

AFRICAN CHROME FIELDS PRIVATE LIMITED**Versus****ADORN SAMAMBWA**

IN THE HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

NDLOVU J

HARARE 10, 16, 31 MAY 2023 & 5, 13 JUNE & 17, 24 JULY & 2, 9 AUG & 15 FEB 2024

Civil Trial*Mr. I. Mupfiga & Mr. W.T. Davira, for the Plaintiff.**M. I. Hore & Mr. A. Chingwe, for the Defendant.***INTRODUCTION**

NDLOVU J: The plaintiff caused a Summons to be issued out of this Court claiming cancellation of a lease agreement of a 20-tonne Roundebult Excavator, payment of USD51 450.00 being arrear rentals, holding over damages calculated at the rate of USD 250.00 per week with effect from the 16th of October 2022, interest at the prescribed rate from the date of Summons to the date of full and final payments and costs of suit on a higher scale. The defendant defended all the claims. The issues for trial were as per the Case Management Order and were:

1. *Whether or not there was a verbal lease agreement between the Parties at the expiry of the written lease agreement.*
2. *Whether or not there was a sale agreement between the Parties after the expiry of the written lease agreement.*
3. *Whether or not Plaintiff is entitled to be paid the sum of US\$51,450.00 being arrear hire/rent fees accrued.*

4. *Whether or not Defendant is liable to pay Plaintiff holding over damages at the rate of US\$2250.00 per week with effect from 16 October 2022 to the date of full and final payment.*
5. *Whether or not the unsuccessful Party is liable to pay the successful Party costs of suit on a higher scale.*

PLAINTIFF'S CASE

LASZLO TAKACS testified that he is the Plaintiff's Human Resources Manager. He knows the Defendant. He would collect US\$2 250.00 per week for the rental of an excavator which forms the subject of the dispute between the parties. He is the one who would do the schedule to monitor the payments made by the Defendant. The collection of rentals happened throughout 2021. He stated that after the expiry of the lease, it continued on the same terms.

During the period from January 2022 to February 2022, the payments became erratic, and at the end of February 2022, arrears had accumulated to US\$ 5000.00. At one time Plaintiff hired Defendant's low bed to ferry a container to Mutoko and a setoff was made against the outstanding rentals. In March 2022, rentals had accumulated to US\$3000.00, which was used to offset the low bed hire fee.

Between April and May 2022, Defendant receded into arrear rentals, and Plaintiff requested to uplift from Defendant, the excavator in dispute. On 15th June 2022, he went to Defendant with a low bed to uplift the excavator but the Defendant refused with the excavator. Electronic mails were dispatched to Defendant regarding the arrears and in June 2022, arrear rentals had accumulated to US\$ 10,900.00 He indicated that he had prepared a schedule for payments made and amounts owing. Plaintiff's legal practitioners wrote a letter of demand on 4 July 2022 and served it on the Defendant leading to the commencement of these proceedings.

According to the witness, the excavator was never sold to Defendant but it had been hired to Defendant. A written lease agreement was tendered. The written agreement was for six months and thereafter it continued on the same terms and conditions. He became aware of the Defendant's version after reading his Plea.

MARK CHRISTOPHER BEUKES is the General Manager and Director of the Plaintiff. He knows the Defendant.

In 2021, Defendant approached him, he needed an excavator for a contract. Plaintiff entered into a hire agreement with Defendant, for the excavator in dispute. The verbal agreement after the written lease agreement expired was solely one for hire, and the agreed hire fee was US\$2250.00 per week.

The defendant started up well with the lease and later became problematic as he became erratic with payments in October or November 2021. He would call and send emails to the defendant notifying him of his breach, in March and April 2022. The defendant ignored the emails. The emails were precise and meant to address Defendant's default in payment of rentals

He was considerate of the Defendant and he allowed him to rectify the defaults. No meaningful performance having materialized from further indulgence to Defendant's default, on 15th June 2022, he communicated with Defendant and sent a Lowbed to Steel Makers to collect the excavator, and Defendant refused to release the excavator. He subsequently instructed lawyers to recover the excavator and arrear rentals. No response to the letter of

demand was received from the Defendant.

