UBUTH BETHU MINING (PVT) LTD t/a
UBUNTU BETHU MINING (PVT) LTD

Versus

A B J ENGINEERING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 9 & 10 DECEMBER 2019 & 30 SEPTEMBER 2021

Civil Trial

Professor W. Ncube & L. Ngwenya for the plaintiff
Advocate P. Dube for the defendant

MABHIKWA J: In this matter, plaintiff issued summons on 15 September 2017 where it claimed:

(a) The refund of the US$21 700 being the balance of the purchase price for a stamp mill which the parties agreed that defendant would refund to the plaintiff following the parties' agreement to cancel the contract of sale. Plaintiff had allegedly bought a stamp mill from the defendant.
(b) Costs of suit.

In its plea, defendant admitted that the parties entered into an agreement of sale, save to say that such agreement was oral. Defendant also admitted that plaintiff paid $26 700 towards the purchase price.

However, defendant denied that there was an agreement to cancel the sale or that plaintiff would be refunded the US$26 700,00 paid towards the purchase price. Defendant denied paying the total sum of US$5 000 as a refund of a part payment of the $26 700. In the contrary, defendant averred that the $5 000 was an *ex-gratia* payment by defendant towards the death bed, and funeral expenses of a relative of one of plaintiff's directors.

At the commencement of trial, it was agreed as common cause that there was an agreement of sale in terms of which plaintiff purchased a stamp mill from the defendant company. Secondly, it was also common cause that plaintiff paid US$26 700,00 towards the purchase price. Thirdly, it was common cause also that at some stage, defendant paid $5 000,00 to plaintiff although the parties do not agree on the reason for the said payment. It was also agreed that the issues to be determined by the court were:

1. Whether the parties agreed that the agreement of sale be cancelled.
2. Whether or not it was a term of such cancellation agreement that defendant would sell the stamp mill to someone else, and from the proceeds thereof, refund the deposit paid, and
3. Alternatively, whether or not the defendant has been unjustly enriched at the plaintiff's expense to the extent of US$21 700,00 being the unrefunded part of the deposit of US$26 700 paid.

Plaintiff led evidence from Sebastian Ncube who also represented the plaintiff company as its director. In short his evidence was that in early 2013, he and his colleague, one day got to the defendant company and liked the mining machinery and equipment they saw there. They spoke to one Ephraim, who took them through a range of company products. Ultimately they decided to buy a stamp mill. They agreed with Ephraim to pay in instalments as and when plaintiff got substantial amounts to pay.

The total purchase price for the mill was US$43 700. Mr Sebastian Ncube's evidence was that he made a number of instalments totaling US$26 700,00. In short, and from his evidence, there developed challenges at the defendant company in respect of the stamp mill. After some time, there were

challenges also at the plaintiff company. This ruling will not get into the minute details of the challenges faced by both companies.

It appears then that the said challenges largely led to, according to *Mr Ncube* representing the plaintiff company, a cancellation agreement in terms of which the plaintiff would be refunded the US$26 700,00 deposit paid towards the purchase price.

Right up to that stage, *Mr Ncube* told the court that he dealt with the defendant company's staff particularly Ephraim and what he believed was the accountant or accounting department of that company.

According to Ncube, after the cancellation agreement, plaintiff was refunded $5 000,00 being part of the US$26 700,00 refund. In fact, one document, with a payment of $3 000,00 from defendant apparently describes the payment as a "refund". (see exhibit 1e).

It was apparent from the evidence, and when asked by the court, Ncube stated that Mr Michael Querl only got involved much later in the matter. It is clear also from the correspondence between the parties filed as exhibits that Mr Querl got involved much later as he sought, in my view to "correct" what Ephraim and others had done. At that stage, Ephraim disappears from the scene and Querl takes over the dispute over the "refund".

Ncube was subjected to intense cross-examination and remained adamant that there was an agreement of sale, which was later on cancelled by agreement of both parties, and that in fact ABJ Engineering went on to make two (2) payments towards the refund as agreed. The total of $21 700,00 according to Ncube remains outstanding. It is worth noting and mentioning that even from the

cross-examination, it is clear that Mr Querl gets involved much later in the failed transaction.

After the plaintiff's case, the defendant applied for absolution from the instance. The court however ruled in judgment number HB-122-19 that the mater proceeds to the defendant's case.

