BRENNAN'S DIESEL SERVICES
(PRIVATE) LIMITED
versus
TENDA BUS SERVICE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 10 and 11 January 2012

**Civil Trial**

*E Morris,* for the plaintiff
*TK Hove,* for the defendant

KUDYA J: This is a claim by the plaintiff against the defendant for ZAR 17 353-00 for the repair between 19 and 30 December 2008 of two fuel pumps. The plaintiff also seeks interest at the prescribed rate from 27 January 2010 to the date of payment in full. In the pleadings the plaintiff sought costs on the ordinary scale but in his oral submissions Mr *Morris,* for the plaintiff, applied for punitive costs. The defendant disputed the entire debt.

While six issues were referred to trial, it seems to me that the only issue for determination is whether the defendant is indebted to the plaintiff in the sum claimed or in any amount.

The plaintiff led the evidence of two witnesses. These were its managing director Michael John Brennan and manager Feisal Suleman. In addition it produced three documentary exhibits. The defendant called the evidence of its managing director John Taurayi Mungwari.

It was common cause that on 19 December 2008 the defendant requested the plaintiff to repair two diesel pumps. The plaintiff's personnel opened a job card before stripping and examining each pump. The parts that were fitted on each pump are listed at the back of each job card (page three respectively of exh(s) 1 and 2). The pumps were repaired and collected by the defendant's employees on 30 December 2008.

There was a dispute between the parties as to who physically brought the pumps for repair. Mr Suleman stated that they were brought by Mr Mungwari. Mr Mungwari stated that it was too menial a function for the managing director. He, however, failed to identify who

did so. Mr Suleman further stated that when Mr Mungwari brought the pumps he agreed to pay in rands at the rate of ZAR 2 000-00 per week commencing from the date of collection. Mr Mungwari disputed the averment and stated that at that time the currency of account was the local currency and payment was due in that currency.

In a bid to demonstrate that the currency of account agreed between the parties was the rand, the plaintiff produced exh 3, the schedule of payments made by the plaintiff. Exhibit 3 shows that the defendant paid R240-00 on 14 January 2009; R300-00 on 2 February 2009; R1 745-00 on 19 September 2009; US$ 390-00 converted at the cross rate of R7.5 to US$1 to give an amount of R 2 945-00 on 26 October 2011 and US$ 189-00 again at the cross rate of R7.5 to give an amount R1 417-00 on 31 December 2009. Mr Brennan and Mr Suleman collected the cash payments on different dates from the stores man at the defendant's offices and signed for the money in an A4 exercise book that was retained by the defendant. They each stated that the money was paid in United States dollars but was converted at the cross rate of the rand against the United States dollar prevailing on each date of payment. The defendant paid a total of R6 647-00 leaving an outstanding balance of R 17 353-00.

Mr Mungwari was adamant that he did not enter into any agreement to pay in foreign currency with the plaintiff. He prevaricated on whether or not the debt was paid out in local currency or in foreign currency. He exhibited confusion in some of his responses. In one vein he agreed that the debt was not fully paid and in another he maintained that it was fully paid out. It seemed to me that he confused other repairs that were paid in local currency before 19 December 2008 with the repairs to the two pumps in issue. His version that the debt was reduced by payment in local currency that was then converted into foreign currency by the plaintiff was incorrect. As he could not dispute the accuracy of the plaintiff's schedule, he admitted that as the legal tender in Zimbabwe after 2 March 2009 was in multiple currencies, he could not pay the last three payments in local currency that had virtually been demonetized. He failed to lead any evidence to demonstrate the amounts paid in local currency that he alleged were converted by the plaintiff into rands. In the end while maintaining that it was against company policy to honour local debts in foreign currency, he admitted that his subordinates may have paid out the amounts indicated in the plaintiff's schedule in foreign currency.

My assessment of the credibility of the witnesses is that the plaintiff's witnesses gave their evidence very well in regards to the schedule of payments found in exh 3. It was supported by the probabilities in regards to the payments made in exh 3. There was one area

however that the plaintiff's witnesses, especially Mr Suleman glossed over. His testimony suggested that he met Mr Mungwari once only on the date he delivered the pumps. I did not understand him to say that the pumps were stripped and examined whilst Mr Mungwari waited. It seems to me that the defendant would have known the actual costs of the repairs on or after the date of collection; being on or after 30 December 2008. It was not Mr Brennan or Mr Suleman's evidence that Mr Mungwari collected the pumps after the repairs. Mr Suleman did not clarify when Mr Mungwari agreed to liquidate ZAR 24 000-00 at the rate of ZAR 2 000-00 per week. The gaps in that testimony were not cured by the dismal performance of Mr Mungwari in the witness box. Mr Mungwari gave the impression that he was by virtue of his office divorced from the central payment activities for the repair of the two pumps. The probabilities did not support his version in regards to the payments in exh 3. I believed the plaintiff's witnesses and disbelieved the defendant's witness in regards to exh 3.

It was common cause that in December 2008, the local currency was in a free fall and had lost its lustre to local residents. It was common cause that the defendant operated a transport passenger service between Harare and Johannesburg. It was further common cause that the pumps were for buses plying the Harare to Johannesburg route. It was further common cause that the plaintiff lawfully held a foreign currency account with its bank. It was further common cause that the spares required to repair the pump were sourced from Europe and South Africa. It seems to me that the buses could only rack in foreign currency for the defendant if they were operational. They could not be operational unless they were repaired. The motivations for both parties to earn foreign currency and the loss of confidence by local residents in the local currency are probabilities that favour the plaintiff's version that the defendant agreed to pay for the repairs in foreign currency.

Accordingly, I find that Mr Mungwari, on behalf of the defendant, agreed on 19 December 2008 to pay for the repair of the pumps in rands.

In his oral submissions, Mr *Hove*, for the defendant, conceded that in the light of the sentiments expressed in *Macape* (*Pty*) *Ltd* v *Executrix Estate Forrester* 1991 (1) ZLR 315 (SC) at 320C that the agreement to pay in foreign currency in Zimbabwe was lawful even though actual payment could not be made without the authority of the central bank. The blanket authority was granted in March 2009.

Mr *Hove* argued that the plaintiff failed to prove the value of the repairs. He made reference to the job cards that did not itemize the cost of spares, the labour charges and the total invoice prices. Both the plaintiff's witnesses conceded that this information was missing

from the job cards. Mr Suleman averred that the missing figures appeared in the computer generated invoice supplied to the defendant by the plaintiff. Outside the information in the further particulars, the only documents that contain the value of repairs are the rand invoices that have a global figure of ZAR15 000-00 in exh 1 and ZAR 9 000-00 in exh 2. The plaintiff did not lead any evidence on how these amounts were computed.

Thus, even though the defendant agreed to pay for the value of repairs in rands on 19 December 2008 and the plaintiff dispatched to it the invoice for the repairs on 30 December 2008, the plaintiff has failed to prove the value of the repairs. It did not call evidence from its buyers or store man to establish the value of the spares and its mark up. It did not lead any evidence on how labour costs were calculated from its workshop personnel. All we have are global figures that have not been explained.

On a proper consideration of the case, I am satisfied that I should have granted the absolution from the instance prayed for by Mr *Hove* at the close of the plaintiff's case.

In the result it is ordered that:

1. The defendant is absolved from the instance.
2. The plaintiff shall pay the defendant's costs of suit.

*Atherstone and Cook,* plaintiff's legal practitioners
*TK Hove and Partners,* defendant's legal practitioners