MARCUS SAMBAZA

versus

SHEPHERD MUCHINI

HIGH COURT OF ZIMBABWE

DUBE J

HARARE, 4 & 11 June 2012

**Civil Trial**

*T. Ruzengwe*, for the plaintiff

*T. Machiridza*, for the defendant

DUBE J: This is an action for damages for breach of contract. This matter initially involved 3 defendants. The other two defendants, Rudzi Madhuru referred to as Ngwenya and Obediah Kazingizi ,(Kazingizi) are barred for failure to enter their pleas.

The plaintiff issued summons claiming damages from the defendant in the sum of USD6 300-00. His claim is based on the following facts. On 19 May 2009 the defendant carried out a survey and identified two borehole sites at the plaintiff’s plot in Nyabira. The plaintiff paid the first defendant the agreed fee of USD 260-00 for his services. On the same date, the plaintiff enquired with the defendant whether he could drill a borehole for him. The defendant consequently gave the plaintiff a quotation for borehole drilling. On 22 May 2009 the defendant introduced Ngwenya to the plaintiff as his employee and agent who was to drill the borehole and to whom payment was to be made. The plaintiff then negotiated the first defendant’s quotation with Ngwenya and they agreed on US$3000-00. On 24 May the plaintiff went with Ngwenya and Kazingizi to the plot to drill the borehole. On 27 May 2009 the plaintiff was informed that they had only drilled 23 metres and stopped because of loose ground.

The defendant refused and neglected to fulfil the drilling contract and or refund the plaintiff his USD2500-00 that he had paid for the drilling. The plaintiff engaged another contractor to drill another borehole. The plaintiff reported a case of fraud at Nyabira Police Station. That case is still pending. The plaintiff claims that he suffered damages in the sum of USD6 300-00. These comprise of USD2 500-00, being the amount paid by thy plaintiff for the drilling, USD3 200-00 being four weeks’ loss of business at USD800-00 per week, calculated from the period when the defendants abandoned the borehole drilling to the time when another contractor completed the drilling. An amount of USD 300-00 is being claimed for expenses incurred by the plaintiff in travelling to and from Nyabira Police station in pursuit of the criminal case.

A number of issues were referred to trial. The main issue for determination is whether the parties entered into a borehole drilling contract.

The plaintiff testified in support of his case. He testified as follows. He approached the first defendant for his services to site a borehole at his plot. The defendant carried out the siting and was paid for his services on 20 May 2009.He enquired from the defendant if he could carry out borehole drilling. The first defendant gave him a written quotation for the drilling of the borehole for USD3 250-00. He accepted the quotation and the parties began to make arrangements to go and carry out the drilling at the plot. Two days later the plaintiff met the defendant and Ngwenya at the corner of Samora Machel Avenue and Park Street, Harare. They met and had their discussions in the defendant’s car. The purpose of the meeting was to introduce the plaintiff to Ngwenya and Kazingizi and so that the plaintiff would make a payment directly to Ngwenya and organise to go to the plot. Kazingizi did not arrive on time and the meeting proceeded without him. The defendant introduced Ngwenya as the person who was going to do the physical drilling of the borehole in the following manner, “Meet Mr Ngwenya who is going to come to the plot and do the drilling”. The defendant instructed him to make all the payments relating to the drilling services directly to Ngwenya. He understood Ngwenya to be an employee, partner or a subcontractor working under the instruction of the defendant and his understanding was that he was still dealing directly with the first defendant. Under cross examination he accepted that the defendant never said that Ngwenya was his employee or agent.