I may state also that during the trial and even after the trial but before judgment, amendments to pleadings were sought by both parties. Most were granted by consent of the parties. The remaining two or three amendments were granted in judgment number HB-182-20. In my view, the above stated amendments were in effect meant to align them with the evidence adduced for and on behalf of both parties. There was no prejudice to either party. This court then went on to deal with and consider the amendment and evidence of both parties as a unit, carefully.

Mr Ncube testified that the stamp mill was expected to have been completed in 2013 but up to 2015, there was no stamp mill. In fact an incomplete one that they had been promised had also been sold.

He and Ephraim agreed to have the agreement cancelled, and that plaintiff be refunded the amount paid. When Ephraim kept on promising the refund, Mr Ncube demanded to see Mr Quell. It is then that Mr Quell advised him that Ephraim and the accounts department had agreed go to certain terms that the company would not normally have agreed to. One of them was that the company would normally want to receive a payment of 50% of the total purchase price of the stamp mill before anything could be done to assemble the stamp mill. According to Mr Ncube, he and Mr Quell, were already arguing at that time. That is also when Mr Quell said they do not refund, but at that stage about two (2) payments by way of refund had already been made to the plaintiff. One of the

payments was shown in exhibit 1 (e), a *pro forma* invoice from defendant. The invoice is endorsed "add Refund BY RTGS 01/11/2016".

Defendant's case

As already stated above, Mr Querl came late into the matter. It was common cause and clear that he was not part of the agreement at the very beginning as it was between Mr Ncube and Ephraim representing their respective companies.

He was not involved right up to the cancellation agreement. As a result, whether what happened between Mr Ncube and Ephraim should be described as an agreement to purchase a stamp mill or an order to purchase same, Mr Querl is not the person to testify about that. Also, he would not be the person to tell the court whether there was a cancellation agreement, or whether defendant was to sell the assembled stamp mill to another buyer and give the proceeds of that mill to the plaintiff.

Michael Querl's evidence was therefore briefly that he learnt from one Ndaba, that Mr Ncube and another gentleman had come. They wanted a stamp mill. A day or two later, they deposited US$5 000,00 and the defendant company started working on the stamp mill although their company's general terms were that work starts after a down payment of 50%. Thereafter, most of his testimony remained largely what he was told by his employees. He however confirmed that documents at his company show that the plaintiff paid for the stamp mill, the last payment having been made on 27 February 2014. He said that his company used the money to buy materials and fittings for the stamp mill. He testified that he personally would not have allowed the plaintiff to pay the amount piece-meal at the slow pace that they did. His testimony was that under normal circumstances, the stamp mill's assembly should have been completed around the end of

February 2013, but because of the failure by plaintiff to pay in time and the resultant confusion and impasse, he is not even sure whether it was completed. However, one or some of the documents from the defendant produced like exhibit 1 (e) were endorsed,

> "… could you please let us know when are you coming for the machine is 99% read for collection."

Mr Querl claimed that that endorsement meant that everything had been secured and was ready. All that was left was that when the customer came to collect it, the pieces would just be carried and assembled on site.

It was his evidence that when he met Mr Ncube for the plaintiff, he wanted the balance on the stamp mill to be paid whilst Mr Ncube was talking of a refund. He says there was no agreement between them. He suggested that the plaintiff would rather make arrangements with another buyer of the stamp mill as there was no refund. He admitted that two payments totaling US$5 000 were made to plaintiff through Mrs Ncube. He denied that this was refund but instead that it was "assistance". He said that he did not know that Ephraim had agreed with Mr Ncube that the defendant company would refund the purchase price. He said Ephraim did not have authority to enter into such an agreement of cancellation and refund which had financial implications.

The second witness for the defendant was Ephraim Ndaba. His evidence is that he was employed by the defendant company as a salesman. His responsibilities were to make orders and sales only. The defendant company was in the business of manufacturing mining equipment and its director was Michael Querl. Ephrain admitted as common cause that he was involved in a transaction for the sale of a stamp mill involving Ubuntu Bethu Mining (Pvt) Ltd and ABJ (Pvt) Ltd. He said this was in January 2013 and the mill was expected to be ready

for collection by 20 February 2014. He reiterated that as shown in the *pro forma* invoices, the standard company terms are that there should be a 50% down payment of a deposit and the balance should be paid on or before collection. Ephraim said he dealt with Mr Ncube and Roy and made the terms clear to them.

