GENESIS VENTURES (PRIVATE) LIMITED
versus
ROLMAY TRADING (PRIVATE) LIMITED
and
LARDFAIR TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 14, 15, 19 January 2009, 24, 25, 27 March 2009, 2 February 2011

Civil Trial

O Mutero, plaintiff's counsel
C.VMamvura, defendant's counsel

BERE J: The plaintiff issued out summons against the defendant out of this court on 13 march 2008 claiming delivery of twenty thousand (20 000) litres of diesel. The defendants rigorously defended this claim. On 13 of June 2008 the plaintiff withdrew action against the second defendant. Consequently the action that remained before the court was against the first defendant.

At the conclusion of the hearing I issued out an order out of this court framed as follows:-

"It is ordered

1. That judgment be and is hereby granted in favour of the plaintiff.
2. That the first defendant be and is hereby ordered to deliver to the plaintiff twenty thousand (20 000) litres of diesel within 14 days from the date of this order.
3. That the first defendant pays costs of suit".

I indicated at the time that my reasons for judgement would follow. Here they are.

THE ISSUES

On 24 November 2008 the parties drew up a joint pre-trial conference which identified the issues for referral of the matter for trial as follows:-

1. Whether the plaintiff and defendant entered into an agreement of sale in respect of the fuel and whether Maswere Haulage was party to such an agreement.
2. Whether the defendant was coerced into executing the settlement agreement.
3. Whether plaintiff is the legal owner of the fuel, and

4. Whether defendant is obliged to deliver the fuel to plaintiff.

THE EVIDENCE

In support of its case the plaintiff called the evidence of Dominic Musengi, the plaintiff's erstwhile Managing Director while the first defendant led evidence from its Chief Executive Officer and Chairman Alex Kudakwashe Mahuni, Stephen Gahadzikwa and Cephas Macdonald Muswere. Both parties produced quite a number of documentary exhibits whose significance will be analysed together with the rest of the evidence in this judgment.

It was the plaintiff's evidence that sometime in August 2007 his company was approached by a prospective client Muswere Haulage Dynamics ('MHD') to enter into an agreement to facilitate the execution of a food distribution contract under the United Nations World Food Programme. MHD had vehicles to use but needed fuel in the execution of this contract hence its overtures to the plaintiff. The plaintiff's evidence was that the result of the discussions between the plaintiff and MHD was the drawing up of a joint venture agreement between the two parties. Exhibit 1 was produced to confirm the existence of such a venture.

As the trial unfolded, it was clear that there was disagreement between the plaintiff and the first defendant plus MHD on one side as to whether exh 1 was a joint venture agreement or a loan agreement a position adopted by the first defendant and MHD. The court noted that the first defendant, despite not having been privy to this agreement was in the forefront in rigorously pushing this argument.

A simple perusal of exh 1 will show that despite it having been titled "re: $6 BILLION ORDER FINANCE FACILITY" the agreement was indeed a joint venture agreement. The body of the whole document supports this observation. In the court's view, if this document was a loan agreement as advocated by the first defendant and MHD, it would have contained specific clauses indicating the rate of interest and a specific time within which that loan was supposed to be repaid. There is no loan agreement which contains provisions of how profit should be shared as what is contained in clause 9 of this agreement. It was quite curious to the court that the first defendant's representative was in the forefront in pushing the argument in favour of a loan facility when the first defendant itself was not party of the formulation of exh 1.

In any event, the plaintiff's representative's uncontroverted evidence was that by operation of law his institution was specifically precluded from issuing loans as they were not licenced to do so.

So much was said about the bonding of MHD's properties pursuant to this agreement which it had with the plaintiff. In the court's view, the security of those properties must not be looked at in a vacuum. One needs to look at the total document and in this regard I am certain as passionately argued by the plaintiff's counsel that clause 12 of exh 1 was slotted in to guarantee the due performance by MHD to ensure that plaintiff would get its 65% as its profit share in the whole arrangements.

The Managing Director of MHD, while giving evidence under cross–examination conceded that he had signed many loan agreements and that this agreement could not possibly have been a loan agreement. The relevant questions and answers in this regard went along the following;

Q. You have signed many loan agreements before excluding this one:

A. Yes

Q. You would know a loan agreement would contain an interest clause, repayment and other things

A. Yes your Honour.

Q. These essentials are not there in this agreement

A. They are not there your Honour".

Really, and without any hesitation I make a specific finding that the status of exh 1 must be answered in favour of the plaintiff. The unified position adopted by the first defendant and MHD was calculated to cloud issues.

