

FRENCH AND SMITH T/A CUSTOMS SERVICES

Versus

INEBRIANT CACHE

And

RONALD MUSONZA

HIGH COURT HARARE

Commercial Division

**CHIRAWU-MUGOMBA J**

Harare 30 October 2023

*B. Machekana*, for the plaintiff

*T. Tembani*, for the defendants

**CHIRAWU-MUGOMBA J:** This matter was placed before me as an action one for case management. I caused a notice to be dispatched to the parties in terms of R18(1) of the High Court (Commercial Division Rules) 2020, notifying the parties that a case management meeting will be held on the 30<sup>th</sup> of October 2023. Indeed the case management was convened and as the record will show, the plaintiff's representatives were present as is required. A representative for the first defendant was also present but the second defendant was conspicuous by his absence. Mr *Tembani* indicated that he was tied up at the criminal courts and I pointed to him that the High Court took precedence and besides there was no proof proffered for his absence. It was indicated that , 'maybe' he would join latter having received the link to join. He did not attend. Not having been excused, the second defendant was in default. I will return to this point later.

At the conclusion of the meeting, I gave judgment through a case management order for the plaintiff as follows:- It is ordered that:-

The 1st and 2nd defendants, jointly and severally, one paying the other to be absolved shall pay the plaintiff: -

- a. US\$297 616.22 (United States Dollars two-hundred and ninety-seven thousand, six - hundred and sixteen dollars and twenty-two cents only) together with interest at the prescribed rate calculated from the date of summons to the date of payment in full.
  - b. ZWL\$ 8 642 587.85 (Eight million, six-hundred and forty -two thousand, five-hundred and eight-seven Zimbabwe dollars and eighty-five cents) together with interest at the prescribed rate calculated from the date of summons to the date of payment in full.
2. The 1st and 2nd defendants shall jointly and severally, one paying the other to be absolved pay costs of suit on a legal practitioner-to-client scale.

I have been requested to give reasons and these are they.

The plaintiff's claim against the defendants can be summarised as follows. In March 2021, the first defendant gave an oral mandate to the plaintiff for the clearance of goods in transit from South Africa to Zambia via Zimbabwe. The defendants misrepresented to the plaintiff that the good were destined for Zambia. As a result, the plaintiff entered what is known as a 'removal -in-transit' entry into the Zimbabwe Revenue Authority ( ZIMRA) system so that the goods would not be levied duty and taxes on the assumption that they were in transit. Such duty and levy would have been paid by the defendants had the goods not been presented as being in transit. The plaintiff cleared the goods for transit to Zambia. However, the 2<sup>nd</sup> defendant diverted the truck that was carrying the goods, i.e. liquor and it was offloaded in Harare. ZIMRA discovered that the goods had not left Zimbabwe and as a result, the plaintiff was charged duty and taxes in the amount of US\$118 831.77 and ZWL\$ 3 242 650.23 being the principal duty that the defendants were supposed to pay if the liquor had been destined for Zimbabwe. ZIMRA also imposed a penalty of double the principal duty and taxes, meaning an additional US\$118 831.77 and ZWL\$ 3 242 650.23. Additionally, ZIMRA also levied US\$58 227.57 and ZWL\$ 2 157 287.39 interest. Plaintiff claimed these amounts on the basis of misrepresentation and the subsequent loss it suffered as a consequence. Additionally, the plaintiff claimed US\$ 1726.11 being what it termed a service charge calculated at the rate of 2.5% of the value of the goods to be cleared.

Plaintiff averred that upon the discovery of the fraud, a report was made to the Zimbabwe Republic Police. The 2<sup>nd</sup> defendant was charged with contravening s136 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*], that is fraud. He was convicted and sentenced to a fine of ZWL\$60 000. In addition, twelve months imprisonment was wholly suspended on the usual conditions.

The defendants entered appearance to defend the matter. Their plea is constituted by denial of the plaintiff's averments. Specifically to the issue of conviction and sentence, the second defendant pleaded that the conviction was wrongful and further that he did not appeal for the sake of what he termed his "mental well-being". Further, that he was charged in his personal and not representative capacity.