Whilst at the meeting, the plaintiff requested for a revision of the quotation for drilling. He discussed the issue with both Ngwenya and the defendant because he understood and assumed that they were from the same organisation. He cannot remember the exact words uttered by the two during negotiations. The two briefly went outside the car and he assumed that they consulted and the defendant and Ngwenya agreed to a discount after consultations. Ngwenya then said that he was granting him a discount. The defendant had no comment. The quotation was reduced to USD3000-00 and Ngwenya endorsed this fact on the quotation. On 23 May 2009 he paid US1000-00 to Ngwenya in the presence of the defendant. The witness initially said that when he paid the money, the defendant was not present He did not get a receipt. Mr Ngwenya indicated that the receipt will be issued at the office on completion of the contract. The defendant assumed that the offices referred to were the defendant’s. He endorsed the payment on the quotation. Another USD1500 .00 was paid to Ngwenya on 25 May 2009. On 24 May 2009 the plaintiff arranged to go to the site with Ngwenya and his crew. Ngwenya and his party failed to arrive at the Westgate Shopping Centre were they had arranged to meet on time, prompting him to telephone the defendant to enquire about the delay. The defendant explained that the delay was due to unavailability of diesel and the team subsequently arrived at the meeting place. The plaintiff went with Ngwenya and his team to the plot with the drilling rig. Obediah Kazingizi was introduced to him as the owner of the drilling rig whilst at the plot. The plaintiff did not know if the defendant visited the site during the drilling of the borehole. When Ngwenya advised him that the drilling was complete he paid him USD1500-00. The defendant only drilled 16 metres instead of the agreed 50 metres. The witness advised the defendant of the problem. A meeting to discuss the issue was arranged by Ngwenya and no one except the plaintiff turned up. The defendant promised to convene a meeting to discuss the problem. The plaintiff was handed a copy of a drilling report on a Westwing letterhead by an employee. The defendant promised to convene another meeting which never materialised. The plaintiff reported the matter at Nyabira Police Station.

The plaintiff engaged another firm of contractors to drill another borehole. He claims USD$3200-00 for loss of business on the basis that had the defendant completed drilling the borehole on the date agreed the plaintiff would have started producing tomatoes at the plot. The claim for USD300 is for transport to and from the police station. USD2500-00 is what he paid for the drilling which he wants reimbursed. He insisted under cross examination that he entered into a contract for drilling a borehole with the defendant. The plaintiff conceded under cross examination that he did not hear the defendant make any contributions on the issue of the discount during the discussion.

The defendant’s evidence is to the following effect. He is a director of Komatic Boreholes Ltd, a company which specialises in borehole siting as its core business. At times the company does drilling of boreholes, pump installations and repairs. He does not own a drilling rig and he used to hire one and its crew if he required to have a borehole drilled. He used to hire a rig from Westwing Boreholes. The plaintiff engaged him to carry out borehole siting at his plot and he was paid USD260-00. The plaintiff further asked him if he could do drilling of boreholes and he gave him a quotation for USD3250-00. The plaintiff wanted the quotation reduced and he told him that if he reduced it, he wouldn’t have any mark-up or profit. He decided to introduce him to a company called West-Wing Boreholes which had cheaper rates. Whilst he had quoted USD3200-00 for the drilling, the plaintiff was looking at USD3000-00. He arranged to meet the plaintiff together with the defendant who is from West-wing Boreholes (Pvt) Ltd in town. He knew Ngwenya as someone who is in the drilling business and he was working at West-wing Boreholes. He was passing through town on that day and decided to meet with the plaintiff and defendant so that he could introduce the two. He introduced Ngwenya as being from West-wing Boreholes. He does not know Kazingizi and only knew that he owned a drilling rig. After introducing Ngwenya to the plaintiff, he gave Ngwenya the floor to talk about the drilling logistics and discuss about the charge. The discussions between Ngwenya and the plaintiff took place in a car along Samora Machel Avenue. The two discussed and agreed to have a 50 metre borehole drilled at USD3000-00 . He decided to have the plaintiff deal directly with Ngwenya as far as logistics and payment was concerned since he was not going to make any profit from the drilling. He told the plaintiff to pay the amount directly to Ngwenya and to liaise with him regarding the logistics of the drilling. After this, he said to the plaintiff in Shona “Mopedzerana’’ which means that the plaintiff and the defendant should finalise the deal on their own. and he left the place.

He denies that he was involved in the negotiations and discussions that took place. Although he was in the car, he never said anything and when the money was paid to Ngwenya, he was not present and he did not receive a share of the money. He denies that he ever spoke to the plaintiff after Ngwenya failed to turn up at Westgate Shopping Centre for the drilling but spoke to the plaintiff after the drilling. The next time he communicated with the plaintiff is after the rig had gone to the plot and after the plaintiff had realised that the borehole had not been drilled as agreed and informed him. He thought that the plaintiff was only informing him of the developments as a person who had introduced him to Ngwenya. He was disappointed with Ngwenya. He promised the plaintiff that he would get in touch with Ngwenya and get his side of the story. He just wanted to see if the issue could be resolved amicably. Ngwenya told him that he could not drill beyond 23 metres because the ground was collapsing and they were afraid that their rods would get struck in the borehole. He met the plaintiff on two occasions to try and see how best the dispute could be resolved. Ngwenya and Obediah Kazingizi became un-co-operative resulting in the plaintiff reporting the matter at the police.

