

HERMA ENTERPRISES
versus
KUPUKAI MINE (PVT) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 & 19 September 2014, 3 & 15 October 2014

Civil Trial

M. Ndebele, for the plaintiff
V. Mudzonga, for the defendant

ZHOU J: On 19 May 2011 the plaintiff instituted an action against the defendant claiming payment of a sum of US\$23 235-00, Value Added Tax at 15%, interest on the principal amount at the prescribed rate from 1 November 2010 to the date of full payment, and costs of suit. The claim is in respect of two tipper trucks and one Front end loader which the defendant is alleged to have hired from the plaintiff in October 2010.

According to the plaintiff the contract of hire, which was entered into orally, provided that the defendant would pay a daily fee of US\$600 for each tipper and US\$300 for the front end loader.

The defendant disputed the plaintiff's claim. In its plea the defendant denied that it entered into the contract for the hiring of the equipment referred to above from the plaintiff. The defendant pleaded that the plaintiff's agreement was with a South African Company known as ZIZWE (Pty) Ltd.

Both parties called one witness each to testify on their behalf. The plaintiff called Pesanai Mombe, its Operations Manager. His evidence was that at the relevant time he was the plaintiff's Operation director. He testified that sometime in September 2010 he was telephoned by Augustine Nzuma and one Murata who advised him that the defendant intended to hire the equipment referred to above. According to him Nzuma was introduced as the defendant's Finance Director while Murata was introduced as the Operations Director.

Initially the defendant hired just the loader for some seven days. After the period of seven days the defendant paid a sum of US\$2 100 for the loader. Thereafter the defendant

hired the tippers and the loader and paid for them at the end of every month at the rate already referred to above. The equipment was being used at the defendant's mine called Kupukai Mine. The problem arose when the plaintiff presented to the defendant an invoice for a sum of US\$31 205-25. A copy of the invoice was produced in evidence as exh1. The defendant failed to pay the amount reflected on the invoice, and complained that it was excessive as the equipment had not been utilised on certain weekends. According to the witness he then revised the figure downwards to a sum of US\$23 350 and presented a revised invoice showing that amount. That too was not settled.

The defendant's witness, Augustine Nzuma, stated that the plaintiff's equipment was hired by a South African company, ZIZWE (Pty) Ltd which was represented in the negotiations by one Johane Rautenbach. According to Nzuma, Rautenbach had an agreement to buy chrome from the defendant. His evidence was that the first time he met the plaintiff's witness, Pesanai Mombe, was when he found him at Kupukai Mine where Mombe had gone to meet Johane Rautenbach. When he enquired from Mombe as to the purpose of his presence at the mine he stated that he had come to see Johane Rautenbach as well as to see the place where the plaintiff's equipment was going to be used.

Nzuma stated that Johane Rautenbach hired the equipment from the plaintiff in order to "boost" the output. The defendant's role in the relationship between the plaintiff and Rautenbach was merely to receive correspondent on behalf of Rautenbach. He denied that the defendant had ever made payments to the plaintiff for the hired equipment. According to him payments were made by Johane Rautenbach.

The evidence tendered on behalf of both the plaintiff and the defendant was thoroughly unsatisfactory and in some respects inconsistent with the pleadings filed on their behalf. In its declaration filed together with the summons the plaintiff averred that when the contract of hire was concluded the defendant was represented by "a Mr Johane" its director who was subsequently replaced by Mr Nzuma. The plaintiff further averred that Mr Johane is the one who introduced Nzuma as "his lawful agent in respect of all matter relating to this contract".

However, Pesanai Mombe's evidence was that the defendant was represented in negotiating the contract by Augustine Nzuma and one Murata.

The plaintiff did not produce proof of previous payments in order to link the transactions to the defendant.

The defendant in its plea as amended states that ‘ZIZWE (Private) Limited’ (*sic*) was carrying on mining operations on the defendant’s mining concessions at Lalapanzi. The plea suggests that the defendant had a contract with ZIZWE (Pty) Ltd to do work on the defendant’s claims. That allegation is repeated in the summary of evidence filed on behalf of the defendant in which it is further stated that Nzuma was only a ‘contact person’ for the purpose of receiving communication directed to ZIZWE. But in his evidence Nzuma denied the existence of a contract between the defendant and ZIZWE. His evidence was that the defendant’s contract was with Johane Rauntanbach in terms of which the latter would buy the defendant’s minerals at the mine. He did not suggest that he objected to an invoice being issued in the name of the defendant. Also, he referred to a written agreement between the plaintiff and Johane Rauntanbach. But he never produced a copy of that agreement.

Be that as it may, the onus remained on the plaintiff to prove its case on a balance of probability. The plaintiff failed to discharge that onus. The evidence which was inconsistent with the facts pleaded and the failure to produce receipts issued in respect of previous payments referred to by the plaintiff’s witness discredited the plaintiff’s evidence. Taking the evidence in its totality the plaintiff has failed to prove that the contract for the hire of its equipment was entered into with the defendant.

In the result, the plaintiff’s claim is dismissed with costs.

Mutendi & Shumba, plaintiff’s legal practitioners
Kanyenze & Associates, defendant’s legal practitioners