

REDRIVER DEVELOPMENT (PVT) LIMITED
versus
PROVENANCE SUPPORT COMPANY

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 13 January, 2002 and 12 November, 2003

Miss Chambuko for plaintiff
Mr Magwaliba for defendant

PARADZA J: The plaintiff in this matter claimed payment of the sum of \$56 120,00 being monies paid to defendant for the provision of certain software, an accounting package, known as Provenance MIS. Plaintiff alleged in his claim that despite payment having been made in anticipation of the provision of the software, defendant, in breach of the contract between the parties, failed to supply the software in such a professional manner as the defendant had undertaken to do.

The following exhibits were produced by consent of both parties, namely a Commercial Bank of Zimbabwe Limited cheque issued by plaintiff in favour of the defendant in the sum of \$56 120,00 dated 14 February, 1999, a document forming the agreement between plaintiff and defendant entitled "Provenance MIS Supply Agreement". I will deal later with whether this document indeed formed the entire agreement of the parties. Thirdly to be produced, was a letter of demand sent by the plaintiff's legal practitioners, Messrs Gula-Ndebele and Partners dated 24 February, 2000 addressed to the defendant.

In its pleadings the defendant admitted that such a contract was indeed entered into between the defendant and the plaintiff and signed by both parties on 13 December,

1999. Needless to say that that contract is indeed the one produced by consent as Exhibit 1.

The defendant stated in its plea that Clause No 12 of the Contract exempted him from liability once payment had been made and in the event of any one of the parties wishing to terminate the contract. Clause 12 of Exhibit 1 reads as follows -

"12. Enforcement of Rights

Any failure by either party to enforce any of its rights under this agreement shall not constitute a waiver of its rights and either party shall at all times have the right to enforce the same at any time".

I will deal with whether this clause applies to this case or not later.

Defendant stated further in its plea that it did supply the software as agreed. I understand that to mean that what defendant is saying is that because it supplied the software that was the end of it. However the defendant did not answer in its plea specifically to plaintiff's averment that defendant had failed to provide the software and service as professionally as the defendant had undertaken to do.

What is clear from the pleadings and in particular the Defendant's Plea, is that the defendant sought to rely on what it called an exemption clause and vigorously averred that that Clause should be given effect. I can do no better than re-state the Defendant's Plea word for word to show the basis upon which the defendant was denying liability. It reads as follows -

"The Defendant pleads to the Plaintiff's claim as set out in the summons commencing action as follows -

1. The Defendant admits that the Plaintiff and the Defendant entered into a contract for the Defendant to supply and install a computer software package to the Plaintiff's computers.
2. The contract was reduced to writing and signed on behalf of the parties on the 13th of December 1999.

3. In terms of clause 13 of the said contract, the parties agreed that the contract would be the sole and exclusive memorandum of the agreement between the parties.
4. In terms of clause 12 to the agreement, any payments made by the Plaintiff to the Defendant in terms of the agreement would not be refundable to it 'for whatever reason'.
5. The Defendant supplied the software package to the Plaintiff's computers. In terms of the agreement and (*sic*) Plaintiff paid the sum of \$56 120,00 which is now subject to the Plaintiff's claim.
6. The Plaintiff is not therefore entitled to a refund of any amount paid to the Defendant in terms of the contract as set out in clause 12 thereof.

Wherefore the Defendant prays for the dismissal of the Plaintiff's claim with costs."

It is therefore clear, from the above, that the defendant did not plead to the various averments raised by the plaintiff as to the other terms and conditions of the contract. Instead, defendant sought to exclude liability by putting his full weight on what defendant refers as an exemption clause, exempting it from liability of refunding the money that it had received from plaintiff for the purposes of supplying the service and software paid for. In so doing, the defendant put itself at very high risk of doing what is normally referred to as "standing on one leg". The danger of doing so is obvious. In the event of that leg being injured in one or another or being incapacitated for whatever reason, the defendant finds itself with no leg to stand on. It is therefore important, under the circumstances, that in drafting pleadings the clever legal practitioner would best advise to his client to deal with all the averments as they appear in the plaintiff's claim.

