ORIGEN CORPORATION t/a NURFERT (PVT) LTD
versus
XSIGMA CORPORATION (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE,24, 25 October & 7 December 2018

**Trial**

*R Stewart*, for the plaintiff
*F Zuva*, for the defendant

MUZOFA J: The plaintiff and the defendant entered into an agreement for the supply of fertilizer. Pursuant to that agreement the plaintiff alleged that it paid US$124 500 to the defendant fertilizer. The defendant failed to deliver. The plaintiff therefore issued out summons for payment of the $124 500 being restitution for the amount paid and interest at the prescribed rate of 5% per annum from 22 September 2017 to the date of payment in full, and costs of suit on an attorney client scale.

The defendant denied liability on the basis that the contract that the plaintiff relied upon was not consummated. The $124 500 paid by the plaintiff was in terms of a different agreement that was satisfied, no amount of money is due to the plaintiff.

At the pre-trial conference the parties agreed that a determination of the following issues will dispose of the matter.

1. Whether or not the plaintiff paid the defendant US$124 500 as alleged in the summons;
2. Whether or not there was an agreement consummated for the sale of the fertilizer for the amount alleged.
3. Whether or not the defendant delivered as alleged in the plea.

One witness Anton Brown ‘Mr Brown” the General Manager gave evidence on behalf of the plaintiff. The plaintiff is a fertilizer manufacturing company, specifically blending fertilizers for farmers. He said the plaintiff and defendant have long standing dealings for the

supply of fertilizer. The plaintiff entered into a supply agreement "the agreement" with the defendant. The agreement was produced as an exhibit. Mr Brown was one of the signatories to the agreement. It was a general agreement which provided for specific orders to be made by the plaintiff to the defendant. Pursuant to that agreement an order for about 300 tonnes of fertilizer was made to the defendant. A payment of $124 500 was made on 22 August 2017. The defendant did not deliver the fertilizer in terms of the agreement neither was the amount reimbursed to the plaintiff. The contract was not cancelled in terms of the contract. He denied that the payment was for a different order.

Under cross examination Mr Brown said in terms of the agreement, the plaintiff was supposed to provide an acceptable guarantee to the defendant. On the acceptance of the guarantee the plaintiff would order fertiliser and payment was only due after delivery. The guarantee was security for payment .The defendant was had the right to redeem the guarantee after 180 days after delivery and plaintiff had not paid. Mr Brown confirmed that the guarantee offered by the plaintiff was not accepted by the defendant. He also said when the plaintiff placed the verbal order for fertilizer, it paid cash in advance, the $124 500 because there was no guarantee. He however insisted that the order that was made in terms of the supply agreement. Parties had not varied the terms of the contract. He confirmed that parties had various verbal agreements for the supply of fertilizer that the defendant actually delivered. After Mr Brown the plaintiff closed its case.

The defendant's counsel applied for absolution from the instance at the close of the plaintiff's case. The court was referred to numerous case law that sets out the test on absolution from the instance which include *Gascoin v Hunter* 1970 TPD 171 @ 173, *Sibanda* v *Linda* HH 34/18, *Lorenco* v *Raja Dry Cleaners and Another* 1984 (2) ZLR 151 SC. It was submitted that the plaintiff relied on the supply agreement to found its case. However the witness, Mr Brown said that there was a verbal agreement for the supply of fertilizer. There was no explanation how the supply agreement was linked to the verbal agreement. The written agreement required a guarantee, no acceptable guarantee was provided. The written contract was therefore not consummated. There was no evidence before the court that the written agreement was varied. Further it was submitted that there were inconsistencies in the plaintiff's case. The plaintiff has no cause of action based on the written agreement .The application was opposed, Mr *Stewart* submitted that the plaintiff established that it paid $124 5000 for fertilizer and that the fertilizer was not delivered. The supply agreement was varied by the parties. The defendant's plea is that the $124 500 was for a different agreement but it

did not give the details of this agreement. The plaintiff established its case. The matter should proceed.

Both counsel for the parties properly articulated the law on absolution from the instance. The court has to ask itself "if there is evidence upon which a court could or might (not should or ought) find for the plaintiff" per ZHOU J in *Interfin Bank Limited (in liquidation)* v *Bartim Lake Nurseries (Pvt) Ltd and Others* HH 773/17. An order for absolution from the instance can be made where the evidence led by the plaintiff does not discharge the burden of proof placed on the plaintiff.

Courts are slow to discharge a matter on the facts before hearing evidence from the other party. However the plaintiff's case should be able to stand on its own without assistance or support from the defendant's evidence. I associate with the sentiments in *MC Plumbling (Pvt) Ltd* v *Hualong Construction (Pvt) Ltd* HH 88/15 at page 5 of the cyclostyled judgment on some of the considerations to be made in answering the question the court should ask itself where the court noted,

> 'My interpretation of the test to be applied to the question of whether to grant absolution from the instance to a defendant at the close of the plaintiff's case is as follows:
>
> 1. The first question to be considered is whether there is any evidence at the close of the plaintiff's case, upon which a court, directing its mind reasonably to such evidence could or might find for the plaintiff?
> 2. The second question to be asked is whether there is any special consideration or reason why the court should reject the evidence adduced on behalf of the plaintiff, (for example glaring inconsistencies, or unacceptable variance with the pleadings filed of record)
> 3. The third question that may be asked is whether the plaintiff has failed to adduce any evidence, or adduced insufficient evidence to establish an essential element of its claim.
> 4. Lastly, whether, an overall assessment of all the evidence adduced on behalf of the plaintiff, the pleadings filed of record, the annexures, the exhibits, all the discovered documents, coupled with the *viva voce* evidence, falls short of establishing the plaintiff's case, on the face of it (*prima facie*)"

In this case I believe there is no evidence upon which the court might or could find for the plaintiff.

