

WINDMILL (PRIVATE) LIMITED
versus
PIONEER HI-BRED (ZIMBABWE) (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 10, 12, 22 February and 2 October 2019

Civil Trial

E.T. Moyo, for the plaintiff
ABC Chinake, for the defendant

MUSHORE J: Plaintiff is a company which is in the business of manufacturing and distributing agricultural implements and products. The defendant is a company which is engaged in producing and distributing agricultural seeds. The Plaintiff company is claiming a certain sum of money “*..in respect of fertilizers sold and supplied to the defendant on credit sometime in or about June 2013*”.

When the plaintiff filed suit in the present matter, it lodged two declarations in or about May 2015. One of the declarations was very brief, (almost embarrassingly so) and the other, which the plaintiff ultimately relied on sensibly gave a comprehensive explanation of the basis of its claiming the sum of US\$157,224-53 from the defendant. Plaintiff detailed its claim as follows:

- ‘3. On various occasions from the 14th June 2013 to 3rd July 2013 the plaintiff sold and supplied to the defendant and/or at its special instance and request **and on credit the following:-**
 - 3.1. Sixty (60) tonnes of Ammonium Nitrate Fertilizers valued at US\$42,000-00,
 - 3.2. Sixty (60) tones of Compound (7:14:7 9OS) Fertilizer valued at US\$37,200-00
 - 3.3. Three (3) tonnes of Compound (13:27:13 ZN) Fertilizer value US\$ 2,880-00,
 - 3.4. Urea 46%N valued at US\$9,120-00”.

The total amount owing in respect of the above listed was US\$92,000-00.

AND

- “5. The Plaintiff further supplied fertilizers and chemicals **to certain farmers on a contract growing scheme sponsored by the defendant** at its special instance and request.
6. Two of these farmers returned to the defendant inputs worth a total of US\$ 52,584-16, which inputs were never returned by the defendant to the plaintiff and for which defendant is consequently liable to pay and in respect of which it agreed in any event to be debited to its account. That brings the total amount which the defendant is liable to the plaintiff to US\$126,864-13.
7. To date the defendant has paid US\$16, 920-00 leaving a cumulative balance owing in the amount of US\$ 126,864-13.
8. Owing to the fact that the defendant’s account was outstanding, due and owing the defendant accrue interest at the plaintiff’s standard rate of interest, accrued in the sum of US\$30,360-40. This brings the balance outstanding, due and payable to US\$157,224-53”

In paragraph 3 plaintiff is claiming sums of money for products allegedly sold directly to the defendant and in paragraphs 5 and 6, plaintiff is claiming a sum of money relating to product allegedly supplied to two farmers, which plaintiff alleges were for the defendant’s account.

The declaration was amended again on the 12th February 2019 with the amount stated as being owed by the defendant to the plaintiff being reduced to US\$138,028-25 after the plaintiff had recalculated the interest which it had previously applied at “a standard rate” of interest, to the prescribed rate of interest.

The defendant denied the plaintiff’s claim in its entirety stating that it had never been supplied with, neither had the plaintiff delivered to it, the list of goods cited by the plaintiff in paragraphs 3.1 to 3.4 of the plaintiff’s second declaration. The defendant also denied that there was a contract with the defendant in respect of those goods and therefore the defendant denied that it owed the plaintiff US\$92,000-00. Defendant also denied outright that it had received returns from two farmers thus rejecting plaintiff’s claim for the value of those alleged returned inputs. The defendant alleged that the plaintiff had contracted directly with the farmers and that there was no contract between it and the farmers in relation to the US\$ 52, 584-16 claimed by the plaintiff in paragraphs 5 and 6 of the declaration.

The defendant further suggested that the plaintiff must look to the certain individuals who had been allegedly doing fraudulent deals with the plaintiff company, who were once employed by the defendant for payment of its claim.

Plaintiff was put the plaintiff “*to the strictest proof*” of all of its claims.

