HB 89-17
HC 2020-15
XREF HC 1109-16

NHLANHLA GUMBO
versus
MMELI PHAHLA MKANDLA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 28 MARCH 2017 AND 6 APRIL 2017

Civil Trial

K Ncube for the plaintiff
O D Mawadze for the defendant

MATHONSI J: The plaintiff is involved in the mining business while the defendant is employed by Agribank as a customer services officer. They both hail from Gwanda. They did not know each other until Tichaona Hove, another Gwanda resident introduced them to each other in October 2014 for a purpose, namely to transact in the purchase of mining equipment. Having been brought together by Hove they did transact but the transaction turned sour as a result of which the plaintiff has sued the defendant.

In the suit instituted by summons issued on 28 July 2015, the plaintiff claims payment of the sum of $21 978-00 being a refund in respect of money paid to the defendant allegedly in terms of an agreement for the purchase of mining equipment, together with interest at the prescribed rate from 17 February 2015 to date of payment and costs of suit. The plaintiff averred in his declaration that about 24 November 2014 the parties agreed the defendant would supply the plaintiff with an excavator and two compressors on or before 17 December 2014 and in pursuance of that agreement he made a cash payment of $21978-00 to the defendant.

The defendant failed to deliver the mining equipment in terms of the agreement and even after the novation of the agreement for him to supply instead one compressor and one excavator for the same price, the defendant still failed to deliver.

The defendant entered appearance to defend and in his plea he denied ever entering into an agreement with the plaintiff averring that the plaintiff had only pleaded with him to "connect"

him with a cousin of his based in the United Kingdom which he did. Upon connecting them through telephone which was on loud speaker, the plaintiff dealt directly with his cousin Marcus Matiwaza in the UK and transacted with him. The defendant however admitted receiving the sum of $21978-00 from the plaintiff which he forwarded to Matiwaza in the UK.

The defendant specifically denied being an agent of either the plaintiff or Matiwaza admitting only being "a communication person" between them. He averred further that the plaintiff has at all times been dealing directly with Matiwaza and even received part payment of a refund of £ 2000-00 from Matiwaza. Litigating against him in those circumstances therefore is nothing more than using him as a "pressure control value" to motivate Matiwaza to refund the money. Significantly, the defendant did not rely on any other defence as may be available to him in law.

The only issue the parties agreed to refer to trial is whether the defendant is indebted to the plaintiff in the sum of $21 978-00 in respect of the contract between them. This is one of those rare cases in which the areas of dispute are very narrow, because most of the facts are common cause and the dealings between the parties is to a large extent documented. The areas of dispute are whether when the parties met for the first time it was disclosed to the plaintiff that he was transacting with Matiwaza and not the defendant. Secondly, whether in making payment to the defendant the way he did it was on the understanding that the defendant would act just as a conduit to transmit the payment to Matiwaza.

The plaintiff's version is that his friend Tichaona Hove knew that he was looking for mining equipment. He then introduced him to the defendant after Hove had seen the defendant driving an eye-catching Ford motor vehicle. This was in October 2014. The defendant had already been briefed by Hove and brought with him his laptop in which images of various machines were saved. The meeting took place outside Jet Store in Gwanda but in the defendant's car. The defendant showed him the pictures but he explained to the defendant that the images did not meet his specifications. He gave the defendant the specifications of what he wanted. They parted after the defendant had taken the specifications.

Much later the defendant advised Hove that he was now in possession of the machines that met his specifications and also gave Hove the price. In November 2014 the three of them

again met outside Power Sales Shop in Gwanda again in the defendant's motor vehicle. He was again in possession of his laptop. The defendant showed him new pictures and fortunately the JCB excavator and Ingalo Rand Compressor he was looking for were there. He then placed an order with the defendant for the supply of 1JCB excavator and two compressors. The defendant quoted him a total price of $21 978-00.

This happened on 23 November 2014 and they parted on the understanding he would bring the money.

