LAWRENCE MANYARA
versus
GIBSON MUZANENHAMO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29, & 30 January & 10 & 29 April 2015

Trial Cause

Plaintiff in person
M Hungwe, for defendant

TSANGA J: The plaintiff, Lawrence Manyara claims a sum of US$19 545.00 as well as interest at the rate of 5% per annum from date of claim to date of judgment, as his share of proceeds owing to him from a business partnership arrangement with the defendant, Gibson Muzanenhamo. Also claimed are costs of suit.

Factual basis of claim

In September 2011 the plaintiff claims that he entered into a verbal partnership agreement with the defendant. The terms thereof were that they were to import cell phones from China for resale and each party was to receive 50% of the net profit. In terms of his contribution to the partnership, the plaintiff says he secured air time from NetOne (a mobile phone operator), worth $10 000.00 on 30 days credit. He says that it was the profit realised from the sale of air time, which instead of paying NetOne immediately, provided the capital for the partnership to enable the importation of cell phones from China.

According to the plaintiff, the defendant already had a shop at a business complex known as Gulf Complex and the partnership leased space within his shop to sell the cell phones. It is also plaintiff's contention that by 31 of December 2011 the business enterprise has realised a profit of $40 000.00. It is on this basis that the plaintiff says he was entitled to receive $20 000.00 as his 50% share. It is his further contention that when he demanded his share of profits, the defendant only gave him US$455.00 in the form of cell phones, leaving a balance of US$19 545.00 which he hereby claims.

The counter claim

The defendant on the other hand denies ever entering into a partnership arrangement with the plaintiff. He says that whatever business he was into, he used his own money and never borrowed or entered into credit facility arrangement involving the plaintiff. Instead, he has a counter claim on the basis that on 31 January 2013, the plaintiff acknowledged being indebted to the defendant for cell phones which he did not deliver to him from China valued at US$5 960.00. This amount was supposed to be paid over four months starting in February 2013 with the final instalment in May 2013. It is defendant's position that despite demand this amount has not been paid. He therefore seeks payment of US$5960.00 from the plaintiff with interest at the rate of 5% per annum from date of summons to date of payment. Costs are also sought on an attorney client scale.

The plaintiff denies owing the defendant the amount in question, arguing that the acknowledgement of debt which he signed was under duress as he was being held in police detention at the time for alleged fraud. His defence to the counter claim is that the cell phones in question were seized by immigration authorities in Hong Kong as the phones were counterfeit. As such his standpoint is that he is under no obligation to pay.

Plaintiff's evidence in chief

At the trial, the plaintiff in his evidence confirmed being in the business of going to China and Dubai to buy phones. He explained that he had made over 30 such trips over the years in this regard. He further expounded that he would go on these trips together with one Musa Banda, who later also gave evidence on behalf of the plaintiff. He too was also in the business of buying phones.

Regarding how he came to be in partnership with the defendant, his evidence was that through what he described as a "connection" he was able to obtain the airtime from NetOne, which he needed an outlet to sell. He confirmed that the defendant was in the business of selling air time and cell phones whilst he was in the business of buying cell phones. He says he needed to expand and it was within this context that the arrangement was entered into with the defendant. His explanation was that instead of paying NetOne immediately, the two agreed that the money from the sale of air time would be used to buy cell phones.

His evidence was that three trips to China had been undertaken specifically on account of the partnership venture. The first was on 25 September when he had taken US9

997.00 to buy phones. The second trip was on 21 October 2011 and he took $10 000.00 on this occasion. The third trip was on 3 December and he took $9980.00 to buy phones.

It was also his evidence that the gross profits before expenses was as follows: September US $22 000.00; October $29 350.00; and December $23 950.00. In terms of profit held as stock in the form of phones he said that in September this was $10 200.00; for October $11.790. 00 whilst for December it was $17 020.00. This amount totals up to $39 090.00. It was his explanation that his claim for $20 000.00 was based on having rounded up this figure. It is on the basis of this stock that he lays his claim for $19. 400.00.

He did not produce any concrete source for the above figures on which he based his claim or confirmation that these figures were over and above any payment to NetOne. His explanation for this was that he was largely on the procurement side of the business partnership. His evidence was that the partnership was short lived as his partner was not cooperating and forthcoming with actual profits after selling the phones. However he testified that even after what he termed a trial partnership ended, they still continued doing business together with defendant giving him money to buy cell phones in China for him. He said that he did not insist on his outstanding payment for profits because they were "friends".