I heard argument in open court from the defendant's legal practitioner, Mr *Magwaliba*, to the effect that the plaintiff's claim was brief and not explicit in stating the plaintiff's claim. I will respond to that argument by saying that it all depends on the nature of the claim. The High Court Rules provide various situations when a

Summons can be issued with, or without a Declaration. Mr *Magwaliba* is perfectly aware of the Summons issued in terms of Rule 12 of the High Court Rules and Summons issued in terms of Rule 13 of the same rules. Rule 12 makes it incumbent upon a litigant to attach a Declaration for the simple reason that a claim may not be based on a liquid document or may not be a liquidated claim. Rule 13 deals with more straightforward claims arising out of liquid documents, acknowledgment and agreements that clearly set out the cause of action. I believe that in this matter, although there is no endorsement on the Summons itself issued by the plaintiff, the claim was based on a written contract and under those circumstances a Declaration may not be necessary.

In any case, the usual procedure a litigant should adopt would for the defendant to either raise an exception, or to seek further particulars or resort to some procedure as laid down in the rules to ensure that before a plea is entered, he is fully aware of the exact nature of the claim he has to answer to. Indeed, in this case, the defendant sought further particulars which were supplied by the plaintiff. A plea was subsequently filed which clearly stated the basis of the defendant's defence. Mr *Magwaliba's* argument that there was no Declaration filed to expand on the nature of the plaintiff's claim to me loses value and therefore has no merit. To raise such an issue during the trial usually happens in circumstances where a litigant realises some fault in the defence raised. I am not suggesting at this stage that there is some fault in the defendant's plea.

The law is trite when it comes to deal with pleadings in general. As already stated above a defendant who decides to restrict himself to one defence in his plea will stand or fall by that defence. What this means is that a defendant, as in this case, who chooses to rely solely on the exemption clause as his defence will succeed if he is able to show that

that exemption clause at law can be properly relief upon as a defence. He will, in the same breath fail if the law does no recognise for one reason or another the exemption clause as valid and enforceable.

To put more clarity to this point, a plea to a claim must satisfy all the requirements as laid down in the law. The Rules clearly state this point for the benefit of every litigant who comes before the Court. A defendant must deal effectively with all the allegations in the Summons and Declaration, if any. He must admit or deny them. If he denies them he would automatically put them in issue. If he fails to deny any allegation whatsoever, such allegation is deemed to be admitted. (See *Herbstein & Van Vinsen* "Civil Procedure Of The Superior Courts In South Africa", 3rd edition, at p 318.) To plead and raise a defence of general issue is not permissible.

I am satisfied that in his plea the defendant has not put in issue the allegation of failing to provide professional service to the plaintiff in supplying the software. It has also not put in issue the allegation that the defendant undertook to supply such software in a professional manner. I must say that in evidence the defendant's only witness sought in detail to show and convince the Court that what the defendant did was not only professionally done but was done in accordance with the contract. The witness, Mr Godfrey Siyawareva, stated in evidence that he initially conducted a demonstration of how the software worked. Having done so successfully and to the satisfaction of the plaintiff he was paid and proceeded to load the software in plaintiff's computers. He does not deny that after loading the software there were problems that plaintiff faced. As far as he was concerned the plaintiff's representative one Miss Rugare Rugara did not avail herself for training. That could be the explanation for failing to configure and use the

software to the plaintiff's best benefit. As far as he was concerned, the software modules were supplied as per Annexure A to the Agreement, Exhibit 1.

The witness's evidence is seriously disputed by the plaintiff. Miss Rugara stated in evidence that they were looking for a package which could do certain things expressly stated to the defendant. After loading the software, the software would not even do the basics that plaintiff expected. After complaining to the defendant. Miss Rugara realised there was no hope and subsequently sought software from elsewhere, which worked perfectly. She then asked for a refund which was accepted initially but later rejected on the basis of the exemption clause in the contract.

