

EDSON MAKINA  
Versus  
TIM JACKSON

HIGH COURT OF ZIMBABWE  
BERE J  
HARARE, 1 March 2012

*O Zimbodza*, for the plaintiff  
*V Mudzonga*, for the defendant

BERE J: It is an ambitious claim. On 9 April 2010 the plaintiff issued summons in this Court seeking delivery of ten tobacco bulk curers and a payment of US\$191 250-00 being damages caused by the alleged failure to deliver the tobacco curers by the defendant.

The agreed facts were that the plaintiff and the defendant entered into a sale agreement for the ten bulk tobacco curers. There was no agreement between the parties as to whether or not the defendant delivered the merx. The defendant alleged he had taken all reasonable steps to ensure the plaintiff had access to the curers whereas on the other hand the plaintiff felt the defendant had not done enough to facilitate delivery of the moduros.

At the conclusion of the matter it became clear to all the parties involved that there was nothing of substance placed before the Court to justify the claim for damages which had been pegged at US\$191 250-00. I wish to state in passing though that a claim for damages should not be left to the Court to indulge in speculation in an attempt to ascertain the figure. A party seeking damages must endeavour to put before the Court all the necessary evidence to justify the amount claimed. There can be no short cut to this approach. Dreaming of figures and throwing them in the trial will not suffice. In a recent Supreme Court judgment their Lordships aptly summed up the correct legal position when they stated as follows:-

“In *Ebrahim v Pittman N.O.* 1995(1) ZLR 176H, 187C-D BARTLETT J quoted with approval the remarks of BERMAN J in *Aarons Whale Trust v Murray and Roberts Ltd & Anor* 1992(1) SA 652(c), 655H-656F that:

‘Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damage to make an appropriate award to his favour. The court must not be faced with an exercise in guess work; what is required of a plaintiff is that he should put before the Court enough evidence from which it

can, albeit with difficulty compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss”....<sup>1</sup>

In the instant case, the plaintiff speculated about his projected loss, unsupported by any meaningful independent evidence. The undated exh 2 was of no assistance at all. After directed probing by the Court the plaintiff’s counsel conceded that there was no justification at all in the Court awarding the plaintiff the amount claimed as damages or any amount at all under this heading. I am satisfied beyond any shadow of doubt that this claim must be dismissed.

It was imperative for the plaintiff in laying the foundation of his claim to lead evidence to convince the Court that the defendant had failed to deliver the tobacco curers.

In his testimony which was not disputed by the plaintiff, the defendant told the Court that delivery was made at the time the contract was concluded when the defendant pointed out the tobacco curers to the plaintiff who undertook to come and physically collect the bulky items. The witness was certainly speaking to delivery *longa manu*.

It will be necessary at this stage to restate the legal position as perceived by the Court. Delivery in this regard has been authoritatively spoken by R. Sharrock<sup>2</sup> when he stated as follows:-

For delivery to take place *longa manu* the transferor must (1) point the thing out to the transferee so that he (and he alone) can exercise physical control over it. This form of delivery is often employed where the size, weight or nature of the thing to be delivered makes physical delivery difficult or inconvenient, eg where the thing is a large load of timber, stones in a quarry or a herd of cattle”.

A similar further observation is again emphasized by the same author R Sharrock when he teamed up with A Borrowdale<sup>3</sup> in the following words:

The seller must give the purchaser or to be more precise allow the purchaser to take, free possession of the *res vendita* together with its accessories, appurtenances and fruits.

This must be done -

- (i) In the case of specified goods, i.e goods which have been physically identified (mentally or ocularly), at the place where the goods were situated when the contract was concluded”<sup>(a)</sup>

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<sup>1</sup> Mathew Mbundire v Tryone Sim Buttress SC judgment No. 13/11 at pp4 and 5 of the cyclostyled decision

<sup>2</sup> Business Transactions Law, second ed, R Sharrock, published by Juta and Company Ltd (Cape Town, Wetton and Johannesburg) 1089 at p 370.

<sup>3(a)</sup> Business Transactions Law; R Sharrock and A. Borrowdale, 1986 edt. published by Juta and company limited, Cape Town, Wetton and Johannesburg at p 163

The two authors went on to say that:-

“If loading and transportation is necessary it is the purchaser’s responsibility. The seller is obliged to place the *res vendita* in a deliverable state so that the purchaser is able to take free possession of it. Thus for instance, in a sale of immovable the seller must free the property from all encumbrances”<sup>(b)</sup>

A further observation is also made that:

“Thus if the purchaser is deprived of or disturbed in his possession as a result of an expropriation or the activities of squatters or a thief this does not amount to eviction because the deprivation or disturbance does not flow from any flow in the seller’s title”.

In the instant case both the defendant and his administration manager at the time, Artwell Kariwo testified that they did everything that was reasonably expected of them to place the nine remaining moduros within the plaintiff’s accessibility. The two testified that the first tobacco curer was delivered without difficulty, and this aspect was not denied by the plaintiff. As regards the remaining nine curers, Mr Kariwo testified that he went out of his way by seeking the assistance of the police officers to facilitate the plaintiff’s access to the curers and expressed surprise that the plaintiff expected him to have done more than he did.

The cumulative effect of the two witnesses’ testimony was to the effect that delivery had been done through *longa manu* and in all fairness the plaintiff did not successfully counter this explanation.

The basis of the plaintiff’s case was that those he sent to collect the moduros were prevented from having access to where the moduros were by a group of people who teamed up to prevent collection. It was clear that the plaintiff had neither instigated this obstruction nor had anything to do with these individuals. It was impossible for the plaintiff to successfully controvert the story told by the defendant and his sole witness.

It occurs to the Court that once the moduros had been pointed out to the plaintiff, it was incumbent upon the plaintiff to put up a *virillis* effort in collecting those moduros and if possible to take legal action against the individuals who were obstructing him in collecting them and not to expect the defendant to do more than he did.

In this regard I derive comfort in leaning on the views of Lee and Honare<sup>4</sup> when they remarked that;

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<sup>4</sup>3<sup>(b)</sup> Business Transactions Law (*supra*) p 164

Lee and Honare – The South African Law of obligation, sec ed, published by Butterworths, 1978, Durban p 88 para 270.

In this regard I derive comfort in leaning on the views of Lee and Honare when they remarked that:

“If the purchaser is threatened with eviction by a third party he should not voluntarily hand over the thing sold to this third party unless the latter’s title is clear not only as against the purchaser but also against the seller”.

In *casu* the evidence led and accepted by the Court pointed to a situation where some unruly individuals backed by some ill informed politician threatened the plaintiff who did not offer any *virilis* defence to the threat even when the defendant’s administrator went out of his way to seek police protection for the plaintiff to enable unhindered collection of the moduros which were confirmed by a Ministry of Lands Official to be outside the ambit of State property.

In conclusion, I am more than satisfied that the respondent did all that was reasonably expected of him to effect delivery of the moduros and that he has no case to answer.

The plaintiff’s case is dismissed with costs.

*Musunga & Associates*, plaintiff’s legal practitioners  
*Mwonzora & Associates*, defendant’s legal practitioners