I must state at this stage that unlike Mr Querl, Ephraiim admitted and testified that the above stated company policy and payment terms were varied by the company. In his evidence in chief, led by Advocate P. Dube, the following transpired;

"Q - In his testimony, Mr Ncube said they got permission to pay over time, can you say who gave permission to plaintiff to pay in that manner?
A - Mr Mike Querl. He is the only person who can give such permission.
Q - Can you say whether the staggered payment was in fact approved by Mr Querl?
A - Yes
Q - How was this approval obtained?
A - Check your *pro forma* at exhibit 1 (e). That is his signature and he is the only person who approves.
Q - Who asked Mr Querl for that approval?
A - I did
Q - Did you have Mr Ncube with you or any representative of the plaintiff at the time you asked for the approval?
A - No. I went alone to the director
Q - In terms of your employment contract, were you authorized to give such a payment plan?
A - No
Q - It is common cause that a total of US$21 700,00 was paid by plaintiff … what date do you say it was ready for collection
A - It was ready by 20 February 2014."

Mr Querl had sought in his evidence to give the impression that there was no variation to the company payment plans as claimed by the plaintiff. If such variation was done, then he claimed that this would have been done by Ephraim wrongfully as he had no authority to vary the company terms. His decision to

vary the terms would have been null and void according to Querl. The variation of the payment terms had become a very material issue during the trial. Mr Querl and Ephraim contradicted each other materially as they each passed the buck onto the other. In my view however, this is one of the areas when Mr Querl was simply trying to renege on the agreement, making it appear like he was undoing Ephraim's unauthorized actions.

It was Ephraim's evidence further, that after sometime as they were expecting plaintiff to complete payments and collect the stamp mill, they learnt that Roy "the investor" was late. Thereafter again, Primrose (Ncube's wife) came claiming that Ncube was hospitalized and needed money.

Ephraim says that Mrs Ncube "asked for cash and was given money for "assistance". In his own words, he says he "referred the matter to Mr Querl" and indicated that a client was ill and needed financial assistance and Mr Querl said since someone was in hospital, the money would be given as assistance and then "added back to the invoice". This meant that the "assistance" was a "loan". The payments were made on 2 separate occasions, two (2) weeks apart. Ephraim says the "assistance" payments are the amounts of US$2 000,00 and US$3 000,00 respectively shown in exhibits 8 and 9 of the respondent's bundle of documents.

Curiously on both occasions, the amounts of US$2 000,00 and US$3 000,00 respectively are not paid out to Mrs Ncube or Mr Ncube in their individual capacities if it was meant simply as assistance for Mr Ncube in hospital. Both amounts are made out to "Ubuntu Bethu Mining" according to the NMB bank ZETC's application form.

Secondly, both the NMB bank application forms (Exhibits 8 and 9) and exhibit 1(e) of plaintiff's bundle of documents do not describe the payment as "assistance" or "loan" anywhere whatsoever. Instead, and as already shown

elsewhere above, exhibit 1(e) describes the payment as "a refund". Exhibit 1(e) is literally an internal document, made in the form of a requisition document written up in this case by Ephraim and approved by Michael Querl. That document also describes the payee or customer as "Ubuntu Bethu Mining (Pvt) Ltd" not Mrs Ncube or Ephraim. When asked by Advocate P. Dube, Ephraim said that Mr Ncube came on 2 November 2016 asking if they could cancel "the order", and get a refund. He says the company responded by letter stating that it does not refund. However, Ephraim's evidence clearly implied that Mr Sebastian Ncube came to make a request for the cancellation and refund on 2 November 2016. He says this was a day after his wife Primrose Ncube had been given "assistance" money on 1 November 2016. This evidence by Ephraim cannot be true. Firstly, if the amount paid on 1 November 2016 to Mrs Ncube was for a hospitalized husband, Mr Sebastian Ncube, he could not himself suddenly appear at ABJ the following day demanding cancellation and refund. If he did, then the defendant should have asked him about the money given to his wife the previous day. Secondly, it cannot be true that the letter explaining that there is no refund, Exh 3(a) was written in response to Mr Ncube's request for cancellation "of the order" and refund on 2 November 2016. It cannot be so because exhibit 3(a) had long been written on 17 June 2016, unless the defendant was trying to cook up evidence by fraudulently back-dating documents.