I digress to deal with the issue of case management as it seems many legal practitioners are still not fully embracing the ethos of the commercial division. The second schedule to the High Court (Commercial Division) Rules, 2020, the 'rules' speaks to the values of the commercial court. Though these are not part of the rules, they nonetheless provide guidance on how the court operates. The establishment of the court is 'designed to improve the ease of doing business in line with criteria set by the World Bank and contribute towards the national effort in attracting local and foreign direct investment'- Second schedule (1). The attributes of the court are a reduction and simplification of processes, curtailment and minimization of costs and time and enhanced efficiency among others. This is the reason why for instance, an application or request for further particulars is not permitted- R12(3). Within a maximum of three days after closure of pleadings, the Registrar shall cause a matter to be allocated to a Judge for case management and case mapping.

Unlike in the general division under the High Court Rules, 2021, in summons and a declaration filed in the Commercial Court, the declaration shall be filed together with the summary of evidence that the litigants will rely on. This includes a schedule of documentary evidence or what is termed discovered documents in the 2021 High Court Rules. More often than not, parties file the actual documents to be relied on. Therefore at a case management meeting, a presiding Judge has a clear over-view of the matter. A case management meeting is meant to support the speedy resolution of matters. More often than not, matters in the commercial division are resolved at the case management stage.

At the case management meeting in *casu*, I brought to the attention of Mr. *Tembani*, the implications of the Civil Evidence Act [Chapter 8:01] especially in relation to the criminal conviction on the same facts upon which the plaintiff was seeking relief. His contention was still that the conviction was wrong and that the first defendant was not convicted. Section 31 of the act states as follows:-

**31 Proof of previous criminal conviction**

(1) In this section—

“**military court**” has the meaning assigned to the term in section 2 of the Defence Act [Chapter 11:02].

(2) Subject to this section, where it is relevant in civil proceedings to prove that a person committed a criminal offence or did or omitted to do anything referred to in subsection (3), the fact that he has been convicted of that offence by any court in Zimbabwe or by a military court in Zimbabwe or elsewhere shall be admissible in evidence for the purpose of such proof.

(3) Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown—

(a) that he did all acts necessary to constitute the offence; or

(b) where the offence is constituted by an omission to do anything, that he omitted to do that thing;

as the case may be.

(4) Evidence of a criminal conviction—

(a) shall not be adduced for the purposes of this section if the conviction is the subject of an appeal in terms of any law, until the appeal has been finally determined or has lapsed or been withdrawn or abandoned;

(b) may be adduced for the purposes of this section even if the convicted person has subsequently been pardoned.

(5) For the purposes of proving in civil proceedings that a person was convicted of a criminal offence, a document which—

(a) purports to be a copy of the record of the criminal proceedings concerned or a copy of any part of the record which shows that the person was convicted of the offence; and

(b) is proved to be a true copy of the original record or part thereof or purports to be signed and certified as a true copy by the official having custody of the original record;

shall be admissible on its production by any person as *prima facie* proof that the person concerned was convicted of that offence:

Provided that this subsection shall not preclude the admission of any other evidence to prove that the person committed the offence.

In *casu*, the criminal conviction has not been denied. No appeal is pending in the criminal courts and it is surprising that Mr. *Tembani* chose to challenge the conviction in this forum. The conviction and sentence have been proved by the criminal record book extract. Therefore the presumption in s31(3)(a), above applies.

Mr. *Tembani* sought to distinguish between the first and second defendants. However, as rightly pointed out by the trial magistrate in the reasons for judgment, at record page 56, the first defendant in terms of s277(3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], is liable as the corporate body due to the conduct of the first defendant. The relevant section reads as follows:-

**277. Criminal liability of corporations and associations and their members, employees and agents**

(1) In this section—

“authorised person” means a person referred to in paragraph (b) of subsection (2) or paragraph (b) of subsection (4);

“director”, in relation to a corporate body, means a person who—

- (a) controls or governs that corporate body, whether lawfully or otherwise; or
- (b) is a member of a body or group of persons which controls or governs that corporate body, whether lawfully or otherwise; or
- (c) where there is no body or group such as is referred to in paragraph (b), who is a member of the corporate body.