The plaintiff admitted that he had been given US$ 5960.00 by the defendant to buy phones for him and that the defendant had also paid for his air ticket. His explanation as to how the loss of the cell phones occurred was that whereas in the past the airline would permit them to bring the purchased phones as part of their luggage, this was no longer permitted. They had to get an agent to send the goods as a separate consignment. On this fateful trip, the phones, after being dispatched by an agent, were confiscated in Hong Kong as counterfeit phones. The agent according to the plaintiff, sent an email explaining this eventuality. The plaintiff said that he only managed to access the email from Hong Kong confirming the confiscation after he had already signed the affidavit acknowledging the debt. He had lost the password to the email and therefore had been unable to open the email which would have confirmed his story that the phones had been confiscated by the customs in Hong Kong. Both he and his friend Musa Banda, who had also sent goods through the agent, had used a joint email to which they had both forgotten the password. It was after successfully opening the email that plaintiff became adamant that he would not pay in the face of confirmation as to what had happened to the consignment. His position was also that the risks were known to the defendant of importing counterfeit phones and that there was no insurance to cover the risks. He said that he signed the affidavit because he did not want to be detained any longer.

The plaintiff also admitted going to China to try and retrieve the phones and it was on his return that he was told to go to the police station where he was detained on the strength of a complaint lodged by the defendant. He also plainly admitted that he brought this claim because he could not understand why the defendant was suing him for US$5960.00 when he had not pursued the partnership claim against him. He further stated in response to cross examination that he would not have brought this claim if the defendant himself had not insisted on suing him for the non-delivered phones.

Musa Banda who also gave evidence on the plaintiff's behalf confirmed that they had gone on previous trips together. In particular, he confirmed the trip to buy phones in China which phones had later been confiscated in Hong Kong. However, he was unable to comment on whether there was a partnership arrangement between plaintiff and defendant involving the sharing of profits as he was not privy to that information. He confirmed however that the plaintiff would also be going there to purchase phones for his own business. He also stated that after the confiscation incident, the plaintiff had attempted to replace some of the phones but that these had been rejected by the defendant as the wrong phones and counterfeits. He also said that in his own case, having also been sent by one Robson Matore to buy phones, he had reached an amicable arrangement of repaying him his confiscated phones.

Defendant's evidence

The defendant's evidence was to the effect that he had never been in a business partnership with the plaintiff. He explained the arrangement as one where he would buy the plaintiff's air ticket to travel to China. The plaintiff would bring back phones and that he would then buy these phones from the plaintiff. Where they were sending the plaintiff as a team with others in the cell phone business, he would pay for half the ticket. He stated that he did not go to buy the phones himself as cost cutting arrangement. He also said that he does not own a passport and therefore cannot travel.

He confirmed giving US$5960.00 for phones which he then did not deliver. He also said that the plaintiff was unable to provide clear proof of the phones having been confiscated. He stated that he went to the police and reported the plaintiff on fraud charges when the two failed to settle the issue. He denied having an air time arrangement as he said he has his own shop and buys airtime directly from NetOne. He denied vehemently that the affidavit signed by the plaintiff had been under duress at the police station.

Robson Matore was the last go give evidence. He collaborated the defendant's testimony to the effect that the arrangement was one where he had teamed up with Musa Banda to buy his phones on the one hand and defendant had teamed up with the plaintiff, Lawrence Manyara on the other. He also shed light that the arrangement was largely one where plaintiff and Musa Banda would bring phones which they put their mark up on and the others would buy the phones and in turn put their own mark up for final resale. The arrangement also involved giving them money for direct purchases of phones. It was in these instances that their travel costs would be contributed to.

Regarding the trip in question where they had been advanced money specifically for the purchase of phones, he stated that he had given Banda $11. 000. 00 to purchase phones whilst the defendant had given the plaintiff US$5960.00. The defendant had borrowed an extra US$200.00 from him as he wanted the plaintiff to also bring him a car radio. He confirmed the defendant and himself had split the ticket costs in half with the plaintiff and Musa Banda.

He also confirmed that upon return they had been told by Musa Banda and the plaintiff that the phones had been confiscated. He said that they did not believe the story as only an email was later produced from China and there was nothing directly from Customs to say that the phones had been confiscated. It was under these circumstances that he and Musa Banda had finally entered into the arrangement where Musa Banda would pay back the money and that the same arrangement had been agreed to between plaintiff and the defendant whereby the plaintiff would pay back the defendant. His explanation was also to the effect hat that the agreement between the plaintiff and the defendant was that the money would be returned or alternatively he would be given his phones. According to Robson Matore, the plaintiff however had reneged on the agreement after he had gone to China on a follow up trip and brought back some phones which were rejected by the defendant. He also explained that each of them had their own business at Gulf complex and that the arrangement was a cost cutting one.

Legal and factual analysis

It is against the backdrop of the above facts that this court is called upon primarily to determine whether there was a valid partnership between the plaintiff and the defendant, and also whether the plaintiff is in fact owed more than the defendant is claiming from him.

