ASTRA STEEL & ENGINEERING SUPPLIES (PVT) LTD

versus

P M MANUFACTURING (PVT) LTD

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 1 & 2 December, 2011 & 14 March 2012

**Civil Action: Application for Absolution from the instance**

*T. Bhatasara*, for the plaintiff

*L. Uriri*, with him *A. Rutanhira,* for the defendant

 MUTEMA J: In March, 2008 the plaintiff and the defendant concluded an agreement in terms of which the plaintiff paid Z$2 750 000 000 000 (two trillion seven hundred and fifty billion dollars) for 2 200 x 195R14 brand new tyres which the defendant allegedly agreed to deliver by 2 March, 2008. To date, the defendant has only delivered 200 tyres leaving a balance of 2000 tyres. The current market value of the tyres is pegged at US$100 per tyre. In the event the plaintiff is claiming delivery of the outstanding tyres, alternatively US$200 000-00 representing the current market value of the tyres, interest and costs of suit.

 In denying liability, the defendant avers that the plaintiff approached and requested it to source the tyres for it from Solution Motors (Pvt) Ltd since the defendant had previously dealt with Solution Motors. Defendant paid the money to Solution Motors for the procurement of the tyres. Solution Motors delivered only 200 tyres. The defendant cannot be held liable for Solution Motors’ failure to deliver the tyres as the plaintiff knew about and approved the involvement of Solution Motors. The defendant fulfilled all its obligations in terms of the agreement between the parties.

 The plaintiff led evidence from only one witness Richard Ziyavaya and closed its case. His evidence was to this effect: he used to be employed by the plaintiff as its finance manager. He represented the plaintiff in concluding exh 1 (the agreement regarding supply of the tyres) though he signed it as a witness while the general manager Mr Marozva signed on behalf of the plaintiff. On 3 March, 2008 Patrick Makava, the defendant’s representative in the agreement, came to the plaintiff’s offices. The two parties were at that time both involved in the Reserve Bank of Zimbabwe farm mechanisation project of manufacturing ox-drawn scotch carts. In the discussion about this project the plaintiff’s representatives mentioned to Makava that they were looking for tyres for the project. Makava told them that he had recently bought tyres for his project and could buy them on the plaintiff’s behalf from the same source. He did not disclose the source. An agreement was then entered into on 4 March, 2008 whereby the plaintiff paid the defendant Z$2 750 000 000 000 for 2 200 tyres which the defendant was to deliver by 21 March, 2008. However, the defendant failed to deliver the 2 200 tyres by 21 March, 2008.

 Marozva, the plaintiff’s general manager phoned the defendant and the defendant promised to deliver in two weeks time. Nothing happened and he wrote, exh 2 on 23 April, 2008 demanding delivery within seven days, failure of which legal action would be embarked upon. Defendant responded via exh. 3 dated 15 May, 2008 assuring the plaintiff that despite facing some challenges, the tyres would be delivered in a few weeks time. No delivery was done.

 In June, 2008 the plaintiff, for the first time came to learn about Solution Motors via exh 4 a letter written by that company saying they were the defendant’s suppliers of the tyres, promising to deliver 200 tyres on 10 July, 2008. Since the plaintiff had no privity of contract with Solution Motors they ignored exhibit 4. The plaintiff told the defendant about exh 4 and the defendant confirmed that Solution Motors were the suppliers and that it had been let down by them.

 On 10 July 2008 the promised tyres were not delivered and Solution Motors wrote exh 5 promising to deliver the 200 tyres by 30 July, 2008. On 14 July, 2008 the plaintiff wrote exh 6 to the defendant and attached exh(s) 4 and 5 telling the defendant to deal directly with its suppliers because the plaintiff was only awaiting delivery of the tyres as per the agreement concluded between the plaintiff and the defendant.

