

CMED (PVT) LTD
versus
ADMIRE MASANDU

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 17 January 2017 & 22 March 2017

Civil Trial

Ms W Nyakudamba, for the plaintiff
S Simango, for the defendant

MATANDA-MOYO J: The plaintiff instituted summons against the defendant for;

- a) payment of \$101 781-60 being the value of diesel stolen and misappropriated by the defendant during his employment with the defendant.
- b) interest on the above sum at the rate of 5% from date of summons to date of full payment;
and
- c) costs of suit.

In his plea the defendant denied stealing any diesel from the plaintiff. He also denied misappropriating any diesel and challenged the plaintiff to prove its claim. At the pre-trial conference the parties agreed that the issues falling for determination were;

- i) whether or not the defendant stole any diesel from the plaintiff and the value of the said diesel.
- ii) whether or not the defendant is indebted to the plaintiff in the amount stated.

On the date of trial the plaintiff amended the figure to \$43 656-20 made up of counts 1, 2, 3 and 5. The amount appearing on the other counts were abandoned.

Christopher Gochera testified that he is employed by the plaintiff as a loss control officer. He knew the defendant as a former fuel clerk in the plaintiff's employ. He testified that he was tasked to carry out investigations after suspicions arose that there were persons who were collecting fuel at the plaintiff's workington depot, yet these persons were not from government. These persons would draw fuel using coupons from various government ministries. Mr Makoni and Mr Chifamba were some of the persons. He testified that as a fuel clerk, the defendant would receive the transfer documents from government ministries who would have bought fuel. After satisfying himself that the money was indeed reflecting in the account, the defendant would issue a receipt for the amount. He would then record the receipt number on the bank statement as a way of showing that a receipt for the amount had been issued. Thereafter he would refer such persons to the next office for issuance of fuel coupons.

Through this witness the plaintiff produced documents involving transfers of \$12 360-00. One transfer was from Ministry of Labour dated 30 October 2009. The other was from Ministry of Education, Sports and Culture dated 29 October 2009. These two documents were presented to plaintiff at different times. The plaintiff's bank statement reflected only a single entry of the amount of \$12 360-00. The transfer document from Ministry of Labour was fake. The signatories appearing thereon were fictitious. However, the defendant issued receipts to both departments based on a single entry appearing on the bank statement resulting in the plaintiff losing fuel to the tune of \$12 360-00. The defendant issued the receipt to the person purporting to be from the Ministry of Labour thereby causing the loss to the plaintiff.

The defendant again issued receipt of \$6 420-00 to the Ministry of Transport based on fake documents. The Ministry of Roads had transferred the sum of \$6 420-00 into the plaintiff's account for fuel on 30 September 2009. The transaction was actioned on 30 September 2009 when fuel was issued to Ministry of Roads. However, again on 22 January 2010 a Mr Chifamba purported from the Ministry of Transport produced another electronic transfer for the same amount of \$6 420-00. The defendant issued Mr Chifamba with a receipt based on a transfer done on 30 September 2009. Based on a single bank deposit of \$6 420-00, the defendant issued receipts worth \$12 840-00 thereby prejudicing the plaintiff of \$6 420-00.

Thirdly, a Mr Musonza produced transfer documents for \$12 360-00. Mr Musonza purported to be from the Ministry of Lands and produced fake transfer documents for

\$12 360-00. That particular amount of \$12 360-00 had been done by the Ministry of Education and Culture on 29 October 2009. This is the same deposit used in count 1. The documents presented by Mr Musonza were fake as the signatories of Chief Accountant did not exist in the Ministry of Labour and Social Services. The defendant is the one who issued receipts to the two customers. The defendant ought to have picked up that he had already issued a receipt in respect of that deposit. The plaintiff suffered damages in the sum of \$12 360-00 as a result of the defendant's actions. The defendant resultantly issued three receipts based on one deposit.

