

MEDLOG ZIMBABWE (PRIVATE) LIMITED
v
COST BENEFIT HOLDINGS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & GUVAVA JA
HARARE: JULY 25, 2017 & 14 MAY, 2018

E.T. Matinenga, for the appellant

J.B. Wood, for the respondent

Judgment No. SC 24/18
Civil Appeal No. SC 455/16

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GARWE JA

[1] The respondent issued summons out of the High Court seeking an order for the release of its plastic bags which were being retained by the appellant, payment of the sum of US\$157 350.05 representing the business it lost as a result of such retention and costs of suit on the scale of legal practitioner and client. The respondent also sought payment of interest from the date of issue of summons to the date of payment in full.

[2] After hearing evidence and submissions from the parties, the court *a quo* ordered the appellant to pay the sum of \$157 350.05 to the respondent being damages for loss of

business, interest on that sum at the prescribed rate and costs of suit on the ordinary scale. The present appeal is against that order.

FACTUAL BACKGROUND

[3] The appellant is a company registered in accordance with the laws of Zimbabwe and carries on business from premises in Avondale, Harare. It is an agent of the Mediterranean Shipping Company (“Mediterranean Shipping”), a company that operates worldwide with its core business being the carriage of containers. As agent, appellant’s responsibility is to fulfil the obligations of Mediterranean Shipping by facilitating delivery of containerised cargo to the clients of Mediterranean Shipping in Zimbabwe.

[4] In this particular instance, at the behest of Mediterranean Shipping, the appellant supervised the movement by road of the plastic bags, which were in a container, from the Port of Beira to Mutare Dry Port. In Mutare, the appellant instructed the employees of the Port not to release the goods until certain monies were paid by the respondent. It is common cause that initially the appellant refused to release the container until a sum of money owed by the wife of one of the directors of the respondent had been paid. Upon realising that the debt had nothing to do with the respondent, the appellant then demanded payment of the sum of \$80.50 in respect of handling charges. The respondent, believing the bags had been unlawfully retained by the appellant, instituted proceedings in October 2012 for the release of the bags, damages for loss of business and interest thereon at the prescribed rate. The sum of \$80.50 was only paid in August 2013 after which the plastic bags were then retrieved.

PROCEEDINGS A QUO

[5] In its declaration, the respondent alleged that it had imported a container of plastic bags from Hong Kong and that it had engaged the appellant as its agent to facilitate the importation and clearing of the goods with the Zimbabwe Revenue Authority (“ZIMRA”). It alleged that, notwithstanding the fact that it had paid the import duty and appellant’s clearing fees, the appellant had refused to release the container on the basis that it was owed money from a previous transaction by the wife of one of the respondent’s directors. It alleged that consequent upon the refusal by the appellant to release the container, a client who had placed an order with it for plastic bags had cancelled the order as a result of which the respondent had suffered damages in the amount claimed.

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[6] In its plea, the appellant, as defendant, denied that it had entered into a contract of agency with the respondent. It alleged that it had been contracted by the shipper (a term used in the freight business to denote the person who prepares the necessary documentation for the carriage of goods), Hong Kong Richer Int’l Group Limited (“Richer International”), to transport the cartons of plastic bags *CIF* Mutare. It alleged that it duly discharged its obligations to deliver the container to Mutare Dry Port after which the respondent became liable to pay its administration fee relating to the Bill of Lading and the container in the sum of \$80.50. The appellant accepted that it refused to release the container before payment of the administration fee in the sum of \$80.50 had been made.

[7] At a pre-trial conference before a judge in chambers, the parties agreed the issues to be determined at the trial. The issues included, *inter alia*, whether a contract existed between the parties, and, if so, the terms thereof. Further, whether the appellant was entitled to refuse to release the container until payment of the handling fee of \$80.50 had been made and, if not, whether the respondent had suffered damages in the amount claimed in the summons.

