stock feeds on invoice 308 were delivered to the first defendant. The plaintiff managed to prove its claim for \$21 822.00 on a balance of probabilities.

In terms of clause 2.2 of the credit facility agreement the first defendant agreed to be liable to pay interest at the prevailing bank rate in the event of defaulting payment. I will thus award interest as agreed upon by the parties.

I will order the defendants to pay costs on a legal practitioner client scale for the following reasons. They defended the claim of \$17 000 which they knew they were liable for only to admit to it during the course of the trial after the plaintiff had produced the pink copies of the delivery notes. It wasted the plaintiff's time and resources. Moreover in terms of clause

2:3 of the credit facility agreement (exh 1) the first defendant agreed to be liable to costs on a higher scale in the event of litigation.

In the result, **it be and is hereby ordered that:**

1. The defendants shall pay to the plaintiff jointly and severally, the one paying the other to be absolved:
 - (a) The sum of \$39 500, 66.
 - (b) Interest on the above amount at the plaintiff's prevailing bank rate as at 26 September 2018 from the date of summons to date of full payment.
 - (c) Costs of suit on a legal practitioner and client scale.

Messrs Makuwaza Magogo Attorneys, plaintiff's legal practitioners
F. G. Gijima and Associates, defendants legal practitioners