

VANLEDGE INVESTMENTS (PRIVATE) LIMITED  
versus  
FREIGHT WORLD (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 11 October 2017 and 29 December, 2017

### **Opposed application**

Ms *K Zvinorova*, for the applicant  
*H Mukonoweshuro*, for the respondent

MANGOTA J: The principle which the court laid in *Smith v Hughes*, RL6 QBD 597 to 607 holds true today just as it did at the time that it was pronounced. It neatly fits into the circumstances of this application. It reads:

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would equally be bound as if he had intended to agree to the other party’s terms” [emphasis added]

The applicant, by way of background, allegedly contracted the respondent to transport its 1632 buckets of palmolien oil [“the goods”] from Johannesburg to Harare. It did so verbally. Whilst the goods were in transit from their place of origin to their destination, 748 buckets went missing and a further 210 buckets got damaged.

On discovering its loss, the applicant filed the present application. It moved the court to compel the respondent to pay to it ZAR 294 992 or its equivalent in United States dollars. The sum, it claimed, constituted damages for 958 buckets of palmolien oil which it lost. It insisted that the respondent was a freight carrier.

The respondent opposed the application. It admitted the applicant’s loss. It, however, denied liability for the same. It stated that it was not the transporter of the goods. Ngwato Logistics transported the goods, according to it. It submitted that its contract with the applicant was one of agency. It said it was the applicant’s customs clearing and forwarding agent. It moved the court to dismiss the application with costs.

The law allows persons to enter into written or oral contracts. The latter present formidable challenges when a dispute which relates to what the parties agreed between them as constituting the terms of the contract arises. The challenges arise from the fact that one party will present a position which is materially diametrically opposed to that of the other party. That, more often than not, tends to create some material disputes of fact which cannot, in an application, be resolved on the papers which the parties place before the court.

The respondent took advantage of the oral contract which it concluded with the applicant. It submitted that the terms of the contract contained material disputes of fact which could not be resolved on the papers. It, on the alleged basis, moved the court to dismiss the application.

Decided case authorities show that the court which is being persuaded to adopt the argument of the respondent has a discretion to either dismiss the application, as it was urged to do *in casu*, or to refer the matter to trial [see *Mugurenje v Maphosa & Ors*, 20015 (2) 44 (H), and [*Musukusa v National Foods Ltd & Anor*, 1983 (1) ZLR 232 (S) as read with r 226 of the High Court Rules, 1971].

*Musukusa v National Foods Ltd and Another*, is also authority for the proposition that, even if notice of motion proceedings are wrongly used, the court will take a robust view of conflicts of fact, where they think they can solve the issue despite apparent conflicts in evidence. GUBBAY CJ echoed the view which *Masukusa's* case enunciated. The learned Chief Justice stated, in *Zimbabwe Bonded Fireglass (Pvt) Ltd v Peech*, 1987 (2) ZLR 338 (D) at 339 C-D as follows:

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned.”

It follows, from the foregoing, that not all material disputes of facts are incapable of being resolved on the papers which the parties place before the court. Courts are, where such disputes appear to exist, enjoined to adopt a robust and common sense approach. They should, in other words, employ an approach which furthers the ends of justice and the interests of the parties whose case is before them. Where the approach remains, in the court's view, prejudicial to one of the parties, to the apparent or real dispute, the best option for the court would be to refrain from using the intended route.

The *onus* is always on the applicant to prove, on a balance of probabilities, that what the respondent states as a material dispute of fact is not such. *In casu*, the applicant's undiluted assertions were that:

- (i) it contracted the respondent to transport its goods from South Africa to Zimbabwe;
- (ii) the respondent is a freight carrier;
- (iii) the respondent issued a Road Consignment note to it for the delivery of the goods;
- (iv) it deposited into the respondent's bank account the sum of \$8 595.57 which was for transportation of the goods and payment of duty- and
- (v) the respondent transported the goods from South Africa to Zimbabwe.

The respondent denied paras (i), (ii) and (v). It admitted para(s) (iii) and (iv) [*supra*]. It also admitted that it did not advise the applicant of the existence of Ngwato Logistics which it said transported the applicant's goods from South Africa to Zimbabwe. It advanced no reason at all for not having informed the applicant of the stated matter. On a proper application of the *Smith v Hughes* principle, therefore, the respondents' attempts to deny liability remain very slim if not totally devoid of merit.

It is common cause that there was never any privity of contract between the applicant and Ngwato Logistics. The applicant did not engage the latter to ferry its goods. The respondent did. The applicant did not, in fact, know of the existence of Ngwato Logistics. It only became aware of that company when it received the letter which the respondent addressed to it on 13 February, 2017. The letter was a response to the one which the applicant wrote to the respondent on 8 February, 2017. It claimed, in the letter, that the respondent pays to it ZAR 294 992 for the missing and damaged buckets of palmolien oil.

