COTTON COMPANY OF ZIMBABWE LIMITED
versus
MOBIL OIL ZIMBABWE (PVT) LTD
and
TOTAL ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 7 OCTOBER 2008,
23, 24 and 25 March 2009,
15 March and 21 April 2010.

CIVIL CAUSE

Adv R Fitches for the plaintiff;
Mr A Chinake for the defendant.

MAKARAU JP: The claim in this matter was filed against the first defendant in March 2005. Trial commenced in October 2008 and has spanned over some 18 months. The cumulative delay between the time of the filing of the summons and the handing down of judgment is a record five years. The telling point though is that there is no letter of complaint from the plaintiff over the time it has taken to get this matter finalized.

It may be pertinent at this stage to note that at conclusion of the trial of the matter in March 2009, but before counsel had made their closing submissions, *Mr Fitches* for the plaintiff indicated that he intended to make an application for joinder, to join to the proceedings Total Zimbabwe (Private) Limited, as second defendant. This was to enable the plaintiff to get satisfaction of whatever judgment I may hand down in its favor from the second defendant as it emerged during the trial of the matter that the first defendant disinvested from Zimbabwe in or about 2006 and sold all its assets to the second defendant. I postponed the hearing of the matter to enable the plaintiff to file and serve the intended application on all parties.

After the application for joinder to be filed and served, the second defendant filed a special plea, alleging that the plaintiff's claim had prescribed.

At the resumption of the hearing of the matter, it emerged that the first defendant had no objections to the proposed joinder which I accordingly granted. Both parties also indicated that they did not wish to call for or lead any further evidence in the matter. I then called for submissions from counsel. Written submissions were only filed on 8 April 2010, hence the unusual delay in the handing down of this judgment.

The Claim

The plaintiff issued summons against the defendant on 16 March 2005, seeking an order compelling the defendant to deliver to it 522 763litres of diesel. In the declaration, it was alleged that the parties had an oral agreement in terms of which the defendant would supply diesel to the plaintiff. It was further alleged that over a period stretching from July 2000 to December 2002, the plaintiff ordered and paid for 2,398 000 litres of diesel from the defendant and that in breach of the agreement between the parties, the defendant delivered 1, 875 237 litres only, leaving the balance that forms the subject of the claim. In the alternative, the plaintiff claimed the sum of two billion ninety-one million and fifty two thousand dollars ($2,091,052,000-00), being the market value of the diesel allegedly not delivered.

The claim was defended.

In the main, while accepting the arrangement between the parties, the defendant averred that it had delivered all the diesel that the plaintiff ordered and paid for, thus putting the onus squarely on the plaintiff to prove the alleged shortfall.

The Evidence.

At the trial of the matter, the plaintiff called one Webster Nhamo Dongo as its first witness. At the time he testified, he was the plaintiff's Purchasing Manager. In that position, he was responsible for all the purchases of the plaintiff, including that of fuel. At the time of the transactions between the parties giving rise to the claim, he was the Senior Purchasing Officer. He and the then plaintiff's Purchasing Manger set the transaction up with the defendant.

The witness gave a detailed account of the processes involved that were involved in the transactions between the parties from the generation of a pro forma invoice through to the delivery of the product. He also testified that an audit carried out by the plaintiff revealed the shortfall that forms the plaintiff's claims.

Under cross-examination, the witness conceded that the parties had an arrangement whereby the plaintiff could collect the ordered fuel on its own. To the best if his knowledge, however, this had never happened. This question followed up on his evidence that the shortfall alleged by the plaintiff arose from a comparative study of the fuel that was delivered to the plaintiff by the defendant an as captured on its internal documents called "goods received vouchers" against the orders that the plaintiff had placed with the first defendant.

In my view, the witness gave his evidence well. He testified mainly as to the general relationship between the parties. These are issues that are largely common cause between the parties. He did not attempt to reconcile the orders against the deliveries, reserving this for the second witness. It is my further view that he fared well under cross–examination. I have no reason to disbelieve him.

Next to testify on behalf of the plaintiff was one Caspa Mangwiro, the plaintiff's Materials and Logistics Officer. During the relevant period, he was responsible for monitoring the fuel that was delivered to the plaintiff's depots. He investigated the matter of the alleged shortfall in the diesel delivered by the defendant. In carrying out this investigation, he compiled the telegraphic transfers that reflected payment for the fuel ordered together with the invoices that the plaintiff received from the defendant. He obtained information from the plaintiff's various depots concerning the deliveries made. He then reconciled the pro forma invoices against the deliveries to come up with the shortfall.

