

TOTAL ZIMBABWE (PRIVATE) LIMITED

Versus

**DUMISANI NCUBE
t/a TOTAL FIFE STREET SERVICE STATION**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 3 MARCH 2022 AND 8 JUNE 2023

Civil Trial

T. Chiturumani, for the plaintiff
R. Ndlovu, for the defendant

TAKUVA J: Plaintiff issued summons against defendant claiming:

- “(a) Eviction of the defendant together with all those claiming occupation and title through him from a premises known as Total Fife Street Service Station situate at No. 126A Fife Street, Corner Fife Street and 13th Avenue Bulawayo, the eviction which is sought following the expiry of the Marketing Licence Agreement that was entered into between plaintiff and defendant wherein defendant was allowed to utilize plaintiff’s said service station but defendant has refused to vacate the premises despite the Marketing Licence Agreement having expired thereby defendant having no right at law to continue occupying the said property and despite demand.
- (b) Costs of suit at an Attorney-Client Scale.”

Defendant entered appearance to defend and filed a plea. The basis of the plaintiff’s claim is that on the 29th of August 2018, plaintiff and defendant entered into a Marketing Licence Agreement herein after called the (“MLA”) wherein plaintiff was the Licensor and defendant the Licensee. Plaintiff who is the owner of property known as Fife Street Service Station allowed defendant to occupy and utilize the service station on terms agreed in the said agreement. The agreed duration of the agreement was one (1) year from the 1st June 2018 up to the 31st of May 2019.

In terms of the agreement defendant was allowed by plaintiff to occupy the said property, to carry out business of importation, purchase, storage, marketing and distribution of petroleum based products and other ancillary business at the said premises. The agreement expired on 31st May 2019 and terminated as agreed.

On the 5th of June 2019, plaintiff wrote to the defendant reminding him that the agreement had expired and was not going to be renewed and that a handover of the property should be done. Defendant refused, failed and or neglected to vacate and to hand over the said premises to the plaintiff to date. The defendant has no right at law to continue in occupation of the property in that the MLA that gave him the right of occupation expired on the 31st of May 2019.

Defendant denied the claim arguing that the MLA was tacitly renewed by the parties on the 3rd of June 2019. According to him plaintiff's territory manager one Chimuti offered him a written contract to sign for the extension of the MLA for a further ten (10) years. He characterized the letter of the 5th of June 2019 as an after-thought, done out of malice.

A joint pre-trial conference minute shows the issues for trial as;

- “1. Whether or not the Marketing Licence Agreement for the period of June 2018 to 31st May 2018 was renewed.
- 1.2 Whether or not the defendant should be evicted from the Total Fife Street Service Station situate at No. 126A Fife Street, Corner Fife Street & 13th Avenue Bulawayo.”

The onus to prove that the MLA for the period of June 2018 to 31st May 2019 was renewed was placed on the defendant while that of proving that defendant should be evicted from the property was on plaintiff. One admission was made by the defendant namely that the MLA for the period of June 2018 to 31st May 2019 expired.

THE PLAINTIFF'S CASE

Plaintiff called its territory manager for the Southern Region one Kesias Makaza. He moved to Bulawayo in September 2018 and he knows defendant as a “dealer.”

The witness said every MLA must be renewed in writing. At the relevant time, he was not the territory manager but one Ms Chimuti who handed over all the records to him. He examined the records but failed to locate the MLA documents.

When asked to explain how a MLA comes into existence, he said a potential dealer completes an application form and he is shortlisted and interviewed. A due diligence search is conducted. Once there is a vacancy, an offer is made and an MLA is availed to the candidate to sign after which the MLA is forwarded to plaintiff for the Licensor to sign. Once the agreement is signed by the Licensor, a hand-over take over takes place and the dealer occupies the premises. He insisted that a valid MLA requires two signatures and that Exhibit 2 was not an after thought but a reminder by the plaintiff that the agreement would not be renewed.

Upon being asked to explain the “Renewal Procedure,” the witness said this is much shorter in that an agreement is issued to the dealer to sign after which the MLA is submitted to the Licensor to sign. He was adamant that *in casu* the MLA was not signed by both parties because there is no evidence of its existence in the Licensor’s records.