DID THE PLAINTIFF AND DEFENDANT ENTER INTO AN AGREEMENT OF SALE IN RESPECT OF THE FUEL AND WHETHER MHD WAS PARTY TO SUCH AN AGREEMENT?

The plaintiff's contention was that it directly purchased the fuel in issue and under cross-examination the MHD managing director had no option but to concede this point. In this regard the Managing Director of MHD was asked the following questions and proferred the following responses:

"Q. What do you want to do with the fuel now?

A. I would not dictate anything because the fuel arrangement was done on MHD behalf between Genesis ('plaintiff') and Rolmay ('first defendant') without MHD being privy to the details of the agreement.

Q. In other words the agreement of the purchase of fuel was between Rolmay and Genesis without your involvement?

A. In terms of the specific details, yes your Honour.

Q. At the time when the fuel was acquired did you give any instructions to Rolmay concerning how the fuel was going to be drawn by yourself?

A. No specific operational instructions were given to Rolmay. The only specific instruction was as per exh 10 in response to his letter of 14 October 2007".

It will be noted that the actual payment for the diesel which forms the subject matter of these proceedings was made pursuant to the issuance of a proforma invoice marked exh 4 which specifically described the customer or purchaser as the plaintiff. The original invoice (exh 3) that had initially been presented to the plaintiff bore the name of the customer or purchaser as MHD. It is common cause that this invoice (exh 3) was rejected by the plaintiff hence its amendment to clearly spell out the name of the purchaser of the diesel as the plaintiff. It was only after it had been amended that the plaintiff paid for the diesel.

As expected, the first defendant (as if it was the spokesperson for MHD) argued that the purchase of the fuel was done by MHD despite the latter specifically acknowledging that it knew nothing about the purchase of the fuel except that it was done by the plaintiff.

The first defendant desperately tried to argue through its Chief Executive Officer that when a Mr Maredza attended to exh(s) 3 and 4 he was acting on behalf of MHD. In the court's view that argument has no merit because of the following reasons:-

Firstly, it would be contrary to the very clear evidence of MHD's Managing Director Mr Muswere that his company was not privy to the arrangement between the plaintiff and the first defendant in the acquisition of the diesel. See the questions and answers, *supra.*

Secondly, exh(s) 3 and 4 bear the first defendant's letter heard implying the first defendant directly invoiced the plaintiff for the fuel in issue.

Thirdly and more importantly, Mr Maredza could not possibly have acted as MHD's agent when his principal was not aware of such agency as per Muswere's testimony. What is clear is that Mr Maredza was acting as the first defendant's agent in order to ensure that payment was effected by the plaintiff.

Having laid this background one needs to focus on other pointers that tend to further the plaintiff's position that indeed it purchased the diesel.

Exhibits number 5 and 7 clearly demonstrate that the plaintiff was exerting its control on the purchased diesel. The two exhibits made it abundantly clear that the first defendant would only allow MHD access to this fuel on conditions set out by the plaintiff. With its eyes wide open, the first defendant through its Chairman, Mr Mahuni committed itself to be bound by the conditions set out. The two exhibits are quite explicit and they require no interpretation. Is it not logical that if MHD had control over ownership of the fuel in question it should have been expected to give directives to the first defendant? It is buffling how the first defendant would attempt to argue that the diesel belonged to MHD, a position which is not even supported by MHD's Managing Director, Muswere.

It is clear to the court that from the very beginning the fuel in question remained the property of the plaintiff and that the first defendant was only going to release the fuel to MHD on the specific terms and conditions laid down by the plaintiff.

Other than trying to promote what appears to be a dubious relationship with the MHD, the first defendant had no mandate to deal directly with MHD as regards the release of the fuel. The first defendant was bound to communicate with or take instructions from the owner of the fuel, the plaintiff as dictated to it by exh(s) 5 and 7.

WAS THE PLAINTIFF COERCED INTO SIGN THE SETTLEMENT AGREEMENT?

It is common cause that for a long time the plaintiff had tried to have the first defendant release the 20 000 litres of diesel to it. This followed the collapse of the joint venture agreement between the plaintiff and MHD. It should be appreciated that the release of the diesel to MHD was conditional upon its ability to execute the United Nation Food Programme contract. Its Managing Director Muswere conceded that that arrangement did not take off the ground as it faced many challenges.

Exhibits 8, 8(a) and 13 must be seen within the context of the initiative taken by the plaintiff and the first defendant's representative Mr Mahuni towards the realisation of the objective of having the diesel released to the plaintiff.