[8] During *viva voce* evidence the respondent, represented by its managing director, Albert Kuwaza, stated as follows. His company ordered the plastic bags from China and, through the supplier, engaged the appellant at its offices in China to transport the merchandise from China to Mutare, Zimbabwe. Once the goods were in Mutare the appellant then demanded payment of the sum of \$1750 which it alleged was owed by a Mrs Kuwaza, wife of one of the respondent's directors, in respect of a previous transaction. The issue of the handling fee of \$80.50 was raised by the appellant for the first time in October 2012, way after a client who had placed an order for the bags had cancelled the purchase.

[9] Under cross-examination, he conceded that, in fact, the company with which he contracted in China was Richer International and that Richer International in turn contracted with Mediterranean Shipping to transport the goods to Mutare. He further conceded that the clearing fees were paid directly to Green Motor Services, the company that was operating Mutare Dry Port and not to the appellant. He told the court, further, that as far as he was concerned, the appellant, Mediterranean Shipping and Green Motor Services were part of the same company.

[10] Following the dismissal of an application for absolution at the close of the plaintiff's case, the appellant's managing director, Dr Giorgio Spambinato, gave evidence before the court *a quo*. His evidence was as follows. The appellant, which operates from offices situate at 27 Natal Road, Belgravia, Harare is an agent of Mediterranean Shipping. It has no offices outside Zimbabwe. The appellant's role was to assist Mediterranean Shipping to execute its contractual obligation of moving cargo into and out of Zimbabwe. In this case the appellant only supervised the movement by road of the container from the Port of Beira to Mutare. It was not involved in the clearance of the goods with ZIMRA. He confirmed that initially the appellant had insisted on payment of the sum of \$1750 owed by a Mrs Kuwaza in respect of a previous transaction but, on realising the error, had personally instructed that the container be released on payment of the sum of \$80.50. That sum represented the handling fee for facilitating the necessary documentation and supervising the speedy execution of delivery by sub-contractors and service providers. He explained that in Zimbabwe it is customary for the agent handling the cargo on behalf of Mediterranean Shipping to recover the costs directly from the recipients of the cargo. In other countries the handling fee is paid by Mediterranean Shipping. Whatever role the appellant played in this case was in fulfilment of its agency agreement with Mediterranean Shipping.

[11] In its closing address *a quo*, the respondent submitted that the question whether there was a contract was "of no real consequence" and that "there needn't have been a contract between them because the scenario can be resolved by the principles of *depositum* ..." Further that, as depositary, the appellant had an obligation to return the goods to the respondent upon demand. The respondent further submitted that it was clear from the summons and declaration that the claim "was vindicatory in nature, not

contractual.” Accordingly, respondent prayed for its claim for damages and interest thereon to be granted on the basis of *depositum*.

[12] In its address *a quo* the appellant submitted that, on the evidence led before the court, no contract had been proven. The person with whom the respondent had communicated in China was not the appellant but an employee of Mediterranean Shipping. More critically, the terms of the alleged contract between the respondent and the appellant had not been established. Moreover, at no stage had the respondent deposited the goods with the appellant.

[13] In its judgment the court *a quo* found that Mr Kuwaza, the managing director of the respondent had been unclear as to the nature of the relationship between the appellant, Mediterranean Shipping, Richer International and the respondent. The court **Judgment No. SC 24/18** **Civil Appeal No. SC 455/16** remarked as follows at page 10 of its judgment:-

“What is apparent from Mr Kuwaza’s evidence is that he did not produce any documents to show the existence of a contract between the plaintiff and the defendant. From the evidence that is before me it is clear that the plaintiff entered into a shipping agreement with Mediterranean Shipping Company in Hong Kong, China in April 2012 for the shipment of its plastic container from China to Zimbabwe. That contract did not involve the defendant.”