 Plaintiff only got a response from the defendant on 4 September, 2008 via exh 7 wherein the defendant was advising that its legal practitioners would talk to Solution Motors and map the way forward. Still in September, 2008 the plaintiff received exh 8 comprising a letter from the defendant’s legal practitioners Scanlen & Holderness, an acknowledgment of debt by Solution Motors to the defendant in respect of the 2 200 tyres and a schedule showing when the tyres would be delivered. Two weeks thereafter Solution Motors delivered 200 tyres to the plaintiff. The delivery dates in the schedule were never fulfilled and on pointing this out to the defendant, it would only say it was trying to enforce the contract with its suppliers. Plaintiff was later sent a copy of the summons wherein the defendant was suing Solution Motors for the tyres.

 In August, 2009 the plaintiff’s board resolved to sue the defendant hence the current suit. He produced three quotations – exh(s) 9A, 9B and 9C- in support of the $100 average price for each tyre. Although the plaintiff paid the defendant Z$2 750 000 000 000 for the tyres, the defendant paid Solution Motors Z$1 895 500 000 000 according to exh 10 the defendant’s summons against Solution Motors. The plaintiff still owes the Reserve Bank what it failed to deliver due to the defendant’s breach of the agreement to deliver the tyres. With that evidence the plaintiff closed its case.

 Following closure of the plaintiff’s case the defendant applied for absolution from the instance. The application was opposed by the plaintiff.

 The test for absolution from the instance was laid down by HERBSTEIN and VAN WINSEN in The Civil Practice of the Superior Courts in South Africa 3rd ed at p 462 in these words:-

“The lines along which the court should address itself to the question of whether it will at that stage grant a judgment of absolution have been laid down in the leading case of *Gascoyne v Paul and Hunter*  1917 TPD 170, which contains the following formulation (per De VILLIERS JP at 173):

‘At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff? ……. The question therefore is at the close of the case for the plaintiff, was there a *prima facie* case against the defendant, Hunter; in other words, was there such evidence before the court upon which a reasonable man might but not should give judgment against Hunter? It follows from this that the court is enjoined to bring to bear on the question the judgment of a reasonable man, and ‘is bound to speculate on the conclusion at which the reasonable man of (the court’s) conception not should, but might or could arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer”.

 Locally, the case of *United Air Charters* v *Jarman* 1994(2) ZLR 341(S) is in point regarding the principle. At p 343 B-C GUBBAY CJ stated:-

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him”.

 An application for absolution from the instance stands much on the same footing as an application for the discharge of an accused person at the close of the State case in a criminal trial: *Munhuwa* v *Mhukahuru Bus Service (Pvt) Ltd* 1994(2) ZLR 382.

 I am also constrained to pay heed to the salutary caution hinted on by BEADLE CJ in *Supreme Service Station* (1969) (*Pvt*) *Ltd* v *Fox & Goodridge* (*Pvt*) *Ltd* 1971(1) RLR I(A) regarding the salient features the court should bear in mind when considering what the judgment of a reasonable man might be on the evidence adduced by the close of the plaintiff’s case. The learned CHIEF JUSTICE pointed out that:-

* The court should bear in mind that the defendant has not yet given evidence and cross-examined on it;
* If the plaintiff has made some case for the defendant to answer and the defence is something peculiarly within the knowledge of the defendant, justice demands that he should be heard;
* The general attitude of judges is that they should be very loath to decide upon questions of fact without having all the evidence on both sides;
* In case of doubt as to what the judgment of a reasonable man might be, the safest course for a judge to take is that which allows the case to proceed.