Thirdly, that claim by Ephraim cannot be true in light of Mr Ncube's email in the form of exhibit 4(a) dated Monday 5 September 2016 at 10:59p.m which Ephraim claimed he had never seen. Exhibit 4(a) refers to a cancellation refund agreement that had long taken place some months earlier than September 5. It goes on to state;

> "… In July, my wife Eddie met Ephraim who promised payment was going to be done in August. It appears Ephraim keeps changing goal posts which I believe the company is merely playing a delaying tactic. I … that ABJ benefited immensely from the amount paid and all one is asking for is a refund after the cancellation of the agreement."

Responding by a letter to a simple verbal request to cancel the order and refund is suspicious but arguably possible. But that the written response then comes some five (5) months earlier than the request being responded to is practically impossible. In addition and after all, the amount of US$3 000,00 given to Mrs Ncube on 1 November 2016 is described in exhibit 1(e) as a "Refund".

The inference therefore is simply that exhibits 1 (e), 3(a) and 4(a) show that Michael Querl and Ephraim Ndlovu were not being candid with the court on the issue of the cancellation and refund. My reasoning in that regard is fortified by the observation that in about 85% of his testimony in answering questions, both in examination and cross-examination, Ephraim would simply rush to state what the procedure or company policy is. Instead of telling the court what he did or what happened he would try to play safe and tell the court "what normally happens" or what "should have happened".

When asked by *Adv. P. Dube* on exhibit 4(a) as claimed by Mr Ncube that he (Ephraim) was changing goal posts, Ephraim claimed that what he "put in black and white" is what stands. He admits having written exhibit 3(a), yet curiously and surprisingly he also, denies elsewhere in evidence ever writing any letter about a "refund" or ever mentioning any "refund" to Mr Ncube. He even forgets that elsewhere, he admits having written exhibit 1(e) and taking it to Mr Querl for his authorization and signature. Exhibit 1(e) has the term "ADD REFUND". Earlier in explaining exhibit 1(e), he claimed that he had written the

clause "ADD REFUND" because he had failed to find the roper term to describe the payment of US$3 000,00 to Mrs Ncube. The court wonders whether in his failure to find an appropriate term, he then used the word "Refund" which term coincidentally becomes so crucial and controversial in this matter, because its existence or non-existence literally decides whether or not there was a cancellation and refund agreement.

Defendant argues in closing remarks that there was never an agreement to refund. It then argues that the only agreement on "refund is the one contained in exhibit 3 (at page 13 of plaintiff's bundle A. This was a letter by defendant dated 17 June 2016. The relevant position reads:

> "With reference to the above, Ubuntu Bethu Mining failed to meet terms and conditions of the above mentioned order.
>
> Please note that there is no refund since all the money prepaid bought raw materials to build up a mill. Thereafter ABJ will only assist by giving an option as follows; Once ABJ got an order for a stamp mill – it will be assigned to Ubuntu Bethu Mining".

This argument is plausible on the face of, it but to claim that the 17 June 2016 letter was "the agreement" would in my view be erroneous. A reading of the letter will show that it was a response to some prior correspondence letter or verbal request. It cannot be "the agreement". In any case, and as stated elsewhere, this letter was written by Mr Querl at a time when he was obviously trying to correct the mistake that he claims Ephraim and the accounts department had already made. Regrettably for ABJ Engineering (Pvt) Ltd, the crucial aspect of the agreements to purchase the stamp mill, cancel and "to refund" took place before Mr Querl's involvement according to the evidence.

It would be naïve of this court to read the letter and indeed other exhibits herein in isolation. The exhibits should be read in context and together with others. The "agreement(s)" clearly do not start with the involvement of Mr Querl. Rather they seem to have long been made. I say so because of the rest of correspondences, *inter alia*, exhibit 13 being the email of Monday 15 February 2016 and exhibit 14 which is the email of Tuesday 8 March 2016. That correspondence, especially the email of 8 march 2016, show that the plaintiff had been demanding their refund from 2015 after cancellation of the sale agreement.