The defendant denies that he introduced Ngwenya as his employee or agent. He did not benefit from the transaction. He also denies that he entered into a contract for the drilling of a borehole with the plaintiff. The defendant gave a clear story and remained consistent with his story. Although he spoke softly and tended to mince his words, this is clearly attributable to his manner of speaking. He also tended to speak very fast.

It is common cause that the plaintiff and the defendant entered into a contract for the siting of a borehole. The defendant was paid for his services. It is also common cause that after the siting of the borehole, the defendant gave the plaintiff a quotation for the drilling of a 50 metre borehole under the Komatic Boreholes letterhead, his company. The quotation was for USD3200-00. The defendant denied in his plea that he introduced the plaintiff to Ngwenya and Kazingizi and stated that his association with the plaintiff ceased when the defendant found the two sites for the borehole drilling. This is not a correct reflection of what happened. The defendant admitted in his evidence that he did indeed introduce the plaintiff to Ngwenya and that after the siting of the borehole, he gave the plaintiff a quotation for the drilling of the borehole which the plaintiff rejected. The first defendant explained that his lawyer made a mistake in drafting his plea as he did in fact tell his lawyer of the drilling quotation.

The defendant claims that the plaintiff intimated that he could not afford the amount charged and thus rejected the quotation. That the plaintiff requested the defendant to refer him to cheaper borehole drillers and that he agreed to assist. The defendant submitted that there is no contract between him and the plaintiff. The plaintiff contended that the defendant agreed to drill the borehole after the plaintiff negotiated and agreed to the reduced contract prize of USD3000-00. He further claimed that the defendant engaged Ngwenya and Obediah Kazingizi to do the actual physical drilling of the borehole. The quotation given by the defendant is therefore central to this dispute. The dispute is centred on whether there was a contract between the plaintiff and the defendant and whether the defendant was part of the team that carried out the drilling of the borehole.

The issue for determination therefore is whether the plaintiff entered into a contract in terms of which the first defendant agreed to drill a borehole for the plaintiff.

The existence of the contract is disputed. Generally speaking, a request for a quotation for services to be rendered by a person seeking services is an invitation to submit an offer. Calling of quotations is a way of finding the best contractual terms by inviting a number of people to submit their quotations. A choice is then made out of the competing quotations submitted. It is for this reason that a request for a quotation cannot be a firm offer. The service provider offers his services by way of his quotation. The person who calls for the quotation may either reject or accept the quotation. Acceptance of the quotation results in a binding contract.

Applying the law to the facts, it is apparent that the plaintiff approached the defendant with a request for a quotation. The plaintiff was not happy with the quotation and he rejected the offer. There is nothing to indicate that the offer was accepted by the plaintiff. The quotation was in fact qualified resulting in the first defendant turning down the offer of the defendant. The plaintiff went on to negotiate the defendant’s offer with Ngwenya. Even assuming that Ngwenya was an employee of the defendant, he clearly had no mandate to negotiate the terms of the quotation with the plaintiff. The defendant was not involved in the negotiations leading to the reduction of the charges for drilling agreed to. There was no acceptance of the quotation and no meeting of the minds of the parties and there cannot be a contract between the plaintiff and the defendant. The plaintiff went on to accept a quotation that was no longer open for acceptance. The conduct of the parties during the negotiations and the period leading to the drilling of the borehole further confirms that there was no contract between the parties, but rather between the plaintiff and Ngwenya.

I will now analyse the events leading to the drilling of the borehole and the conduct of all parties during the period preceding the drilling, the actual drilling period and after the drilling.

After he was given a quotation by the defendant, the applicant negotiated the quotation with Ngwenya. Did he negotiate with the right person? The defendant says the plaintiff had earlier negotiated with him and he had turned him down when he suggested a discount. The fact that he negotiated with Ngwenya means that he was dealing with Ngwenya. This is clear from the meeting that took place in the car at Corner Park Street and Samora Machel Avenue. The plaintiff was introduced to Ngwenya. The plaintiff was advised to make all payments to him. Negotiations for the reduction of the quotation then started. The negotiations were carried out in the presence of the defendant. There is nothing that the defendant is reported to have contributed towards the discussion. It is said that they consulted **over** the issue of the discount, but the actual contents of the deliberations are not known. An amount of US$ 1000 was given directly to Nwenya the following day. None of the money was given to the defendant and he was not present when the money was given to Ngwenya. The fact that the plaintiff was instructed to deal with Ngwenya and make all payments relating to the drilling services to Ngwenya, seems to me to indicate that it is Ngwenya who was involved in the drilling. The indications by the defendant that ‘’Mopedzerana’’ seems to me to indicate that he left it to the plaintiff and the defendant to finalise their deal and secondly that he no longer had anything to do with the drilling arrangements.

