RIX UPHOLSTERY P/L
versus
BUDDULPHS P/L

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 4 and 11 September and 15 October 2008

Trial Cause

Mr *C Tafireyi*, for plaintiff
Mrs *J Wood*, for defendant.

MAKARAU JP: On 20 December 2007, the plaintiff issued summons against the defendant claiming the sum of $87, 501, 810 -94 being the value of certain goods that were stolen after the plaintiff had placed them in storage with the defendant. The claim was resisted primarily on the basis that the defendant was not negligent in any respect leading to the loss of the goods. In particular, it was the defendant's case that the parties had specifically agreed that the defendant would not be liable for any loss or damage suffered by the plaintiff howsoever and form whatever cause arising even if the defendant and its agents were negligent.

The facts giving rise to this claim are largely common cause. I summarize them as follows.

The plaintiff, as its name implies, is in the business of upholstery. It is managed by one Alwyn Richard Pahla in whose name the initial process was sued. By consent, the plaintiff was substituted from Alwyn Richard Pahla to Rix Upholstery (Private) Limited.

Sometime in 2007, Pahla was proceeding on holiday. He took his personal goods and goods belonging to the plaintiff and placed them in storage with the defendant. He had used the defendant for this purpose before. When he placed the goods into storage, he was not shown a quotation from the defendant where the terms and conditions are endorsed. He however signed the contract indicating that he accepted the terms and conditions of carriage endorsed on the back of the defendant's quotation. Clause 7 of the terms and conditions of service reads:

"The Contractors shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever cause arising even if the customer (sic) and/ or their

servants and /or agents are negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the customer's risk."

Pahla further indicated on the contract form that the plaintiff would take out insurance for the goods but because he was in a rush, he never got round to taking out the insurance.

Sometime in October 2007, the defendant called Pahla and advised him that some of his goods had been stolen. He inspected the goods and established that some of the leather belonging to the plaintiff was missing. Specifically, these were 31 parcels of leather, each 45 square metres in size.

A report of the theft was made to the police. Subsequent investigations revealed that the leather was stolen by persons who included one of the defendant's employees by the name Alexio Chinzara. Armed with this information, the plaintiff filed this claim which was resisted on the basis that I have detailed in the opening paragraph of this judgment.

At the trial of the matter, Pahla gave evidence for the plaintiff. His testimony was a repetition of the facts that are largely common cause in this trial. He gave his evidence well. He was not shaken under cross examination. I find no fault with his testimony.

It may be pertinent however for me to note at this stage that while the witness testified that he was not shown the quotation on which the terms and conditions of storage were endorsed, he nevertheless signed the contract, specifically accepting the importation of those terms and conditions into the contract he signed. That he accepted the terms and conditions blindly does not in my view make the terms and conditions invalid and inapplicable. *Caveat subscripto*.

On the basis of the foregoing, it is therefore my finding that the terms and conditions as endorsed on the reverse side of the defendant's quotation are binding on the parties.

The plaintiff also called one Brighton Ruzvidzo as a witness. He is a member of the Zimbabwe Republic Police based at Southerton Police Station. He received a report of a theft that had occurred at the defendant's. Prior to receiving the report of the theft of the plaintiff's goods, he had received other reports of thefts from the defendant. In the first reported cases, an employee of the defendant's known as Alexio Chinzara was implicated and accused of the offences. Later on during the course of his investigations, he discovered that Alexio Chinzara was involved in the theft of the plaintiff's leather.

He attended the scene of the offence. From his observations, there was no physical break in and he concluded that the theft had been effected through the doors. In the previous cases, Alexio Chinzara had confessed and had told the police that he used duplicate keys to

gain access into the warehouses where he stole from. In the view of the witness, the gap that had been created in the defendant's outer security wall was too small to be used for the removal of the goods from the premises.

He arrested the person to whom the leather had been sold. By then, Alexio Chinzara, who had been granted bail in the previous matters, was on the run.

In my view, the testimony of this witness does not take the plaintiff's case much further. The loss of the plaintiff's goods to theft is common cause.

I found the testimony of this witness somewhat hazy on details and to some extent, based on conjecture. In his view, since Alexio Chinzara had confessed to the earlier thefts where he had used duplicate keys to gain access into the warehouses, duplicate keys were also used to gain access into the warehouse where the plaintiff's goods were stored. He holds this view despite the evidence of the plaintiff and of the defendant's second witness that there was a forcing of the bars of the steel gate to the warehouse. In view of this unsatisfactory feature of his evidence, where there is evidence to the contrary, I shall not rely on the testimony of this witness.

The third witness to testify on behalf of the plaintiff was one Rodrick Madzima. He is the leather dealer to whom the stolen leather was sold. He bought the leather from three young men. Alexio Chinzara was one of the three.

The witness gave his evidence well. He was however understandably a bit vague on the dates when the leather was sold to him.