The following day on 24 November 2014, the plaintiff says he was accompanied by Hove to Agribank, the defendant's place of employment, where he handed over the sum of $21978-00 to Hove who in turned handed it to the defendant. The latter used a money counter to count the money. After satisfying himself that the full purchase price had been paid the defendant assured him that he would make delivery of the equipment on 17 December 2014. At no time did they discuss Matiwaza or that he was the one sourcing the equipment. As far as he was aware he was contracting with the defendant who never disclosed that he was acting as a conduit for Matiwaza.

After that he communicated with the defendant through emails and at no time did the defendant reveal to him that the emails he was sending to him were being forwarded from Matiwaza. The plaintiff produced a bundle of emails, exhibits 1 and 2 confirming that. Those exhibits show that the email communication was originating from the defendant and there is nothing to suggest that it was being forwarded as would happen if the defendant was merely a medium of communication between the plaintiff and Matiwaza.

I will by way of example cite two emails written to the plaintiff by the defendant. On 2 December 2014 the defendant wrote the following email to the plaintiff using his address; "pahlammleli@gmail.com." which address was used throughout in their communications;

> "Good morning sir, Thank you for your guidance and specifications regarding type, size and make of the excavator. However, our budget plays a major role in limiting our choices. Our initial budget was based on a 1990 JCB 3 XC (images and quote attached for reference.) This means that with this budget, these are the options:
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> 1. We can buy an excellent, working machine with age of plus or minus 2 or 3 yrs of the quoted age as (prior) initial quotation.
> 2. Buy a later version, worth more than our budget (by chance) that might be faulty with hidden defects which might also turn out to be costly in the long run.

> 3. Look for different quotations and then increase our budget so that our search criteria changes as well.
> 4. Under the circumstances we widen our search to other neighbouring countries like Scotland and Ireland.
>
> These are my recommendations which are subject to criticism ---. The information is not meant to discourage or manipulate our transaction sir, but merely to guide and allow you to be in the picture of what is involved in this transaction. At the end of the day we will be happy to provide you with a service that suits your needs. Please feel free to correct us and (air) your views so that we are all in the same picture.
> NB. Any changes will also have an effect on our targeted shipping time frame. The information above expresses the views of my brother Marcus (the agent buyer.)" (The underlining is mine)

Clearly in that email the defendant was rendering advice to the plaintiff and making suggestions. He was making recommendations in his personal capacity and referred to Matiwaza merely as an "agent buyer." He was certainly involved in the identification and choice of the equipment in question.

On 8 December 2014 the defendant again sent an email to the plaintiff in which he was expressing his personal involvement. He wrote:

> "Good morning sir, please note that the machine we had chosen has been sold to another buyer. However, the search continues. I am currently waiting for the price for NH 85 (1999). Will keep you posted."

The plaintiff stated that after waiting for a while following the passing of the promised date of delivery, that is 17 December 2014, without any delivery and the defendant continued to make excuses, he eventually cancelled the agreement and demanded a refund. When the defendant failed to comply he engaged his lawyers who sent him a letter of demand. It was only after the letter of demand, but not before the defendant had requested a meeting during which he begged for forgiveness and the withdrawal of the matter from lawyers, that Matiwaza surfaced. He started claiming ownership of the transaction and readily offered to refund the money. He even paid the equivalent of $3000-00 leaving a balance of $18978-00 which he is now claiming.