According to him, the excavator is owned by Plaintiff, and it is currently in Defendant's possession and its whereabouts are unknown. If returned when requested, the excavator would have realized profit for Plaintiff, and owing to the unlawful holdover by Defendant, plaintiff has lost weekly, US\$2250.00, being a weekly rental of the machine. He was not privy to how arrear rentals were arrived at as such tasks were mandated to the 1st Witness. He maintained, like the 1st witness that the term 'sold' on the petty cash receipts related to rentals as inscribed thereon for the hire of the excavator to the defendant

DEFENDANT'S CASE

ADORN SAMAMWA is the defendant. He knows the plaintiff's witnesses. He has a long-standing relationship with the plaintiff's 2nd witness, Mark Christopher Beukes.

In 2020, he approached the plaintiff with 2 proposals which were to enter into a joint venture with the plaintiff or negotiate to purchase an excavator. Mr. Beukes then called and advised him that he could not sell him the excavator but lease it to him for 6 months after which they would see the way forward.

He denied the plaintiff's claims and confirmed that he had a written lease agreement with the plaintiff which was valid from the 1st of April 2021 to the 30th of September 2021 at USD2250.00 per week. After the expiry of the written lease agreement, a sale agreement was entered into between the parties in terms of which the plaintiff sold to him the excavator for USD70 000.00 which was to be paid on or before the 30th of June 2022.

He could not return the excavator because he fully purchased it and paid the purchase price

in full. According to him, the plaintiff has a history of dishonesty. At one time, the plaintiff was selling pumps, pictures of new pumps were sent to him by Mr. Beukes but to his utter surprise when he went on the ground to see the pumps, Mr Beukes had exchanged the pumps and gave him old pumps. He once bought a Boo Mag roller from the plaintiff for USD15,000.00 and the plaintiff through Mr. Beukes reneged and gave him a Roundbuilt Roller which is an inferior quality from the Boo Mag roller initially agreed on.

He was never issued with any receipts when he made payments both for rentals and purchases. The excavator purchase price was paid in installments which were to be paid on or before the 30th of June 2022 with no specific figure per month as all that the plaintiff wanted was cash flow to keep the company afloat. He does not have the licence book for the excavator in question.

ANALYSIS & RESOLUTION

In resolving the issues referred to trial one is bound to resolve issues 1 and 2 simultaneously because they are central to the dispute between the Parties and an answer to one of them extends to answer to the other. The question of the nature of the agreement post the expiry of the written lease agreement is central in this matter and was accordingly highly contested.

It should not be forgotten that the standard of proof in civil proceedings is proof on a balance of probabilities. In answering the ultimate question of whether or not a party upon whom the onus of proof rests on a particular issue has proven its claim or defence the credibility of its witness[es] is the critical tool leading of course to the balancing of probabilities. The Plaintiff's claim must be balanced against the Defendant's defence, the goal being to decide of which of the two versions is more likely to be true.

Lewendo Ent. [Pvt] Ltd v Freight Africa Logistics HH 653/15

Selamolele v Makhado 1988 [2] SA 372 [V]

The probability must be of such a degree sufficient enough to found a presumption in favour of the party with the onus of proof on the issue in contention. Its force must be of sufficient weight to found the evidentiary onus on the other party calling upon it to rebut the presumption.

ZUPCO Ltd v Pakhorse Services [Pvt] Ltd. SC 13/2017

The onus is on him who alleges.

Pillay v Krishna 1946 AD. 946

This case boils down to the Plaintiff's word against the Defendant's primarily. The witnesses for the Plaintiff were adamant that there was never a sale agreement between the parties. An attempt was made to repossess the excavator by Plaintiff from Defendant who refused the repossession. Emails were sent to Defendant addressing the issue of hire fee arrears and not the purchase price and Defendant at worst ignored them and at best did not assert his ownership of the property he now claims to have fully paid for. The plaintiff's legal practitioners wrote a letter of demand to the Defendant and chose to ignore the same according to him. The defendant does not deny that he fell into arrears with his payments to the Plaintiff. Whether the arrears were in respect of the hire [per Plaintiff] or purchase [per Defendant], the fact remains that it is those arrears that birthed this litigation.