In the plaintiff's declaration as amplified in the further particulars, it was alleged that the plaintiff purchased $300 tonnes of urea fertilizer at an agreed price of US$124 500 which sum was paid by the plaintiff. The terms of payment were 100% payment before delivery and

delivery was to be made within 30 days of payment in full. The defendant failed to deliver within 30 days as agreed. The defendant requested for further particulars as follows,

"Ad Paragraphs 3-4

1.1 When did the parties enter into this agreement?

1.2 Was the contract in writing? If so, a copy is hereby requested.

1.3 How and when was payment for the urea made to the defendant? Confirmation of such payment is hereby requested."

The response was

"Ad Paragraph 1

1.1 March 2017
1.2 Writing copy attached (supply agreement)
1.3 Transfer dated 22 August 2017 (copy attached as proof of payment")

The combined effect of the plaintiff's pleadings reveals that its cause of action arose from the supply agreement. The terms of the supply agreement were that the plaintiff was to advise the defendant of its fertiliser requirements within 14 days or more, pay for the fertiliser within 180 days of the delivery to the respective warehouse. The plaintiff was to provide a local bank guarantee of US$250 000 for its obligations to pay for the fertiliser to the defendant. It is common cause that the plaintiff did not provide the acceptable guarantee. It provided a guarantee that was rejected and returned. To my mind the guarantee was for the defendant's security for payment. In the absence of that guarantee could an order be placed pursuant to that agreement? I do not think so. Mr Brown's evidence was that a verbal agreement was made for fertiliser and there was 100% upfront payment. His evidence was in tandem with the declaration. However in my view true to the saying that the devil is in the details the plaintiff in its further particulars referred to the supply agreement. This supply agreement was literally at cross roads with the evidence by Mr Brown and the declaration. It remained uncertain on what basis the $124 500 payment was made. If it was made in terms of the supply agreement why was the money paid before delivery? Neither the plaintiff's pleadings nor the evidence by Mr Brown indicate that the agreement was varied. The variation was not pleaded. Assuming it was based on a variation of the supply agreement, there was no evidence as to the new terms of the agreement. In his evidence Mr Brown referred to an oral agreement he did not say it was a variation of the supply agreement. The

plaintiff said parties had a relationship and a couple of oral agreements were made for the supply of fertilizer which defendant supplied.

The approach by our courts, which approach resonates with the tenets of the law of contract, is that courts do not make or rewrite contracts for parties. The function of the court is to interpret and enforce those contracts made by parties. The court cannot be used to vary or negotiate new terms of a contract. The plaintiff relied on the supply agreement yet it is clear that the terms of the supply agreement were not fulfilled; it is not for this court to vary the terms. The supply agreement was clearly not consummated, no guarantee was provided, and therefore the plaintiff could not place an order without any payment it could not pay after delivery. In my view that was the backbone of the agreement. Without that central piece the agreement crumbled. There was no evidence that the agreement was varied. Mr Stewart in his submissions said the supply agreement was varied but the submission was not supported by evidence and in any event a legal practitioner cannot supplant the plaintiff's case by way of evidence.

The test really focuses on the plaintiff's case. Mr Stewart in his response referred to defendant's case. The proper approach is whether on a proper consideration of the plaintiff's case a reasonable court could or might find for the plaintiff. It would be a misnomer to analyse the defendant's case at this stage. The test applies to the plaintiff's case as presented to the court. There were clear contradictions in the plaintiff's case as to the basis of the claim. The declaration as amplified by the further particulars indicate that defendant breached the supply agreement. Mr Brown's evidence was to the effect that there was an oral agreement with different terms. The applicant's case was self-destructive. I do not agree with the plaintiff's submission that the plaintiff has established that it made an order and paid but there was no delivery of the fertiliser that should be enough. Where a plaintiff alleges a breach of contract it must be established that the contract existed and parties agreed to the terms and conditions of the contract. In addition it should be shown that the plaintiff complied with the terms and conditions but the defendant failed to fulfil its obligations. In this case plaintiff failed to show that the terms and conditions of the supply agreement were fulfilled especially the guarantee. To that extent l agree with the defendant that the supply agreement was not consummated. There is no need to proceed with a matter where the plaintiff is unclear on which agreement it relies on. Accordingly the following order is made.

1. The application for absolution from the instance be and is hereby granted.
2. The plaintiff shall pay the defendant's costs.

*Matizanadzo & Warhurst*, plaintiff's legal practitioners
*Bruce Tokwe Commercial Law Chambers*, defendant's legal practitioners