The defendant called Amerigo Alvera as its first witness. He is Furniture Manager at defendants. He did not deal directly with the plaintiff.

He testified that the defendant has a standard quotation that has its terms and conditions on the reverse side. The document was duly adduced into evidence.

The witness also testified on the various security measures that it has in place at the warehouses before narrating hoe the theft of the plaintiff's goods was reported to him.

In my view the witness gave his evidence well. I have no reason to doubt his testimony.

Last to give evidence in this trial was Ben Mutambu Nyamhunga. He is employed by the defendant as a storesman. He is in charge of warehouse No 1 where the plaintiff's goods were stored.

He recalls how he discovered the theft of the plaintiff's goods in October 2007. He noticed that the sliding door was off its rails and was askew. It had been removed from its hinges and was not in its normal position. Access had been gained into the warehouse through the tempered door. Apart from the theft of plaintiff's goods, there had been no other thefts from the warehouse under his charge.

The witness is of the old school. He has been employed by the defendant for the past 48 years. He clearly impresses as being honest and truthful. I will rely on his evidence.

On the basis of the above evidence, I now have to ascertain whether the defendant is liable to the plaintiff as claimed.

In its declaration, the plaintiff alleged that the defendant was in breach of the contract obtaining between the parties as it failed to return to the plaintiff certain items that had left with it for storage. The cause of action pleaded is thus embedded in contract and does not arise *ex delictu.* I make this point at this stage as in argument, *Mr Tafireyi* for the plaintiff sought to argue that the defendant was vicariously liable to the plaintiff as the missing items were stolen by the employees of the defendant. While the tenor of the evidence led and the suggestions put to the defendant's witnesses during cross-examination suggested that the plaintiff believed the defendant was at fault, no fault was pleaded in the papers and no cause of action of which fault is an element was raised. The pleadings raise a simple allegation of breach of contract.

It is also pertinent in my view to stress at this stage that a plaintiff who has suffered loss as a result of the alleged negligent performance of a contract by the defendant has the option to embed his claim in either delict or in contract. He cannot plead both save in the alternative as damages for breach will seek to place him in the position he would have been had the contract been performed. In other words, contractual damages simply convert the plaintiff's bargain into monetary terms. Damages for delictual loss on the other hand seek to replace the diminution to the plaintiff's estate caused by the delict. The loss is fixed as on the date of the delict. Occasionally the amount of damges claimable under each cause of action coincides but not always. The amount of damages claimable in this matter is the market value of the lost leather and this may have caused *Mr Tafireyi* to think he can argue in delict for a claim that is founded *ex contractu,* for the same amount would have been claimable had the cause of action been founded in delict, a case of the end justifying the means, perhaps. The legal principles applied in establishing liability under each cause of action are different and

necessary averments to sustain each cause of action have to be made and supporting evidence adduced.

As indicated above, the plaintiff chose to plead breach of contract. By so doing he nailed his colours to the mast and must succeed or else he will fail on the cause of action that he chose to plead.

To determine the dispute before me, it appears to me that I must be clear as to the nature of the contract that the parties entered into, the obligations that the defendant assumed under the contract and whether or not he breached such obligations as pleaded.

Regarding the nature of the contract that the parties concluded, I am clear that this was a depositum contract. This is a specific contract whose terms are implied by law. (See *Electra Rubber v Socrat* 1981 ZLR 356 (AD) at 359 D-E). It is defined as a contract whereby one person delivers to another a thing to be kept by him gratuitously or for reward and returned on demand. An essential element of the contract is the fact of the delivery of the item to the bailee and its return to the owner upon demand. These are the key essentials that distinguish the contract from other agreements. The point was in my view succinctly put by WADDINGTON J in *Smith v Minister of Lands and Natural Resources* 1979 ZLR 421 (GD) at 428 E-G in the following words:

> "Bearing in mind that the contract of depositum involves the delivery of a thing "to be kept", I do not think that it can be said that the circumstances in which the plaintiff's boat was left at the dam constituted a delivery to the defendant for the purposes of being kept. At the most, on the evidence led, what happened was that the third mooring bay was simply pointed out by an official at the Park as being a place where the plaintiff could moor his vessel. No evidence was led and it cannot in my view, be inferred from any of the surrounding circumstances that it was the intention of any official at the Park, acting on behalf of the defendant to keep the vessel for the plaintiff. The circumstances are akin to the kind of case where a member of the public is allowed to come on to ground owned by a person who runs the business of a car park and to leave his motor vehicle there for stipulated periods in return for a small fee."

From the example given by WADDINGTON J above, one immediately thinks of a parking slot allowed by the city authorities along streets for the convenience of motorists. When one parks their vehicle in such a slot, one has not delivered the vehicle to the city authorities and need not demand it back from them when he wishes to drive away.

