FREMIUS ENTERPRISES (PRIVATE) LIMITED
versus
ZIMBABWE NATIONAL ROAD ADMINISTRATION

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 10 September and 3 October 2018

Civil trial

J Dondo, for the plaintiff
I Ndudzo, for the defendant

CHIKOWERO J: This is an application for absolution from the instance.

The test is simply whether at the close of the plaintiff's case, there is evidence upon which a reasonable court might find for the plaintiff.

The test is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.

To successfully ward off absolution the plaintiff therefore need only establish a *prima facie* case.

In *Gascogne* v *Paul and Hunter* 1917 TPD 170 the court put it thus:

> "At the close of the case for the plaintiff therefore, the question which arises for consideration of the court is: is there evidence upon which a reasonable man might find for the plaintiff?... The question therefore is at the close of the case for the plaintiff, was there such evidence before the court upon which a reasonable man might, but not should give judgment against the defendant."

This is the legal position obtaining not only in South Africa, but also in this country. See *Supreme Service Station (1969) Pvt Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR (1) (A); *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S); *MC Plumbing Private Limited* v *Hualong Construction (Private) Limited* HH 88/15; *Veronica Nyon*i v *Elias Zvenyika Munemo Ndoro* HH 714/16 and *Claude Neon Lights SA Ltd* v *Daniela* 1976 (4) SA 403.

The plaintiff's allegations as set out in the Declaration attached to the summons are as follows.

During the period extending from 2011 to 2013, the parties entered into an agreement in terms of which the plaintiff undertook to rehabilitate certain roads situate in Buhera, Gutu and Zaka Rural District Councils ("the local authorities").

It was a term of the agreement that the plaintiff would remunerated by the defendant upon completion of the work and submission of its invoices/IPCs [Interim Payment Certificates] relating to each particular project.

The plaintiff would not charge 15% Value Added Tax ("VAT") in its claims for the reason that it had not yet registered for same with the Zimbabwe Revenue Authority ("ZIMRA").

In early 2013, ZIMRA demanded 15% VAT from the plaintiff on all its claims notwithstanding the fact that the plaintiff had not registered for VAT. ZIMRA's contention was that the plaintiff had to collect such VAT from the defendant and then pay it over to it or simply pay such VAT from its own coffers and recover same from the defendant.

The defendant could not during that period make arrangements either to pay such VAT to the plaintiff for the latter to pay it over to Zimra or to pay directly to Zimra because it also had some outstanding tax issues with the tax authority.

In May 2013, the defendant undertook in writing to refund the plaintiff the total VAT it would have paid to Zimra.

In the result, the plaintiff paid the total sum of US$ 893 000-00 to Zimra being 15% VAT on all its claims for the work it had performed in the aforesaid local authorities thereby suffering great financial prejudice.

Despite repeated demands and full compliance by plaintiff of (*sic*) the defendant's conditions for a refund of the said VAT, the defendant failed and neglected to pay either the said VAT or any part thereof.

At the commencement of the trial, the capital amount was amended, by consent, to US$628 130-38.

The following further particulars were furnished by the plaintiff. The agreement was oral. The defendant would agree that the plaintiff perform the works following its engagement by a local authority and then undertake to pay it upon completion of the project and submission of the IPCS.

Further, in entering into the agreement, the plaintiff was represented by its Managing Director, Mr F. Chimbari. The defendant was represented by its then Chief Executive Officer, Dr Frank Chitukutuku.

In its plea, the defendant denied the existence of the agreement and put the plaintiff to the "strictest" proof thereof.

It was admitted, however, that the plaintiff did not claim VAT from the defendant.

Further, the defendant averred that it was not liable to pay the VAT in question. Reliance was placed on the provisions of the Value Added Tax Act [*Chapter 23:12*] ("the Act'). Henceforth, I will also refer to defendant as Zinara.

The plaintiff led evidence from Mr F. Chimbari whereupon it closed its case.

It was not disputed that roads were rehabilitated by the plaintiff.

These roads were under the jurisdiction of the three local authorities already referred to.

It also was common cause that the local authorities were satisfied with the work done.