On 29 January 2010 a Mr Chifamba who purported to be from the Department of Roads presented transfer documents for \$13 960-00. Such documents were created from transfer done by Ministry of Foreign Affairs on 31 December 2009. The defendant issued a receipt to Mr Chifamba knowing that no money had been transferred into the plaintiff's account. The plaintiff suffered loss of \$12 960-00 due to the defendant's actions.

Under cross-examination he conceded that he became aware of the procedure to be followed in issuing coupons whilst investigating this matter. He also conceded that without clients showing proof of transfer documents, it was difficult to ascertain who had made those deposits. He also conceded that the transfer documents the system relied upon, were not the actual RTGS documents but those generated by clients. On being asked whether it was possible for the defendant to decline issuing receipts to persons who would have brought these transfers his answer was in the positive. He explained that upon realising that the funds had been exhausted the defendant could have refused to issue receipts. Issuing receipts twice and sometimes thrice on one deposit was either fraudulent or grossly negligent.

This witness conceded that the defendant did not conceal any documents or information. This witness however, denied that there was another person by the name Mushayabasa who was authorizing release of fuel. He explained that Mushayabasa was responsible for issuing coupons upon verifying that the person had been issued with receipts by the defendant. This witness admitted under cross-examination that a fuel supervisor by the name Nyatsanga resigned during the investigation period but maintained the losses claimed were caused by the defendant's actions.

This witness confirmed that no audit was done. On the suggestion that the fuel was stolen by Directors this witness insisted that the fuel was stolen by the defendant.

Brian Manjengwa also took the witness stand in support of the plaintiff's case. He was the fuel manager at the time. He corroborated the above witness in all material respects. He confirmed defendant was a receipting clerk responsible for receiving RTGS or bank transfers from government departments, cross-check that the amount was appearing in the bank and there after issue a receipt. He described how the defendant would reuse amounts deposited by bona fide ministries to reissue receipts thus causing loss to the plaintiff. It was his evidence that the fraudsters who brought fake transfers were working with the defendant. How else would they be aware of amounts deposited by user ministries? He reiterated that had the defendant acted diligently and honestly he would not have issued three receipts for a single credit in the bank.

Under cross-examination he stuck to his story. He explained exh 9 which is a bank statement which showed that a receipt had already been issued in respect of \$6 420-00. However, the defendant disregarded that entry and issued another receipt. He explained there was one statement for the day. It was easy for the defendant to simply refer to such entry and realise a receipt had already been issued for the amount. Once there was that realization the defendant would refuse to issue another receipt. He refused the suggestion that the defendant was a victim, more so when he repeatedly issued receipts for amounts already exhausted.

C Mushayabasa testified that she used to work with the defendant in the Petrol, Oil and Lubricants Department. Her duties were to maintain coupon register, record incoming coupons and issuing out coupons to customers. She would ensure transfer and receipt tally before issuing the coupons. She confirmed the defendant was responsible for issuing receipts. Under cross-examination she accepted she was the one who recorded that a Mr Chifamba collected coupons. Such Mr Chifamba used two separate identity documents. She did not realise that at the time. She also accepted that during the defendant's absence she could also issue receipts. She could not be drawn to say the defendant misappropriated funds.

Under re-examination she confirmed duplication of receipts cause the losses.

The defendant testified that he is now employed by Econet as a driver. At the time he was employed as an accounts clerk by the plaintiff. His job entailed verifying bank transfers and issuing receipts against such transfers.

He bemoaned the lack of systems in the department at the time. He acknowledged that he would receive a bank statement every morning. Sometimes he would issue receipts which clients

would not collect for over six months. The client would have collected product and would not be interested in collecting the receipt. He testified that it was possible for client to collect fuel without receipt. He denied the existence of a register. He acknowledged issuing three receipts and sometimes two on the same transaction. He explained that because he kept the files in another office which was not accessible always, it became difficult for him to do the verifications before issuing receipts. He denied having had any motive to cause any loss to the plaintiff. He said losses were caused by poor management. No internal audits were done.