It is trite that for a contract of sale to be perfecta there should be a meeting of the minds of the parties among other things. There must be no confusion between the parties regarding the nature of the transaction they are embarking on. Once Plaintiff motivated its claim as it did, the evidential burden was now on Defendant to rebut the evidence of Plaintiff's witnesses and show the court that the transaction was a sale.

Where one party resiles from a legally binding contract of sale, the offended party has legal remedies available to it. It is in my view highly improbable that parties who had reduced their hire agreement to writing, despite that they were known to each other and friendly to each other, would agree on an amount less instalment sale. According to him, he was supposed to pay “something” every Tuesday, yet Defendant says, Plaintiff was in difficult times financially at the material time. Defendant told the court that the 2nd witness for the Plaintiff was a dishonest character who had deceived him previously, not once but twice in transactions of a similar nature. Why would Defendant be so trusting this time around? So trusting to not demand the licence book as well. Why would Plaintiff sell on instalment payment of which was equivalent to the hire fee and payable at the same frequency as the hire fee? It simply defies logic.

Defendant admitted under cross-examination that the excavator belongs to the Plaintiff. He could not tell how the parties settled for US\$70,000.00 as the sale price. Curiously Defendant told the Court that upon proposing to purchase the excavator when the written lease expired the 2nd Plaintiff witness said he would revert to him after talking to their Head Office. When the 2nd witness for the Plaintiff later called he told him that he would continue paying the same amounts as rentals for at least 12 months. This buttresses the version and later conduct of the Plaintiff.

I find the witnesses for the Plaintiff to have been credible witnesses in articulating the case for the Plaintiff. Where they allegedly faltered in their evidence, it is to immaterial issues. The same cannot however be said about the Defendant. His evidence was inconsistent and his

behaviour was inconsistent with someone who had bought an excavator and fully paid for it. His conduct is inconsistent with someone dealing with an individual he did not trust. On a balance of probabilities, Plaintiff has proven its claim that it did not sell its excavator to Defendant and Defendant defaulted in servicing the lease agreement and had the excavator against its will. The unsanctioned possession is causing Plaintiff financial prejudice justifying an order for holding over damages.

DISPOSITION

Plaintiff has on a balance of probabilities satisfactorily proven its claim against Defendant.

I accordingly make the following order:

1. The lease agreement entered into by and between Plaintiff and Defendant for the hire of a 20-tonne Rondebult Excavator with **VIN. LSW00225AH0023368** and **Engine No. 78369717** be and is hereby cancelled.
2. The Defendant be and is hereby ordered to deliver the aforesaid Rondebult Excavator to the Plaintiff within 48 Hours of notice of this order to him.
3. Failure by Defendant to comply with para-2 above, the Sheriff of the High Court be and is hereby authorized and directed to attach and deliver to Plaintiff the aforesaid Rondebult Excavator within 48 Hours of such failure by Defendant.
4. The Defendant be and is hereby ordered to pay Plaintiff a sum of US\$51,450.00 [payable in ZWL\$ at the prevailing Interbank Exchange Rate on the date of payment] being arrear hire fees, for the period 31 December 2021 to 15 October 2022.
5. The Defendant be and is hereby ordered to pay the Plaintiff holding over damages calculated at the rate of US\$2 250.00 per week [payable at the prevailing Interbank

Exchange Rate on the date of payment] with effect from 16 October 2022 to the date of the return of the aforesaid Rondebult Excavator to the Plaintiff.

6. The Defendant be and is hereby ordered to pay interest on all the aforesaid amounts due, at the prescribed rate from the date of Summons to the date of full and final payment.
7. The Defendant shall pay Plaintiff's costs of suit.

NDLOVU J.

15/02/2024

Gundu Dube & Pamacheche, Plaintiff's Legal Practitioners.

Hore & Partners, Defendant's Legal Practitioners.