

**EDMOND CAR SALES**

**Versus**

**DANIEL GENEUX**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 17, 18 OCTOBER & 11, 12 & 4 DECEMBER 2003

*M J Mellin* for plaintiff

*N Ndlovu* for defendant

Civil Trial

**NDOU J:** The plaintiff sued the defendant for the payment of the sum of \$108 025,00 with interest thereon calculated from the date of summons to date of payment in full. In addition the plaintiff seeks an order that the defendant pays costs of suit. The claim is alleged to have arisen in the following circumstances. First, the defendant hired plaintiff's DAF truck with a trailer for the purpose of ferrying chrome at the rate of \$3 000,00 per day for 22 days. The total costs amounted to \$66 000,00 together with sales tax of \$9 900,00 resulting in aggregate total of \$75 900,00. Second, the defendant hired the plaintiff's Leyland truck and trailer for the purpose of ferrying chrome at the rate of \$3 000,00 per day for 10 days. The total cost amounted to \$30 000,00 together with \$4 500,00 sales tax resulting in aggregate total of \$34 500,00.

Third, the defendant hired the plaintiff's CK 10 truck for the purpose of ferrying chrome at the rate of \$2 500,00 per day for 11 days. The total cost amounted to \$27 500,00 together with sales tax thereon amounting to \$4 125,00 resulting in aggregate total of \$31 625,00. The defendant denies hiring the said vehicles. His case is that he merely accompanied the late James Makurira for the latter's meeting

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with the plaintiff. In essence his case is that the plaintiff and the late James Makurira are the parties to the agreement forming subject matter of these proceedings. He states that he, however, made a cheque for \$34 000,00 for and on behalf of the late Makurira “as security for a deposit which the plaintiff demanded” and after the late Makurira had stated that he did not have his chequebook on his person. He subsequently stopped payment on the cheque which, according to him, plaintiff was only supposed to hold as security for payment from the late Makurira. The plaintiff’s case is that the \$34 000,00 was an initial payment against the abovementioned hire charges.

**Plaintiff’s case**

**Edmond Totri**

He is the Managing Director and shareholder of the plaintiff company. The defendant contacted him over the phone inquiring about hiring the plaintiff’s trucks to ferry chrome. The defendant intimated that he would come over to Bulawayo (from Shurugwi) on the following Saturday to finalise the deal. He indeed came to his office on the said Saturday. They sat in his office and discussed the hiring of the trucks. His (i.e. plaintiff’s) daughter Caroline was present in the office. He agreed on the tariff or price with defendant. They also agreed on the allied questions of the fuel for the trucks and food for the drivers. They agreed on the three trucks at the tariff stated above. They agreed that the defendant would pay him a deposit which he did by way of the above mentioned \$34 000,00 cheque. The defendant then gave the drivers the directions of their rendezvous and when they would meet. All these logistical arrangements were made by the defendant. He was adamant that the agreement was entered into between him and the defendant and did not deal with the

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late Makurira. He does not know whether the trucks ferried the chrome on behalf of the late Makurira, but he is certain he dealt with the defendant in this matter.

The witness was subjected to some tactful, detailed and determined cross-examination. I am satisfied that he gave his evidence well. He stuck to his story which in my view is probable. Overall I find that he is a credible witness.

**Caroline Mackintosh (nee Totri)**

She is the previous witness's daughter and also a director of the plaintiff company. She also confirmed what her father said that the defendant came to their office to discuss about hiring their trucks. Although she was not present all the time when her father and the defendant discussed, there are, however, issues that she is certain about. First, she was in the office when the defendant arrived. He introduced himself as a brother-in-law of their long-time clients, the Van Rensburg brothers. Second, she was adamant that the defendant arrived on his own. Third, she was eventually directly involved in the implementation of the agreement. Fourth, she confirmed that the defendant gave the above-mentioned cheque as a deposit. Finally, she does not know the late Makurira and in her attempts to recover the said amounts she dealt with the defendant. She was similarly subjected to lengthy and probing cross-examination. I am satisfied with her demeanour. She is, in my view, a credible witness. Her testimony corroborates that of the previous witness on the crucial issue of the absence of the late Makurira during the deliberations leading to the agreement *in casu*.