No sooner had the settlement agreement exh 8(a) been signed by the parties than it met with controversy. The first defendant's representative alleged that "the settlement was arrived at through unlawful intervention by Senior Assistant Commissioner Chengeta who abused his

office by ordering junior officers at the Central Intelligent Unit to arrest him with a view to coercing him to release fuel to the plaintiff"[1] .

The allegations raised by the first defendant's representative trigger interesting legal issues and it is pertinent that those be considered before I deal with the evidence led in this regard in this trial.

THE LEGAL POSITION

Exhibit 8(a) being a signed agreement is governed by the caveat subscriptor rule. This observation was observed and raised by the defendant's counsel in his closing submissions.

Commenting on this rule R.H Christie remarked as follows:-

> "It is a matter of common knowledge that a person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently turn out not to be his liking he has no one to blame but himself. This general principle is in our law, usually traced back to *Burger v Central SAR* 1903 TS 571 where the learned judge INNES CJ is reported to have commented as follows at p 578:
>
> "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature"[2] .

It is trite that duress and or undue influence are some of the defences a party can successfully raise in order to repudiate a written contract. This is precisely what the first defendant has sought to achieve in this trial.

The position taken by Mr Mahuni on behalf of the first defendant cannot be looked at in isolation. The witness's evidence must be put under scrutiny in the light of the evidence of the other witnesses to see if indeed he signed the settlement under duress.

There are aspects of Mr Mahuni's testimony which I have already commended on which cast serious doubt on the credibility of this witness's testimony. The witness's strout effort to try and defend the agreement that was entered into between the plaintiff and MHD in the witness's absence did not impress the court. The witness strenuously conducted his defence as if he was a legal practitioner paid to represent MHD. The whole record of proceedings will show that the witness came out in full force to support and protect MHD even in circumstances where he was not invited to do so. Not only this, but even in circumstances where his evidence differed materially from the evidence of Mr Muswere as I will demonstrate hereunder.

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[1] Paragraph 7 of first defendant's plea
[2] The Law of Contract in Sourht Africa, R.H. Christie first edition, published by Butterworths in 1983, at p 180

Throughout Mr Mahuni's testimony when he was being led by his counsel, he gave the impression that he still had in his possession the 20 000 litres of diesel in his custody. Under cross-examination by the plaintiff's counsel, he revealed for the first time that he had given MHD the diesel in question starting with the first 100 litres, followed by the remaining quantity. The witness conceded that in doing so he had acted in complete violation of the plaintiff's specific instructions in releasing that diesel. The following questions and answers in his cross examination demonstrate the limping nature of the witness's testimony.

"Q. Did you release this fuel to MHD?

A. Yes

Q. When was this?

A. I am not sure but he wanted to buy an ERF truck and he asked for 100 litres of fuel for MHD.

Q. Did you advise the plaintiff of that development?

A. No.

Q. Why?

A. I did not see any reason to advise the plaintiff.

…..

Q. All in all how many litres of diesel did you release to MHD?

A. I believe at the end of the day MHD accessed the whole facility during the time this matter became the subject of this litigation

Q. Did you seek any written prior authority from the plaintiff?

A. No".

To appreciate the fallacy of the position taken by Mr Mahuni one needs to look at the evidence of Mr Muswere on the same issue of the alleged release of the fuel to MHD. Mr Muswere was categoric that not a single drop of the diesel was released to him by Mr Mahuni and this is what Mr Muswere had to say in this regard:

"Q. Do you know whether Rolmay (first defendant) has delivered the fuel to plaintiff?

A. I am not aware.

Q. Did they not deliver the fuel?

A. No.

Q. Mr Mahuni told this court that he delivered all the fuel to you in October-November after you had indicated your property had been used to secure the fuel, was he lying?

A. Exhibit 10 is self explanatory. He never delivered the fuel to us. If he said so the facts will not be true".

In the court's assessment of the conflicting evidence given by the two witnesses, the court is more inclined to believe the evidence of Mr Muswere as it was consistent with the evidence of the plaintiff especially on the ownership of the fuel and the manner in which the draw down of that fuel was supposed to be made.

I make a specific finding that Mr Mahuni must not be believed when he alleged he had released the fuel in issue to MHD. The conduct of Mr Mahuni makes the court doubt if at all he had the fuel in issue at the time his company was paid by the plaintiff.

It is this same man who has soiled his credibility in the eyes of the court who alleges that when he signed the settlement agreement in the comfort of his legal practitioner's office, he did so either under duress or undue influence. It is necessary at this stage to closely examine the circumstances under which the settlement agreement was drafted and eventually signed by the plaintiff's representative and Mr Mahuni himself.