The defendant pleaded to those paragraphs in the plaintiff's declaration as follows:

"AD PARAGRAPH 5

1. This is disputed. The Defendant:
 - a) has no knowledge of the physical supply of such fertilizer and chemicals to certain farmers;
 - b) has no knowledge of the identity of the dates of such supply;
 - c) has no knowledge of the contract growing scheme allegedly sponsored by the defendant.

and puts the Plaintiff to the strictest proof of each and every allegation made in connection with the amount claimed, including proof of supply and delivery of the chemicals and the relevance of the contract growing scheme as regards the defendant and the benefit directly by the defendant of such supply of fertilizers and chemicals, which is denied.

2. AD PARAGRAPH 6

- 2.1 The Defendant has no knowledge of the allegations made in this paragraph. The Plaintiff is required to establish both in fact and at law;
 - a) the initial delivery of goods worth US\$52,584-16 to the two unnamed farmers; and
 - b) the subsequent return by the said unnamed farmers of such goods to the Defendant.

- 2.2 Defendant denies any knowledge of such initial delivery or return and denies that it is indebted to the Plaintiff, as alleged or at all and puts the plaintiff to the strict proof thereof"

The parties settled and agreed the issues for trial as follows:-

"ISSUES

1. Whether or not the plaintiff sold and delivered any fertilizer and chemicals to the defendant or to third parties on the authority or at the instance of the defendant or with its knowledge?
2. Whether the defendant made any payments in respect of the goods allegedly sold and delivered to such third parties?
3. Whether the defendant is liable to pay and owes the plaintiff the sum of US\$138,028-25 (previously USD157, 224-53), as claimed or at all?
4. Who should pay the costs of suit?"
 - 4.1.

Whether the defendant is liable to pay the plaintiff the sum of US\$52,584-16

Plaintiff called Ms Joan Dunford as its sole witness. Ms Dunford was employed as the credit Manager at the relevant time. She explained that her duties were to collect money; approve credit facilities and handle legal matters. Ms Dunford's chiefly spoke to the documents and in short her evidence comprised an explanation of the plaintiff's documents as they related to the plaintiff's claim. Ms Dunford initially testified that two farmers called Jongwe and Mangwende, had received inputs from the plaintiff by way of fertilizers and chemicals under a

scheme sponsored by the Defendant. However during her testimony, Ms Dunford's carefully constructed explanation began to unravel. In her evidence-in-chief it emerged from her own testimony that the farmers mentioned above were the ones responsible for servicing the debt pertaining to the inputs they obtained from Windmill. Ms Dunford testified as follows:-

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“Q. Now the two farmers that you referred to in your claim they were under which scheme?

A. They were under the contract where Pioneer was working in collaboration with Windmill.

Q. That would be the second scheme?

A. That would be the second scheme I mentioned where the farmer was responsible for paying the debt.”

Page 10, transcript

“Q You were saying what about the input schedule?

A. What was happening is the customer would advise what sort of hectorage they would grow and from there the sales reps would advise what inputs she would need to grow. From there we would create the order collection order and from there the invoices that show that the customer collected.”

Thus during Ms Dunford's testimony, it very quickly emerged that the plaintiff appreciated that it could only look to the farmers themselves, for payment of the US\$52,584-16 claimed by the plaintiff from the defendant. In fact Ms Dunford's testimony clarified that the plaintiff had directly contracted with and directly supplied the inputs to those two farmers by admitting that the agreement to furnish the inputs to the farmers was an agreement between the plaintiff and the farmers which obligated the farmers to pay for the inputs. Her evidence went as follows:

“Page 25, cross-examination

Q. Listen carefully, is this contract between Windmill and Pioneer or is it between Windmill and Mrs Mangwende?

A. Its Windmill and Mr Mangwende

Q. So we both agree that Pioneer is not a party to this contract?

A. Correct My lady

Q. The contract does not require Pioneer to pay anything to Windmill?

A. Agreed. Correct.

Q. Therefore if we turn and look at page 2 of that contract, all the items listed under section 11 Pioneer did not buy from Windmill?