Under cross examination he, accepted his duties involved receipting mainly although he could be assigned other duties. On receipting he would check transfer versus bank statement. Once the transfer appeared on the bank statement he could then issue a receipt. He acknowledged having issued two, sometimes three receipts from the same transaction but explained that he did not have time to look at the statements always. He admitted that he would write a receipt reference against every amount receipted on the bank statement.

Analysis of Evidence

From the evidence it is apparent the defendant was employed as accounts clerk responsible for receipting. Before issuing a customer with a receipt it was the defendant's responsibility to ensure the amount reflected in the plaintiff's bank account. Once a receipt was issued the defendant would endorse against the deposit as appearing on the bank statement the receipt number. The defendant accepted that he did issue two receipts and sometimes three receipts based on a single bank entry. His explanation was not reasonable. Firstly he said he could not access the file and would issue receipts without verification. On another breadth he said he was overwhelmed and would not bother to check. In so doing he accepted responsibility for such losses. Mr Gochera and Mr Manjengwa gave their evidence well. They were not shaken under cross-examination. The documents produced indicated that the receipting was done by the defendant. The *modus operandi* was the same. A client would transfer an amount. A receipt would be issued. Thereafter another person would bring fake transfers based on that deposit. Another receipt or other receipts would be issued resulting in that other person accessing coupons without paying for them.

The defendant admitted that he realised there were no proper systems. It is my view that he took advantage of the lack of supervision to perpetrate these offences. He would know the amounts deposited and liaise with his colleagues who would prepare fake documents. The system would easily identify double allocation at receipting level. The defendant knew that once he issued a receipt it became easier to access coupons. He took advantage of the laxity in systems to steal from his employer.

I am of the view that there is overwhelming evidence showing that the defendant stole fuel from the plaintiff. It was at the receipting stage that the losses occurred. The defendant's actions did cause the plaintiff's losses.

The Law

The plaintiff approached this court in order to recover from a thief, losses caused to it. The action based on *condictio firtiva* is a remedy the owner of, of someone with an interest in a thing has against a thief and his heirs for damages. See *Kruger v Naitatil* 1952 (4) SA 405 (SWA) at 408; *John Bell and Co. (Pvt) Ltd v Esselen* 1954 (1) SA 147 (A) at 151 E – 152 B, *Crots v Pretorius* 2010 (6) SA 512 (SCA).

For an applicant to succeed he or she has to show that the subject matter was indeed stolen. The crime of theft should be proved that is:

“that the thing should have been taken without the owner having consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or in other words deprive him of the whole benefit of his ownership.” See *R v Sibiya* 1995 (4) SA 247 (A).

Applying the above law to the facts of this matter, I am of the view that the act by the defendant complained of by the plaintiff constitutes ‘theft’. There is overwhelming evidence of the defendant's participation in the theft of fuel from the plaintiff. It is the defendant who had knowledge of amounts deposited by genuine clients for fuel. The defendant would then liaise with his accomplices to generate fake transfer documents which the defendant would use to raise receipts. Such receipts formed the basis for stealing fuel from the plaintiff. It became easy to access coupons once a receipt was issued. It is common cause that the person who issued all the receipts in this matter is the defendant.

The defendant intentionally orchestrated a plan to steal from his employer the plaintiff. From the evidence of the defendant, he did not challenge the figures as presented. The plaintiff has therefore managed to prove that the defendant stole from it.

Having proven the offence of theft against the defendant, the plaintiff is thus entitled under the *condictio furtiva* to recover the value of the stolen diesel from the defendant. See *Chetty v Isaltile Ceramics Ltd* 2013 (3) SA 374 (SCA).

I am thus satisfied that having proved on a balance of probabilities that the defendant stole fuel from it, the plaintiff is entitled to the order sought.

Accordingly I order as follows:

1. That the defendant pays the plaintiff the sum of \$43 650-20 being the value of diesel stolen from the plaintiff and misappropriated by the defendant
2. That the defendant pay interest on the above amount at the prescribed rate from date of judgment to date of full payment and
3. That the defendant pays costs of suit.

TK Hove & Partners, plaintiff's legal practitioners
Simango Legal Practitioners, defendant's legal practitioners