The defendant confirmed most of what the plaintiff said in his evidence. He however does not have one version of the events. I have already alluded to the fact that in his plea he had averred that the plaintiff dealt directly with Matiwaza and that he never acted as an agent for

either the plaintiff or Matiwaza. In response to the letter of demand sent to him, his erstwhile legal practitioners, T. J Mabikwa stated his case as:

> "RE: MMELI MNKANDLA V CINDERELLA BROTHERS MINING
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> Your letter dated 16 February 2015 and addressed to Mr MMELI MNKANDLA has been handed to us with instructions to reply thereto. Please note our interest in the matter as we reply as follows;
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> From the onset, our client is shocked by your client's lack of gratitude. Our instructions are that our client never entered into an agreement with CINDERELLA BROTHERS MINING or MR NHLANHLA GUMBO as is alleged in your letter. We are advised that your client learnt that ours has a cousin (MARCUS MATIWAZA) in the UK who has assisted a number of people and institutions in Gwanda to acquire assets like cars, excavators, compressors and other equipment from the UK. Gumbo then pleaded with our client to connect them with the UK based cousin for assistance which he did. There was absolutely never any agreement that Mmeli Mnkandla would supply an excavator and two compressors as now claimed in your letter. ---. Our client does not wish to deny knowledge of the money. What he wants is the truth. Your client requested to use our client's CABS account. They went into CABS together. The money was then deposited into the account and thereafter transferred to MARCUS's UK account. Our client has clear documentation to that effect. In fact, documents in our possession show that all the money was transferred in full. This was because our client was getting nothing, no commission, no fee or payment as he was not even an agent in the transaction. He was just assisting. At the request of your client, he was nothing more than a centre of communication. For that reason, he is indeed aware that your client was acquiring an excavator and two compressors from the UK. Our client says he was shocked to receive your letter. As a result he has tried to establish what went wrong between Gumbo and his cousin Marcus. He noted that when your client sent the money, they were emailed images of 1990 and 1991 equipment – the JCB (3 XC) type as per the initial budget. ----."
> (The underlining is mine)

We know of course that most of what is contained in that letter is not correct. The emails I have referred to illustrate that he was directly involved from the very beginning. He is the one who was sending images to the plaintiff. He did not connect the plaintiff to Matiwaza before disappearing from the scene. In fact that name is only mentioned once in those emails as a mere "agent buyer."

We also know from his testimony that he acted on the instructions of Matiwaza to keep the money that had been paid to him by the plaintiff from 24 November 2014 when he received it until he dispatched the first butch equivalent to £11460-00 three days later on 27 November

2014. He only despatched the second butch of £2900-00 more than two months later on 6 February 2015. (See exhibit 3). In fact, during his testimony, although he kept prevaricating, the defendant was forced to admit that he was acting as an agent of Matiwaza. He said he was receiving telephone instructions from him which he passed on to the plaintiff by email.

The defendant stated that on their very first meeting with the plaintiff and Hove, he had immediately telephoned Matiwaza in the UK and put the phone on loud speaker. The plaintiff then dealt directly with Matiwaza and not himself, something which is also not true because we know as a fact that he was communicating with the plaintiff by email claiming ownership of the exercise. He admitted having the email addresses of both the plaintiff and Matiwaza but could not give an explanation as to why it became necessary for him to be involved instead of the two communicating directly. He could not explain why if at all he was forwarding Matiwaza's emails, that is not reflected in the emails. Ultimately as I have said he was forced to admit being Matiwaza's agent. The question is: did he disclose the principal?

It is trite that a witness who gives false evidence and lies about a particular incident or fact leads to an inference that such a witness is hiding something. See *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* 2003 (2) ZLR 139 (H); *Stohill Investments Properties (Pvt) Ltd* v *Mahachi and Others* 2014 (1) ZLR 533 (H) 547C.

Even if the defendant had not admitted being an agent of Matiwaza, I would not have hesitated to make a finding that he was. This is because all the evidence in this matter points to the fact that he was despite his feeble denial. From the very beginning he is the one who brought the images of the equipment. He brought the quotations and communicated throughout with the plaintiff. He took the money and sent it to Matiwaza in terms of the latter's specific instructions. If he is to be believed on this aspect, he was being telephoned and emailed by Matiwaza with information to pass onto the plaintiff. In those circumstances he was indeed an agent.

