DELTA ZIMBABWE LIMITED t/a DELTA LAGERS
versus
LAST MAPURANGA t/a LASSY NIGHT CLUB

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 5 June 2017 and 5 July 2017

Trial

B.T. Mudhara, for the plaintiff
L. Jonasi, for the defendant

MATANDA-MOYO J: The plaintiff brought a claim against the defendant for payment of $17 420-71 for goods sold and delivered to the defendant for period ending March 2015. The plaintiff claimed interest at 18% per annum and an order declaring stand 7923 Tynwald Township of stand 7739 Tynwald Township held under Deed of Transfer number 1489/2009 especially executable. The plaintiff also sought costs on a higher scale and collection commission.

The defendant denied being indebted to the plaintiff in the amount claimed nor in any other amount. It was the defendant's case that the plaintiff only delivered stock worth $6000-00. The plaintiff breached the agreement entered into between the parties by failing to deliver supplies. That impacted negatively on the defendant's business. The defendant should therefore not be allowed to recover the $6000-00 as it would be tantamount to the plaintiff benefiting from its own breach. The defendant denied that the mortgaged property is especially executable and prayed for dismissal of the plaintiff's claim with costs.

The issues referred to trial are as follows:

(1) whether or not the plaintiff supplied beverage products amounting to $17 420-71 to the defendant;

(2) what amount is owed to the plaintiff.

(3) costs of suit

The parties admitted that the defendant had paid to the plaintiff the sum of $4 500-00.

The plaintiff called three witnesses to testify in its favour namely Mr Manase Bvocheko, Mr Mark Chisare and Mr George Mangere. Mr Manase Bvocheko testified that he

is employed by the plaintiff as a Credit Control Manager. He testified that in 2014 the defendant applied for and was authorised to get beverages on credit. The terms of the agreement were that the amount would be settled 7 days from date of invoice, to pay interest rate chargeable by Standard Chartered Bank of Zimbabwe on unsecured overdrafts, no credit to be extended where previous payment had not been settled by due date, and that once there is default the whole amount outstanding became due and payable. The defendant failed to pay for goods delivered to the value of around $17 000-00. The matter was referred to him and he in turn engaged lawyers to recover. He also testified that the defendant secured the loan with a mortgage bond over stand 7923 Tynwald Township.

Under cross-examination he denied that deliveries to the defendant's place required to be signed for by provided signatories. He also said that invoices to prove deliveries would be produced. He agreed that there were instances where drivers diverted orders but maintained the defendant's orders reached their destination.

Mark Chisare testified that he is employed by the plaintiff as a driver/salesman. He used to deliver beer in the Hatcliff area. He explained the procedures taken when delivering. He also described the defendant's premises from where he operates. On 23 January 2015 this witness delivered certain beverages to the defendant's place in the sum of $2 341.83. The total amount for empties received was $354.96. The manager on duty signed for the consignment. Under cross examination he was taken to task on why address on invoice indicated Mt Pleasant and not Hatcliff. The witness testified that the defendant used to reside in Mt Pleasant but that he made deliveries at Lassy Nightclub Hatcliff. He insisted he made the delivery at the defendant's nightclub.

George Mangere testified that he is a driver/salesman with the plaintiff and has been so employed for the past 16 years. His duties involve selling and delivering alcohol. He explained that before offloading any deliveries the customer must first confirm the order and quantities. He testified that on four occasions he delivered alcohol to the defendant's nightclub. Through him invoices marked 1, 3, 4 and 5 were produced. He acknowledged he made those deliveries to the defendant's nightclub and the managers signed for the orders. Invoice number I was to the value of $3 422.09 and the value of empties supplied by customer was $494.16. Invoice 3 had an amount of $3 489-89, invoice 4 - $3 017-22 and invoice 5 - $2 634-45. After delivery this witness testified that the managers signed as having received goods as stated on the invoices. Under cross-examination this witness insisted that

the defendant placed the orders and he received same. He insisted deliveries were made as per invoices to the defendant.

The defendant Last Mapuranga testified on behalf of the defendant. He has several beer outlets including Lassy nightclub in Hatcliff. He testified that indeed he entered into a credit facility agreement with the plaintiff for supply of liquor products on credit. However he testified that the agreement as produced by the plaintiff was incomplete. Mr Mapuranga testified that another page showing signatures of those authorised to sign for deliveries was omitted by the plaintiff. He however failed to produce such page. He acknowledged that a bond was registered over the Tynwald stand to the tune of $20 000.00. However his credit facility could not exceed $15 000-00. He denied ever increasing the facility to an amount of $17 000-00. He admitted having received goods to the tune of $6 000-00. It was his testimony that he has since paid for the $6 000-00. He denied having received gods as shown in exhibit four that is invoices 1, 2, 3, 4 and 5. This witness admitted he knew the plaintiff's witness, Ms Mangere and Mr Chisare. He testified that only himself, Mengine Kambarami and Yvonne Muvimwa would receive orders from the plaintiffs. Invoices as produced were not signed by any one of them. This witness testified that he used to stay in Mr Pleasant. He now resides in Avondale. He said he could be a victim of fraudulent activities by Delta employees.

