FRANCIS MASHONGANYIKA
versus
WEDZERA PETROLIUM (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 14 May 2013 and 13 June 2013

Civil trial

S Hashiti, for the plaintiff
O Nyamanhindi, for the defendant

MAFUSIRE J: The plaintiff was a nephew of one Eric Nhodza (hereafter referred to as "Nhodza"). Nhodza was at all material times the defendant's major shareholder. The evidence established is that the plaintiff and Nhodza were very close.

The defendant was a fuel dealer. The plaintiff ran a car sales business. Sometime in 2009 the plaintiff and Nhodza made a deal. The defendant would import 70 000 litres of diesel fuel on behalf of the plaintiff. The defendant would sell the fuel on behalf of the plaintiff. Nhodza had referred the deal to the defendant's officers for implementation. On 1 July 2009 the defendant had raised a pro forma invoice for the fuel. It was in the name of the plaintiff. The cost was USD62 300-00. The plaintiff paid the amount. The defendant imported the fuel and sold it. Between 6 October 2009 and 31 December 2009 the defendant had paid back to the plaintiff an amount in the sum of US$46 381-00. This had been done in tranches. So far all this was common cause.

At the trial the dispute was as to the nature of the deal between the parties. There was much debate on whether the plaintiff's injection of US$62 300-00 into the defendant was a loan or an investment. The plaintiff himself seemed unclear. In some documents he referred to the payment as a loan. But in others, and certainly at the trial, he referred to it as an investment.

However, whatever the nature of the transaction; whether loan or investment, in my view nothing materially turns on this. The real nub of the matter was whether the agreement

between the parties was that the plaintiff's injection of US$62 300-00 into the defendant would yield to the plaintiff an interest rate, or a return on investment, and whether that rate or return was initially 14% per month and subsequently reduced to 7% per month. The plaintiff said he would be entitled to receive an amount of US$8 722-00 per month in interest or as a return on investment until the defendant had paid him back the original capital amount in full or until the deal was cancelled. On the other hand the defendant's position was that following the importation of the fuel it became difficult to off-load it in bulk as required by the plaintiff. The plaintiff had then asked for his money back and for a reversal of the transaction. The defendant had agreed to pay back. Over time the defendant had paid back US$46 381-00. Thus according to the defendant, the balance due to the plaintiff was only US$15 919-00.

The defendant denied that the deal between the parties had been that of a loan of money or an investment agreement. However, the defendant did not describe what it thought was the true nature of the agreement. The defendant also denied that the plaintiff had been entitled to any interest at all or to any return on investment.

On the premise that his injection of US$62 300-00 into the defendant would have yielded him interest or a return at 14% per month the plaintiff calculated that the original $62 300-00, plus the interest earned at that rate, less the US$46 381-00 paid back by the defendant, left a shortfall in the sum of US$67 522-00 due and owing by the defendant. On the other hand, the defendant, on the premise that the plaintiff was entitled to no more than the return of his original capital injection, calculated that US$62 300-00, less the US$46 381-00 which it had paid back to the plaintiff had left a shortfall of only US$15 919-00. The defendant said it was agreeable to paying this amount.

The plaintiff gave evidence. He also called one Fungai Lazarus Nyagwaya (hereafter referred to as "Nyagwaya"). Nyagwaya was a chartered accountant and a certified fraud examiner. At the relevant time he worked for a firm of chartered accountants called Gwatidzo and Company. They had been the defendant's external auditors at the relevant time. Nyagwaya had been the team leader during the audit of defendant's books.

The defendant called its chief executive officer at the time, one Tobias Mupinga (hereafter referred to as "Mupinga"). Neither party called Nhodza although he had been listed as one of the witnesses for the defendant.

The plaintiff had to prove that he had injected US$62 300-00 into the defendant's business for a return or interest at the rate of 14% per month until the capital amount was paid back or until the deal was cancelled. His deal with Nhodza had been verbal. He also had to

prove that at some stage the rate of interest or the rate of return on investment had subsequently been reduced to 7% per month by agreement between himself and Nhodza.

To prove that he had been entitled to a rate of 14% per month the plaintiff produced copies of bank documents which the defendant did not challenge. These showed the plaintiff's initial deposit of US$62 300-00 into the defendant's account. They also showed the defendant's deposits into the plaintiff's account in the sums of US$8 722-00 on 6 October 2009, US$8 722-00 on 10 November 2009 and US$8 722-00 on 15 December 2009. $ 8 722-00 is exactly 14% per cent of US$62 300-00. Thus for three months the defendant did make payments to the plaintiff at rates equivalent to 14% per month of the plaintiff's initial capital injection. The plaintiff argued that this was the proof that there did exist an agreement between him and Nhodza that his investment would yield him a return at the rate of 14% per month.

The defendant did not accept. Mupinga's evidence was that Nhodza did refer his deal with the plaintiff to himself. The defendant would handle it purely as a business transaction and not an accommodation between relatives. He said that his instructions from Nhodza were that the defendant would buy the fuel for the plaintiff. The fuel would belong to the plaintiff. The defendant would sell it for him. They did sell the fuel. However, the plaintiff would only be entitled to the exact amount of his initial capital injection: US$62 300-00, and nothing more. Nhodza had told him nothing about the plaintiff being entitled to any interest or any return on investment.