[14] However at pages 10-11 of the cyclostyled judgments the court *a quo* stated:-

“I am of the considered view that the circumstances of this case show that there was a contract between the plaintiff and the defendant. Although the defendant said that it was acting as an agent of Mediterranean Shipping Company its conduct towards the plaintiff shows that it also contracted with the plaintiff separately. It is not disputed that the defendant facilitated the importation of the plaintiff’s cargo from the Port of Beira to Mutare. Thereafter it demanded payment from the plaintiff for the service that it had rendered. The parties did not enter into this contract verbally or in writing but they did so by their conduct. By demanding payment from the plaintiff for the costs it incurred in facilitating the importation of the plaintiff’s cargo the defendant created a contract between itself and the plaintiff. It made it a condition of the contract that if the administration fee was not paid, the

plaintiff's cargo was not going to be released. If there was no contract between the plaintiff and the defendant, the defendant should have simply demanded payment of its fees from Mediterranean Shipping Company which it alleges to be its principal. At law an agent's duty is to perform his mandate on behalf of his principal and he accounts to his principal. The agent's remuneration is paid by the principal and not by a third party. I therefore take it that the moment an agent starts demanding payment from the third party and not from his principal then it means that he is no longer acting in terms of the contract between himself and his principal, but he would have created his own contract with the third party. That contract he would have created with the third party is separate from his contract with his principal. In *casu* this is what the defendant did. It created its own contract with the plaintiff, which contract was separate from the one it had with Mediterranean Shipping Company."

[15] At page 12 of its judgment, the court, without commenting on the submission by the respondent that it now relied on a contract of *depositum*, concluded by stating:-

"If there was no contract between the 2 companies then the defendant should and would have demanded its fee from Mediterranean Shipping Company which is its principal. If there was on (*sic*) contract the defendant had no business demanding that money from the plaintiff. It also had no business withholding or refusing to release the plaintiff's container on the basis that the handling fee had not been paid. All the defendant's payments would have been due from Mediterranean Shipping Company. The plaintiff managed to prove that there was contract between itself and the defendant."

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[16] Based on the above findings, the court concluded that the appellant had wrongfully refused to release the container and that the respondent had proved its contractual damages. It consequently made the order which is the subject of this appeal.

GROUNDS OF APPEAL

[17] In its notice of appeal the appellant raised five grounds. These are:-

1. The court *a quo* erred in finding that there was a contract between the appellant and the respondent when the latter was unable to identify the nature of the contract it relied upon and its terms – i.e. whether the contract was one of carriage, *depositum* or agency.

2. The court *a quo* erred in finding that there was a contract between the appellant and the respondent despite a contrary indication in the bill of lading and respondent's lack of knowledge of the terms of the contract it alleged.
3. The court *a quo* erred in placing the onus of proving the terms of the contractual relationship between appellant and respondent on the former, albeit obliquely.
4. The court *a quo* erred in finding that-
 - 4.1 the contract for the sale of the plastic bags between the respondent and Nedol Investments (Private) Limited was not a sham; and
 - 4.2 the loss suffered by respondent, if any, was reasonably foreseen by appellant at the time of the conclusion of the alleged contract and despite the fact that the reasonable foreseeability was not specifically pleaded and proved.
5. The court *a quo* erred in finding that the respondent had mitigated its loss.

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APPELLANT'S SUBMISSIONS BEFORE THIS COURT

[18] In its submissions before this Court, the appellant has argued that the respondent did not sufficiently identify the nature of the contract between the parties – in particular- whether it was one of agency or *depositum*. The terms of the agreement, be it agency or *depositum*, remained unknown. It further submitted that the case for the respondent was muddled and that the judgment of the court *a quo* was equally confusing and confused. Lastly, it submitted that whilst the facts show some relationship between the parties, the respondent had not proved the nature of the relationship that existed between them.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

[19] In its heads of argument, the respondent has submitted as follows. Its declaration in the court *a quo* made it clear that what it sought was the release of its goods arising from their unlawful detention. Further, that even if there was no contract of agency between the parties, the respondent “was not without a remedy” and that there was a tacit contract of *depositum* between the parties.

