

AUGUSTINE RHUHWAYA

Versus

NDODANA MOYO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17, 18 MARCH & 20 AUGUST 2015

Civil Action

K. Ngwenya for the plaintiff
R. Ndlovu for the defendant

TAKUVA J: Plaintiff issued summons from this court claiming:

- “(1) An award dissolving the partnership and for the parties to share equally all proceeds acquired to date.
- (2) An order for the payment of US\$60 000,00 due to plaintiff by defendant being monies expended by plaintiff to purchase equipment for Dundee 5 Mine, installation of electricity and the drilling of the borehole.
- (3) Interest on US\$60 000,00 for the prescribed rate from the 14th of December 2012 to date of full and final payment.
- (4) An order declaring stand number 2672 Bulawayo Township of Bulawayo Township Lands held under Deed of Transfer 2118/2011 measuring 929m² also known as No. 6 Clyde Road, Famona Bulawayo especially executable.
- (5) An order for the payment of US\$300 000,00 as damages for loss of investment caused by defendant which sum the plaintiff would have earned had the partnership continued and for the future benefits in the permanently installed equipment.
- (6) Costs of suit on an attorney and client scale.”

Defendant filed his plea in which he denied the plaintiff’s claim *in toto*.

The factual background surrounding the dispute between the parties is largely common cause. On 16 May 2012, the parties entered into a written memorandum of agreement of partnership which was produced as exhibit I. After that, the plaintiff at his own expense injected into the partnership a sum of US\$55 411,50 in purchasing mining equipment, installing a

borehole, ball mill, jaw crusher and connecting electricity to the mining site. The parties subsequently agreed that the plaintiff's capital injection would be US\$60 000,00 after factoring in ancillary costs incurred by the plaintiff.

It is common cause that on 14 December 2014, defendant through a letter admitted in evidence as exhibit 2 sought to dissolve the partnership without paying or reimbursing the plaintiff. Consequently, a dispute arose and plaintiff referred the matter to arbitration as provided for in clause 11 of the memorandum of agreement of partnership. Defendant delayed to pay his share of fees and no meaningful progress occurred until plaintiff issued summons.

At the pre-trial conference the issues were identified as:

- “(1) Whether or not the partnership should be dissolved and the parties share equally all profits earned to date.
- (2) Whether or not defendant should pay a certain amount for the equipment and installations that were solely purchased by the plaintiff.
- (3) Whether or not the defendant should pay any interest on any amount due.
- (4) Whether stand number 2672 Bulawayo Township held under Deed of Transfer number 2118/2011 should be declared specially executable.
- (5) Whether or not plaintiff is entitled to damages for the prejudice and loss of his investment caused by defendant's frustration of the partnership.
- (6) Whether or not defendant should pay plaintiff's costs of suit on an attorney and client scale.”

At the commencement of the trial, the parties were agreed that there were basically two issues for determination namely;

- (a) Whether or not the defendant should pay US\$60 000,00 for the mining equipment and installations that were solely purchased by the plaintiff.
- (b) Whether or not plaintiff is entitled to damages for the prejudice and loss of his investment caused by the defendant's frustration of the partnership. Put differently issues 1, 3 and 4 were resolved at the commencement of trial.

As regards the second issue, defendant admitted in writing and in his evidence in chief that the US\$60 000,00 is due to the plaintiff. He conceded that plaintiff solely and single handedly purchased the mining equipment, ball mill, jaw crusher, installation of borehole and electricity with a combined value of US\$55 411,50. More significantly, defendant admitted that the parties agreed to round off the figure to us \$60 000,00.

While admitting that the US\$60 000,00 is due and owing to the plaintiff, defendant sought to try and rely on clause 4 of the memorandum of agreement of partnership contending that the parties were supposed to share profits and losses in equal shares upon dissolution of the partnership. On the other hand, plaintiff contended that there were no profits or losses to be shared because defendant had for all practical purposes dissolved the partnership without affording it an opportunity to make a loss or profit to share. Further, plaintiff testified that the US\$60 000,00 cannot be categorized as a loss or profit to the partnership in that it is money which plaintiff was supposed to recoup from the partnership at the exclusion of the defendant.

In my view, defendant is liable to the plaintiff to the tune of US\$60 000,00 for three simple reasons: Firstly, the defendant admitted writing a letter proposing a pre-mature termination of the partnership. Secondly, defendant admitted that plaintiff bought the mentioned equipment using his own funds. Thirdly, defendant admitted that due to the nature of the equipment and investment, he stands to be the long term beneficiary of the equipment installed at his mine. I find therefore that the plaintiff has proved on a balance of probabilities that defendant owes him US\$60 000,00.

In respect of the fifth issue, plaintiff's evidence is to the effect that had the partnership continued for an indefinite period as envisioned in clause 3.1 of the memorandum of agreement of partnership, he would have derived a return on his investment and benefited from the permanently installed equipment. He explained how he arrived at the figure of US\$300 00,00 in damages. It was also contended that defendant authored a letter in which he sought to prematurely dissolve the partnership after only 6 months. Plaintiff professed ignorance as to the

grounds for this premature termination. According to him all was well until defendant wrote the letter.

Defendant on the other hand has a completely different story. According to him, plaintiff brought 3 “partners” who he did not know and started mining operations with these 3 excluding him. When defendant complained, plaintiff told all the workers not to communicate with defendant. He said at some point, plaintiff chased him from the mine. When things got to a head, the two had a meeting where plaintiff told defendant to write exhibit 2 indicating his wish to terminate the partnership. Pursuant to this agreement, defendant then wrote the letter i.e. exhibit 2. Defendant said plaintiff dictated the actual terms to be contained in the letter. At one point in January 2012 defendant got injured and plaintiff chased him away from the mine for 6 months. According to the defendant when plaintiff was working alone at the mine, he did not remit any money to the defendant.

Defendant’s evidence on the circumstances surrounding the writing of exhibit 2 was not challenged in cross-examination. Defendant in my view is a credible witness who admitted owing plaintiff US\$60 000,00. He readily admitted that at some stage while negotiating, he offered his house as security. As regards the reasons for terminating this contract, his version is more probable than the plaintiff’s. I say so for the simple reason that, according to the plaintiff they were smooth sailing when for no apparent reason defendant wrote exhibit 2. I disbelieve the plaintiff’s account of events. I find therefore that the two parties after discussing their problems, agreed to terminate the partnership in terms of the partnership agreement. Since the termination was on mutual agreement, there is no wrongfulness on the defendant’s conduct. Consequently, defendant is not liable to pay damages to the plaintiff.

Accordingly, it is ordered that:

1. The partnership be and is hereby dissolved.

2. The defendant be and is hereby ordered to pay US\$60 000,00 due to plaintiff by defendant being monies expended by plaintiff to purchase equipment for Dundee 5 mine, installation of electricity and the drilling of a borehole.
3. Stand number 2672 Bulawayo Township held under Deed of Transfer number 2118/2011 is declared not to be specially executable.
4. The plaintiff's claim for US\$300 000,00 as damages for loss of investment be and is hereby dismissed.
5. Defendant to pay plaintiff's costs of suit.

Messrs T J Mabhikwa & Partners, plaintiff's legal practitioners
R. Ndlovu & Company, defendant's legal practitioners