A robust and common sense approach of the matter points to the fact that the applicant genuinely believed that it contracted the respondent as the carrier of its goods. If it entertained a view which is different from the stated one, the probabilities are that it would not have written as it did. The fact that the respondent issued to it a Road Consignment note and accepted from it the sum of \$8 595-57 which was payment for transportation of goods and duty only serves to confirm the view which the applicant held in regard to its contract with the respondent.

The respondent, it has already been stated, denied that it carried the applicant's goods. It maintained the position that it was the applicant's agent. It attached to its papers a number

of correspondences. These, it said, supported the status which it held in the contract. Amongst the correspondences which it relied upon are the following:

- Annexure A,
- Annexure B,
- Annexure B, C, D, E, F and G.

The first annexure A, has a heading which reads ‘**The Shipping and Forwarding Agents’ Association of Zimbabwe: Standard Trading conditions**. It said it is a member of the stated association. It submitted that the heading of the annexure shows that it is nothing else but an agent of any of its clients, the applicant included.

What is conspicuously absent is that the respondent did not state that it ever drew the contents of the annexure to the applicant. The probabilities are that it did not. If it did, it would have made averments to the stated effect.

I will accept and assume, for argument’s sake, that the respondent drew the attention of the applicant to the contents of the annexure. Where this occurred, the applicant would not have lost sight of clause 17 of the same. That does, to all intents and purposes, operate against the position which the respondent’s took of the matter. It imputes on it the fact that it, in some cases, operates as a carrier of goods in addition to its main objectives. It reads:

“The Company shall be entitled, in the absence of express instructions to the contrary, to employ independent third parties to perform all or any of the functions required of the Company. Where such parties are disclosed to its customers, the Company shall have no responsibility or liability to its customer for any act or omission of such third party .... If the third party is not disclosed to its customer, then such third party shall, for the purpose of the Company’s responsibility to its customer, be deemed to be a servant of the company” (emphasis added).

The above stated clause ties the respondent’s liability to the loss of the applicant’s goods in an irrefutable manner. The respondent contracted Ngwato Logistics to ferry the goods from South Africa to Zimbabwe. It did not disclose that fact to the applicant. It is, in terms of the above cited clause, liable for the applicant’s loss.

Clause (2) of the annexure does not, in any way, come to the assistance of the respondent. The clause states, in clear and categorical terms, that the respondent does, at times, carry goods for other persons – natural or legal entities. It reads:

“The Company is not a common or public carrier. Its carriage is merely incidental to its clearing and forwarding operations and it may refuse to accept for carriage any goods or class of goods” (emphasis added).

Similarly, clause 16 which it said exempted it from liability connects it to liability in a very material way. It reads:

“The company shall not be liable for loss or damage to goods unless such loss or damage occurs whilst the goods are in the actual custody of the company and under its actual control and unless such loss or damage is due to the willful act of the company or its own servants” (emphasis added).

A reading of the underlined words together with the last sentence of clause 17 attaches liability on the respondent. Ngwato Logistics which it contracted to transport the goods is, by extension, deemed to be a servant of the respondent.

The letter which the respondent addressed to the applicant on 14 April, 2016 connects the respondent’s liability to the applicant’s loss in a very substantial manner. It reads, in part, as follows:

“Regarding freight forwarding we are in charge of the cargo from the time of collection to delivery to your door and will provide you with tracking updates”. [emphasis added]

The other annexures which the respondent placed reliance upon do not assist its case at all. None of them states that it is a shipping and forwarding agent. All of them bear this very conspicuous logo which reads: From anywhere to anywhere, we deliver the goods (emphasis added).

I will once again assume and accept, for argument’s sake, that the respondent was the applicant’s agent as it claimed. The above analysed matters show one clear thing. They show that the respondent assumed personal liability for the loss which the applicant suffered following the gross negligence of Ngwato Logistics which it hired to ferry the goods from South Africa to Zimbabwe. MALABA J (as he then was) made some incisive remarks on such a matter as the present one. He stated in *Taunton Enterprises (Pvt) Ltd & Anor v Marais*, 1996 (2) ZLR 303 (H) at 314 H - 315 A that:

“Where the allegation is that personal liability of the agent is based on a written contract, the answer to the question lies in the construction of the terms of the written contract. If the alleged personal liability is based on an oral contract, clear evidence of the terms by which the agent expressly or impliedly assumed personal liability must be led”.

The respondent, it has been observed, cannot escape liability as a principal who contracted with the applicant. It cannot also escape liability as an agent of the applicant. The evidence which the applicant led showed that it assumed personal liability for the applicant’s

loss. It admitted that the applicant suffered the stated loss. It should, therefore, make good the same. The law demands that it does so.

The applicant proved its case on a balance of probabilities. The application is, accordingly, granted as prayed.

*Muza & Nyapadi*, applicant's legal practitioners  
*H Mukonoweshuro & Partners*, respondent's legal practitioners