Under cross-examination he admitted his plea did not talk of a missing form on the agreement with specimen signatures. He admitted he could not deny George Mangere came to his place on 23 January 2015. He agreed that his address as appearing on the liquor licence is the Mt Pleasant one. He admitted that after summons he paid monies to Delta which reduced claimed amount to $12 920-71.

The plaintiff's case is simple and straight forward. The plaintiff produced invoices which showed that on five occasions liquor products were delivered to the defendant on credit. Such invoices had not been settled in full. The defendant after the issue of summons made certain payments which reduced the figure to $12 920-71.

From the evidence of both parties it is common cause that the parties entered into a agreement for a credit scheme whereby the defendant would access products on credit. As security a mortgage bond was registered over stand 7923 Tynwald Township of stand 7739 Tynwald Township. The plaintiff's witnesses testified that five deliveries in issue were made to the defendant. The total deliveries came to $17 420-71. Between the time of issue of

summons and trial the defendant paid $4 500-00 leaving a balance of $12 920-71. Generally the plaintiff's witness gave their evidence well.

On the other hand the defendant made bold assertions without proof. The defendant firstly testified that the agreement provided that only three persons from the defendant's side would sign for the goods. Despite naming the three, the plaintiff failed to produce such document. If that document existed the defendant and his lawyers would surely not have missed such a crucial piece of evidence. It is my view that the defendant was not telling the truth.

The defendant denied that goods were delivered to his place. After testimony by the plaintiff's witnesses and after production of invoices the onus shifted to the defendant to at least disprove the plaintiff's story. The defendant could have introduced evidence of his managers then to the effect that no products were delivered. The defendant failed to do so.

The defendant testified that he received goods worth $6 000-00 which he paid for. Again the evidence was not produced. Instead the evidence showed that the defendant paid $4 500-00. If it were true that the defendant received goods worth $6 000-00 he could have admitted owing $1 500-00. Again the defendant's version of events became improbable.

The defendant did not give his evidence well. He was evasive and he struck me as an untruthful person. He was fidgeting most of the times. He also claimed he had inside knowledge of certain employees of the defendant who claimed to have made deliveries at certain premises, only to be discovered that such deliveries were diverted. I am of the view that the defendant was trying his luck to evade payment by invoking all sorts of excuses.

The probabilities of this matter favour the plaintiff. It is common cause that a mortgage bond was registered over the Tynwald property as security. Once there is proof of owing by the defendant, it follows that the property is executable.

This is a simple matter of sale of goods on credit. Firstly the plaintiff should prove the existence of an agreement of sale. In order to prove sale, there must be an agreement on the subject matter, price to be paid. The seller must intend to sell and buyer must intend to buy. See *Union Government (Minister of Finance)* v *Van Soelen* 1916 AD 92, D & H, *Piping Systems (Pvt) Ltd* v *TransHex Group Ltd* (2004) 4 ALL SA 183 (C), *Essentials Citibank NA* v *Thandrogen Fruit Wholesalers* CC 2007 (6) SA 110 (SCA).

From the evidence produced before me it is clear that an agreement of sale on credit was entered into between the parties. The intention of the parties was clear. The plaintiff

intended to sell its liquor products to defendant and the defendant intended to buy. The prices were as per invoices supplied to the defendant at the time of delivery.

The plaintiff has discharged the onus of it to prove on a balance of probabilities that liquor products to the value of $17 420-71 were supplied to the defendant. Evidence by the drivers/salesmen coupled with the receipts proved that. Signatures of managers of the defendant were appended to the invoices. The defendant then failed to discharge the onus on him of disproving the plaintiff's claim. The defendant's version of events had so many contradictions and could not be believed.

In the result I am satisfied that the plaintiff has managed to prove its case. I also took note of the fact that the defendant has made payments of $4 500-00 which reduced the debt to $12 920-71.

According I order as follows:

1. That the defendant pays to the plaintiff the sum of $12 920-71.
2. That the defendant pays interest of the above amount at the rate of 18% per annum from 24 August 2015 to date of full payment.
3. That certain piece of property, namely stand 7923 Tynwald Township of stand 7739 Tynwald Township held under Deed of Transfer number 1489/2009 dated 4 March 2009 is hereby declared especially executable.
4. That defendant pays costs of suit on a client attorney scale.

Mundia & Mudhara, plaintiff's legal practitioners
Koto & Company, defendant's legal practitioners