On Monday 5 September 2016, Sebastian of Ubuntu Bethu wrote yet another email shown below in exhibit 4 (a);

> "Please note that the contents of your as follow up to the meeting we held is not a true reflective of what was discussed. Ubuntu bethu approached ABJ to cancel the agreement due to reasons that have always been forwarded and requested a sum of money that was paid as deposit. ABJ said they didn't have money to refund but promised to refund when they got a client to buy a stamp mill. In the same meeting names of potential client for stamp mills were mentioned. In July my wife and Eddy met Ephraim who promised payment was going to be done in August. It seems Ephraim keeps changing goal posts which I believe the company is merely playing delaying tactic. I don't think it's necessary to overstate that ABJ benefitted immensely from the amount that was paid and all one is asking for is a refund after the cancellation of the agreement. (emphasis is mine)
>
> Kind regards
>
> Sebastian
> Ubuntu bethu"

In that email, the plaintiff used the term "refund" on three (3) occasions. On the fourth occasion, the terminology used was or requested the sum of money paid as deposit" In the same email, the applicant complains that Ephraim had

pronounced that payment of the refund was going to be done in August but it was not done and Ephraim "was changing goal posts".

On the very next day on Thursday 6 September 2016, the defendant replied by email stating that Ubuntu Bethu remained on the top of the list as per the agreement, and that there was no change of goal posts. In that email, there was no mention whatsoever, of the word "refund", not even to query what "refund" the plaintiff was talking about.

The term "refund" was therefore already a contentious term between the parties. It would therefore be inconceivable that on 1 November 2016 after a visit by Mr Ncube's wife, the defendant would make a payment and make an entry on a *pro forma* invoice for the applicant as – "ADD REFUND BY RTGS 01/11/16 – 3 000,00" unless it was indeed a refund.

I do not find it believable that such an endorsement would have been made if there was no agreement to refund and if the payment was not a refund. I find it even more unbelievable to hold, as Ephraim claimed, that he used the term "refund" because he failed to think of any other term to use. Surely, the amount could simply have been referred to as "medical assistance" or "loan".

It appears also from the evidence, including his own evidence that in dealing with the plaintiff, whether it was Sebastian Ncube, Ray, Mrs Ncube or Eddie or any combination of them, Ephraim never took them to Mr Querl. As a result, the veracity of whatever he claims to have them discussed with them and passed on to Mr Querl and vice-versa cannot be verified. It is known only by him and subject to manipulation. It is for that reason that at times his evidence appeared muddled and conveniently made to suit what his employer would want to hear.

Ephraim denied ever seeing exhibit 4(b) and exhibit 13 whilst Michael Querl said he learnt about them from him. In fact after denying, he had to admit in cross-examination after being told that Mr Querl's evidence was that he learnt of the two documents from him. He then admitted that exhibit 13 was in fact addressed to him. It was received by him and was responded to by him. The said email (exhibit 13) was sent to ABJ sales department on Monday 15 February 2016 at 1:33pm. The email makes reference to an earlier held meeting and is addressed to the attention of Ephraim. The body part reads.

"Attention Ephraim

Follow up to our meeting I hereby send details of my banking details.

Account Name: Sebastian Ncube

Bank Name: MBCA

Branch : Belmont

Account No.: 141016033505

I hope you will make a transfer as soon as possible as that will help me to avoid serious problems as I explained in our meeting.

Kind regards

Sebastian" (the underlining is my emphasis)

I am inclined to agree with Advocate W. Ncube for the plaintiff that there is no way exhibit 13 would have been written if there was no earlier meeting where a cancellation and refund agreement was made, otherwise Mr Sebastian Ncube would have to be a genius to falsely create and generate such an e-mail

with such details and even the day, date and time back-dated to February 2016. He would even need to have been a rare breed of a genius to create exhibit 14 which was a follow up email of Tuesday, 8 March 2016 at 10:21pm wherein he complained that since the agreement and promise to his wife in 2015, they had waited and waited and have realized that they may wait and infinite. He appreciated Ephraim's efforts but indicated therein that it was time to see the managing director himself. Exhibit 14 was clearly about the "delayed refund".