The facts of the case as gleaned from both the plaintiff’s *viva voce* and documentary evidence, reveal that contrary to the defendant’s contention, the defendant did not expressly tell the plaintiff’s representative(s) that the tyres would be sourced from Solution Motors or that the plaintiff requested the defendant to source the tyres for it from Solution Motors. Ziyavaya’s evidence was that parties agreed that the defendant would source the tyres for the plaintiff. The third party’s identity was never disclosed. Clause 2 of exh 1 seems to support this. Exhibit 1 does not categorically reveal that the defendant was a mere intermediary between the plaintiff and a third party let alone Solution Motors. If Solution Motors had been disclosed to the plaintiff there would have been no reason why the plaintiff would not have dealt with Solution Motors from the outset or why exh(s) 2 and 3 would have been silent about Solution Motors’ involvement. Exhibit 4 is Solution Motor’s letter addressed to the plaintiff announcing that they were the defendant’s suppliers and promised to deliver 200 tyres on 10 July 2008. This shows when Solution Motors came into the equation for the first time. It is clear therefore that when the agreement – exh 1 was concluded, there was no privity of contract between the plaintiff and Solution Motors. This view is corroborated by HC 6016/08 wherein the defendant sued Solution Motors for the delivery of the outstanding tyres, alternatively their value as at the date of judgment. Further corroboration of the same view is borne out by exh 6 wherein the plaintiff wrote to the defendant attaching exh(s) 4 and 5 – letters by Solution Motors to the plaintiff – telling the defendant to deal directly with its suppliers. Also, exh 8, which is an acknowledgment of debt by Solution Motors to the defendant, shows that there was no privity of contract between the plaintiff and Solution Motors.

 Also, the fact that the plaintiff paid the defendant Z$2 750 000 000 000-00 for 2 200 tyres whereas the defendant paid Solution Motors Z$1 897 500 000 000-00 is one of the *indicia* showing absence of privity of contract between the plaintiff and Solution Motors.

 Since the defendant insists that there was such privity of contract then justice demands that it be heard.

 Defendant’s other plank of defence is that it undertook to enter into a contract with Solution Motors for the benefit of the plaintiff (*stipulatio alteri*). One of the essential features of *stipulation alteri* is that the stipulator and the promiser must intend to create a right for the third party to adopt and become a party to the contract. In *Graphics Africa (Zimbabwe) (Pvt) Ltd* v *Rank Xerox Ltd* 1989(2) ZLR 292 (HC) it was held that in contracts for the benefit of a third party, there is no formalistic requirement of acceptance of the benefit. The manifest intent of the third party should be considered to ascertain whether it did indeed accept the benefit or not. I may add here that until acceptance by the third party takes place, the contract remains one between the actual parties and may be modified or even cancelled.

 In the instant case, there is no indication from the plaintiff’s evidence that either the defendant undertook to enter into a contract with Solution Motors for the benefit of the plaintiff or that plaintiff, when Solution Motors emerged onto the scene, accepted the benefit. On the contrary the evidence reveals that the plaintiff wrote exh 6 to the defendant attaching exh(s) 4 and 5 alluded to *supra*, directing that the defendant deal directly with its suppliers. This conduct is anything but acceptance of any benefit accruing from the contract between the defendant and Solution Motors! Plaintiff’s acceptance of the delivery of the 200 tyres was not and could not amount to acceptance of benefit for purposes of proving existence of a *stipulation alteri*. This can at best be termed a mere arrangement of convenience. Also, contrary to the defendant’s contention, taking this delivery cannot by any stretch of the legal imagination amount to a novation. Novation cannot be a one-sided affair.

 The *lis* between the defendant and Solution Motors in HC 6016/08 is not clearly directly for the benefit of the plaintiff. It seems to me that it stands to immediately benefit the defendant who was susceptible to being sued by the plaintiff in terms of clause 4 of exh 1. If there were a *stipulatio* or novation then the plaintiff should have sued Solution Motors in its own right.

 On the totality of the various defences raised by the defendant, viz *stipulatio*, novation, impossibility of performance justice demands that as the defendant shoulders the onus to discharge them, it must be heard and be cross-examined on the same.

 In view of the foregoing I consider that a reasonable man, on the evidence adduced by the plaintiff, might find against the defendant. Even if a reasonable man may not arrive at the above conclusion, I would consider that it would not be far-fetched to hold that there is a doubt as to what the judgment of a reasonable man might be hence the safest course to take at this juncture is that which allows the case to proceed.

 In the event I make the following order:-

1. The application for absolution from the instance be and is hereby dismissed.
2. Costs to be in the cause;
3. The parties shall mutually agree, in consultation with the registrar, on a convenient date for the continuation of the trial.

*Kantor and Immerman*, plaintiff’s legal practitioners

*Scanlen & Holderness*, defendant’s legal practitioners