[20] In paragraph 3 of its heads of argument, it has further stated:

“The respondent had contended that the claim was of a vindicatory nature and that any contract between the parties was one of *depositum* As the appellant states, the court did not deal with these issues. It is here noted that by the time the matter came before the court, the goods had been released and if the claim had originally been vindicatory in nature, it no longer was, which was probably the reason why the court *a quo* allowed itself to be misled by the appellant to believe that the claim fell to be decided in contract.” (my emphasis)

[21] At paragraph 10 of its heads of argument, the respondent has also stated: Judgment No. SC 24/18
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“The absence of a contract, however, would not have left the respondent without a remedy because he would have a claim in delict for any loss incurred as a result of the unlawful possession of his property”

[22] Finally, at paragraphs 13 and 14 of its heads, the respondent has further argued:-

“13. Thus, as the respondent’s counsel contended at p 239, the issue whether there was a contract between the parties was really of no consequence and the appeal cannot succeed on the basis that no such contract was brought into being.

14. The court *a quo* found in effect that there was a tacit contract between the parties based on the fact that the appellant raised charges mentioned above against the respondent.”

RESPONDENT'S SHIFTING CAUSE OF ACTION

[23] It is clear from the foregoing that the respondent, as plaintiff, changed its cause of action as the trial progressed. In the declaration, the claim clearly arises from a

contract of agency. When the respondent realised that the evidence did not establish such agency, an aspect I deal with shortly, it then claimed, without amending its pleadings, relief on the basis of the *rei vindicatio* and a contract of *depositum*. In its submissions before this Court, the respondent says, whatever the correct position might be on whether or not it had a contract with the appellant, it cannot be without a remedy. The suggestion was made that it even had a claim arising out of delict.

[24] I am inclined to agree with learned counsel for the appellant that the cause of action *a quo* was most confusing. The cause of action based on a contract of agency was abandoned in favour of the *rei vindicatio* and *depositum*, which had not been pleaded. No evidence was led on the terms of such contract. To add to the confusion, before this Court, the possibility of the claim arising out of delict has also been thrown in. The manner in which the respondent handled its cause of action in the court *a quo* and before this Court is most unsatisfactory and not permissible. Implicit in the submissions by the respondent in support of the judgment of the court *a quo* is that pleadings serve no purpose.

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THE IMPORTANT PURPOSE OF PLEADINGS

[25] The manner in which the respondent has handled its case both *a quo* and in this Court brings to the fore the question as to what the purpose of pleadings is. In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.

25.1 In *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) the court remarked:-

“The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.”

25.2 Harwood BA in his text *Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice* (16th edn, Stevens & Sons Ltd, London, 1957) states at page 72:-

“The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision.”

25.3 In *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182, the court remarked:

“The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.”

25.4 In *Courtney–Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm), the court remarked at page 698:-

“In any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings ... and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment.”

25.5 In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94(A), 108, the court cited with approval the case of *Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 where at page 198 it was stated as follows:-

“The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.”

25.6 In *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 898 the court cited with approval the following remarks by the authors Jacob and Goldrein in their text

Pleadings: Principles and Practice at p 8-9:

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings ... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation. ... Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings, and neither party can complain if the agenda is strictly adhered to.” (my emphasis)

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25.7 The authors Cilliers AC, Loots C and Nel HC in their text *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa* (5th edn, Juta and Co. Ltd, Cape Town 2009) quote the following passage from Halsbury’s *Laws of England*, 4th edn (Reissue), Vol 36 para 1 in which the function of pleadings is said to be,

“... to give a fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at the close if they are not subsequently amended.” (at page 558)

25.8 In *Farrell v Secretary of State for Defence* (1980) 1 All ER 166 at page 173,

Lord Edmund-Davies stated as follows,

“It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been ... a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trial with a jury. To shrug off criticism as ‘a mere pleading point’ is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.”

