

CALLANDER ENTERPRISES (PRIVATE) LIMITED
and
MAKOMBORERO MUZA
versus
ECONET WIRELESS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 15 September 2017 & 9 May 2018

Trial

L Zero, for the plaintiffs
S Mubvuma, for the defendant

MATANDA-MOYO J: The plaintiffs sued the defendant for payment of \$54 000 plus interest plus costs of suit. The claim is based on unjust enrichment. The plaintiffs alleged that sometime in 2008 they entered into a verbal contract with the defendant for the supply of shared phone sim cards. The parties also had a separate written agreement separate from the verbal one above.

In terms of the verbal agreement the plaintiffs would, through the use of their own funds purchase shared phone sim cards from a company called Shared Phone (Pvt) Ltd, which company was based in South Africa. Such sim cards would be delivered to the defendant who would register, activate and allocate phone numbers to the sim card for distribution to payphone operators. The understanding from the plaintiffs was that at a later stage the verbal agreement would be reduced into writing and parties would agree on a share of profits. In terms of the proposed agreement the plaintiffs were to get 10% on all re charges.

The plaintiffs thus bought 2500 sim cards, had them registered with the defendant and distributed to end users. The defendant advised the plaintiff that they would be responsible for replacing lost or damaged sim cards resulting in the plaintiff purchasing a further 200 shared sim cards for replacement purposes. In 2014 the plaintiffs got the knowledge that defendant had converted the pay phones into buddie lines which are active to this date. The defendant is thus deriving a benefit from the buddie lines yet has not paid anything towards those lines.

The plaintiff spent \$54 000 on purchasing the lines which the defendant is unjustly benefitting from.

The defendant pleaded that the plaintiffs claim is prescribed in terms of s 15 (d) as read with s 16 (1) and (16 (3) of Prescription Act [*Chapter 8:11*]. The defendant also excerpted to the plaintiffs' declaration as being vague and embarrassing in so far as it failed to identify who represented the defendant in the alleged contract. The defendant averred that the plaintiffs' declaration failed to disclose a cause of action rendering it fatally defective. The plaintiffs' claim for breach of contract fails to disclose how such breach was occasioned. The plaintiffs' in their pleadings fail to disclose how liability is imputed on the defendant.

The defendant also specially pleaded that the plaintiffs' claim is invalid having been instituted both in contract and on unjustified enrichment.

On the merits the defendant denied entering into the alleged agreement with the plaintiffs. The defendant only acknowledged having entered into a written agreement with the plaintiffs on 6 August 2008. The defendant also denied entering into any agreement with the second plaintiff in his personal capacity.

The defendant pleaded that any decision to purchase pay phone sim cards from Share Phone South Africa (Pvt) Ltd, was not based on any agreement with the defendant. The defendant also denied having converted the plaintiffs pay phone sim cards into buddie lines. The defendant denied being liable for any damages that may have been suffered by the plaintiffs as a result. The defendant prayed for dismissed of the matter with costs *debonis propriis*, on a legal practitioner and client scale.

In their replication the plaintiffs conceded that no agreement was entered into with the second plaintiff in his personal capacity. The second plaintiff only represented the first plaintiff.

The issues which were referred for trial at Pre-Trial are as follows:

- (1) Whether or not the plaintiff's claim as pleaded has prescribed.
- (2) Whether defendant was given possession of the sim cards purchased by the first plaintiff and if so, under what terms?,
- (3) Whether the defendant converted any of the sim cards for its own use and benefit contrary to the terms agreed by the parties?
- (4) If the answers to (b) (c) above are in the affirmative, whether the defendant was as a result unjustifiably enriched as the expense of the plaintiffs? And
- (5) To what extent in terms of quantum was the defendant allegedly unjustifiably enriched.

The matter came up for trial. I decided to deal with the issue of prescription first as it had the potential of concluding the matter without wasting time hearing evidence. The issue of prescription required no evidence to be led. The parties filed detailed heads of argument in relation to prescription and I am indebted to the parties.