It was his testimony that for each delivery received, the plaintiff would raise a goods received voucher. This was done by the store's person at each of every plaintiff's depots throughout the country.

The witness adduced into evidence as exhibit "1", a summary of the reconciliation that he did for all the plaintiff's depots. He compiled the exhibit personally. In compiling this exhibit, he used invoices from the defendant and copies of telegraphic transfers from the plaintiff's bank on one hand and, the goods received vouchers from the plaintiff's depots and the delivery notes from the defendant on the other. These mismatched to the extent of the shortfall.

Finally, the witness adduced into evidence fifteen flat files. In each file was the pro-forma invoice and proof of payment made on that invoice. These fifteen files related to fifteen of the nineteen transactions that the parties conducted over the period in question. In respect of the remaining four transactions, the witness testified that the files had gone missing.

Under cross- examination, the witness admitted that the plaintiff could at times collect diesel from the defendant. He testified that he had not prepared a schedule showing any such collections and that these did not form part of his reconciliation. He also admitted that at one stage the plaintiff ordered diesel on behalf of its chairman but could not confirm whether delivery of such fuel had been effected directly to him by the defendant, in which case, such delivery would not be captured on any goods received voucher issued by the plaintiff.

The witness also confirmed that whilst he had these documents in his possession, he had not adduced into evidence the goods received vouchers for a number of the plaintiff's depots that received delivery of diesel from the defendant.

Also under cross-examination, the witness was shown an assessment that had been carried out by the defendant on the documentation relating to two depots of the plaintiff. The assessment revealed that a total of 38 000 litres delivered to the plaintiff had not been captured in plaintiff's schedule. This, he conceded. He also conceded that that the summary of transactions that he had compiled may not be entirely correct

When it was suggested to him in cross-examination that he did not complete the reconciliation in that orders that were made in December 2001 could have been delivered in January or February 2002, he testified that he went by a certain cut off date and that diesel delivered after the cut –off date, if any, was not taken into account. The cit off date as captured on the reconciliation schedule is 31 December 2001.

The witness impressed me as a measured man. He gave his evidence very slowly and took time to verify figures and information from his volumes of files. Understandably, he had to rely on his records for details of the transactions between the parties as the transactions were many and were for the period 2000 to 2001, some seven years before the trial. Any shortcoming that I find in his evidence is not a reflection on his credibility but an attack on the integrity of the records he had to use and the record keeping system that was employed by the plaintiff at the time.

After this witness, the plaintiff closed its case.

The first defendant called one Benjamin Matanda as its only witness. He is employed by the second defendant as Customer Care Manager. At the relevant time, he was employed by the first defendant in the same capacity. He is familiar with the business relationship and arrangements that obtained between the plaintiff and the first defendant. To the best of his knowledge, the defendant delivered all the diesel that the plaintiff ordered from it. The deliveries wee completed in early 2002. Again according to his knowledge, some of the invoices were not paid on by the plaintiff. These are however included in the plaintiff's schedule as outstanding deliveries.

The witness also testified that the defendant carried out an independent investigation into the matter of the alleged short deliveries and examined ledger cards availed to it by the plaintiff. From his personal examination of the ledger card relating to Bindura depot, he

established that the total volume of diesel delivered as recorded on the plaintiff's reconciliation schedule for this depot was understated. The same was found to be true for Gokwe and Kadoma depots.

The witness also compared the documents that he had for the Chinhoyi depot and found that 77 000 litres of diesel that had been delivered to the depot was not captured and recorded in plaintiff's reconciliation schedule. He did not agree with the suggestion by Caspa Mangwiro on behalf of the plaintiff that such diesel had been mis-recorded on the ledger card as the invoice numbers appear to have dropped by one digit. He testified that it was quite normal for one customer to pick up the same volume of diesel twice a day on two different but consecutive invoices as delivery depended on the configurations of the delivery truck.

Under cross- examination, the witness parried all questions put to him with ease. I did not notice any hesitation on his part in responding to any of the questions. Generally, I gained the impression that the witness was honest. I shall rely on his evidence.

After the evidence of this witness, the first defendant closed its case.

Prescription.

The first issue that arises in this matter is whether or not the plaintiff's claim against the second defendant has prescribed.

The first defendant did not raise the issue at all.

In resisting the plea, the plaintiff has sought to rely on the provisions of section 16 (3) of the Prescription Act [Chapter 8.11], which reads:

"(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

It has been submitted on behalf of the plaintiff that the identity of the second defendant as a debtor was unknown to the plaintiff until the trial of this matter when the disposal of assets by the first respondent to the second respondent was disclosed.