The witness said he was familiar with Retail Call Reports whose core purpose is to record any information pertaining to how a station is run. He confirmed that the then Territory Manager visited the premises in issue on the 1st, 2nd, 3rd and 5th of June 2019 to conduct a reconciliation of the accounts to ascertain the balance sheet or financial position of the account.

Further it was his testimony that the defendant was supposed in terms of the MLA to wind up and vacate the premises after the lapse or expiration of the MLA. This according to the witness is what defendant was supposed to do between the 1st and 5th of June 2019. He denied that by allowing the defendant to remain in occupation during this period plaintiff tacitly renewed the MLA.

Under cross-examination the witness confirmed the procedures for entering into an MLA and renewal thereof. He however could not deny or confirm whether or not Chimuti offered defendant another licence since he was not privy to whatever discussions Chimuti and defendant engaged into. Finally, he said the role of a territory Manager in renewing a MIA is that of a facilitator and nothing else. The plaintiff closed its case after the evidence of this witness.

DEFENDANT’S CASE

Defendant himself took to the stand and testified as follows;

That he is a businessman and a Chartered Accountant who has been an appointed dealer by plaintiff since 2012. Sometime in May 2019 at the dealers' conference he was reminded by defendant's retail Manager one Kudzai Midzi that his MLA was due to expire and he should take steps to renew it. He was referred to his Territory Manager Ms Chimuti. He met Ms Chimuti and during that discussion a need arose that his house he had used as surety be revalued. Ms Chimuti arranged for an independent evaluator from Harare and defendant's house was evaluated and his credit facility was reviewed from \$50 000- 00 to \$100 000-00. He was assured by Ms Chimuti that his MLA will be renewed on \$100 000-00 credit limit.

Post 31st May 2019, he continued trading as usual and having received delivery on the 29th May 2019. On the 3rd of June 2019 he received a message from Chimuti to the effect that she will visit the station for stock control, renewal of a MLA and other activities. On the same day, Chimuti brought an agreement drawn between plaintiff and defendant which had terms of renewing the parties' relationship for the next ten (10) years. According to the defendant Chimuti did stock control accounts, pump reconciliation, house keeping and all other heads ticked in Section A of the Retail Call Report.

Defendant further narrated that throughout his long relationship with plaintiff, upon renewal of the MLA, the Territory Manager would offer him an agreement to sign and after signing the copies would be sent to Harare for plaintiff's signature. In the meantime, the parties would be trading normally and governed by the terms of the new agreement. Defendant gave an illustration that the 2018 MLA was signed by him on the 30th May 2018 and plaintiff only signed on the 29th August 2018. However during the period from May 2018 to 29 August 2018, the parties were trading being governed by the same agreement.

After signing the contract offered to him by plaintiff, he was not worried about the possible delay in plaintiff signing it as he was already trading normally and it was always the norm. On 5th June 2017 Chimuti returned with different news advising defendant that after sending the signed agreement to Harare, her bosses decided to terminate the agreement. She gave him Exhibit 2.

Defendant also explained that the real dispute between Perfect Core (Pvt) Ltd and plaintiff was about fuel which Perfect Core paid for but was never delivered by plaintiff. He believed this was the reason why plaintiff declined to sign the MLA. It was defendant's evidence that if there was not going to be a renewal Plaintiff's Territory Manager was going to

visit the station on the 31st May 2019 and ensure that pumps are locked and she was not going to allow defendant to continue trading on the 3rd of June 2019. Further, he denied that upon termination the dealer is allowed two weeks to clear or sell stock because upon termination all stock is purchased by plaintiff. According to him, the two week period allowed in the agreement was for removal of personal property.

Under cross-examination, the defendant maintained that although the MLA expired on the 31st May 2019, the parties' relationship continued based on the renewal agreement the Territory Manager had offered him to sign. Defendant stated that Ms Chimuti was still in plaintiff's whatsapp chat group and stays in Bulawayo. If indeed plaintiff wanted to challenge his testimony it should have called her.