The essentials of a partnership are that:

(a) each of the partners brings something into the partnership or binds himself to bring something into it whether it be money, labour, or skill;
(b) the business should be carried on for the joint benefit of both parties; and
(c) the object should be to make profit or some other gain.
(d) the contract should be a legitimate contract

See *Rhodesia Railways & Ors* v *Commissioner of Taxes* 1925 AD438-465; *Metallion Corp Ltd* v *Stanmarker* Mining *(Pvt Ltd)* 200 7(1) ZLR 301 at 302 A-B. However, the presence of these essentials is not necessarily conclusive where there is evidence of a contrary intention whether in an agreement or in light of other admissible evidence. (See also *Stanmarker Mining (Pvt Ltd)* v *Metallion Corp Ltd* 2006 (1) ZLR at 308F-G). Furthermore, the business need not be a continuous one but can be for a joint venture in respect of a single undertaking as long as the requirements of a partnership are present. (See *Pezutto* v *Dreyer and Others* 1992 (3) SA 379 (A). Also as observed by Christie relying on Grotius, 'profit means net profit and an agreement to share gross returns is not normally a partnership'. [1]

Although a business partnership can be oral or by conduct clearly the presence of a written agreement which details the agreed parameters of the partnership has the advantage of avoiding problems such as in this case, of the difficulty of proving the existence of the partnership in the first place. In casu there was no written agreement with the plaintiff relying on what he variously termed as a "form of understanding" or a "trial agreement" to found his claim. In an economic environment where more and more people are finding ways of complementing their skills in entrepreneurial arrangements but without the knowledge of the formal law that surrounds various types of business formations, suffice it to observe that this in an area where the state and legal service organisations can equally be proactive with legal information dissemination. *(See observations made in Deria Mupapa* v *George Mandeya* HH 443/14)

At the heart of misunderstandings such as these appears to be the very loose and often fluid misunderstanding, prevalent in our society, among non-legal savvy citizens, of what constitutes a business arrangement such as a partnership. Also a situation where primacy is given to friendship first and business second is one that all too often abounds amongst citizens to their detriment. It further compounds the difficulties that arise when preference for orality in associative business arrangements, rather than the written word, is mistaken for

[1] See RH Christie *Business Law in Zimbabwe (Juta & Co Ltd: South Africa) 1998 at p 358*

keeping the arrangement plain and simple. The plaintiff exemplified this problem of friendship first and business second, most clearly in his responses in cross examination when he said the following:

> "Lawyer: You waited for the whole of 2012 and part of 2013 until such time you approached the court in 2013 and you said the reason you came to court was because he had caused your arrest.
>
> Plaintiff: It was my right to claim at any time.
>
> Lawyer: Had he not reported you to the police would you have reported him in this matter.
>
> Plaintiff: No, no he was my friend. I would not do this to my friend. His reporting was a push factor. He pushed me into claiming. I wanted to claim my money but did not do so because he was my friend."

The above statements tend to confirm that these proceedings where brought because the defendant claimed his money for the non-delivered phones. They also tend to confirm that the plaintiff did not really consider himself as having a claim against the defendant which was worth pursuing.

The plaintiff's claim that he brought money into the business in the form of proceeds from the sale of net one air time is problematic. The plaintiff's own evidence was that what he considered as having brought to the partnership was the airtime business credit facility. Taking his own evidence that the proceeds from the sale of Netone air time were used to finance the purchase of phones before paying Netone, then there clearly is an air of illegality in 'robbing Peter to finance Paul'. Indeed the plaintiff failed to place evidence before this court to confirm systematic payments to NetOne to justify that what he seeks to share were indeed net profits. Instead the only evidence submitted was a letter from a later date after the purported partnership which showed that he was significantly in mora regarding his payments to NetOne, as evidenced by their demand from him. If it is the sharing of net profits that is a strong indicator of a partnership, it was clearly absent in this regard.

The evidence also suggests that there was no business partnership in the sense that business would be carried out for the purposes of realising joint profits. The evidence by three of the witnesses in particular namely Musa Banda, Robson Matore and the defendant himself all corroborated the fact that the arrangement which was in place was one that would benefit each of them in their individual capacity as opposed to a partnership arrangement. Whilst Musa Banda admitted that he was not privy to any other arrangement that the plaintiff may have had with the defendant, there was nothing that the plaintiff was able to place before this court to confirm his claim of a partnership. Instead what he was able to tell the court was that although he considered himself as having had some loose working arrangement for three

months which then failed, the primary driver in bringing his claim was because he had been reported for fraud. The defendant on the other hand was supported in his evidence including by the plaintiff himself that the sum of $5960.00 had been advanced to him for the purchase of phones which were not delivered for reasons which do not in my view go to the root of their contractual agreement.

In the circumstances I find that there is no basis for the plaintiff's claim for $19 545.00. I do find however that the defendant's counter claim for $5960.00 is a valid one and ought to be paid. I however do not think that the costs of suit on a higher scale are justified.

1. Accordingly, the plaintiff's claim for $19 545.00 is dismissed.
2. The defendants counter claim for the payment of $5 960.00 succeeds with interest at the rate of 5% per annum from date of claim to date of payment.
3. Defendant is awarded costs of suit on an ordinary scale.

Hungwe & Partners, Defendant's legal practitioners