In his submissions on the plea, Mr Chinake makes out the case that the plaintiff's cause of action against the first defendant has prescribed. As stated above, it is not necessary that I determine whether this is so as the plea of prescription has been filed by the second defendant only. I cannot determine the issue in respect of the first defendant *mero motu* and outside of the pleadings between the parties..

The issue that has exercised my mind in this matter is whether the same facts that can sustain a plea of prescription against the first respondent can be relied upon by the second defendant.

It is common cause that the second defendant has been cited as a defendant before me as the successor in title to the first defendant. No culpability is alleged against the second defendant which has been joined in the proceedings merely to enable the plaintiff, if successful, to obtain satisfaction of its judgments against the assets of the second defendant, formerly owned by the first defendant.

It appears to me that ordinarily, the defences that are available to the first defendant are also available to the second defendant. In fact, it appears to me that on the merits of the matter, the second defendant has no independent defence to offer as it did not transact with the plaintiff prior to its taking over of the first defendant's assets and business in 2006. It also appears to me quite clear that had the first respondent successfully raised the issue of prescription, this would have equally shielded the second defendant. It is the reverse of the situation that I need to determine in this matter.

It appears to me that the second defendant cannot rely on the facts that would have sustained a plea of prescription against the first defendant as the causes of action that the plaintiff has against each defendant, whilst the same, arose on different dates. Whilst it may be correct that the plaintiff's cause of action against the first defendant arose in or about December 2001 when the last invoice was made out between the parties, as submitted by *Mr Chinake*, the same is not true or correct with regards to the second defendant. As was observed by LEWIS JP in *Street v Evans* 1977 (3) SA 950 (RA) at 951,

"When dealing with the question of prescription, one has to ask oneself what is it that is being prescribed. What is being prescribed is one's right to sue. The right to sue depends on having a cause of action which has accrued to one,….."

It presents itself clearly to me that the plaintiff's right to sue the second defendant only accrued in March 2009 during the trial of the matter between the plaintiff and the first defendant when the disposal of assets to the second defendant was revealed. Prior to that revelation, the plaintiff had no cause of action against the second defendant as it was unaware of its identity and of the facts that would make the second defendant liable for the debts of the first defendant. Prescription against the second defendant can only have commenced running from the date of the disclosure. It was then successfully interrupted by the joinder of the second defendant to these proceedings.

Again in arriving at the conclusion that I do, I am guided by the remarks by GREENLAND J in *Hodgson v Granger and Another* 1991 (2) ZLR 10 (HC) at 16 to the effect that the whole purpose of the Prescription Act and other statutes of limitations is to penalize the dilatory creditor but not a creditor who is unaware, through no fault of his own, of the cause of action at his disposal.

On the basis of the foregoing, I would dismiss the plea of prescription as against the second defendant.

Whether the defendant failed to deliver all the diesel that the plaintiff ordered.

In my view, the above represents the sole issue that falls for determination in this trial. It is not legal a legal issue *strictu sensu*. It is a reconciliation issue. It is my further view that the exercise of reconciling what can be proved to have been ordered and what can prove to have been delivered could effectively have been done by the parties' logistical officers prior to trial. It is an issue that should have been settled at pre-trial conference had all parties effectively played their role in the matter.

In essence, the plaintiff is alleging a short delivery of the diesel that it ordered and paid for. To prove its case, all the plaintiff had to do was to set up its paper trial, showing the order, proof of payment on that order and the deliveries received against that order, thereby revealing the alleged non- delivery of the diesel duly ordered and paid for. This may sound simple and in my view it is indeed a simple exercise where proper and comprehensive records are kept of all transactions of this nature, something that I expected an establishment of plaintiff's stature to do.

It became apparent however during the trial that the plaintiff did not keep a comprehensive paper trail of each order of diesel made from date of order to date and place of delivery. What the plaintiff sought to do at the trial was to show a general deficiency between the total of all orders allegedly made and deliveries received without necessarily showing which particular orders were paid for but were not received at all or were received in part.

In my view, having chosen to show a general deficiency, the plaintiff bore the onus of showing accurately what it is that it had ordered and paid for, to establish the opening entry of the account as it were. Having done so, it still would have borne the onus of proving what was delivered, again accurately, to establish the closing entry of the account, thereby revealing the deficiency claimed. Anything short of this would be fatal to its claim.

It is trite that a general deficiency cannot be proved without first proving what was due even if one can accurately prove what has been received.