THE LAW

R. H Christie in his book *Business Law in Zimbabwe, Juta & Co* 1998 at page 44 describes a tacit contract in the following terms;

“Offer and acceptance or both may take the form of actions instead of words, in which case the resulting contract can be described as tacit. If the existence of such a contract is disputed the court must decide whether the conduct of the parties shows that they intended to contract with each other (*Salisbury Municipal Employees Association v Salisbury City Council* 1957 R & N 127, 131, 1957 (2) SA 554, 557; *Salisbury Bottling Co. (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd* 1965 RLR 268 280; *Municipality of Bulawayo v Zimbabwe Football Association* 1989 (3) ZLR 261 (S) and the inquiry involves drawing inferences from the proved facts. In *Briston v Lycett* 1971 (2) ZLR 206 A 224-5, 1971 (4) 8A 223 239 the Appellate Division accepted that the inference of agreement cannot be drawn unless the court is satisfied “beyond doubt,” that it is the correct inference The inference of intention to contract cannot be drawn if the conduct of the parties is explained by the erroneous belief that they were already contractually bound to each other. *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 288-9.

A good example of a tacit agreement is *Megashe v Georgias* 1936 SR 59 in which provisory notes were sent under cover of a letter containing certain conditions. By cashing one of the notes the recipient was held to have tacitly agreed to the conditions

In *Elrison's Electrical Engineers Ltd v Barclay* 1969 (2) RLR 461 (A) 464, 1970 (1) SA 158 160 BEADLE CJ described a tacit contract in the following terms;

“A customer takes a machine which requires repairs to a firm skilled in such repairs in order that the firm may repair it, and nothing is said about price or about what repairs might or might not be necessary. In such a case a tacit contract comes into being

between the customer and the firm under which the customer agrees to pay the reasonable charges for such repairs as may be reasonably necessary.”

APPLICATION OF THE LAW TO THE FACTS

The first issue is whether or not the MLA for the period of June 2018 to 31st May 2019 was renewed? As agreed, the onus is on the defendant. Defendant’s argument is that there was a tacit renewal of the agreement in that the renewal agreement was produced by plaintiff who offered it to defendant. Defendant accepted it and signed it and the parties began to operate on the basis of the terms from the 1st June 2019 to the time plaintiff decided to change its mind.

The following facts are common cause;

1. that the parties’ MLA tendered as Exhibit 1 by plaintiff lapsed on the 31st May 2019.
2. that the parties have had the Licensor/Licensee relationship since 2012 and there has been a number of renewals. In fact Exhibit 1 was also a renewal. It is also common cause that the parties traded from 30th May 2018 to 29th August 2018 governed by an agreement which plaintiff had not yet signed.
3. that the service station in dispute as at the relevant time, was under the management of Ms T. Chimuti who was plaintiff’s Territory Manager.
4. that on the 3rd June 2019, the then Territory Manager Ms Chimuti visited the Service Station in dispute and carried out certain activities.
5. that Ms Chimuti gave defendant a termination letter on 5 June 2019.

In arguing that there was a tacit relocation, defendant relied on the following conduct allegedly committed by the plaintiff;

- (a) that on the 3rd of June 2019, Ms Chimuti visited him and offered an agreement which he signed.
- (b) that during that visit, the parties carried out certain activities which clearly indicated a process of renewal of the MLA according to the Call Report.
- (c) that the renewal procedure was that the plaintiff generate an agreement through the Territory Manager and offers it to the Dealer to sign. The agreement is then

sent to Harare for plaintiff's representative to sign. However during the period after the Dealer's signature and before plaintiff's representative signs, the Dealer continues to operate on the same terms and conditions of the agreement yet to be signed by plaintiff.

- (d) that during the discussion with Ms Chimuti a need arose that the house he had used as surety be revaluated. Ms Chimuti arranged for an independent evaluator from Harare and defendant's house was evaluated and his credit facility was reviewed from the sum of \$50 000-00 to \$100 000-00. Ms Chimuti guaranteed defendant that the agreement will be renewed on \$100 000-00 credit limit.
- (e) that after the 31st May 2019, defendant continued trading as usual until the 5th of June 2019.