By his own admission, Mr Mahuni was trained as a prosecutor and subsequently worked as a public prosecutor. He is the Chief Executive Officer and Chairman of the first defendant. He is certainly not an unsophisticated man.

The witness told the court that he was telephoned by Detective Inspector Tuwe who invited him to C.I.D. Headquarters at Morris Depot which place he visited the following day. Upon seeing Tuwe he was advised of the issue relating to the subject matter of these proceedings. Mr Mahuni went on to say that he was advised that if he did not deliver the diesel he would be detained. Commenting on the arrival of Mr Musengi (the plaintiff's representative) at the police station after Mr Mahuni himself had invited him this is what he said:-

> "Mr Musengi eventually came to where I was seated and the policeman told him I had come and wanted to talk. We talked and I asked Mr Musengi that if they wanted the diesel, they should cede the security they were holding from Mr Muswere to me and he declined saying they would have problems. I asked what we could do to resolve the matter and he suggested a settlement plan and I said I preferred my lawyers to do the draft settlement plan. He left for his office on the understanding that I would be calling him later to peruse the settlement plan.
>
> …….

> Mr Gahadzikwa (first defendant's legal practitioners) came to C.I.D. Headquarters, Morris Depot and duly asked if it was in order for me to leave the police station to prepare the settlement agreement at his offices which permission was granted. I gave instructions to Mr Gahadzikwa to prepare the settlement agreement. The document was forwarded to Genesis for the attention of Mr Musengi. The same was returned with material alterations to both the text and content. I am sure Mr Gahadzikwa will have the altered document when he comes.
>
> We then debated on the way forward, that is myself and Mr Gahadzikwa. What we weighed was the possibility of allowing the threat and arrest to go through and facing it in court and also the threat of publicity in the light of the fabricated story earlier told by the police. In my own experience I was sure at the request for remand the police could allege anything, true or false but it was my wish that particular damage be by all means avoided. I also gave Mr Gahadzikwa the peace of information I had gathered about the involvement of a senior police officer to junior officers handling the matter to detain me. He (Mr Gahadzikwa) advised me we would take the risk of signing but would also then make the necessary complaint against the conduct of the particular senior officer and to see that the matter would be completed without bad publicity that would affect my business" (my emphasis).

In his evidence in chief, Mr Musengi for the plaintiff expressed total surprise that Mr Mahuni was alleging that he had been coerced into signing the agreement. As far as Mr Musengi was concerned the agreement was entered into when Mr Mahuni was out of custody and going about his business after Mr Mahuni himself had taken the initiative to have such settlement put in place. The witness further emphasized that he did not draft the settlement agreement but that it was drafted by Mr Mahuni's lawyer on the specific instructions of Mr Mahuni who was better positioned to know the time required to effect delivery of the diesel which he proposed in the agreement stretching from 18 January 2008 to 8 February 2008. The witness denied any form of coercion on his party or on the party of the police in bringing about the settlement agreement.

The position of Mr Musengi on this issue is firmly supported by the cross examination of Mahuni himself which tended to exonerate the police and Mr Musengi himself of any wrong doing. The cross-examination of Mr Mahuni in this regard went along the following:-

"Q. You called Mr Musengi to the police station?

A. Yes.

Q. That was your volition?

A. It was put to me the complainant was willing to listen to my settlement proposals.

Q. Did you do it at your own volition?

A. Yes.

Q. When he came to station where did you and Mr Musengi carry out your discussion?

A. In one of the offices at C.I.D. Headquarters

Q. Was your discussion carried out in the presence of the Investigation Officer?

A. No.

Q. Was there any police officer in that room?

A. No.

……..

Q. How do you know about publicity?

A. I knew it would – the police are in the habit of inviting the press. My fear was not speculative"

It is very clear to the court that Mr Mahuni was not subjected to any form of threat into signing the settlement agreement. Even if one were to accept everything Mahuni said about the manner in which the settlement agreement was signed one would still find it impossible to conclude that the settlement agreement was a product of duress.

The duress that is sufficient to vitiate a contract must not be fanciful or imagined. It must be some real and serious threat and the totality of the evidence put forward by Mr Mahuni and his counsel Mr Gahadzikwa did not come anywhere nearer to this. On his own party Mr Gahadzikwa did not hear any police officer or Mr Musengi threatening to cause the incarceration of Mr Mahuni in the event of failing to reach a settlement. The lawyer relied on the instructions given by Mr Mahuni whose fear in the court's view was merely fanciful and unsupported by the circumstances under which the settlement agreement was prepared and signed.