In our law, ordinarily an agent does not incur liability for his or her involvement in the transaction between the principal and the third party. The law regards the agent as a conduit pipe which falls off automatically the moment a contract is concluded between his or her principal and the third party.

However there are instances where the agent will incur personally liability. This happens for instances where the agent acts for an undisclosed principal.

As stated by the learned author R. H Christe *Business Law in Zimbabwe*, Juta and Co Ltd, 2nd ed. at page 352:

> "Just as a principal is normally liable to third parties on contracts made on his behalf by an agent, so the agent is not normally liable. The general rule naturally does not apply if the agent expressly, impliedly or by usage accepts personal liability on the contract, and whether he has done so is a question of fact, the onus being on the third party: *Taunton Enterprises (Pvt) Ltd* v *Marais* HH 135-96. When an agent does not disclose the fact that he is contracting as an agent he will be liable on the contract to the third party, whatever the third party's rights may be against the undisclosed principal, because on the basis of quasi-mutual assent the third party is entitled to regard him as a principal." (The underlining is mine.)

In the present matter the defendant masqueraded as the supplier of the equipment. He pretended as if he was the one sourcing the equipment to the extent of sourcing images whether from Matiwaza or elsewhere, which he repeatedly gave to the plaintiff as if he was the supplier. He engaged the plaintiff in communications over a long period via emails without disclosing that he was not the one purchasing the equipment in the UK. He collected the money himself and acted as if he was the one paying the dealer directly.

Although we now know that he was working with Matiwaza the person on the ground, for purposes of the law, the defendant was an agent of an undisclosed principal. Such an agent assumes personal liability for the simple reason that he did not disclose the principal. On that basis alone the defendant is liable to refund the money, especially as it is also apparent that he expressly or impliedly assumed personal liability.

Whichever way, the defendant cannot escape personal liability. This is because by his conduct he gave the plaintiff reasonably to understand that he was dealing with him. That is the essence of the doctrine of quasi mutual assent. It is described by R. H Christie, *ibid* at p32 in the following:

> "Thus, nobody can successfully invoke the doctrine unless he is in the position of the reasonable man, relying on words or actions of the other party which he has understood in their ordinary sense. To assist such a person without being unfair to the other party the courts have worked out three matters of detail. First, the party seeking to invoke the doctrine must be treated as if he had been aware of all relevant facts of which a

> reasonable man in his position ought to have been aware. Second, no fault or blame need be attributable to the other party beyond 'blame in the sense that by his conduct he has led the [party seeking to invoke the doctrine], as a reasonable man, to believe that he was binding himself'. Third, the party seeking to invoke the doctrine need not prove, as he would have to prove if he were relying on estoppel, that he acted to his prejudice in reliance on the other party's words or actions: *Springvale Ltd* v *Edwards* 1968 (2) RLR 141 (A) 149, 1969 (1) SA 464 -470."

In the present matter I have already stated that the defendant presented himself as the big man involved in sourcing equipment in the UK without disclosing that he was relying on and forwarding money to Matiwaza. Because of his conduct he led the plaintiff to believe that he was dealing with him. By the doctrine of quasi mutual assent the defendant is therefore liable.

It is not disputed that what now remains outstanding is $18978-00 after Matiwaza refunded $3000-00. *Mr Ncube* for the plaintiff has asked for costs on a punitive scale because the defendant was obstinate. I am not persuaded that this is a case for such an award to be made. I have already found that the defendant was indeed an agent. His liability stems from his failure to disclose the principal which, on its own does not warrant punitive costs.

In the result, it is ordered that:

1. The defendant shall pay to the plaintiff the sum of $18 978-00.

2. Interest on that amount at the prescribed rate from 17 February 2015 to date of payment in full.

3. Costs of suit on an ordinary scale.

Kossam Ncube and Associates, plaintiff's legal practitioners
Mawadze and Mujaya, C/o Dube Banda, Nzarayapenga, defendant's legal practitioners

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