He negotiated for a discount with Ngwenya and this was endorsed on the quotation by Ngwenya after the discussion. The endorsement reads, “Agreed with Mr Ngwenya 50m for $3000,00”. A total of US$2500.00 is also endorsed as having been paid on the 23rd and 25th of May 2009. It is clear from the endorsement that the agreement was between Ngwenya and the plaintiff. If indeed the first defendant was the principal, why would he not endorse this on his quotation himself and why would he not play an active role in the negotiations. The fact that the plaintiff negotiated with Ngwenya over the discount to be given seems to me to indicate that the plaintiff had failed to reach agreement with the defendant over the quotation. The defendant’s story that he refused to negotiate his quotation seems plausible to me. The fact that he issued a quotation on which the plaintiff negotiated a discount does not mean that a contract exists between him and the plaintiff. Once the defendant refused to give the plaintiff a discount, no agreement could arise.

The plaintiff testified that he assumed that the second and third defendants were employees or agents of the first defendant. During the negotiations Ngwenya was taking a lead role in the negotiations. The plaintiff actually says that he never heard the defendant contribute anything when he was negotiating the price. Why would the first defendant play a passive role if he was the principal? The part played by the defendant was minimal. He seems to me to have been merely a facilitator of the drilling contract. The fact that the plaintiff was to deal directly with Ngwenya and handover the money to him shows that Ngwenya was in control of the transaction. There is nothing from the evidence which suggests that Ngwenya was an employee or agent of the first defendant. Ngwenya seems to have been the central figure as he was actively involved in the negotiations for a discount and was subsequently given the deposit money for the drilling and carried out the drilling. Although it is suggested that the defendant was actively involved in the negotiations, it was not clear from the plaintiff’s testimony what role he actually played. In his cross examination, the plaintiff was clear that he never heard the defendant contribute anything when negotiations were taking place. The plaintiff’s assumption that Ngwenya was an employee or agent of the defendant does not find support on the facts and has no basis at all. There is nothing to suggest that the defendant engaged Ngwenya and Kazingizi as suggested. All these factors reveal that Ngwenya was the central figure in this discussion and that the transaction was between the plaintiff and Ngwenya.

The arrangements to go to the site were made with Mr Ngwenya and his crew. The defendant does not seem to have been involved at all. If this was his contract the defendant would ensure that he made arrangements to the site. The defendant denied communicating with the plaintiff over the delay in leaving for the site. There is no evidence to support the fact that the plaintiff and the defendant spoke over the phone concerning the delay. The defendant never went to the site during or after the drilling. If he was involved he would be interested in going to the site. The second payment was made at the site and to Ngwenya. The defendant does not seem to have been involved in the actual drilling nor did he supervise the job.

After the drilling, the plaintiff reported his concerns to the defendant and demanded that the defendant fulfil the contract. The defendant tried to convene meetings between the plaintiffs, himself Ngwenya and Kazingizi and these never materialised as Ngwenya and Kazingizi were not cooperative. This resulted with the plaintiff lodging a complaint with the police. The defendant was co-operative. His explanation is that he felt obliged to assist the plaintiff as he is the one who introduced him to Ngwenya. His explanation is plausible. He wanted to protect his business reputation.

The evidence before the court reveals that the contract to drill the borehole was between Ngwenya and the plaintiff. This is apparent from the role Ngwenya played in the negotiations for a discount and the fact that he carried out the actual drilling. This fact is confirmed by a drilling report compiled by West-wing Boreholes. The evidence led does not reveal that the defendant was part of the drilling contract. The probabilities favour the defendant’s story that he was not involved in the drilling of the borehole. The court is not satisfied that a contract existed between the plaintiff and the first defendant.

The plaintiff’s claim is dismissed.

Costs follow the event.

*Mapombere, Musakana & Ruzengwe*, plaintiff’s legal practitioners

*Manase & Manase*, 1st defendant’s legal practitioners