Mupinga further testified that the repayment of the plaintiff's initial capital outlay would depend on the defendant's cash flow situation. This would be determined by the defendant's finance department. That the first three payments were exactly 14% of the plaintiff's initial capital outlay was just fortuitous, Mupinga said. After all, he further said, subsequent payments were far less than US$8 722-00 per month.

Mupinga further said that when the defendant's repayments had become sporadic the plaintiff approached him. He said it was only at that time that the plaintiff for the first time had raised the issue of interest, or a return on investment with him. Mupinga said that since Nhodza had told him nothing about the plaintiff's entitlement to interest or a return on investment he had referred the plaintiff back to Nhodza. Nhodza had not come back to him with what he had discussed with the plaintiff concerning the matter.

It was not in dispute that at the time of the trial the defendant had paid back US$46 381-00. Documentary evidence from both sides showed that after the payment in

December 2009 the defendant's subsequent payments had become quite erratic. The one payment had been in January 2010. It was for US$3 000-00. The next had been US$3 800-00. It was in April 2010. The next was also US$3 800-00 in June 2010. The further documented payments were US$1 500-00 in November 2010 and US$2 000-00 also in November 2010.

The plaintiff explained in his evidence that after the defendant's payments had become sporadic he had had occasion to meet Nhodza at a funeral. They had discussed the deal. Nhodza had wanted to know whether things had been going on according to plan and whether the plaintiff was getting his 14% return. The plaintiff said he had complained to Nhodza about the erratic payments. Nhodza had then explained that due to a huge influx of fuel dealers in the country it was no longer easy to sell fuel. He had then suggested a reduction of the rate from 14% to 7% per month. The plaintiff said that it was then that he had mulled pulling out of the deal.

There was a gap in the evidence as to whether the plaintiff and Nhodza had finally sealed the compromise deal at 7% per month and how the further payments had been effected. The documented payments fell short by some US$6 000-00 of the figure of US$46 38-001 which both parties agreed had been paid back.

However, the gap in the evidence was, in my view, immaterial. There was other evidence which was common cause and which has helped decide the matter. As the auditors, led by Nyaguwa, conducted the audit of the defendant's books, they wrote to the plaintiff on 2 July 2010 for confirmation of the amount due by the defendant to him. They had a figure but they did not disclose it. The plaintiff had to insert the amount on the blank space provided. The plaintiff inserted an amount of $65 077-00 on the audit letter. He said that he had taken into account all the defendant's payments up to that time. The auditors then called the plaintiff in. They explained that their audit was for amounts as at 31 December 2009, and not as at the date of the letter. They further explained that according to the defendant's books the correct amount owed to him as at 31 December 2009 seemed to be US$71 022-00. The plaintiff noticed that if he discounted the defendant's last two payments of US$1 500-00 and US$2 000-00 in November 2011 the remainder would be exactly US$71 022-00. The plaintiff's evidence on this aspect was corroborated by Nyaguwa in every respect.

The defendant's cross-examination of the plaintiff and of Nyaguwa on the aspect of the balance of the amount due by the defendant as at 31 December 2009 yielded nothing. It actually strengthened the fact that in its own books, after taking into account the amounts it had paid back to the defendant, the amount owing to the plaintiff was $71 022-00 as at 31

December 2009. The plaintiff's claim in the summons was for US$67 522-00. This figure took into account the defendant's subsequent payments of US$1 500-00 and US$2 000-00 both in November 2011. Therefore I hold that the plaintiff has proved his entitlement to the amount he has claimed in the summons. Whatever the nature of the agreement between him and Nhodza was, it was such that he would be entitled to a return on the amount of US$62 300-00 that he had injected in the defendant's business. Mupinga's evidence made no sense. On the one hand he claimed that after Nhodza had referred his deal with the plaintiff, his close relative, to the defendant they had treated it purely as a business transaction. He claimed that they bought the fuel for the plaintiff. They sold the fuel for the plaintiff. But on the other hand Mupinga said that the defendant retained the profits. The plaintiff would only get back his initial outlay and nothing more. He was emphatic that at that time the defendant was in a sound financial situation and would require no assistance from shareholders' relatives such as the plaintiff.

Mupinga did not, and could not, testify on what had been agreed upon between the plaintiff and Nhodza. He had not been there. Nhodza was not called in to refute the plaintiff's version on the interest or return on investment.

Furthermore, the defendant's initial repayment at US$8 722-00 per month tallied exactly with a rate of 14% per month. This seemed to corroborate the plaintiff's evidence that there was an agreement at that rate. Mupinga's explanation that repayments depended on the defendant's cash flow situation and that that US$8 722-00 equated to 14% per month was just coincidental does not accord with the probabilities.

In the premises judgement is hereby entered for the plaintiff in the sum of US$67 522-00 with interest thereon at the rate of 5% per annum from 4 May 2012, the date of the summons, to the date of payment in full. The defendant shall pay the plaintiff's costs of suit.

Zuze Law Chambers, plaintiff's legal practitioners
Muringi Kamdefwere, defendant's legal practitioners