25.9 In a paper: *A Judge’s View Point, the Role of Pleadings* presented by Justices

Rares of the Federal Court of Australia and Richard White of the Supreme

Court of New South Wales at a judge’s symposium, the learned judges

remarked:

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“Precise formulation of the applicant’s rights in the initiating document is of central importance. This is because the pleading is the source from which many other consequences flow in the life of the litigation from filing at first instance through to final resolution in the High Court. The pleading will be used as the reference point for the seeking of particulars, the administering of interrogatories (which is virtually extinct), the obtaining of an order for discovery if the court is satisfied this is required, the issue of subpoenas, the calling of evidence, the relevance and admissibility of evidence, the closing arguments, the reasons for judgments and the availability of arguments on appeal. At all of these points, the following questions arise: “Was this issue pleaded?” and “How was this issue pleaded?” The question is not the loose one whether the argument could possibly be raised on the evidence at the conclusion of a hearing but whether the issue has been pleaded ...”

[26] I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a

court is called upon to make a determination. Therefore a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent.

REQUISITES FOR PLEADING A CONTRACT

[27] In an action based on a contract, the material averments that must usually be made are the existence of the contract, the relevant terms of the contract and the applicability of those terms to the particular right forming the basis *ex contractu* of the claim – *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa*, op cit, p 569.

WHETHER THE CONTRACT OF AGENCY WAS PROVED

[28] This was the basis of the respondent's cause of action before the High Court. The respondent's managing director did not know the exact relationship between the appellant, Mediterranean Shipping and Richer International of Hong Kong. From the evidence, it is clear that the appellant was not involved in the transactions that took place in China. It does not conduct operations outside Zimbabwe. It only got involved, as agent of Mediterranean Shipping, in tracking the container once it landed in Beira and in having it transported to Mutare Dry Port. It was also clear from the evidence that, as agent of Mediterranean Shipping, the appellant was supposed to receive payment from Mediterranean Shipping for its role in checking the Bill of Lading and ensuring that the cargo was delivered to Mutare Dry Port. The appellant's managing director explained however that it is the practice in Zimbabwe for the recipient to be billed directly by the appellant.

[29] Clearly, no contract of agency was proved. The fact that the appellant invoiced the respondent for handling fees does not, on its own, show the existence of a contract. The exact relationship that existed between the two parties was not established. In the circumstances, the court *a quo* should have granted the application for absolution from the instance which was made at the close of the case for the plaintiff. The court *a quo* accepted that the respondent had not produced documents to show the existence of a contract. The court further accepted that the respondent had entered into a shipping agreement with Mediterranean Shipping in Hong Kong and that the appellant was not involved. The court also accepted that the appellant only got involved in supervising the movement of the container from Beira to Mutare at the behest of Mediterranean Shipping. The court further found that although the parties had been involved in these transactions over the years, the respondent did not know that the appellant was merely an agent of Mediterranean Shipping. Having made these findings, that really should have been the end of the matter. The suggestion that, judging by the conduct of the parties, there must have been some other undefined contract between them, is not borne by the evidence. In any event, the court did not state what type of contract this may have been and what its terms were.

[30] Of significance is the fact that the respondent itself accepted, in its closing submissions, that its claim was not based on agency but rather on *depositum*. Having abandoned its claim based on a contract of agency, it was not for the court *a quo* to find, as it did, that there was some other undefined contract. Once the respondent abandoned its pleadings, the court should have granted absolution from the instance. The attempt by the respondent to rely on the *rei vindicatio* and *depositum*, as well as

delict, clearly confirms that the respondent had not established any real cause of action against the appellant.

DEPOSITUM NOT ESTABLISHED IN ANY EVENT

[31] Earlier in this judgment, I cited several decided cases in support of the proposition that pleadings serve the important purpose of identifying the issues that require determination by a court and also enabling a defendant to know the case he has to meet before the court. To this principle however there is a qualification. In a limited sense, a court can adjudicate on issues not raised on the pleadings even when no amendment has been applied for.

31.1 In *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A), 433, CENTLIVRES JA, referring to an issue not raised on the pleadings but fully canvassed at the trial, said:

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”This court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial.“

31.2 Further in *Middleton v Carr* 1949 (2) SA 374 (A) at 385, SCHREINER JA, in similar vein, stated:

”Where there has been full investigations of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised.”