Each of them, as did the plaintiff, signed the respective IPCs to signify satisfaction with services rendered.

The IPCs were essentially invoices.

At the end of it all, a total of US$628 130-38 was paid to the plaintiff by the defendant.

That amount was the aggregate of the sums reflected on the individual IPCs.

No VAT was charged on all the IPCs. This too was common cause.

The view that I take is this. This application turns on a determination of two issues. In fact, each issue, standing alone, is decisive.

I turn to examine each issue in turn.

<u>Has the plaintiff sued the correct defendant?</u>

My view is it has not.

Pertinent on this aspect are the responses given by Mr F Chimbari under cross-examination. It went like this:

> "Q You were entering into contracts with the local authorities particularly rural district councils pertaining to road construction?
> A Yes
> Q You entered into contracts with Gutu Rural District Council?
> A Yes
> Q You entered into contracts with Buhera Rural District Council?
> A Yes
> Q You entered into contacts with Zaka Rural District Council?
> A Yes
> Q You confirm these contracts would speak to Plaintiff on one hand and the rural district councils on the other hand as to the two contracting parties?
> A yes
> Q Defendant in terms of the law is merely a fund which makes payment at the behest of the rural district councils?

A I agree"

The summons alleges a contract between plaintiff and defendant. The evidence on record discloses not one contract between plaintiff and defendant. In fact, it established no privity of contract between the parties to this suit.

Instead, it establishes contracts entered into between plaintiff and parties who have not been sued. Those parties are the three local authorities.

It hardly needs recording that the rights and obligations in terms of contracts entered into are between the contracting parties themselves, unless the contract is for the benefit of a third party. In that event, the rights or benefits accrue in favour of the third party.

Accordingly, the obligation to rehabilitate the roads fell on the plaintiff. It was an obligation owed to each of the local authorities. In the same vein, the obligation to pay for the services rendered fell on each of the local authorities. It too, was an obligation owed to the plaintiff.

If, for example, the plaintiff did not render the services and an order for specific performance were to be sought, the plaintiff would not have been Zinara but each of the local authorities affected.

By the same token, if payment was not effected for services rendered the plaintiff would not have sued Zinara but the defaulting local authority.

It matters not that a 3rd party, Zinara, was ultimately the one paying on behalf of each local authority. At law, that obligation remained the baby of Gutu, Zaka and Buhera Rural District Councils. Indeed, Mr Chimbari testified that each local authority would take the IPCS to Zinara for payment.

Exhibit 5 is a letter written to Zinara by ZIMRA. It is dated 10 April 2018. In confirming that plaintiff paid US$628 130.38 to ZIMRA as VAT, ZIMRA states as follows:

"This letter serves to confirm and notify you of the following information with respect to the referenced client:

1. The client had VAT obligations to ZIMRA amounting to $628 130.38 resulting from operations carried out in Buhera RDC, Zaka RDC and Gutu RDC for the period 2011 to 2013.
2. <u>The total obligation above arose from the contracts done by Fremus Enterprises (Pvt) Ltd having been contracted by the said councils and specifically paid by ZINARA.</u> This was unearthed by ZIMRA during an investigation as Fremus Enterprises (Pvt) Ltd was not registered for VAT back then.

3. Fremus was consequently registered for VAT and the referenced amount was posted onto their VAT account. A total amount of $628 130.38 has been paid to date by way of garnish order and deposits by Fremus Enterprises (Pvt) ltd. The total amount was paid and receipted as shown in the table below…"

The portion I have underlined above reinforces the concession made under cross-examination, namely

that the contract was not entered into between plaintiff and defendant as alleged in the summons and declaration. Rather, the contracts had the plaintiff and the local authorities as the parties thereto.

I point out also that each IPC was signed and date-stamped by a representative of the respective local authority, on behalf of the local authority, and the plaintiff.

This stood as certification that the work reflected on such IPC was properly carried out and the concomitant amount was due for payment.

In all the circumstances, therefore, no reasonable court may find that plaintiff has cited the correct defendant.

