

DHARWIZI TRANSPORT SERVICES (PRIVATE) LIMITED
versus
MISHECK MAHLENGWE MUYAMBO

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 18 June 2018, 30 January 2019

Civil Trial - Delict-breach of duties-loss occasioned

H. Mutasa, for the plaintiff
S. Simango, for the defendant

MUSHORE J: The plaintiff is Dharwizi Transport Services (Private) Limited; a private limited company which primarily deals in the business of conveyance and transportation of petroleum products, both inside and outside Zimbabwe. The defendant, one Misheck Mlambo was once employed by the plaintiff company as a truck driver and in such a capacity his duties were to transport fuel from one place to another.

The facts were that on or about the 25th July 2013, the defendant was instructed by the plaintiff to transport 41,848 litres of petrol to Tazama in Ndola, Zambia from Beira, Mocambique. It is alleged by the plaintiff that defendant breached his duties in that he took possession of the fuel, but somehow diverted it to an unknown location, where he offloaded it and sold it for his own financial gain, causing a loss to the plaintiff in the amount of US\$52,920-00. The US\$52,920-00 is the value of the fuel consignment which the defendant was transporting on behalf of the plaintiff. The plaintiff has filed the current suit in a bid to recover US\$52,920-00 from the defendant. Plaintiff is also claiming costs on a higher scale.

Defendant filed a plea, denying plaintiff's claim that he breached his duties as aforesaid, alleging that he fulfilled his duties by transporting the said fuel to the location instructed by the plaintiff. Defendant averred that when he returned to work after the trip that he furnished the plaintiff with proof of delivery by way of delivery notes. He stated that the plaintiff duly paid him his allowances upon receiving such delivery notes. He pleaded that the tracking report of his journey which was done by the plaintiff would confirm that he

performed his duties, as and would show that he arrived at the destination and delivered the fuel as instructed by the plaintiff.

Plaintiff countered this stating that the tracking report shows that he never arrived at the destination and that after the defendant returned from the journey in question and only that it was after the plaintiff had paid him his allowances, that the plaintiff was alerted by its client that the fuel in question had not yet arrived at Tazama depot.

Plaintiff called four witnesses. The first witness was one Kelvin Masunzanwa. He testified that he had been employed by the plaintiff company since 2012 as a Security Manager. He testified that defendant was tasked to transport 41848 litres of petrol from Beira, Mocambique to the Tazama depot in Ndola, Zambia. He stated that on the 27th July 2013, the defendant travelled from Harare to Beira; arriving at Beira on the 2nd August 2013. He stated that the tracking report showed that defendant then passed through the Chirundu Border post between Zambia and Zimbabwe en route to presumably deliver the fuel to the Tazama Depot in Ndola, Zambia. He stated that after the defendant's trip, when defendant returned to the depot in Harare, the defendant handed him documents represented them to be proof of delivery documents. On the basis of those documents being presented to him he paid the defendant his allowance and the defendant went on his way. He stated that when he called the client in Zambia with respect to invoicing it, the Zambian client advised him that it was still waiting for delivery of the fuel in question. It was only then that alarm bells went off in his head causing him to begin investigations on the matter. He testified that upon a closer inspection of the documents submitted to him by the defendant, he ascertained that the documents were false. He produced the documents in court as follows:-

- (a) A product receipt note number 30886 which was purportedly issued by the Zambian client Oper 8. Oper 8 denied that they issued that document to the defendant.
- (b) A delivery note which had defendant had purportedly received at Tazama Depot in Zambia, which upon a closer inspection had some missing signatures which was unusual.
- (c) A document numbered 001176 which is a document which defendant had represented was compiled by persons who received the fuel in Zambia.
 - (i) The document was incomplete in that it had no consignment number filled in; neither did it record the time when the cargo had been offloaded. Further the

document showed an omission in that the product had not been quantified on delivery. The document was undated, and did not name the person who had purportedly received the fuel; who at the relevant time was a Mr Kazungo.

