LEWENOD ENTERPRISES PRIVATE LIMITED
versus
FREIGHT AFRICA LOGISTICS

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 2 June 2015, 13 July 2015, 29 July 2015

Civil Trial

S. Machingauta, for plaintiff
N. Mashizha, for defendant

CHIGUMBA J: The standard of proof in civil proceedings is proof on a balance of probabilities. What this brings to mind is a mental picture of the scales of justice, the embodiment of the underlying principle that underpins the justice system. It entails a balancing of the plaintiff's claim against the defendant's defence. It necessitates a decision of which of their versions of events is more likely to be true. In other words which version is more believable, or most likely to have transpired, than the other? It is my view that the preponderance of probabilities is an exercise which involves an evaluation and an assessment of the likelihood of the plaintiff's version being the correct one as opposed to the defendant's, or *vice versa*. In making this determination we look at the pleadings, at the documentary evidence, at what the parties' representatives said and did when they were in the witness stand, and finally at what the law says in light of the evidence that we will have accepted. Then we determine what ought to be done in order to do justice between the parties.

The plaintiff issued summons against the defendant on 24 March 2014 in which it claimed payment of USD$48 000-00 being the replacement value of Soya beans that were lost while in the defendant's custody, interest at the prescribed rate, and costs of suit. The defendant denied entering into any agreement with the plaintiff for the transportation of Soya beans. It

admitted that the parties entered into an agreement for the transportation of seed maize, which agreement was mutually terminated by the parties. The matter was referred to trial for the determination of the nature of the agreement between the parties, whether such agreement was terminated, whether the defendant gave instructions for the loading of a truck with soya beans, and consequently, whether the defendant is liable for the loss suffered by the plaintiff, of thirty tones of Soya beans, valued at USD48 000-00.

It is common cause that the parties signed a 'Load Confirmation and Rate Agreement on the 28th of November 2011 in terms of which the defendant agreed to bear the risk for any loss or damage to the goods carried by it and indemnified the plaintiff against any claims. The parties agreed that any changes to the contract would be reduced to writing, and that the defendant could not subcontract without the express written consent of the plaintiff. It was a term of the contract that collection of the load was confirmation, by the defendant, of the terms and conditions of the parties' contract. It is common cause that a load of soya beans, as opposed to seed maize, was loaded onto a thirty tonne truck on behalf of the plaintiff. It is common cause that the truck which accepted plaintiff's load went missing and that the representative of the defendant assisted the plaintiff's representative to search for the truck.

Was the agreement between the parties mutually terminated? Was the truck that loaded soya beans a truck which had been sub-contracted by the defendant with the plaintiffs express consent, written or otherwise? Did the truck load thirty tones of soya beans valued at USD$ 48 000-00, or less or more, or maize seed instead of soya beans? When the defendant's representative offered to and did assist the plaintiff's representative to look for the misappropriated truck, was this an acceptance of liability on the part of the defendant? The contemplation of the possible answers to these questions will assist the court to assess the probabilities in this case, and to decide which of the parties' versions is supported by the preponderance of probabilities.

In a civil case, the plaintiff must prove its case on a balance of probabilities. This has been interpreted to mean that:

> "It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say" we think it more probable than not" the burden is

discharged, but if the probabilities are equal it is not". See ***Milner* v *Minister of Pensions***[1]**,** and ***Thulisani Dube Nyamambi* v *Bongani Ncube***[2]**.** In the case of Zimbabwe ***Electricity Supply Authority* v *Dera***[3]**,** the court said that:

> "… in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. In a criminal matter, on the other hand, the trial is an attack by the State, representing society, on the integrity of an individual. The main concern is to do justice to the accused. If the prosecution fails, the State does not lose".

The learnered authors ***Hoffmann & Zeffertt*** in their book ***SA Law of Evidence***[4] state that;

> "There are no exceptions to the rule that all issues in a civil action are decided upon a preponderance of probabilities."

In ***Joubert, The Law of South Africa*** [5] the learned author says that:

> "In civil proceedings, proof is furnished upon a preponderance of probability and this is the case even when allegations of criminal or immoral conduct are to be proved."

Accordingly, we must balance the plaintiff's claim against the defendant's defence, and in so doing, decide which of their versions is more likely to be true. In other words which version is more believable, or most likely to have transpired, than the other? The preponderance of probabilities is an exercise which involves an evaluation and an assessment of the likelihood of the plaintiff's version being the correct one as opposed to the defendant's. In making this decision we look at the pleadings, at the documentary evidence, and at what the parties' representatives said. The evidence shows that the parties willy- nilly and haphazardly changed

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[1] 1947 2 All ER 372 @ 374

[2] HB82-15

[3] 1998 (1) ZLR 500 (SC)

[4] 4 ed at p 528

[5] vol 9 para 573 p 340

the terms of their contract verbally, and not in writing. This makes it difficult to assess whether the defendant is being candid when it says that the contract was 'mutually' terminated verbally. It is equally difficult to assess whether indeed the defendant sub-contacted to a third company as alleged by the plaintiff, because neither the plaintiff's consent to such a course of action, nor the alleged sub contract itself, is in writing.

This case boils down to a question of the plaintiff's word against the defendant's. The probabilities are evenly balanced. Unfortunately, in order for the plaintiff to win its case, the preponderance of probabilities must be tilted in its favor. In this case they are not. The evidence does not show that the defendant had a hand in giving loading instructions to SeedCo. The evidence shows that it was plaintiff which faxed loading instructions to SeedCo. A copy of this fax would have assisted the court to determine, who gave the instruction, which company was authorised to load, the registration number of the truck, the name of its driver and his identity number.

The plaintiff said that this information was supplied to it by the defendant. It may very well have been. There is insufficient evidence that the defendant supplied this information to the plaintiff pursuant to a subcontract. The terms of the subcontract were not made clear to the court. There is insufficient evidence, in the absence of the loading instructions, as to the nature of the goods which were loaded onto the truck in question. Was it soya beans or maize seed? Was it thirty tonnes or less, or more? It is anybody's guess because there was no evidence placed before the court, on which it can base any findings in answer to those questions. It is highly probable that the defendant's version is correct, that as a player in the transport industry defendant referred the plaintiff to another transporter when it was unable to load the plaintiff's goods. If the defendant was unable to load the plaintiff's goods, then in terms of the plaintiff's own contract, defendant was not bound by the terms of the contract and not liable to indemnify the plaintiff against loss or damage.

There is no evidence that, even if it were found that defendant was authorized verbally by the plaintiff to subcontract, the terms of the plaintiff and defendant's initial contract would also be binding on the defendant as a subcontractor. No contract between the defendant and the third party was alluded to, produced, or had its terms if they were verbal, placed before us. We come

to the inescapable conclusion that the plaintiff did not manage to discharge the onus on it to prove its case on a preponderance of probabilities.

It is more probable that the plaintiff was the victim of fraud, and that, because the alleged fraudsters were referred to it by the defendant's representatives, plaintiff wishes to hold the defendant to account. The plaintiff cannot do so on the basis of the evidence which it placed before the court. The cause of action is not founded. The evidence before the court is inadequate, and insufficient, to tilt the probabilities in the plaintiff's favor.

For these reasons, the plaintiff's claim is dismissed with costs.

Tavenhave & Machingauta, plaintiff's legal practitioners
Sachikonye-Ushe, defendant's legal practitioners