In respect of Ms Chimuti's alleged "offer" to the defendant, plaintiff denied ever giving defendant an unsigned contract document for extension of the MLA for the alleged ten years. Defendant failed to call Ms Chimuti to corroborate his version. The onus is on defendant to prove that the MLA was extended. From defendant's evidence and heads of argument, plaintiff should have called Ms Chimuti as its witness to "challenge" his testimony on the events that transpired between them. I disagree with this approach because the defendant has the duty to prove on a balance of probabilities that the MLA was tacitly renewed. No such document was produced in Court. Despite defendant's evidence that two witnesses signed the document, none was called to testify corroborating that indeed such a contract document was not only produced to defendant by Ms Chimuti, but also that he signed it and they also signed as witnesses. Further no evidence was led either in the form of emails or letter by defendant making a follow up on the contract documents.

Not only was defendant aware that Ms Chimuti was in Bulawayo but he also had her cellphone number as according to him they used to communicate through whatsapp messages. Ms Chimuti is what can be described as defendant's "star" witness in that in my view his case stands or falls on her testimony. In view of that it is surprising why defendant failed to indicate what efforts he made in a bid to locate Chimuti. In my view since defendant was aware that Chimuti was no longer employed by the plaintiff, he should have made efforts to locate her and call her as a witness. It certainly does not make sense to me for the defendant on one hand to

hinge his entire case on what Chimuti did and said, yet on the other to ignore her evidence saying plaintiff can call her if it so wished.

I take the view that defendant failed to call Chimuti because he knew that she was not going to confirm his version of events.

The second ground upon which defendant relies on is the Retail Call Report compiled by Chimuti on the 3rd of June 2019. While the visit is admitted by the plaintiff, the purpose is vehemently disputed in that according to the plaintiff this was just one of the routine visits that were done by the Territory Manager in executing her duties. On the other hand, the defendant's interpretation of the visit and duties carried out is that it was "business as usual" as the licence had been renewed. Specifically, defendant referred to the heading in the Retail Call Report marked "Matters to be reviewed." One of the items was "Contract or MLA." The defendant interprets this agenda to mean that it was definite that the expired MLA was going to be renewed on the day.

This interpretation is incorrect in my view in that the agenda item alone as it appears from the listed items does not indicate renewal of MLA neither is it a gesture of its renewal. It simply means that discussion was going to be made concerning the MLA, either its renewal or non-renewal.

Again the evidence of Chimuti was crucial in establishing this fact as inferences are drawn from proven facts. Chimuti is the author of the Retail Call Report and as soon as defendant realized that the report was ambiguous, he should have made efforts to locate and call for Chimuti's evidence.

The third ground is that it has always been the norm by the parties that defendant is "offered" a contract, he signs it first and then it is sent to the plaintiff's head quarters for signing at a later date. This is common cause as shown by plaintiff's witness one Kesias Makaza. It is common cause that after the MLA lapsed on 31st May 2019, defendant remained in occupation for five (5) days from 1 June to 5 June, 2019. The reasons for remaining in occupation are hotly disputed by both parties.

However on 5 June 2019 plaintiff's Network Manager wrote to the defendant in the following terms;

“RE: EXPIRY OF YOUR MARKETING LICENCE AGREEMENT (MLA) – FIFE STREET STATION”

The above matter refers. We hereby advise that the Marketing License Agreement (MLA) entered into by and between Total Zimbabwe and yourself expiring 31 May 2019 shall terminate on date of lapse. You are hereby advised that we shall not be renewing it. This termination extends to any subtenants you may have on the premises.

You are required to avail yourself or a representative for a formal handover of the site to a Total Zimbabwe representative on 7 June 2019. We request that you settle all outstanding statutory obligations – council, wages, pensions and claims due to various business activity suppliers and stake holders to ensure a smooth transition. Your trading and guarantee accounts will be reconciled by date of handover to ascertain amounts due and receivable.

We would like to take this opportunity to thank you for the business relationship enjoyed over the years at the station and wish you well in future endeavours. Please acknowledge receipt of this letter by signing and returning a copy.”