- (ii) There was a variation in fuel quantity which was purportedly offloaded which was unexplained. The offloaded quantity of fuel was reflected as being 41 263 litres and yet the defendant was supposed to have delivered 41846 litres of fuel. When such a variation occurs ordinarily such a variation is recorded on that document as having occurred, with the customer commenting on such a variation on the document. This had not been done by the customer.

Mr Masunzanwa stated that when he saw all of these discrepancies, he contacted the tracking company so that he could get a report on the route which the defendant had taken. A Mr Brian Chakara from the tracking company compiled a tracking report and the tracking report showed that the defendant never arrived at the intended destination being the Tazama depot.

He stated that armed with all of this information, he telephoned the defendant to query the issue with him and that the defendant advised him that he was at Chirundu border post and that he was not feeling well. When he did not hear further from the defendant he said that he travelled to Chirundu in order to locate the defendant, only to find the truck which defendant was driving parked and abandoned by the defendant. He testified that he phoned the clinic at Chirundu looking for the defendant who had told him was unwell and that the defendant was nowhere to be found. A report was made to the Police and after several days he heard from the Police who stated that they had arrested defendant. Under cross examination, Mr Masunzanwa testified that he never should have paid the defendant any allowance, given that it was now clear to him that the defendant had not delivered the fuel in question to the plaintiff's client in Tazama.

Plaintiff's second witness was one Bria Mukombo who was called by the plaintiff to give evidence about his purported signature on the delivery note which the defendant had presented on his return to Harare. He testified that he was not at the Tazama depot at the relevant time and that on the dates that it was alleged by the defendant that he had personally taken delivery of the fuel consignment in Tazama, Ndola. Mr Mukombo testified that at the relevant time, he was actually employed by a company called Socotec International Inspection Zambia Limited as a fuel delivery inspector; based in Lusaka Zambia. He testified

that he could never have signed the product receipt note number 30886 because he was not at Tazama depot in August 2013 when the purported delivery was made. Interestingly he also testified that the defendant could not have offloaded fuel at Tazama depot in August 2013 because at that time there was no petrol offloading. He informed the court that at the relevant time, petrol could only be offloaded at another depot called Indeni which was also located in Ndola, Zambia.

Plaintiff's third witness, one Mr Mhizhi Kazungo, who was employed as an Assistant Inspector at Tazama Petroleum Products Limited. Mr Kazungo also disowned the signature which was purportedly his on document 30886. He corroborated Mr Mukombo's evidence that at the relevant time the Tazama depot was not receiving petrol consignments and thus the petrol which defendant alleged conveying could not have been offloaded at Tazama depot. He confirmed that Mr Mukombo was not working with him at the Kazamba depot at that time. Both Mr Mukombo and Mr Kazungo gave clear and direct evidence. They both had travelled from Zambia to give their evidence.

Plaintiff's fourth witness was the vehicle tracker, a Mr Brian Chakara who had been working for the tracking company called Treck-King Satellite Tracking and Recovery (Pvt) Ltd as a Systems Support Technician for 14 years. He explained in detail on how trucks and vehicles are tracked via satellite. During his testimony he produced the tracking report on defendant's route which recorded the defendant's route at the relevant time with pin-point precision. He demonstrated that the defendant's truck never entered the Tazama depot as alleged by the defendant and that the tracking report showed that defendant's vehicle had stopped on a street some blocks away; which was some considerable distance from the Tazama depot. He testified that on arrival at the street which was several blocks away from Tazama depot, the defendant had turned his engine off at 5:11pm and turned it on again at 6:09pm thereby illustrating that the defendant had stopped on the street from about an hour. He was even able to provide detail on when the trucks engine was switched on and off, and was also able to detail the specific times when the truck was idling or in motion. His tracking device also provided data on the speed that the defendant was travelling throughout his journey. After that he tracked the defendant leaving the street, turning round and retracing his journey on his way back away from Ndola to Zimbabwe. He stated that the defendant could never have offloaded fuel at Tazama because his truck never entered the Tazama depot. By the additional use of the Google Maps Application, he was able to approximate the distance between Tazama depot and the spot where the defendant had stopped for one hour. He

approximated that that distance was approximately a kilometre away. He performed well on the stand and was an impressive witness.

