

MASHONALAND TOBACCO COMPANY (PVT) LTD
versus
PAMUKA (PVT) LTD
and
FRANK TREVOR MUSHININGA
and
TINASHE GIBSON SITHOLE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 6 October 2022

Date of *ex tempore* judgment: 6 October 2022
Date of this judgment: 30 May 2023

Summary judgment

D. Ndawana, for the plaintiff
B. Magogo, for the defendants

MAFUSIRE J

[1] On 6 October 2022 I granted summary judgment in favour of the plaintiff against the defendants jointly and severally. The judgment was in the sum of US\$419 435-40 together with interest thereon at the rate of 10% per annum from 6 August 2019 until the date of payment. I gave my reasons *ex tempore*. The defendants appealed. I am told that on the day of hearing in the Supreme Court, the appeal was removed from the roll. Two letters from the parties' legal practitioners dated 10 and 11 May 2023 have been brought to my attention. They seek to explain what transpired at the Supreme Court. The substance of the explanations is roughly the same although the detail is somewhat different.

[2] In substance, the letters from the parties' legal practitioners inform that the appeal was postponed or removed from the roll with a direction from the Supreme Court that a full judgment with reasons is required. I called the legal practitioners into Chambers for clarity. At the informal sitting I was furnished with a consent order from the Supreme Court dated 8 May 2023. It said that the matter had been removed from the roll with costs for the reason

that it was incomplete. The parties opined that ‘incomplete’ was most likely a reference to an incomplete or non-existent judgment. They drew attention to the first paragraph of my *ex tempore* judgment which had been transcribed and made part of the record of appeal. It read:

“I preface my ruling with these remarks. This is an *ex tempore* ruling. What I mention is the gist of the decision or the reasons for the decision that I have taken today after re-reading and re-reading the papers and hearing argument. I think we have sat for three or more times in this matter. If more detailed reasons are required for the decision I have taken today, they may be proffered upon written request received within a reasonable time, and only after I am satisfied that my *ex tempore* ruling today does not cover the essentials of my decision.”

[3] In Chambers, the lawyers and myself deliberated for some time trying to work out the exact respects in which my *ex tempore* judgment might have been deficient. The lawyers seemed satisfied that it covered the essentials. The defendants’ representative in particular, explained that they had appealed the *ex tempore* judgment believing that the reasons given in it had been sufficient but that on appeal, a different view had prevailed. However, after perusing the notice of appeal, which had now been availed to me, I opined to the parties that the deficiency might have been in relation to the issues raised in grounds of appeal 1 and 2. These grounds attack my decision, or the lack thereof, regarding the plaintiff’s amendment of the first defendant’s name from ‘Pamuka Leaf Tobacco Company (Private) Limited’ to ‘Pamuka (Private) Limited’. It was readily agreed that I would supplement my *ex tempore* judgment in that regard. This then is the supplement.

[4] In its summons, the plaintiff cited the first defendant as ‘Pamuka Leaf Tobacco (Private) Limited’. In the application for summary judgment, the plaintiff cited the first defendant as ‘Pamuka Leaf Tobacco Company (Private) Limited’. That was the name by which it was referred to in the various sittings and proceedings before this court, including in the default judgment granted on 24 November 2021, *per* CHINAMORA J, and the rescission of that judgment on 23 February 2023, *per* CHILIMBE J. The application for summary judgment was finally argued before me on 6 October 202 after two or three abortive sittings. One of the issues that detained the court was that of the supplementary affidavit that had been filed by the plaintiff without leave. The defendants took an objection. Full argument was presented on the propriety or impropriety of the plaintiff’s supplementary affidavit in the court record. In the end, no ruling was necessary. In some kind of trade-off between the parties, the

defendants abandoned their objection when the plaintiff acquiesced to their intention to file supplementary affidavits of their own. That was done.

[5] The other issue that detained the court was in relation to the citation of the first defendant as aforesaid. Distilled, the defendants' argument was that the original agreement between the parties referred to the first defendant as 'Pamuka Leaf Tobacco (Private), Limited' but that the acknowledgement of debt partly relied upon by the plaintiff referred to this defendant as 'Pamuka Leaf (Private) Limited', yet that the application for summary judgment cited this defendant as 'Pamuka Leaf Tobacco Company (Private) Limited'. As such, the argument proceeded, the plaintiff had brought to court a non-existent party or a wrong party altogether.

[6] An adjunct to the above argument was that the plaintiff relied on, among others, an acknowledgment of debt incorporating a surety agreement. The second and third defendants denied signing the acknowledgement of debt or having any knowledge of it. They denied binding themselves as sureties for the indebtedness by the first defendant to the plaintiff. Full argument in these regards was also presented. Among other things, the plaintiff largely relied on the documents in its supplementary affidavit to show that the essence or core of the first defendant's name was 'Pamuka' and that it was also known by those other variations. It was also argued on behalf of the plaintiff that the documentary evidence attached to the affidavits showed that the plaintiff disbursed money into the first defendant's bank account and that the defendants expressly acknowledged liability the quantum of which had been settled not only in the acknowledgement of debt and suretyship, but also in e-mails.

[7] On 30 June 2022, during the first sitting in the application for summary judgment, I dismissed the defendants' objection over the mis-citation of the first defendant. I gave my reasons *ex tempore*. But they are not captured in the judgment that I eventually delivered at the end of the whole case. These are they. I was satisfied that the defendants' objection in this regard was frivolous and a distraction. The mis-citation was something rather innocuous. In all the variants of the first defendant's name, 'Pamuka' was the root or core of the name. The principal documents produced in court, particularly the primary tobacco funding agreement, the acknowledgements of debt and the suretyship, show that the first defendant was referred to by one or other of its variants. They also showed that the plaintiff deposited money into a

bank account in the name of the first defendant as cited in the amended order and in this judgment. I was convinced that the defendants were trying to hide behind a finger to avoid their obligation and that the issue of the alleged mis-citation was just an after-thought.

[8] The rest of the reasons for my decision in granting summary judgment are set out in the *ex tempore* judgment already referred to above.

30 May 2023



Gill, Godlonton & Gerrans, legal practitioners for the plaintiff
Mafongoya & Matapura, legal practitioners for the defendants