(2) For the purposes of imposing criminal liability upon a corporate body, any conduct on the part of—

(a) a director or employee of the corporate body; or

(b) any person acting on instructions or with permission, express or implied, given by a director or employee of the corporate body;

in the exercise of his or her power or in the performance of his or her duties as such a director, employee or authorised person, or in furthering or endeavouring to further the interests of the corporate body, shall be deemed to have been the conduct of the corporate body, and if the conduct was accompanied by any intention on the part of the director, employee or authorised person, that intention shall be deemed to have been the intention of the corporate body.

(3) Where there has been any conduct which constitutes a crime for which a corporate body is or was liable to prosecution, that conduct shall be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body, and if the conduct was accompanied by any intention on the part of the person responsible for it, that intention shall be deemed to have been the intention of every other person who at the time was a director or employee of the corporate body

This finding has not been challenged by way of an appeal. Therefore it remains extant. It is therefore improper for the second defendant to distance himself from the first defendant. The findings in the Magistrate court as well as the conviction equally apply to the first defendant. In my view, the first and second defendants cannot run away from liability.

The next consideration is what then does a Judge do under those circumstances?

The answer lies in R18 (1)(2) (3) and (4) which reads as follows:-

*Power to make and give directions for disposal of suits*

18. (1) A judge shall, within ten (10) working days after receipt of the record, on his or her own motion direct the registrar to cause the parties to the proceedings to appear before him or her, for the purposes

of case management, in order that he or she may make such order or give such directions in relation to any case management as well as any interim application which the parties may have filed or intend to file as the judge deems fit, in order to achieve the just, expeditious and economical disposal of the dispute.

(2) Where any party fails to comply with any order made or direction given by the judge under sub rule (1), the judge may dismiss the suit, strike out the defence or counterclaim or make such other order on the papers filed of record as he or she considers just.

(3) The judge may, in exercising his or her powers under sub rule (2), make such order as to costs on the papers filed of record as he or she considers just.

(4) Any order or direction given or made against any party who does not appear before the judge when directed to do so under sub rule (1), shall be deemed a default judgment and may only be set aside or varied by the judge on good and sufficient cause shown upon application made within ten (10) days of the order being made or direction being given and on such terms as the judge considers just.

The second defendant failed to attend the case management meeting virtually and was in default. The provisions of R18(4) become relevant. In terms of R18(2), a judge may, (a) dismiss the suit, (b) strike out the defence or counter claim (c) or (d) make such other order on the papers filed of record as she considers just. In my view, a matter can be disposed of at the case management stage depending on the circumstances.

In my exercise of the powers vested in me in accordance with R18(2), I considered the matter having heard from Mr . *Tembani*. I also considered the fact that the second defendant was in default. I added all the sums claimed by the plaintiff and gave judgment under a globular figure separately for claims in United States and Zimbabwe dollars.

The plaintiff claimed in its summons and declaration an order against the second defendant and all other directors of the first defendant based on s 68(3) of the Companies and Other Business Entities Act [Chapter 24:31], that reads as follows,

### **68. Fraudulent, reckless or grossly negligent conduct of business**

3. If it appears to a court that any business of a company or private business corporation was or is being carried on—

(a) recklessly; or

(b) with gross negligence; or

(c) with intent to defraud any person or for any fraudulent purpose;

the court may declare that —

(d) any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in such manner or in such circumstances; or

(e) any person who was knowingly a party to the carrying on of business of the private business corporation in such manner or in such circumstances;

(hereinafter called an “impugned person”) shall be personally responsible, without

limitation of liability, for all or any of the debts or other liabilities of the company or private business corporation as the court may direct, and the court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing the liability, including an order under subsection (4).

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Having already found the second defendant jointly and severally liable together with the first defendant, I did not consider it proper to grant the relief sought by the plaintiff based on the above cited section. I also considered that the plaintiff had not cited the other director of the first defendant nor pleaded why the court should exercise the powers set out in s68(3) in respect of him.

On costs, I exercised the powers set out in R18(3) and granted these on a legal practitioner-to-client scale. In my view, the defendants ought to have engaged the plaintiff with a view to settling the amounts claimed rather than to enter appearance to defend. The defendants were also insincere in attacking the criminal conviction in this court instead of appealing.

Accordingly, I gave an order as amplified.

*AB and DAVID*, Plaintiff's Legal Practitioners

*TEMBANIIGOMO LAW PRACTICE*, Defendants Legal Practitioners.