Defendant opened his case and testified as a sole witness for the defence. His testimony was poor, full of inconsistencies and frankly unbelievable. He testified that when he made the journey, he did not know where he was going and that he had to be guided by other truckers which he said he followed to Tazama depot. I found this to be implausible given that the defendant was a very experienced trucker. I also noted that this was a last minute defence, given that the defendant did not raise this point in his plea filed of record. During his testimony, the defendant began distancing himself from the documents produced by the plaintiff stating that the documents had been manufactured by the plaintiff. Again, that allegation was not contained in his plea. He told the court that he could not remember which documents he had signed, and then gave sensational testimony that he had fallen prey to fraudsters, yet at the same time he failed to justify why he took payment from his employer if the documents presented were indeed fraudulent. He accused the plaintiff's witnesses of manufacturing the documents, including the tracking report. His testimony lacked credibility in its entirety and he struggled to answer questions which were put to him when he was being cross-examined. He was unable to explain his journey to the court and he did not challenge the evidence given by Mr Kazungo that there was no fuel offloading facility at Tazama at the relevant time.

The plaintiff's case was well presented and the witnesses performed very well as opposed to the defendant whose testimony was full of gaps. I am inclined to accept the testimony given by the plaintiff's witnesses over that of the defendant.

At the end of the trial the parties' legal practitioners asked for time to prepare and file written submissions. I allowed the parties 10 days to file their closing submissions. Plaintiff complied. Defendant did not and to-date has not filed closing submissions.

The action for the recovery of the loss is an Aquilian action. The requirements are:-

- "There must have been some conduct on the defendant's part (i.e. an act or omission) which the law of delict recognises as being wrongful or unlawful (the wrongfulness requirement);
- The conduct must have led either to physical harm to person or property and, thereby, to financial loss, or have caused purely financial loss which does not stem from any physical harm to person or property;
- The defendant must have inflicted the patrimonial loss intentionally or negligently;

- There must be a causal link between the defendant’s conduct and the loss”

G. Feltoe “*The Law of Delict*’ [3rd Edition] page 9

The loss occasioned to the plaintiff was as a direct result of defendant’s wrongful conduct when defendant intentionally diverted his vehicle loaded with fuel and failed to deliver the consignment to the plaintiff’s customer. Although the defendant had been tasked with delivering the fuel to Tazama, he failed to do so as was explained by the plaintiff’s Mr Kazungo. In breach of his duty to the plaintiff, defendant offloaded the fuel to an unknown recipient and returned to Harare to collect allowances for a task which he had not performed. The plaintiff suffered financial loss of \$52,920-00 as a result of the defendant’s actions. Plaintiff established this fact in testimony given by its four witnesses. Plaintiff is entitled to the remedy sought in this action.

On the question of costs on a higher scale being sought by the plaintiff, I am not in a position to award special costs because plaintiff did not plead for them specifically in his declaration. An award for costs on a higher scale is one which has to specifically be pleaded to so that the other party can replicate to it, if necessary. It is not an award which is granted simply because a party desires it. Thus the plaintiff would only be entitled to an award of costs on the ordinary scale.

Accordingly I order as follows:-

- “1. Defendant is ordered to pay the plaintiff the sum of US\$52,920-00 together with interest thereon at the prescribed rate, calculated from the date of this order to the date of payment in full.
2. Defendant is to pay the plaintiff’s costs of suit”

....., plaintiff’s legal practitioners
....., defendant’s legal practitioners