A. No

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Q. And we agree that it doesn't bind Pioneer?

A. No it does not"

Ms Dunford all but reinforced the defendant's averment in its plea that the inputs in question were NOT supplied to the farmers at the defendant's special instance and request.

Ms Dunford was forced to admit also that the drivers who she had identified as being the drivers who had collected the inputs on a list of the invoices, (produced by the evidence, page 11, Exhibit 1A), were NOT defendant's drivers.

Page 32, Cross-examination

"Q. No. I am dealing with four specific invoices which are in your claim, this is your claim not my client's claim.

A. Yes I agree

Q. And I am saying on your own documents those invoices match column 1 of page 11, it's a fact?

A. Yes I agree with you.

Q. And at the end of the same page, which you produced, the car who collected this product and the drivers are not Pioneer cars or drivers, that is all I want to establish.

A. That is fine if you say so.

Q. So it is common cause that those disputed invoices were not collected by Pioneer?

A. We have established that"

Ms Dunford also informed the court that the plaintiff had also sued the farmers themselves for financial compensation for the inputs which it had supplied the farmers when she said:

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Perhaps I could explain that Mrs Mangwende defaulted so we sued her.

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Q. Yes, so after she picked up that supply of inputs, you were explaining what then happened after she collected the inputs?

A. She defaulted so we sued her...."

Regarding Mr Jongwe she informed the court that although the plaintiff intended to sue Mr Jongwe for the inputs he took, they were unable to locate Mr Jongwe.

When asked by Mr Chinake why the plaintiff was now suing the defendant for compensation for the inputs, which the defendant clearly knew nothing about, Ms Dunford testified that she decided to do so after Mrs Mangwende informed her that she (Mrs Mangwende) had surrendered the inputs to the custody of the defendant. However during her testimony, Ms Dunford was forced to concede that even if the goods had been returned to the defendant, it was the farmers who were liable for them:

Page 41, cross-examination.

“Q. Now if these goods were returned to Pioneer, who is liable for them?

A It would be the farmer”

The schemes

The plaintiff attempted to link the defendant to the claim for US\$52, 485-16 by alleging that the inputs had been supplied to the farmers under a particular scheme, called the IBDZ scheme. The relevance in plaintiff implying that the inputs were released to the farmers on the IBDZ, as opposed to the direct scheme, was that under the IBDZ scheme, it is the defendant who would have ordered the inputs from the plaintiff. If the inputs had been supplied to the farmers under the direct scheme, then that would have meant that liability for payment for the inputs would fall upon the farmer themselves. However, when Ms Dunford gave her testimony, she conceded that the farmers had contracted directly with the plaintiff under a scheme in which the contracts were between the plaintiff and the farmers. In the light of Ms Dunford’s testimony, it became clear that the letter of demand dated 21st May 2012 which the plaintiff’s lawyers had written to the defendant was misleading in that it suggested that the inputs had been supplied to the farmers by the plaintiff under the IBDZ scheme.

In summarising the above evidence, the plaintiff’s only witness admitted that there was no legal basis connecting the defendant to be liable for payment of compensation for the product collected by the farmers. She also admitted that and that she had no proof that the product had been returned to the defendant. It is my view that the plaintiff’s claim against the defendant for the recovery of US\$52,584-16 is not justified.

Whether the defendant is indebted to the plaintiff for payment of the sum of US\$72,900-00

To re-iterate, in paragraph 3 of plaintiff's amended declaration, plaintiff alleged that it had sold and supplied various goods to the defendant valued at US\$91,200-00. In its plea, defendant had categorically denied that the goods referred to had been ordered by and supplied; or supplied to the defendant on a credit basis. Defendant also denied having received such goods. Defendant put the plaintiff to the proof of lawful contract being shown to have existed for the supply of such goods. Defendant insisted that any such contract relied upon by the plaintiff was the result of fraudulent activities of certain individuals who fraudulently contracted with the plaintiff.