As alluded to elsewhere above, Ephraim was quick to deny especially when asked about a certain document or an allegation by the plaintiff. For instance, when told about exhibit 4(a) he quickly denied ever seeing it even before *Advocate Dube* gave it to him or asked her questions. Similarly he denied seeing exhibit 13 until he was told that in his testimony, Mr Quel had claimed that he knew that Mr Ncube did not keep his personal financial affairs separate from those of the company because of exhibit 13 which he got through Ephraim as it was addressed to him.

Further, Ephraim denied knowledge of exhibit 14 which was again a follow up email to exhibit 13 and addressed to him, until it was put to him that in cross-examination Mr Quel had admitted receiving that request from Mr Ncube through him and that he had agreed to meet and had thereafter met Mr Ncube. He could not answer and when pressured for an answer, as to who was not telling the truth between him and Quel, he finally answered simply that he "never received that letter because he never signed it" (exhibit 14). Further Ephraim denied ever meeting Mrs Ncube alone or with her husband, or with Eddie and Nkosilathi any time before 1 November 2016. He said the 1st time he saw her was on 1 November when she was given the "assistance money". However he could not

sustain that evidence when presented with the other facts including the exhibits referred to above.

Unjust enrichment

In its plea to plaintiff's claims defendant makes no reference at all to the alternative claim of unjust enrichment. Throughout the evidence and amendment, there was no contestation of that claim.

In response to the plaintiff's closing submissions, defendant simply argues that no such admission was made and that it remained the plaintiff's onus to prove its claim on a balance of probabilities. Thus, defendant argues that it was not done.

Firstly, our legal position on that point is found in Order 15 particularly Rule 104 (2) of the High Court Rules, 1977. The relevant rule reads as follows;

> "104. Matters which must be specifically pleaded
>
> (2) Except as provided by Rule 117, every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He shall admit or deny every allegation, or state that he had no knowledge concerning it, or confess and avoid it. Every allegation not so dealt with shall be taken to be admitted. The same rule shall apply to every allegation in subsequent pleadings, except where a joinder of issue is justified."

The above rule is clear that the opposite party "must" plead specifically to the declaration or claim in reconvention. The only exception is rule 117 of Order 18 where it is not necessary for a denial or defence as to damages claimed or their amount, and to some extent Rule 102.

Secondly, the requirements of unjust enrichment were laid down in our court by BARTLETT J in *Industrial Equity Ltd* vs *Walker* 1996 (1) ZLR 269 (H) that

> "(a) The defendant must be enriched.
> (b) The plaintiff must have been impoverished by the enrichment of the defendant;
> (c) The enrichment must be unjustified;
> (d) The enrichment must not come within the scope of one of the classical enrichment actions;
> (e) There must be no positive rule of law which refused an action to the impoverished person".

Unjust enrichment as a general source of action therefore, is an action solely based on equity and one that would lie in order to prevent the enrichment of one person to the detriment of another unjustly. I am in agreement with the defendant's submission therefore that unjust enrichment as a cause of action occurs at law when one party is enriched at the expense of another in circumstances that the law sees as unjust.

In casu it is not in dispute that plaintiff paid a total of US$26 700,00 to defendant towards the purchase of a stamp mill. There is no dispute that plaintiff was paid back a total of US$5 000,00 referred to as "refund" in exhibit e. This left an amount of US21 700,00 outstanding being the claim for unjust enrichment. The defendant has been enriched at the expense of the plaintiff which has been impoverished in the same amount.

There has been no plausible explanation proffered to justify why the defendant should retain that benefit. I am also satisfied that defendant did not, as required by the court rules, plead to the claim of unjust enrichment. It is deemed to have admitted the same. No rule of law has been advanced which prohibits an

action to the impoverished *in casu*. I am convinced that all the requirements for this action have even satisfied.

Accordingly, I order as follows that;

1. The payment of US$21 700,00 or its RTGS dollar equivalent at the inter-market bank rate on the day of the payment, the payment being a refund of part of the purchase price paid by plaintiff to the defendant for the manufacture of a stamp mill or alternatively being the amount by which defendant has been unjustly enriched at the expense of the plaintiff.
2. Costs of suit.

Mathonsi Ncube Law Chambers, plaintiff's legal practitioners
Longhurst, Bruce & Company, defendant's legal practitioners