My assessment of evidence on the settlement agreement would not be complete if I do not comment on exh(s) 11 and 12. Exhibit 12 is a replication of exh 11, the only difference being that the exhibits were addressed to the Attorney General and the Commissioner of Police respectively. The theme in both letters is basically two-fold; to castigate Senior Assistant Commissioner Chengeta for alleged abuse of office by ordering junior officers to arrest Mr Mahuni and to try and provide a historical background of the dispute between Mr Mahuni and Genesis Ventures (the plaintiff).

In the court's view and in the light of the findings of the court deriving from the assessment of all the evidence tendered, the attack on Chengeta was most unfortunate and uncalled for. Mr Mahuni was invited to the police station for questioning and subsequently offered on his own volition to resolve the matter amicably. The evidence as assessed does not support any form of coercion against him by either Chengeta or any of the officers. This is borne out by the evidence of Mahuni, Gahadzikwa and Musengi as seen by the court.

Secondly, the solution proposed or advocated by Mr Gahadzikwa in exh 11 was as a result of information he gathered from his client Mr Mahuni and in the light of the court's findings that information was not a true reflection of what had transpired. In the light of the court's findings, it is not entirely true that the actions of Mr Mahuni made him immune from prosecution and even the settlement agreement he signed did not rule out Mr Mahuni's prosecution. See para 3 of exh 8(a)

To say that the police should not have questioned Mr Mahuni on a charge of either fraud or theft by false pretences was not correct. There was nothing wrong which Chengeta did to warrant his stinging criticism by Mr Mahuni through his legal practitioner.

The exhibits referred to as 11 and 12 must be seen as a well calculated scheme by Mr Mahuni to cloud issues in this matter in order to camouflage what appears to be his fraudulent conduct in dealing with the plaintiff. I attribute the conduct to fraud because he misled the court into believing he had released the fuel to MHD when there is overwhelming evidence suggesting he never did so. Such conduct is deplorable and it made Mr Mahuni a good candidate for prosecution at the time he signed the settlement agreement. The charge of either theft by false pretences or fraud could have been sustainable. So, in essence nothing really turns on exh(s) 11 and 12.

The decision by Mr Mahuni to invite Mr Musengi to the police station when confronted by the police is not without significance. Throughout these proceedings Mr Mahuni tried to give the impression that the diesel belonged to MHD and logically it should have followed that when called by the police to account for that diesel his first port of call should have been MHD (whom he had always argued had the legitimate claim to the diesel). One is left to wonder why Mr Mahuni did not seek to reach a settlement with the "real owner" of the diesel MHD (that is, according to him). It would have been very easy for Mr Mahuni to call Mr Muswere of MHD to give a statement to the police in order to have him exonerated. By

opting to discuss the issue with Mr Musengi, Mr Mahuni was clearly signifying his acknowledgment that the plaintiff was indeed the owner of the fuel and not MHD.

THE ALLEGED NON-JOINDER OF MHD

It was strenuously argued by the first defendant's counsel that the plaintiff ought to have cited MHD as a party to these proceedings and that failure to do so was fatal to the plaintiff's case. I am not persuaded by this argument. Firstly, it completely misses the import of order 13 r 87 which for the avoidance of doubt reads as follows:

> "87.(1) No cause or mater shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the person who are parties o the cause or matter".

Secondly and more importantly, the court has already made a finding that MHD was not the owner of the diesel in question but the plaintiff. There was therefore no need to cite or join MHD in these proceedings. The point was sufficiently canvassed by the plaintiff's counsel. I agree with his position.

Thirdly and equally important it should be noted that in terms of order 13 r 87(2)[3] the court is enjoined to join a party "either of its own motion or on application" by the party who feels they have an interest in the proceedings. In the court's view, this provision is not meant to come to the aid of a party who is fully aware of the proceedings but for some reason consciously decides not to protect their interest. A party that feels it has an interest in the proceeding before the court must take the initiative at the earliest opportunity to protect itself.

MHD has been watching proceedings in this case from the fence. The evidence led in this trial suggests that as far back as October 2007, MHD was aware of the dispute involving this fuel. It got to know about the summons commencing action issued out of this court on 13 March 2008. Its director participated in these proceedings. MHD did completely nothing to have itself joined in the proceedings. Surely it cannot be heard to cry fowl.

In the court's view MHD decided not to join in the proceedings because it had no interest in the matter. It fully appreciated it had nothing to do with the dispute between the plaintiff and first defendant. It must be commended for its professional stance.

It was for theses reasons that I granted judgment with costs in favour of the plaintiff.

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[3] Order 13 rule 87, High Court of Zimbabwe Rules

Sawyer & Mkushi, plaintiff's legal practitioners
Scanlen & Holderness, first defendant's legal practitioners