The defendant averred that the plaintiffs' claim is prescribed. In 2015 the plaintiffs brought a similar claim against the defendant under HC 4236/15. Such matter was withdrawn at Pre-Trial stage after the issue of prescription was raised. The plaintiffs have been claiming this debt since 2011. The defendant submitted that Prescription started to run on 12 April 2011 when the defendant responded to plaintiff's claim denying liability. Summons in the present case were served upon the defendant in January 2016 when the debt had been extinguished by prescription. The defendant prayed that the matter be dismissed.

The plaintiffs opposed the claim by the defendant that the claim had prescribed. The plaintiffs averred that their claim is based on unjustified enrichment. The plaintiffs averred they became aware of the fact that the defendant had converted its sim card to buddie line sometime in 2014. Prescription therefore started to run in July 2014. The plaintiffs submitted that the defendant seems to rely on breach of contract and not an unjust enrichment-which forms a different cause of action. The events referred to by the defendant related to meetings relating to breach of contract not unjustified enrichment. The question of prescription should therefore be determined in relation to the claim of unjust enrichment.

Let me start by looking at the plaintiff's claim against the defendant. What is it that the plaintiffs are claiming against the defendants? What is the cause of action? It is common cause that the figure as claimed by the plaintiffs represents the costs of purchasing 2700 shared phone sim cards. A look at the plaintiff's declaration show that such declaration fails to disclose a cause of action. Paragraph 10 of the plaintiff's declaration is clear that the claim is based on:

- "a) breach of contract of the verbal agreement by the defendant,
- b) unjustified enrichment of the defendant at the expense of the plaintiffs to the tune of \$54 000 (fifty four thousand United States Dollars) being purchase price of sim cards."

Cause of action has been defined as a set of facts sufficient to justify a right to bring an action against another to obtain money, property or enforcement of a right. It is those facts which gives a person a right to seek judicial redress against another. It must portray grounds on which an action may be sustained. If proved such facts should constitute all the elements required to sustain the claim.

In the case of *Auto Garage v Motokov* [1971] EA 514 the court gave three essential elements to support a cause of action namely:

- a) That the plaintiff enjoyed a right
- b) That such right had been violated and
- c) That the defendant is liable”

In considering whether or not the claim discloses a cause of action the court only considers the pleading and anything attached to it – see *Read v Brown* 22 QBD 31. In the present case the plaintiff firstly tries to rely on breach of a verbal contract. Material facts relating to the verbal contract have not been pleaded. The terms are not clear and neither is the breach clear. Secondly the plaintiffs submitted that they were suing on unjust enrichment. Five elements must be established in order to prove unjust enrichment namely;

- (i) An enrichment
- (ii) An impoverishment
- (iii) A connection between enrichment and impoverishment
- (iv) Absence of a justification for the enrichment and impoverishment and
- (v) An absence of a remedy provided by law.

See *Jordan & Another v Penmill Investments & Another* 1991 (2) SA 430 (E), *Ratta v Della Ratten* 927 so 2d 1055 (Fla, 4th DCA 2006).

The plaintiffs’ declaration does not disclose a cause of action as against the defendant. The plaintiffs do not allege that they conferred a benefit upon the defendant and neither is there an allegation that the defendant accepted or retained the benefit conferred. The plaintiffs do not even allege that it would be inequitable for the defendant to retain the benefit without paying fair value for it. The pleadings show that pay phone sim cards were purchased for distribution to plaintiffs’ customers.

The plaintiffs’ claim is based on both breach of contract and unjustified enrichment. Unjustified enrichment has not been pleaded in the alternative. In so far as the claim is based on two different headings it becomes vague and embarrassing. In the result unjust enrichment has been improperly pleaded. Having come to the conclusion that this claim is based on an alleged breach of the verbal agreement, it follows that prescription starts running when the debt became due and owing. The parties are agreed that the debt became due and owing sometime in 2011. Summons were only served upon defendants in January 2016 when the debt had prescribed – see s 16 of the Prescription Act.

This matter should not have been referred to trial as the pleadings disclosed no cause of action. Even if such cause of action was disclosed it is clear that prescription has run its course.

Accordingly the claim fails and is dismissed with costs on a higher scale.

Hungwe and Partners, 1st and 2nd plaintiff's legal practitioners
Mtewa and Nyambirai, defendant's legal practitioners