During the trial, the plaintiff's second and key witness conceded that the plaintiff did not have a full set of documents relating to four of the transactions listed in its summary of transactions as the files for these transactions had gone missing. As indicated above, he only adduced into evidence fourteen files instead of nineteen. The transactions for which no documents were adduced into evidence relate to invoices number 8 dated 2 April 2001, number1039 dated 4 May 2001, invoice number 1061 dated 4 May 2001 and invoice number 13861 dated 10 December 2001. There was no evidence adduced before me in respect of these transactions to show that either the order had been made or that payments had been made in respect of the orders. All I had was the evidence of the witness that these wee valid transactions for which he could not produce supporting documents.

The issue that arises is to what extent the court can rely on second hand hearsay evidence to prove a fact that a contemporaneously made document ought to have proved.

It appears to me that where a document was made contemporaneously with a transaction, recording that transaction, that document and that document alone is the only admissible evidence of that transaction. Any first hand hearsay evidence purporting to give the details of the transaction is inadmissible.

It is the general rule that no evidence is admissible to prove the contents of a document other than the original document itself. The authors LH Hoffman and DT Zeffertt in the South African Law of Evidence (4th Ed), page 390, refer to this general rule as one of the most important surviving remnants of the best evidence rule. As with any general rule, there are a number of exceptions to this rule but these are in my view, of no application in this case. The plaintiff seeks by oral evidence of its second witness, to prove what was contained in various documents that have since gone missing. The witness purported to testify on orders for diesel that had been placed seven years ago. Such evidence is inherently unreliable especially in view of the fact that some of the documents whose contents he purported to testify on were still awaited from the plaintiff's bank. He had not even seen the document. It may not exist. Even assuming that he had at some time seen the documents he seeks to testify on, his recollection of what he saw on the documents constitute inadmissible hearsay evidence as to the contents of the documents as he was not the author of any of the documents in issue.

I may have been inclined to accept the oral evidence of the witness that he saw some documents that prove that some transactions occurred between the parties but such documents are no longer in his possession. It is another thing for me to accept the oral evidence of the witness to prove the contents of the missing documents.

In view of the fact that the plaintiff could not prove that it ordered or paid for the diesel in the four transactions under dispute, it cannot be said that the first defendant failed to deliver such diesel.

The total of the diesel in the four disputed transactions is 338 000litres. I would have simply deducted this amount from the plaintiff's total claim were I satisfied that the plaintiff has accurately proven before me what diesel it received from the first defendant. I am not.

The plaintiff did not produce before me all the source documents from which it concluded that there had been a shortfall in the delivery of the diesel that it had ordered. It is common cause that the plaintiff compiled its reconciliation from the goods received vouchers generated by its depots. Not all of these vouchers were produced before the court. All I have is the oral evidence of the plaintiff's witnesses testifying as to the quantity of the diesel allegedly received by the plaintiff. Such oral evidence is not the best evidence of delivery as each delivery was recorded in a document that was made contemporaneously with the delivery. I would even venture to suggest that such evidence is hearsay as the witnesses did not make any of the entries that are allegedly on the vouchers.

Further and in any event, assuming that the oral evidence of the plaintiff's witnesses is admissible, the accuracy of the figures given by the witnesses is in doubt.

It is common cause that the parties had an arrangement whereby the plaintiff could collect some of the diesel directly from the defendant. In this event, some other document and not a "goods received voucher" would be generated. The first witness testified that whilst he was aware of the arrangement, he was not aware of any collections that the plaintiff may have made. The second witness again admitted knowledge of the arrangement and testified that he had not taken these into account when he did his reconciliation. He did not prepare a schedule of such collections, which according to him, were done by the plaintiff's Muzarabani and Glendale depots.

It was also not in dispute that one of the transactions had been for and behalf of the plaintiff's chairman. The invoice indicated that delivery would be effected to him. It was not

clear from the plaintiff's evidence whether such delivery had been effected directly to the chairman, in which event there would be no goods received voucher generated.

As indicated above, the issue before me is one of reconciling two entries in an account that must balance at the end of the exercise. It is an accounting issue to be resolved on the basis of what the records reveal and not on the basis of the credibility of the witnesses who testified before me. Where the relevant records are incomplete, the calculations cannot be done on the speculative basis of what the witnesses say.

On the basis of the above, it is my finding that the plaintiff has failed to prove the accurate quantity of diesel that it ordered from and paid for. It has also failed to prove that the diesel that it ordered was not all delivered.

In the result, I make the following order:

1. The defendant is absolved from the instance.
2. The plaintiff shall meet the defendant's costs of suit.

Dube Manikai & Hwacha, plainitff's legal practitioners.
Kantor & Immerman, defendant's legal practitioners.