Her evidence to me was to say the least, sensible and well supported in material respects by a Mr Misimirembwa. The suggestion by defendant that she had made a false claim because she had not proved to the court that she was not using the defendant's software is to me far-fetched. I believe the plaintiff's evidence totally.

On the other hand defendant's evidence is not based on its pleadings. Its value in that regard is thus seriously diminished. If allowed, defendant's evidence would have the effect of taking the plaintiff by surprise. All I can say is that the defendant demonstrated too much confidence and over-reliance on the defence he proffered at the expense of the defence he could have raised by dealing with the merits of the case as contained in the plaintiff's claim.

I now deal with the exemption clause that the defendant refers to in its plea. I have already quoted word for word the provisions of clause 12 of the Agreement. Before I proceed it must be accepted that although it is generally agreed by the parties that this document forms the basis of the contract agreed by the parties, there were other aspects

of the agreement which were not contained in the document. The reason is that the document comes in the nature of a standard company document which is supplied to customers on engagement not a document prepared as a result of negotiations of the various terms and conditions by the contract and parties. That is the reason, for example, the agreed purchase price, the subject of this claim, is not provided for anywhere in that document. The defendant also mentioned implementation of the agreement in phases. That is again not contained in that document. The exemption clause that the defendant therefore sought to rely on is contained in a standard agreement form printed prior to even the parties meeting to contract. I am not suggesting it should be regarded as not binding. I am saying so because the law has a way of dealing with such exemption clauses which are contained in such documents.

Christie, in "The Law of Contract in South Africa" had this to say about exemption clauses in such documents at p 204 -

"The legal advisor of the company or public body who is instructed to draft a standard form contract-----will almost certainly include what has come to be known as an exemption or an exception clause. To reduce the uncertainties for which management will have to make allowances in its planning and costing he will seek to define as closely as possible the extent of the company's legal liability to customers, and he will find that the most convenient way to do this is by a clause exempting the company from liabilities it would otherwise be obliged to accept. Wishing to do as good a job as possible for his client or employer he will probably draft his clause in such a way as to give his company the maximum protection, and the company will accept this clause and incorporate it in its standard form of contract without seriously considering whether it needs it or not. For example, the cost of accepting the risk of liability and insuring against it may be less than the loss of goodwill and the cost of litigation involved in adopting and relying on a stringent exemption clause, but how often does a company take such matters into account? So what starts as a legitimate aid to planning and costing so easily becomes an expensive trap for the unworried customer.

Obviously the law cannot stand aside and allow such traps to operate unchecked, and the courts have protected the public from the worst abuses

of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly".

Turpin, in an article in the 1956 South African Law Journal at p 144 described such clauses in a contract as "imposed terms".

Christie, concludes that the courts will decide what is permitted and what is not permitted on the basis of the dictates of public policy. In the case of *Morrison v Angelo Deep Gold Mines Limited* 1905 TS 775 at 779, INNES CJ in discussing the established rule that a man contracting freely and without duress is free to waive any of his rights, stated as follows -

"Now, it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule and certainly the law will not recognise any arrangement which is contrary to public policy".

It is clear therefore, that contracts that are *contra bonos mores* will not be enforced once they are found to be such. If any element of fraud or cheating in whatever degree is found to exist and the litigant concerned is trying to hide behind an exemption clause so as to avoid an obvious liability the courts will not enforce such a clause. To treat the situation in a manner that results in enforcing such a clause would clearly be protecting and encouraging dubious and fraudulent ways of doing business among parties to the contract. Put clearly, it would be against public policy.

I must express my indebtedness to the submissions made by Miss *Chambuko* in her closing argument. I can do no better than paraphrase what she says in her argument.

Although plaintiff in its pleadings repeatedly referred to Clause 12 of Exhibit 1, I believe and it appears to be agreed, that the correct clause should be Clause 11. That clause reads as follows -

"11. **Assignment of Agreement**

The agreement is not transferable to any purchaser or other licensee of the software or to any other software vendor and no refund will be made if the licensee terminates this agreement for whatever reason. Both parties further agree that this agreement may not be assigned to any third parties."

This clause has two main parts. Firstly, the penalty part and secondly the exemption from liability part. The penalty part of this clause is on the no refund aspect Section 2 of the Contractual Penalties Act Chapter 8.04 defines "penalty" as follows -

"Penalty means -

- (a) any money which that person is liable to pay, or
- (b) anything which a person is liable to do or perform, or
- (c) any money, right, benefit or thing which a person is liable to forfeit;

under a penalty stipulation;

Penalty stipulation means a contract or provision in a contract under which a person is liable -

- (a) to pay any money; or
- (b) to do or perform anything; or
- (c) to forfeit any money, right, or thing which a person is liable to forfeit;

as a result or in receipt of -

- (i) an act or omission in conflict with the contractual obligations;

or

- (ii) the withdrawal of any person from a contract;

whether the liabilities expressed be by way of penalty, liquidated damages or otherwise."

The second part which refers to "for whatever reason" is a typical exemption clause, exempting liability of a party to a contract under whatever circumstance.

Miss *Chamboko* argues that it is trite that such a clause cannot exonerate defendant if it is found that such a clause contemplates a situation where the parties have performed their contract and not where there has been a fundamental breach. In the case of *Hall-Thermotank Natal (Pvt) Ltd v Hardman* 4 (SA) 481 it was stated that an

exemption clause was only limited to protect the plaintiff against false or imperfections on the product of its labours which were otherwise in accordance with the contract.

HENNING J had this to say at p 835 -

"I do not propose to attempt to define the expression 'fundamental breach of contract'. But I apprehend it to include (a) non-performance by a contracting party of his obligations; (b) performance which is useless for its intended purpose and (c) performance which is so defective as to constitute a breach going to the root of the contract".

Looking at the language of Clause 11 Exhibit 1 the court should not be persuaded to think that the parties hardly intended that the plaintiff would be exonerated from liability if it failed to perform its obligations at all or if its performance proved useless, or it committed a breach going to the root of the contract. After all, the parties must have had in mind that both of them would carry out the terms of the contract in full. It is most unlikely that they contemplated that plaintiff would be excused from the consequences of a fundamental breach. See also the judgment of KORSAH JA in the case of *Transport and Crane Hire v Hubert Davies & Co (Pvt) Ltd* 1991 Vol 1 ZLR 190 (SC). It was held in that case that the breach of a contract was a fundamental breach, and the exemption clause would not exempt the respondent from liability from such fundamental breach.

I totally agree with those submissions. At the same time I am not persuaded by Mr *Magwaliba's* arguments which I found in most cases arose out of issues which were not specifically pleaded in the pleadings upon which the defendant relied. He argues strongly, while accepting the existence of an exemption clause that the contract in issue should be regarded as a Consumer Contract and therefore governed by the Consumer Contracts Act.

I have difficulties in accepting his argument for the simple reason that his client the defendant is the one who was providing a service. The Consumer Contracts Act is aimed at protecting consumers in the position of the plaintiff. The Act creates provisions that give relief to such parties as the plaintiff where the contracts are regarded as unfair or contain unfair provisions or where the exercise of a power right or discretion under such a contract is or would be unfair. Defendant is trying to escape liability by invoking a clause which plaintiff says is not fair, more precisely, unenforceable. Under the circumstances, I am of the view that plaintiff has proved its case on a balance of probabilities. Plaintiff is therefore entitled to the relief sought.

In conclusion I therefore make the following order -

- (a) Judgment is hereby granted in favour of the plaintiff in the sum of \$56 120,00 as claimed in the summons;
- (b) Defendant is ordered to pay interest at the prescribed rate of 25% *per annum* calculated from 24 February, 2000 to date of full payment;
- (c) Defendant is ordered to pay costs of suit.

Gula-Ndebele & Partners, plaintiff's legal practitioners
Magwaliba Matutu & Kwirira, defendant's legal practitioners