**Jackson Brown**

He is an employee of the plaintiff company. He saw the first witness in discussion with the defendant in the former's office on the specified day. He confirmed that there was no one else involved in the discussion besides the two. He did not see the late Makurira. He says if the latter was waiting outside he would have seen him as he went out of the office from time to time. He was not shaken under cross-examination. He is credible.

**Defendant's case****Daniel Geneux**

He is in the transport industry. He said that his friend, the late Makurira, asked him to accompany him to Bulawayo to assist him in securing trucks for hire to ferry chrome. The request had a racial root in that his late friend opined that being white the defendant was in a better position to negotiate with white employees of the plaintiff company. The colour of his skin would serve as some security or assurance that the late Makurira would pay for the hired trucks.

He came to Bulawayo with the late Makurira on a Saturday. They proceeded to the premises of the plaintiff company. After the introductory rituals, the first witness and the late Makurira negotiated the hire agreement. He was present to offer some assistance to his friend in the negotiations. During the discussions it came out that the first witness knew his brothers-in-law, the Van Rensburg brothers. In addition to what I have already stated above his reason for accompanying the late Makurira was for him (i.e. the defendant) to explain to people at the plaintiff company the modalities of ferrying chrome. So he explained the system to the first witness, especially how ZIMASCO paid the transporters of the chrome. After that the first

witness and the late Makurira agreed on a price. The first witness asked for security from the late Makurira. The latter had left his chequebook in Shurugwi. He said he came to the late Makurira's rescue by issuing the cheque referred to *supra*. He issued the cheque on the basis that it would not be banked. Mr Makurira drew a map for the drivers. Mr Makurira passed away in June 1998. Summons were issued after his death and after he, i.e. the defendant brought his death to the attention of the plaintiff company. Under cross-examination he stated that he and the late Makurira used his (i.e. defendant's) car to travel from Shurugwi to Bulawayo. He could not explain how the cheque would serve as security if he told the plaintiff and the late Makurira, as he alleges, that he was going to stop payment if the cheque is banked. There was obviously no security provided by the cheque if his version is accepted. He later conceded that the cheque did not even belong to him but his wife. The defendant had signing powers on the cheque account. He had not consulted his wife at the time he signed the cheque but only told her at a later date. Although in his plea the defendant averred that he was not aware of the specifics of the contract he conceded that that was incorrect as his purpose to accompany the late Makurira was to give specifics of the payment by ZIMASCO. He struggled to reconcile the two statements.

Further he conceded that on the map allegedly drawn by the late Makurira his name and telephone numbers appear. So on the map given to the plaintiff company drivers he is reflected as the contact person. He stated that he was also present throughout the negotiations. He also said his contact number on the map was there because he also had to facilitate the signing of the contract by ZIMASCO. Why he was playing this role is not clear but he used the phrase "my job" in this regard. So it was his job to have the contract signed by ZIMASCO for direct payment to the

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plaintiff for ferrying the chrome. He said the late Makurira contacted him many times when the plaintiff's truck broke down. He assisted the late Makurira in connection with the repairs of broken down trucks. He also communicated with the plaintiff's representative about the conditions of the trucks, the reluctance of the late Makurira to sign the ZIMASCO stop order form etc. The plaintiff's representative called him several times about the non-payment for the hired trucks. In fact he says Mr Totri was putting him under a lot of pressure. He, however, did not push Mrs Makurira too hard about the matter as she was under a lot of pressure after the death of her husband. From what I have outlined it is clear that defendant's involvement was crucial and not marginal as he said in his plea. His vehicle was used for this trip to Bulawayo (around 200 kilometres). He did the negotiation with Mr Totri. He paid by cheque an amount of \$34 000,00 to facilitate the deal. He was the contact person between the plaintiff and ZIMASCO over the issue of stop order payment. When the trucks broke down the issue was referred to him. He even had one of the trucks repaired in Shurugwi. When payment for the hire of trucks was not forthcoming the plaintiff approached him. He played a pivotal role in this matter with the late Makurira (and his wife after his death) playing a peripheral role. His explanation for playing such a major role is far from convincing. I make a negative finding on his credibility. I am satisfied that he is not being truthful about his dealings with plaintiff.

