

BRANDON BOWEN  
and  
MARANGE RESOURCES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
NDLOVU J  
HARARE, 9 FEBRUARY & 01 MARCH 2023

*Adv. L. Uriri*, for the Plaintiff.  
*Mr. K. Magorimbo*, for the Defendant.

**NDLOVU J.** At the close of Plaintiff's case, Defendant launched an application for absolution from the instance. As was to be expected, the application is opposed by Plaintiff.

#### **PLAINTIFF'S EVIDENCE**

Plaintiff issued a summons in his individual capacity in 2016 out of this Court claiming payment, from the Defendant of US\$234 500.00 plus costs of suit on a legal practitioner and client scale. The claim is based on unpaid for security services Plaintiff allegedly rendered to Defendant. Defendant defended the action.

In brief, Plaintiff told the Court that he was contracted by Defendant's predecessor, Canadel (Pvt) Ltd [*Canedile*] sometime in 2009 to provide men on horses security services in the mining fields of Marange. When Canadel left the mining fields Defendant took over, and the contract which was predominantly oral, tacitly relocated to Defendant in that Plaintiff continued providing the security services and continued engaging the Accounts Department personnel of Defendant who coincidentally had been with Canadel previously, regarding payment of the outstanding bill. The communication was predominately through emails. In some instances, Defendant's personnel negotiated amounts variations for the security services with Plaintiff and even paid Plaintiff for those services that he was rendering to Defendant. For Defendant's audit purposes, Plaintiff was classified by Defendant as its creditor. The amounts of money paid to Plaintiff by Defendant were paid into the Bank account of an entity known as Two Mile Trading (Pvt) Ltd [*Two Mile*], which entity is Plaintiff's family company and in which Plaintiff is one of its Directors. On one occasion a payment was made into Plaintiff's

father's Bank Account. These payments to 3<sup>rd</sup> parties were done with the knowledge and consent of Defendant because Plaintiff did not have a personal Bank Account in his name.

The amount claimed is not disputed. The engagements over the subject matter between Plaintiff and Defendant's personnel is not disputed either.

### **DEFENDANT'S PLEA**

In its Plea filed on 26 October 2016 Defendant, in brief, denied entering into an agreement with Plaintiff. It stated that Plaintiff was erroneous in his view that Canadile "turned into" Defendant. It stated that Plaintiff must direct his claim to Canadile. Defendant denied ever making any clear or unequivocal acknowledgment of debt with respect to Plaintiff's claim.

### **DEFENDANT'S SUMMARY OF EVIDENCE**

In its Summary of Evidence, Defendant indicated that its witness will tell the court that Defendant entered into a contract for the provision of security services with an entity going by the name Two Mile which is not a party to these proceedings. That Defendant did not contract with Plaintiff in his personal capacity. The summary of evidence was filed with this court on 01 March 2017.

### **DEFENDANT'S CROSS-EXAMINATION OF THE PLAINTIFF**

The following was put to the Plaintiff. That Defendant will say they knew Plaintiff as a functionary of Two-Mile. Someone cannot be faulted for thinking that Plaintiff was representing Two Mile in his dealings with the Defendant judging from the Bank deposits made into Two Mile's Bank Account for security services rendered to Defendant at Marange Mining fields. That Defendant will say Plaintiff is unknown to it.

### **ARGUMENT IN MOTIVATION OF THIS APPLICATION**

That Plaintiff has failed to prove an agreement between himself and Defendant. All there is; is evidence showing an intimate relationship between a 3<sup>rd</sup> party and Defendant, and that 3<sup>rd</sup> party is not before this Court. There is no evidence showing that Plaintiff was acting outside the scope of the 3<sup>rd</sup> party. No evidence has been led, backing Plaintiff's claim and Defendant's liability is to Two Mile and not to Plaintiff. Defendant paid Two Miles based on the invoices.

As a result, Plaintiff has failed to adduce sufficient evidence upon which the court may find for him. There is no departure by Defendant from its plea.

### **ARGUMENTS IN OPPOSITION TO THE APPLICATION**

Plaintiff argued that the basis for this application by Defendant has not been pleaded, that is as regards Defendant having contracted with Two Mile Trading P/L and not Plaintiff in his personal capacity. The 3 issues referred to trial condense in the question of whether or not there was a privity of contract between Plaintiff and Defendant. The fact in issue being who between Defendant and Canadile Mining is liable for Plaintiff's claim. Two Mile appears for the 1<sup>st</sup> time in Defendant's summary of evidence long after service of the Plaintiff's bundle of documents. Defendant did not seek an amendment to their Plea.

Plaintiff has explained why payments were made into a 3<sup>rd</sup> party's Bank Account and the invoice dated 30 June 2016 clearly indicates, the name of the Plaintiff and in brackets Two Mile. A party cannot in a civil trial expect judgment in its favour from cross-examining a witness on something the cross-examiner did not plead.

Defendant's cross-examination of Plaintiff boils down to;

***"A reasonable person would have reasonably believed that they were dealing with Two Mile Trading P/L"***

The defendant is seeking to rely on its opinion and inference. It cannot do that because it was aware of that opinion when it pleaded. Two Mile is not mentioned in a letter to the Police seeking clearance for Plaintiff to enter the mining area by the ZMDC and neither is it mentioned in several emails tendered as **Exhibits**. When Plaintiff asked Defendant's personnel to deposit the money in an account at a particular Bank, they asked him to put that in a letter. They did not ask Two Mile to do so. This application must be dismissed.

### **THE LAW**

The test in deciding an application for absolution from the instance is as follows;

***"Is there evidence upon which a reasonable man might find for the Plaintiff? Put differently, is there a prima facie case against the Defendant."***

***"The practice has been to lean on the side of allowing the case to proceed. This is so because it is always secure to decide on questions of fact after hearing all the evidence."***

*Supreme Service Station [1969] [Pvt] Ltd -v- Fox and Goodridge [Pvt] Ltd 1971 (1) RLR 1.*

*Bailey NO -v- Trinity Engineering (Pvt) Ltd & Oars 2002 (2) ZLR 484.*

### **RESOLUTION**

In this matter having considered the pleadings filed of record, the evidence adduced by the Plaintiff, and the cross-examination that ensued, I find that this is not a case fit for absolution from the instance. Defendant never pleaded that it contracted with Two Mile Trading P/L for services that Plaintiff claims were rendered by him to Defendant in his personal capacity. Plaintiff has tried to explain why the payments made to him by Defendant were made into 3<sup>rd</sup> parties' Bank Accounts. Whether or not that explanation sustains his claim is not to be decided at this stage of the trial. Defendant has to explain its defence against the evidence of Plaintiff and the pleadings filed of record. It is trite that only when both parties have testified can a court decide on issues of fact in a matter.

### **DISPOSITION**

Accordingly, I find that Plaintiff has managed to establish a *prima facie* case upon which a reasonable court might find for Plaintiff. It is therefore ordered as follows;

The application by Defendant for absolution from the instance after the closure of Plaintiff's case is dismissed.

*Mlotshwa Solicitors*, Plaintiff Legal Practitioners

*Mutamangira & Associates*, Defendant's Legal Practitioners.