31.3 In *Sager’s Motors (Pvt) Ltd v Patel* 1968 (2) RLR 267 (A), Lewis AJA accepted that the above remarks correctly reflected the position in this country.

At page 274 A – B he stated:

”The *ratio decidendi* of the cases ... referred to above is that where there has been a full and thorough investigation into all the circumstances of the case and a party has had every facility to place all the facts before the trial court, the court will not decline to adjudicate on an issue thus fully canvassed simply because the pleadings have not explicitly covered it.“

31.4 The above remarks were cited with approval by this Court in *Guardian Security Services (Pvt) Ltd v ZBC* 2002 (1) ZLR (S), 5 D – H, 6 A-B. That a court can determine an issue that is fully canvassed but not pleaded is therefore now settled in this jurisdiction.

[32] Implicit in the submissions by the respondent, both *a quo* and in this court, is the suggestion that, although not pleaded, the existence of a contract of *depositum* was established on the evidence adduced before the court *a quo*.

[33] *Depositum*, as a concept, was, as would be expected, developed by the Romans. A contract of *depositum*, or deposit, as we now call it, is “... a contract in which one person (*depositor*) gives another (*depositarius*) a thing to keep for him *gratis*, and to return it on demand ... the ownership of the thing is not transferred, but ownership and possession remain with the depositor The receiver is not allowed to use it” – Hunter W.A., *A Systemic and Historical Exposition of Roman Law in the Order of a Code* (2nd Ed) William Maxwell and Son, London 1885.

[34] In *B.C. Plant Hire cc t/a BC Carriers v Grecco (SA) (Pty) Ltd* (2004) 1 All SA 612 (C), the court held that a contract of *depositum* comes into existence when one person (the depositor) entrusts a moveable thing to another person (depository) who undertakes to care for it gratuitously and to return it at the request of the depositor. The depository does not benefit from the deposit in any way. If the depository uses the thing, then this is considered a *furtum usus*. The depository can only be found liable where gross negligence (*culpa lata*) is established. See also *Ncube v Hamadziripi* 1996 (2) ZLR 403 (HC); *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd*

1994 (2) ZLR 382 H; *Smith v Minister of Lands and Natural Resources* 1979 RLR 421(G); 1980(1) S.A 565 (ZH).

[35] In this case it was never the respondent's case at any stage that it had given the container to the appellant for safe keeping or that the appellant had agreed to keep the container *gratis* and to return it on demand. The appellant does not handle containers *ex gratia*. To the contrary, the appellant was demanding payment of the handling fee of \$80.50 before the container could be released to the respondent. In short, the evidence did not establish the existence of a contract of *depositum*.

DISPOSITION

[36] It is clear, from all the circumstances of this case, that the respondent did not establish any cause of action cognizable at law against the appellant. It may, but I make no firm finding in this respect, have had a cause of action arising out of delict as suggested by its counsel before this Court. However this was not the cause of action pleaded before the court *a quo* or established during the oral hearing. The possibility of a cause of action arising from delict was, as already noted, raised for the first time in heads of argument filed before this Court. The fact that the respondent abandoned its claim based on agency and then sought to rely on the *rei vindicatio* and *depositum* (without amending its pleadings) and also delict, leaves one in no doubt that the respondent was on a fishing expedition and was not clear, even in its own mind, what its cause of action against the appellant was. In changing its cause of action at whim, as it did, the respondent breached the whole essence and purpose of pleadings. It cannot in these circumstances be said to have proved its claim for contractual damages against the appellant.

[37] The appeal must therefore succeed. Costs are to follow the event.

[38] It is accordingly ordered as follows:-

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and in its place the following is substituted:

“The plaintiff’s claim be and is hereby dismissed with costs.”

GOWORA JA

I agree

GUVAVA JA

I agree

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Honey & Blackenberg, appellant’s legal practitioners

Venturas & Samkange, respondent’s legal practitioners