In *casu*, however, the goods were not only left with the defendant. They were delivered to the defendant who took them into its custody. The defendant then stored the goods in warehouses which were under its control. It kept the goods under lock and key. To retrieve the goods, the plaintiff could not simply approach the warehouse and remove his goods therefrom

as a driver would remove his vehicle from a parking slot. He had to demand them from the defendant. The keys to the warehouse where the goods were kept were not accessible to him but were kept by the defendant's employees.

It is on the basis of the above that I am satisfied that the parties concluded a contract of deposit and the averment by the defendant that the contract was for storage only and not for safekeeping becomes unmeritorious in the circumstances. Was the contract for storage only, the plaintiff would have been merely shown a designated place on the defendant's premises where he could place his goods. The defendant's employee would not have taken into their custody the goods and keep them under lock and key.

Under a contract of depositum, the bailee has the obligation, imposed by law, to return the goods to the owner upon demand. The liability of the bailee under the depositum contract is in my view similar to the obligations imposed on sailors, innkeepers and stable keepers by the Praetor's Edict which is a part of our law. (See *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (SC)). It is now the settled position in this jurisdiction that the Edict applies to carriers by land, a trade that the defendant plies in but is not relevant for the purposes of this trial. The quotation upon which the defendant's terms and conditions are endorsed clearly indicate that the defendant is not a public carrier and does not assume the obligations and liabilities of a public carrier. In my view, it matters not whether the defendant describes itself as a public carrier or not as its obligations and liabilities as a bailee under the deposit contract are implied by law. In my view, the strict liability that is imposed on public carriers by the Edict *de nautis, cauponibus et stabulariis* is similar to the strict liability that the common law imposes on a bailee under a depositum contract.

As for carries by land, our law recognizes that the parties to a depositum contract can agree to exempt one of the parties from liability for breach of the contract that ordinarily would have attracted liability. In this regard, carries by land have invariably inserted clauses in their contract limiting their liabilities to instances of gross negligence only. A number of such clauses appearing in contract of carriage mainly have come before the courts for interpretation and application.

In *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* (supra), the court had to deal with the case of ninety-five bales of cotton that were destroyed whilst being transported by the defendant under a contract of carriage under which the goods were being carried at the "sole risk" of the consignor.

It was argued for the consignor in that matter that the Praetor's Edict *de nautis, cauponibus et stabulariis,* dealing with the liability of sailors, innkeepers and stable keepers applied and that the "owners risk" clause in the contract did not exempt the carrier from liability for negligence but would exempt the carrier from the absolute liability of the common law.

Dealing with the issue of the "owners' risk" clause in the contract of carriage between the parties, DUMBUTSCHENA CJ (as he then was), had this to say at 315 H:

"Generally, carriers by land may contract themselves out of strict liability imposed by the common law or limit their liability. The issue here is whether in spite of the strict liability imposed by common law, the respondent is exempted from liability for damage occasioned by its servant's negligence."

After setting out in detail the submissions made by both counsel in respect of this issue, the Chief Justice continued at 317 F to put it as a trite position at law that the question of exclusion of liability by a carrier is one of fact or interpretation, to be decided in light of all the relevant circumstances. I presume that the Chief Justice in this regard was essentially observing that each case depends on its facts.

In conclusion, the Chief Justice held that the clause in the matter before him did not expressly refer to negligence and therefore was not wide enough to exempt the respondent from liability arising from negligence.

In *Zeeta Manufactures (Pvt) Ltd v Zimbabwe United Freight Company Limited* 1990 (1) ZLR 337 (HC), CHIDYAUSIKU J (as he then was), had to deal with the case of a consignment of jewellery in a small parcel that was stolen together with the tricycle belonging to an employee of the defendant as he was making deliveries. The consignment was in a padlocked cargo bin but the tricycle itself was left unattended and unlocked. In absolving the defendant from liability, the Chief Justice, who was dealing with an exemption clause that specifically referred to negligence had this to say at 340 A:

"I am satisfied that for the plaintiff to succeed he has to establish that the conduct of the defendant's employees constitute gross negligence. It will not be sufficient for him to establish ordinary negligence."

The court went on to find that the plaintiff had failed to prove gross negligence on the part of the defendant's employees and accordingly dismissed the plaintiff's claim with costs.

In *casu*, no averment was made in the declaration that the defendant or its servants were negligent in any way. No argument was advanced that the defendant was negligent. It is common cause that the goods were stolen from a secured warehouse by forcing apart the steel doors to the warehouse. The plaintiff was however at pains to show that the goods were stolen

by an employee of the defendant's. In my view, employing a dishonest employee on its own is not per se proof of negligence.

I am not satisfied that the plaintiff has led any evidence before me that tends to show that the defendant was negligent at all in the matter, let alone being grossly negligent in the loss of the plaintiff's leather.

On the basis of the foregoing, I would dismiss the plaintiff's claim with costs.

Muzondo & Chinhema, plainitff's legal practitioners.
Byron Venturas & Partners, defendant's legal practitioners.