This being the position, the plaintiff has, in my view, failed to establish a *prima facie* case.

I proceed to examine the other ground on which I also hold the view that the application succeeds.

Assuming the defendant was correctly cited, does it have the obligation at law to pay the VAT?

VAT is charged on the supply of taxable goods and services. Section 6 of the Act reads:

"6 value-added tax

(1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of-

a) The supply by any registered operator of goods or services supplied by him or after the fixed date in the course or furtherance of any trade carried on by him; and…"

This provision, as read with s (6) (2) (a) of the Act, provides that VAT shall be paid by the registered operator who supplies goods or services in furtherance of any trade or business carried on by him.

If follows that the obligation, imposed by statute, to pay VAT was solely that of the plaintiff.

Plaintiff sought to evade this obligation by averring that it was not a registered operator at the material time and could not therefore lawfully charge, collect and pay VAT.

I agree with Mr Ndudzo that this argument has no merit. A registered operator is defined in s 2 of the Act in the following words:

> "Registered operator" means any person who is or is required to be registered under this Act."

Because it was required to register, plaintiff was a registered operator in terms of the law.

In *AT International Limited* v *Zimbabwe Revenue Authority* HH 823/15 KUDYA J dealt with this aspect in these words;

> "Mr de Bourbon took the point that as the appellant was not a registered operator, it could not be liable for VAT. It is correct that the appellant was not a registered operator. However, every trader in this country is liable to be registered for VAT from the date of such liability under s 23 (3) and (4) of the Act. Subsection (4) (b) reads:
>
> "(4) Where any person has -
>
> (b) not applied for registration in terms of subsection (2) and the Commissioner is satisfied that that person is liable to be registered in terms of the Act, that person shall be a registered operator for the purposes of this Act with effect from the date on which that person first became liable to be registered in terms of this Act. The appellant under the provisions of s 23 (4) (b) is deemed to have been a registered operator."

In terms of s 23 (1) (a) of the Act, the total value of plaintiff's taxable supplies being in excess of the prescribed amount of $60 000 on 16 May 2011, the law required it to pay VAT.

The IPC issued to Gutu Rural District Council on the 16th of May 2011 was for payment of the sum of $195 064.95. It, produced as exh 1, appears on page 7 of the plaintiff's bundle of documents. The rest of the IPCs, also produced as exh "1", were issued after 16 May 2011.

Mr Chimbari testified that plaintiff was not required to pay VAT at the time it issued the IPCs. Two reasons were advanced for this. Firstly, that plaintiff had not charged VAT on the IPCs. Secondly, that plaintiff had not been paid the VAT.

Again, this testimony does not assist the plaintiff in establishing a prima facie case at all. Section 8 (1) of the Act states;

> "8. Time of supply.
>
> (1) For the purposes of this Act, a supply of goods or services shall, except as is otherwise provided for in this Act, be deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any

> payment of consideration is received by the supplier in respect of that supply, whichever time is earlier."

Clearly, plaintiff had an obligation to pay VAT the moment it issued the IPCs to the local authorities. That is the earlier period referred to in s 8 (1) of the Act. I am with defendant's counsel on this point.

If VAT is not separately charged, as here, the law is that the price on the invoice is deemed to include VAT. In this respect, s 69 of the Act provides:

> "69. Prices deemed to include tax.
> (1) Any price charged by any registered operator in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of paragraph (a) of subsection (1) of section six in respect of such supply, whether or not the registered operator has included tax in such price."

It occurs to me that the corresponding Act in South Africa is to the same effect. See *Masango and Another* v *Road Accident Fund and others* 2016 (6) SA 508.

Despite earlier correspondence wherein Zinara apparently accepted to refund plaintiff the VAT it would have paid to ZIMRA (not originally charged on the IPCs) the tax law is clear in respect of who bore the obligation to pay VAT, and when.

Inevitably, this application succeeds.

I therefore order as follows;

1. The defendant be and is hereby absolved from the instance.
2. The plaintiff shall pay the defendant's costs.

Dondo and Partners, plaintiff legal practitioners
Mutamangira and Associates, defendant's legal practitioners