**PLAUDIT CHEMICALS CC**

**VERSUS**

**AFRICAN ASSOCIATED MINES**

**AND**

**SMM HOLDINGS (PRIVATE)LIMITED**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO31 JANUARY 2012, 19 SEPTEMBER 2013 AND 20 FEBRUARY 2014

*S. Mazibisa* for the plaintiff
*J. Moyo* for the defendant

Civil trial

**MAKONESE J:** This matter was first heard on the 31st January 2012. The matter was then postponed on divers occasions for reasons beyond the control of the court. The parties led evidence from the Plaintiff and Defendant's witnesses and judgment was reserved. The respective legal practitioners, both senior legal practitioners, undertook verbally to file submissions by 30th September 2013. I made various efforts through my clerk to secure these written submissions but none were forthcoming. On the 20th December 2013 Defendant's legal practitioner filed his closing submissions, indicating his frustration that he had waited in vain for Plaintiff's legal practitioner to file his submissions first to enable him to respond. After a further waiting period the Plaintiff's legal practitioner finally and eventually filed his closing submissions on the 3rd of February 2014. I must indicate however, that Plaintiff's legal practitioner has apologised for his late filing of the closing arguments. I must also observe that it is important for legal practitioners to file documents timeously moreso where they make undertakings to file such documents within a stipulated period.

Background

The Plaintiff is a duly incorporated company in terms of the laws of South Africa whose address and principal place of business is in the Republic of South Africa. The 1st and 2nd Defendants are duly incorporated companies in terms of the laws of Zimbabwe. The Plaintiff is in the business

of supplying mining equipment, spares and machinery to various companies inside and outside Zimbabwe. In the year 2008 the Plaintiff supplied certain spares and equipment to the Defendants. At the commencement of the trial, the court was advised by the parties that they were in agreement and that save for an amount of R119 439.90 payments made were equivalent to the value of goods supplied by the Plaintiff. In other words, but for any interest and legal charges raised by the Plaintiff the only amount in dispute is R119 439.90. The Plaintiff further avers that the Defendant is liable to pay the said sum of R11943.90 together with interest at the rate of 10% per month as well as collection commission and costs on a legal practitioner and client scale. The Defendant denies that it owes any amount and contends that in any event there is no obligation to pay interest at the rate of 10% per month as well as collection commission and costs on a punitive scale. I shall deal with these issues in turn:

WHETHER PLAINTIFF IS ENTITLED TO PAYMENTOF R119439.90

The Plaintiff asserts that the claim for payment of R119439-90 is valid and must stand. The Plaintiff led evidence from Mathew Chikwanda, who is the Chief Executive Officer of the Plaintiff's company. He testified that in or around March 2008 Plaintiff opened an account for the Defendant for the supply of mining spares and equipment. On various dates goods were brought in from South Africa into Zimbabwe and the Defendant took delivery of the said goods on credit. Chikwanda told the court that it was understood by the parties that payment would be effected within 90 days from the date of delivery. He stated, further, that it was in the contemplation of the parties that the terms of credit would be formalised by reducing them into writing. The written credit agreement would cover issues including the rate of interest, collection commission and legal costs. It was also envisaged that the issue of securitization would be covered in such agreement. The parties never got to sign the agreement as there was no agreement on certain terms. The Plaintiff acknowledged that the defendant raised a query regarding goods worth R119439.90, which it says it never received. The method of delivery as explained by the Defendant's witness Patrick Zenizeni was accepted by Chikwanda. It was to the effect that the Plaintiff's driver would bring the goods to the Defendant at Zvishavane. A physical check would be conducted by the driver and the Plaintiff's employee against delivery notes. If satisfied, the Defendants would sign the delivery note confirming receipt of the goods. In the event that certain goods were missing appropriate endorsements would be made and signed for