Defendant also averred that the plaintiff was aware of the fraudulent activities of those individuals who had been relieved of their duties with the defendant and averred that the plaintiff had no basis at law to sue the defendant for the recovery of US\$72,900-00 and instead should pursue its claim for those persons responsible for the liability, or at the very least join those individuals to the proceedings.

During the trial, the plaintiff failed to furnish the court with a contract rendering the defendant liable for the payment of US\$ 79,200-00. Instead it emerged that the plaintiff was relying on an order placed and not on a contract binding the defendant.

Page 28, cross-examination

“Q. Ok, let me put the question bluntly, can you show the court the contract between you, the plaintiff and Pioneer which you rely in.

A From which scheme, there were three schemes?

Q. For the amount outstanding.

A. For the amount outstanding, we have shown the evidence that was an order `` from Pioneer for specific fertilizers which they collected, we have shown that.

Q. So you not relying on the contract?

A. No, we are not relying on the contract. I am relying on the order that was issued by Pioneer.

Q. So while you are on that point you are not relying on a contract?

A. Correct, but I am also relying on the documents that I have.

Q. You are not relying on a contract, correct?

A. Correct but I also relying on the documents that I have.

Q. You can't have it both ways unfortunately. If you are not relying on the contract, you are relying on an order, correct?

A. Correct.

Q. What is the value of the order?

A. The value is \$79,200-00”

Ms Dunford admitted that there was no direct evidence that the defendant had ordered the goods concerned and that most probably what had happened was that the individuals (one Stanley Kanembirira and Danny Myers) who had been dismissed from employment by the defendant for their fraudulent dealings had placed the order for those goods by telephone which was not for defendant’s account or benefit. Because the plaintiff had not joined these two individuals to the present proceedings, and because the plaintiff admittedly failed to secure their attendance at court; I find the suggestion made by the defendant that the plaintiff had had direct dealings with these employees, and that the transactions were unknown to the defendant plausible. In fact Mr Moyo for the plaintiff was candid with the court when he advised the court that he had spoken to the two witnesses but they were avoiding involvement in the matter.

The plaintiff was unable to establish a contractual basis for suing the defendant for payment of \$79,200-00.

Defendant called one witness a Mr Madzima. To be frank, the foundation of plaintiff’s claim had all but vanished at the conclusion of the plaintiff’s case, thus Mr Madzima’s evidence served chiefly to drive that point home. I did however come to understand the extent of the plaintiff’s appalling paperwork from listening to Mr Madzima give evidence, and it is no wonder that Ms Dunford struggled to connect the documents which were introduced by plaintiff, to the claims which the plaintiff had alluded to in the pleadings. Plaintiff’s case had all but evaporated by the time Mr Madzima concluded his testimony.

At the end of the trial I invited the parties’ counsel to settle closing submissions and file them with the court. I appreciate the case references which I intend to borrow from.

It is trite that he who alleges something must prove it. See *Book v Davison* 1988 (1) ZLR 365. Also *Astra Industries Limited v Peter Chamburuka* SC 27/12 in which it was held that:

“The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove it”

As I have already alluded to in my discussion {*supra*} the plaintiff failed to establish its claim in that the plaintiff did not manage to show the court that Pioneer was connected by

contract or credit or by any manner whatsoever that the amount claimed by it was claimable against the defendant.

Further the basis of plaintiff's claim at law was not made clear. The plaintiff's witness testimony was tainted by hearsay. The persons who had allegedly liaised with the farmers or placed the order for the goods allegedly ordered by the defendant were reluctant to come to court. Another issue which was not resolved was why the plaintiff was suing the defendant for claims it ought to have made against those third parties thereby suggesting that the plaintiff was potentially seeking to unjustly enrich itself. All in all, the plaintiff's claim was not made out. In the circumstances plaintiff's claim must fail.

Accordingly, I give the following order:

“Plaintiff's claim is dismissed with costs”

Scanlen & Holderness, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners