

[1]Sunny Yi Feng Zim v Sallolly Investments & Ors, [2]Sunny Yi Feng Zim v Costa Logistics & Anor

HH 406-21
HC 3971/21
And HC 3970/21

SUNNY YI FENG ZIMBABWE (PVT) LTD
versus
SALLOLLY INVESTMENTS (PVT) LTD
and
REGIS CHUNDU
and
COSTA LOGISTICS (PVT) LTD
and
ENERST ZVIKOMBORERO GWINYAI
and
OFFICER IN CHARGE ZRP NORTON N.O.

Case 1

SUNNY YI FENG ZIMBABWE (PVT) LTD
versus
COSTA LOGISTICS (PVT) LTD
and
ENERST ZVIKOMBORERO GWINYAI

Case 2

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE,

Date of written judgment: 5 August 2021

Urgent court application & urgent chamber application

On the papers

MAFUSIRE J

[1] These are two cases under one judgment. At a pre-hearing case management conference, the parties agreed to have them consolidated. It made sense. Among other things, the cause of action in both matters is the same. The real protagonists are the same. Kindred orders are being sought. Both matters were filed under certificates of urgency. They were filed on the same day.

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[2] Case 1 is an urgent court application. The applicant seeks final relief. The draft order is characteristic of bad draftsmanship. It lacks precision. It seeks an order directing the respondents [obviously excluding the fifth respondent, a mere policemen with no stake in the dispute] to offload certain 40 000 litres of diesel [obviously into the applicant’s tanks, otherwise where else?] The diesel is to be offloaded from a certain fuel tanker currently parked at the applicant’s premises [which are not identified]. The draft order goes on to direct that in the event that the respondents fail to offload the fuel as ordered, the Sheriff should do that himself by offloading the fuel it into the applicant’s reservoirs [obviously at the premises where the tanker is currently parked]. The draft order finishes by claiming costs of the application against the respondents. It says nothing about the liability for such costs being joint and several, or being against only such of the respondents as are culpable.

[3] Verbatim, the draft order in Case 1 reads:

- “1. The Respondents are hereby ordered to offload 40 000 litres of diesel currently loaded on an International Truck Registration Number ADZ 4276 currently at the Applicant’s premises forthwith.
2. In the event of the Respondents failing to offload the diesel as ordered, the Sheriff of the High Court of Zimbabwe if (*sic*) hereby ordered to offload the fuel into the Applicant’s fuel Reservoirs.
3. The Respondents shall pay [the] costs of this Application.”

[4] Case 2 is an urgent chamber application. It seeks a provisional order against Costa Logistics (Pvt) Ltd [*“Costa Logistics”*] and Enerst Zvikomborero Gwinyai [*“Gwinyai”*] who are respectively the third and fourth respondents in Case 1. The final order sought on the return day, apart from costs, is an interdict barring the two from removing the fuel tanker from the applicant’s premises. The interim relief seeks the relocation of the vehicle to a safe place, but within the applicant’s premises, as designated by it. This is pending the determination of an unnamed case [but obviously the urgent court application above]. Verbatim the interim relief sought reads:

- “1. That pending the determination in HC the Respondents are hereby ordered to relocate their vehicle registered (*sic*) ABZ 4276 to a safe place designated by the Applicant within its premises.”

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[5] At the case management conference aforesaid, following certain admissions and undertakings made by both sides, Case 2 had been all but settled. The parties agreed to file either a notice of withdrawal by consent, or some deed of settlement. But up to the time of this judgment nothing had been received. However, this might have been due to an interposing difficulty. The case management conference was on Thursday, 28 July 2021. The consolidated hearing, if Case 2 did not settle, was scheduled for Tuesday, 3 August 2021. However, following a Practice Direction from the Office of the Chief Justice to guide the operations of the courts in the wake of the extended lockdown measures put in place by Government to check the spread of the covid-19 pandemic, one of several such Directions in the recent past since the outbreak of that world pandemic in 2019, the courts have been practically shut down for all matters except bails and remands. Under the circumstances, and in line with previous Practice Directions, word was sent round to the parties that this matter would be determined on the papers but that the parties were free to file whatever additional papers they might deem fit, for as long as the documents reached me before concluding this judgment. Only the applicant's supplementary heads of argument were received. However, they add no value.

[6] Much of the facts are common cause or without contest. Demonstrably, it is a dog eat dog situation in some sections of society. In this matter someone seems to be up to no good at all. The events have all the hallmarks of a fraud. The finger is pointing straight at Sallolly Investments [Pvt] Ltd [*"Sallolly Investments"*] and Regis Chundu [*"Chundu"*], respectively the first and second respondents in Case 1, even though the applicant, on the one side, and the third and fourth respondents, on the other, mutually accuse one another of collusion with the culprits. Chundu has effectively vanished. He is no longer reachable on the telephone. Sallolly Investments cannot be traced. The addresses initially supplied have turned out to be false. Feng's lawyers have failed to serve process on them. Forty thousand litres of diesel fuel are at stake. Although poor draftsmanship seems to put the fuel tanker at stake as well, plainly the parties are tussling over the fuel only. Once the fate of the fuel is determined, the fuel tanker will most likely be let go.

[7] It is expedient to refer to the parties by their names or monikers to avoid confusion. The applicant, Sunny Yi Feng [*"Feng"*], is a tile manufacturing company near Norton. On 10 July

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2021, Sallolly Investments offered Feng 40 000 litres of diesel. Feng accepted. The price, the mode of payment and of delivery were all agreed upon. Feng was represented by one Leo, and Sallolly Investments by Chundu. But the two had never met before. The deal was concluded over the telephone. Payment for the fuel would be made upon delivery. On 16 July 2021 the fuel tanker in question arrived at Feng's premises near Norton, laden with the fuel. Feng says inside the fuel tanker's cab were four people. It is agreed the first two were the driver and his assistant. It is not agreed who the other two were. Feng believes the third person was Chundu, and the fourth Gwinyai. At the case management conference, Mr A. *Mambosasa*, representing Costa Logistics and Gwinyai, said that his instructions were that Gwinyai was in a separate car. However, this minor conflict does not stand in the way.

[8] Feng says after verifying the fuel quantity, it made a bank transfer of RTGS \$4.8 million into the account of Sallolly Investments with one of the local banks, as per prior arrangement with Chundu. Feng has produced both the invoice from Sallolly Investments and the proof of payment. The proof of payment was shown to the driver and all those inside the cab. However, the fuel was not offloaded. It was alleged that the fuel tanker's pump was too small for the task. It would not be able to offload the fuel from the tanker into Feng's reservoirs. So it was agreed that a bigger pump would be procured from Norton. One or other or more of those people in the cab left to get the bigger pump. The tanker was left behind, still parked inside Feng's premises. However, when those people returned, the narrative had changed. It was ordered that the tanker had to be driven away with its fuel because no payment had been made. But Feng would not hear of it. Its employees blocked the tanker. They protested the fuel had been paid for and now belonged to Feng.

[9] Gwinyai demanded the release of the truck and of the fuel. He claimed the fuel had been supplied by Costa Logistics. The tanker belonged to his employer Lopdale Energy (Private) Limited [*"Lopdale Energy"*]. He had been engaged by one Mushangwe to supply the fuel to some premises near Norton. Those premises had turned out to be Feng's factory. He did not know Feng. He did not know Mushangwe. But he and Mushangwe belonged to the same WhatsApp platform for fuel dealers. Mushangwe had assured him that payment of the fuel would be made in United States dollars upon delivery, but before offloading. Since he had

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received no payment, he could not allow the fuel to be offloaded. He knew nothing about Feng's alleged \$4.8 million payment.

[10] There was no agreement. The matter was reported to the police. The police would not get involved, stating that it was a civil dispute. On 19 July 2021 Feng filed this urgent court application, Case 1, simultaneously with the urgent chamber application, Case 2. They are vigorously opposed by Costa Logistics and Gwinyai. Basically the grounds of opposition are that they do not know Feng. They have no contract with it. It is Feng which may have been defrauded by Chundu. They do not know anyone by that name either. Their fuel has not been paid for. Feng has no right to cling to it and to the truck. Feng's recourse lies against Chundu, whoever he is and wherever he may be. Feng has no lien over the truck or the fuel. It made no such improvements on them as would form the basis of a lien. In any event, a lien is a weapon of defence, not of attack.

[11] Regarding the critical developments when the fuel tanker entered Feng's premises, Gwinyai says Mushangwe, who was with him in another vehicle, not inside the tanker's cab, told him that the payment for the fuel would be made in Avondale in Harare. He and Mushangwe drove to Harare to collect the money. But in Harare, Mushangwe's story changed. Gwinyai got no payment. So he cancelled the deal and immediately drove back to Norton to order the tanker off Feng's premises with the fuel unloaded. However, Feng's employees barricaded the tanker and prevented it from leaving.

[12] Gwinyai also argues that Feng is approaching the court with dirty hands. It should be denied audience. He says on 20 July 2021 Lopdale Energy obtained *ex parte* from the magistrate's court at Norton, an order for the release of the tanker. However, the messenger of court failed to execute the order. He was denied entry and access by Leo. The tankers' tyres had been deflated. Lopdale Energy should be joined to the current proceedings so that it can counter-claim for the return of its vehicle.

[13] At the case management conference, Mr *T.G. Kuchenga*, representing Feng, admitted that Leo had been arrested by the police in relation to the dispute but said that he was on remand. He elaborated on what Feng's deponent had said in an answering affidavit that the

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messenger of court had not been denied entry or access to the tanker as such. He said when the messenger of court had arrived at Feng's premises to execute the order, the tanker had already been blocked by several other delivery trucks that were bringing supplies to the factory and taking away deliveries. Because of the chaos caused by the inappropriately parked tanker, most drivers, including the tanker driver, had since left. Therefore, there was no way the tanker could be removed. The driver had left with the ignition keys. At any rate, Feng had immediately obtained, also *ex parte*, an order staying execution of the release order.

[14] That is the case before me. Here now is my decision, first the preliminary point about Feng coming to court with 'dirty hands'. As was stated in *Associated Newspapers of Zimbabwe [Private] Limited v The Minister of State for Information and Publicity in the President's Office & Ors* 2004 (1) ZLR 538 [SC]:

"This Court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards."

[15] In his return of service on his unsuccessful attempts to execute the order of the magistrate's court, the messenger of court wrote in part:

"The main entrance was blocked with the 30 tonne trucks with load of gravel. Saw Mr Leo who refused me from collecting the Truck. Police arrested Mr Leo. On hold for another attempt tomorrow. To hire 30 to 40 tonne cranes."

[16] There is a presumption of validity on what the messenger of court stated on his return of service as to the truth of what transpired. But that presumption is rebuttable on a balance of probabilities. I am satisfied that Feng has successfully rebutted it. From his own report above, there was no way the messenger of court would have removed the fuel tanker. It was blocked by other huge trucks laden with gravel. Furthermore, apart from that blockage, it would need a 30 to 40 tonne crane to remove it. This all but confirms Feng's story that the fuel tanker had been blocked by other heavy duty trucks bringing supplies and taking away deliveries, and that, at any rate, the drivers of the trucks, including that for the tanker, had since left with the ignition keys. Therefore, the respondents' preliminary point is hereby dismissed.

[17] On the merits, the matter falls to be decided on the principles of agency. In simple terms, an agency is a three way relationship. It is created when one person, the principal, hires

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another, the agent, to do something for a third person, the third party, on behalf of the principal. From the facts that are common cause, Chundu, fronting his *alter ego*, Sallolly Investments, contracted with Feng to supply it with forty thousand litres of diesel fuel. Terms were agreed upon, including the currency of the deal. But Chundu, also known as [a.k.a.] Sallolly Investments, did not have the fuel. He turned to Gwinyai, this time using the alias Mushangwe. Terms were agreed upon, including the currency of the deal and the place of delivery. But Gwinyai did not have the fuel. His employer Lopdale Energy had a tanker. Gwinyai hired Costa Logistics to supply the fuel. Terms were also agreed upon. Chundu a.k.a. Sallolly Investments a.k.a. Mushangwe, looked up to Feng for payment. Feng paid. Costa Logistics delivered the fuel. It looked up to Gwinyai or Lopdale Energy for payment. They did not pay. Chundu/Mushangwe promised payment in Avondale, Harare. Together with Gwinyai they drove to Harare, leaving the tanker parked at Feng's premises unloaded. It is not clear how Chundu/Mushangwe managed to shake Gwinyai off his back. But Gwinyai quickly realised he was not going to be paid. He rushed back to Feng's premises. His plan was to have the tanker driven away, unloaded. Feng blocked it.

[18] Feng accuses Gwinyai and Costa Logistics of collusion to defraud it of its \$4.8 million. It says it is Gwinyai that came with Chundu. It says Gwinyai was in the fuel truck when Leo showed the proof of payment. Gwinyai seemed satisfied. The fuel would have been offloaded but for the small size pump. He left with Chundu/Mushangwe ostensibly to get a bigger pump. It is only now that he is saying they had left together to collect payment in Avondale, Harare. But even this shows that Gwinyai was at all times aware that his money for the deal would come from Chundu/Mushangwe, not Feng. That concludes Feng's argument. To me, it has a lot of substance.

[19] But Gwinyai equally accuses Feng of collusion with Mushangwe/Chundu to defraud it of the fuel. He did not know this Chundu or Mushangwe fellow. He did not know Feng. Whatever deal was between Feng and Chundu/Mushangwe does not concern him. Until the fuel is paid for, there will be no delivery or any offloading.

[20] Regrettably for Gwinyai and Costa Logistics, the probabilities support Feng. The law supports it too. Gwinyai's case is limping. I do not have to go into the whole question of

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ostensible authority as between Gwinyai and Chundu/Mushangwe, as argued by Feng, to show that Gwinyai held out to Feng that Chundu/Mushangwe was Gwinyai's agent to whom payment of the fuel could be made. I also do not need to get bogged down with the question of who colluded with who to defraud the other. That is for the criminal court. Lastly, I also do not need to be detained by the question of whether or not Feng has a lien over the tanker and the fuel.

[21] From the facts, Chundu/Mushangwe alias Sallolly Investments, was the principal to supply the fuel to Feng, the third party. Chundu/Mushangwe alias Sallolly Investments would supply the fuel through his/its agent Gwinyai, who in turn would do so through his own agent Costa Logistics. It is clear Feng performed its side of the bargain with Chundu or Sallolly Investments. It paid the full amount and in the currency of the deal. On his part, Chundu or Sallolly Investments has partly performed. The fuel was brought to Feng's premises. Plainly, Feng is entitled to specific performance. It is not to Feng that Gwinyai or Costa Logistics should look to for payment. Feng does not know them. It has no privity of contract with them. There was no such relationship between Feng and Gwinyai or Costa Logistics as is recognised by law. It is to their agent Chundu/Mushangwe alias Sallolly Investments that they should look to for the payment done by Feng. Therefore, the diesel fuel must be offloaded into Feng's fuel reservoirs and let go the tanker.

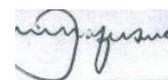
[22] As already pointed out, the draft order is poorly drafted. However, since the order of court must be efficacious, simple amendments to it will do no violence to the substance of the remedy sought, or cause any injustice to the respondents. Costs shall follow the event. However, on the question of costs, not only should the fifth respondent be absolved, as clearly he is not a party to the dispute in any conceivable capacity, but also I shall refrain from ordering that the liability therefor be joint and several. This is for a good reason. The applicant has not asked for it. The difference is significant. An order of liability that is joint and several gives the creditor the right to procure payment of the debt from any one of the co-debtors individually or collectively, up to the full amount. But where liability is not joint and several, it means the creditor cannot collect the full amount of the debt from any single debtor as the debt is split proportionally between both of them or amongst all of them. So, the following order is hereby made:

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- i/ Within 48 hours of the grant of this order, the first, second, third and/or fourth respondents shall offload, or cause to be offloaded, from a certain fuel tanker, registration no ABZ 7839, which at all relevant times from 16 July 2021 was attached to the motor vehicle registration no ADZ 4276, and at all relevant times parked at the applicant's tile manufacturing factory situate near Norton, forty thousand [40 000] litres of diesel fuel into the applicant's fuel reservoirs thereat.
- ii/ In the event of non-compliance with the order aforesaid, the Sheriff for Zimbabwe, or his lawful deputy, or assistant, is hereby empowered, authorised and directed to execute the order and give effect to it by any means authorised by law.
- iii/ The costs of this application shall be borne by the first, second, third and fourth respondents.

5 August 2021



Makururu & Partners, legal practitioners for the applicant in both cases;
Mambosasa, legal practitioners for the third and fourth respondents in case 1, and for the respondents in case 2