W. J & A. H GUILD (PVT) LIMITED t/a HILLCREST FARM
and
G. W. GRANGER
versus
POWERFUL GRAND INDUSTRIES (PRIVATE) LIMITED T/A CAPITAL FOODS

HIGH COURT OF ZIMBABWE
UCHENA & MWAYERA JJ
HARARE, 30 September & 19 November 2014

Civil Appeal

A. W. J. Wood, for the appellant
V. Chivore, for the respondent

UCHENA J: The first appellant and the respondent have admittedly been doing business with each other. The first appellant has been paying the debt to the respondent leaving a balance of $23 853-31. The appellant now disputes the relationship because the Credit Facility Application Form on which they signed a contract is on National Foods Operations Limited Capital Foods/ Safco Animal Health's letter heads. The second appellant appealed against the court *aquo*'s finding that he bound himself as a surety for the first appellant's debt. He is the first appellant's managing director and signed the credit agreement on behalf of the first appellant.

The Court *aquo* found the appellants liable for the stock feeds delivered to it by the respondent and ordered it to pay the sum of $23 653-31. The appellants being not satisfied appealed to this court relying on the following grounds of appeal;

1. That the court *aquo* erred by displaying bias towards the respondent.
2. The court *aquo* erred by finding that respondent had the requisite *locus standi* to sue on the agreement in question.
3. The court *aquo* erred in finding that the 2nd appellant had consented to the jurisdiction of the magistrate's court.

4. The court *aquo* erred in finding that the disputed delivery on or around 23 April 2011 was not in issue.
5. The court *aquo* erred in finding that two, 30 tone loads of chicken feed had been delivered to the 1st appellant by respondent on or around 23 April 2011.

The second appellant's appeal can be easily resolved by examining the alleged surety agreement form. It is common cause that he did not sign the portion provided for the surety even though his details had been filled in the portion of the credit facility form the surety should have signed. The failure to sign vindicates his appeal against liability and the court's jurisdiction. His appeal should be upheld.

The issues of the respondent's *locus standi* and deliveries of 23 April 2011 are capable of disposing the appeal without dealing with the other grounds of appeal except that of the court's jurisdiction.

The credit form signed by the first appellant and the respondent clearly indicates that both parties consented to the jurisdiction of the Magistrate's court. The court *aquo* therefore had jurisdiction to hear this case in-spite of the amount claimed being above the court's jurisdiction.

The trial court relying on the evidence of Mark Rogers on p 13 of the record found that the first respondent had *locus standi* as the respondent merged with Capital Foods and they clearly had business dealings as demonstrated by the appellant giving the first respondent payment plans on pages 121 and 122 of the record. Their business relationship is put beyond doubt by the appellant's managing director Gary Grainger, who, when he testified for the appellant on p 22 of the record said; "I had a business relationship with the plaintiff for 2 years until the bank messed up payments". He on the same page agreed that he signed pages 1 and 7 of the Credit Facility Agreement. He under cross-examination at p 24 agreed they entered into an agreement with Capital Foods which was the first respondent's trading name. This proves beyond doubt that the magistrate correctly found that the first respondent had *locus standi*. The appellant's managing director was aware of the plaintiff's identity when he testified. That puts to rest the issue of *locus standi*. The only issue which remains unresolved after his evidence is whether the appellant still owes the respondent any money in view of the disputed delivery of 23 April 2011.

On p 23 0f the record Gary Grainger told the court that he does not believe that they received the delivery of 23 April 2011. The respondent's witness on p 14 of the record

admitted that, that delivery was disputed by the appellant, after it had been paid for. The dispute over that delivery is therefore not disputed but the respondent is saying it is not part of the amount in dispute as it was previously paid for despite the dispute. The respondent's witness' reasoning is not logical because if a customer disputes delivery and has made payments for it he should be credited if there is evidence of none delivery or the supplier doubts its having made the delivery. That payment would affect payments for future deliveries.

On p 13 Mark Rodgers leading evidence for the respondent said, "There are deliveries for November 2011, **there were 2 deliveries of 30 tonnes one there is proof of delivery, the other there is no proof as the client didn't sign for that delivery.** The amount owed or the delivery they claim was already paid for. **The disputed delivery is not part of the claim. I didn't see the relevance of disputing a delivery after the fact. The deliveries we request payment for are dated October 2011".** On p 17 he was asked about the possibility of double invoicing and he said **"Its possible but I don't believe so"**. When it was put to him that the onus was on them to prove they delivered he said, **"We assume it has been received"**. He under re-examination on p19 was asked, "You can confirm you made a conclusion that the defendant paid for deliveries on 20 and 23 April?" to which he answered, **"yes audits confirmed this".**

These exchanges prove that the appellant complained to the respondent about the disputed delivery. They confirm that, that delivery was not signed for by the appellant. It further confirms that despite that dispute and the payment made the respondent wants to be paid for later deliveries without crediting the appellant for payment made for feeds not delivered. The trial magistrate's conclusion that "the plaintiff proved on a balance of probabilities the sum he claims is owed" is not supported by the evidence on record.

The value of the disputed delivery is not stated, leaving this court with no evidence from which it can determine the amount still owing to the respondent. This leaves this court with no option besides remitting the case back to the magistrate who should hear evidence from the parties to determine the amount paid for the goods not delivered and the resultant balance still to be paid to the respondent by the appellant.

The first appellant and the respondent have both partially succeeded. Each party shall therefore bear its own costs. The second appellant has succeeded in proving that he did not bind himself as a surety for the first appellant. His appeal succeeds and the respondent should pay his costs.

In the result it is ordered as follows;

1. The appellant's appeal against the court *aquo*'s finding that the respondent had *locus standi*, be and is hereby dismissed.
2. The 2nd appellant's appeal be and is hereby upheld.
3. The 1st appellant's appeal against the court *aquo*'s finding that the respondent delivered 30 tonnes of feeds on 23 April 2011, is upheld. The case is remitted back to the court *aquo* for it to hear evidence from the parties on the value of the disputed delivery and the amount still owing to the respondent.
4. The respondent shall pay the 2nd appellant's costs.
5. There shall be no order as to costs between the 1st appellant and the respondent.

MWAYERA J agrees----------

Messers Venturas & Samukange, appellant's legal practitioners.
Messers Gula –Ndebele & Partners, respondent's legal practitioners