Plaintiff expressly communicated its intention as regards the life of the MLA. Notwithstanding this clear position, defendant argued that this was just but an afterthought since the MLA had been tacitly renewed on the 3rd June 2019. I am not satisfied that the “renewal practice” proves that a tacit agreement came into force *in casu*.

Fourthly, defendant argued that the revaluation of his house was in anticipation of a renewal of the MLA. Again, the alleged initiator and executor of the entire process is Ms Chimuti who was not called to testify by the defendant. Defendant failed to produce the valuation reports as an exhibit. This is crucial because plaintiff denied ever revaluing defendant’s house. The onus was therefore on defendant to prove with documentary evidence i.e the evaluation report that indeed the house was revalued in anticipation of the renewal of the MLA. Further plaintiff had denied that defendant’s credit limit was revalued upwards but that defendant was granted a waiver to receive fuel up to the value of US \$96 000-00 when his credit limit was US \$50 000-00. I find that plaintiff’s evidence on this point is more credible and probable than that of the defendant especially taking into account inflationary pressures.

Finally, defendant argued that the MLA was renewed because he was allowed by plaintiff to trade as usual until the 5th of June 2019. This is just an offshoot of the argument that the MLA was tacitly renewed. The evidence of the plaintiff’s witness shows that the last delivery of fuel was on 29 May 2019 and no fuel was ever delivered at the station after this date. After the expiry of the MLA on 31st May 2019, the parties had two (2) weeks to do hand over and take over. Defendant was not supposed to sell fuel after 31 May 2019 as the MLA

says that all the products would be repurchased by plaintiff. According to the plaintiff the continued sale of fuel and other products was therefore illegal. I agree with this observation as the defendant took advantage of the two week period of hand over to carry out illegal sales of fuel in violation of the MLA.

On the evidence on record, I take the view that the defendant has failed to prove on a balance of probabilities that the MLA was tacitly renewed.

As regards the second issue, namely whether or not defendant should be evicted from Total Fife Street service station, the plaintiff relied on the same facts and evidence discussed in the first issue. The two issues are related in that if the answer to the first issue is in the positive then it follows logically that the answer to the second issue is in the negative and *vice-versa*.

Defendant's argument here is still anchored on the following disputed facts;

- (a) that he was offered an agreement by plaintiff on 3rd June 2019.
- (b) that he was allowed to continue trading after the 31st May 2019 and
- (e) that there was a Tacit Renewal.

I must point out that this court has already pronounced itself on the above issues. Plaintiff's argument is based on the same facts which it interprets differently. I find the explanation given by the plaintiff on its conduct reasonable and true. Defendant derived his right of occupation of the property from the MLA of June 2018 to May 2019. The moment that MLA expired on 31 May 2019, he had no right at law to continue in occupation of same. It is common cause that this MLA expired on 31 May 2019.

In view of my finding that the MLA was not tacitly renewed, defendant therefore had to vacate the premises at the expiry of the two weeks hand over period after 31 May 2019. At the heart of the agreement between the parties are fuel sales. Curiously defendant notwithstanding his conviction that the MLA had been unlawfully terminated, did nothing to enforce this agreement through the courts for three years. I find his excuse that he did not approach the court to enforce his rights as he was trying to exhaust other remedies to be false. The only proof that is on record is that defendant only approached ZERA with the issue of the

dispute between Perfect Core Suppliers and plaintiff and not for the alleged breach of MLA by plaintiff.

I take the view that on a balance of probabilities, plaintiff has discharged its onus of proving that defendant should be evicted from Total Fife Street Service Station situate at Number 126A Fife Street, Corner Fife Street and 13th Avenue, Bulawayo. I find also that the MLA was not tacitly renewed.

In the result, the court orders as follows;

- (a) Eviction of the defendant together with all those who claim occupation and title through him from a premises known as Total Fife Street Service Station situate at number 126A Fife Street, Corner Fife Street and 13th Avenue, Bulawayo.
- (b) Costs of suit at an ordinary scale.

Messrs Chiturumani & Zvavanoda Law Chambers c/o Ncube and Partners, plaintiff's legal practitioners
R. Ndlovu and Company, defendant's legal practitioners