### **Rodgers Makurira**

His testimony does not take the case any further as he merely repeated what he was told by his sister-in-law and the defendant. More importantly he was not present when the transaction was conducted. The same applies to the testimony of Edwin Will. The latter merely established that he was at some point hired by the late

Makurira to load chrome into the plaintiff's trucks. This piece of evidence is not helpful in the resolution of the issues before the court.

**Faria Chigwada**

He is the Operation Accountant for the Mining Division at ZIMASCO. Besides confirming that the late Makurira had a tribute with ZIMASCO the rest of his testimony is irrelevant to the issue before me.

**Doreen Makurira**

She is the widow of the late James Makurira. She knew very little about the transaction *in casu*. Her testimony does not take the matter further.

**Finding**

From my above analysis it is evident that I find that the defendant approached Mr Totri and negotiated the agreement forming the subject matter of this case. He did not indicate to Mr Totri that he was acting as an agent of some other principal. He gave the impression that he was the party to the agreement. He negotiated and agreed on terms with the plaintiff. He made out a cheque in favour of the plaintiff. Mr Totri later dealt with him in the plaintiff's bid to recover the amounts due in terms of the agreement. In the circumstances, whether the hired trucks were going to carry out work on the tribute of the late Makurira is immaterial. When summons were issued the defendant did not immediately plead that the plaintiff had sued a wrong party. Instead he requested for further particulars which included invoices. Even if one accepts that the defendant was negotiating on behalf of the late Makurira the fact remains that the credible evidence shows that Mr Totri was no aware of this fact. He believed that the plaintiff was dealing with defendant. Mr Totri did not see the alleged principal. Therefore at most his evidence shows that the late Makurira was an

undisclosed principal. The plaintiff in this scenario is that of a third person. In this regard in *O’Leary and Ano v Harbord* (1888) 5 HCG I at 11 SOLOMON J said:

“The apparent party to a contract, the agent, is estopped from denying liability, inasmuch as by his conduct he led the other contracting party to believe that he was really the principal; and on the other hand the principal cannot escape liability on a contract to which he was in reality a party by taking advantage of the form in which the contract was made by his agent.”

In *Natal Trading and Milling Co Ltd v Inglis* 1925 TPD 724 at 727 CURLEWIS

JP said;

“When the undisclosed principal is discovered, the other contracting party has the right to sue either the agent with whom he contracted, believing him to be a principal or the actual principal. And if with full knowledge of the circumstances he elects to sue either one he is debarred from subsequently proceedings against the other on the same contract.”

In other words the liability of the principal and agent is alternative and only one action can be maintained on that cause of action. This judgment of CURLEWIS JP was approved by the Appellate Division in *Cullinan v Noordkaaplandse Aartappel – kernmoer Kooperatie Bpk* 1972(1) SA 761 (AD) at 771H.

Be that as it may, I find that the plaintiff was unaware of the existence of a principal until this was raised late in the pleadings. The contract was therefore between the plaintiff and the defendant. If I am wrong in the latter finding, because the evidence established that the plaintiff was unaware of the existence of the late Makurira, upon discovery the plaintiff’s position would be that of a third person who becomes aware of an undisclosed principal. As such the principle in the *Natal Trading and Milling Co* case *supra* applies. Either way the defendant would still be liable.

In the circumstances I find that the plaintiff has established its case on a balance of probabilities and I order as follows:



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1. Judgment be and is hereby entered in favour of the plaintiff against the defendant for the payment of the sum of \$108 025,00 with interest thereon at the prescribed rate from the date of issue of summons to date of payment in full.
2. Costs of suit.

*Ben Baron and Partners*, plaintiff's legal practitioners  
*Lazarus & Sariff* defendant's legal practitioners