by both parties on the delivery notes. The defendant produced copies of the delivery notes that showed that certain goods were not received. Mr Chikwanda did acknowledge that there was a query regarding certain goods that were allegedly not received by the Defendant. It seems to me that the evidence of Defendant's storeman P Zenizeni was very clear in this regard. Chikwanda was forced to concede that these goods were not received. He sought to argue that there were two separate supply contracts being the ordinary and initial contract or arrangement and what was referred to as the CCJ Petrow arrangement, the latter being an arrangement where Defendant's purchases from the Plaintiff were to financed by CCJ Petrow (Pty) Limited. Chikwanda's submission was that these missing goods were not goods that were being delivered on the ordinary account that is the subject of these proceedings but on the CCJ Petrow account. I did not follow the logic advanced by Chikwanda on this aspect. In any event, and at any rate once it was accepted that there were goods that were not received and it is conceded that such goods have not been accounted for, it stands to reason that the Defendant cannot be compelled to pay for goods not received. On this basis alone the Plaintiff's claim cannot succeed.

PAYMENTOF COLLECTION COMMISSION

It is necessary for me for the purpose of the completeness of this judgment to comment on Plaintiff's claims for collection commission. The Plaintiff has sought to rely on the provisions of an unsigned credit agreement. The Defendant cannot be contractually bound by an unsigned agreement in the particular circumstances of this case. The Plaintiff's evidence that it was in the contemplation of the parties that the terms in the unsigned agreement would bind the parties is not tenable and the court rejects it. In this jurisdiction collection commission is governed by Statutory Investment 314 of 1982 (The Law Society By-Laws). The Law Society fixes the rate at which legal practitioners may raise or claim collection commission against their clients. Since dollarization the Law Society does not appear to have fixed a tariff governing collection commission. The rate which has always been applied is 10% of the capital debt. However, collection commission may be determined by the parties who may fix a rate for particular commercial transactions. In such instances the rate applicable must be reduced to writing and agreed to by the contracting parties. Where the Defendant has not agreed to pay collection commission at all the court can neither fix a rate for collection commission nor compel the Defendant to pay such commission.

The Defendant has properly indicated that there is an even stronger argument against liability for the collection commission by the Defendant. The position which has not been controverted by the Plaintiff is that Plaintiff obtained judgment against Defendants under case No. HC 1288/10 by way of a Summary Judgment application on the 5th of August 2010. The Plaintiff then issued a Writ of Execution on the strength of which the Deputy Sheriff attached the Defendant's property. Thereafter Defendants made payment to the Deputy Sheriff who passed on the money to the Plaintiff's legal practitioners in September and November 2010 after the issuance of the Writ and attachment of Defendant's property. It is now a settled legal principle which has become part of our law that once legal proceedings have been instituted and where the matter has gone to execution stage, a legal practitioner can no longer claim collection commission. It is now considered that recovery of any amounts due is now being done through the process of the court and therefore collection commission is no longer chargeable. See *UDC Rhodesia Limited –v- Ushewokunze* 1972(2) ZLR page 97; and *Scotfin Ltd v Ngomahuru* 1998 (3) SA 466 (ZH).

For this and other reasons alluded to there is therefore, in my view no basis for Plaintiff's claim for collection commission.

Interest

The Plaintiff avers that the Plaintiff operates a business involved in the supply of goods for the mining industry and that there was an understanding that interest should be levied on overdue accounts. The Plaintiff argues that the goods were supplied on a 90 day account and that it follows naturally, that after the expiration of the 90 day period interest would begin to accrue on the outstanding amounts. The Plaintiff's witness sought to relie on a bundle of e-mail communications between the parties wherein the Defendants undertook to settle the various outstanding amounts. The undeniable fact, however is that there was never an agreement whether oral or written on the rate of interest to be paid by the Defendant.

In terms of the provisions of the Prescribed Rate of Interest Act [Chapter 8:10] interest can only be pegged at the prescribed rate, in the absence of an agreement by the parties on any other rate. Section 4 of the relevant Act provides as follows:-

"If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade or custom or in any other manner, such

interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, order otherwise."

See also the case of; *Funding Initiatives International (Pvt) Ltd v Constantine Mabaudi* HH 20/07.

The above case lays out the principle that interest on a debt must be within the permissible limit before it can be treated as enforceable and recoverable.

In *casu*, the Plaintiff was charging interest at the rate of 10% per month which eventually translates to 120% per annum. This rate of interest was clearly excessive and by any stretch of imagination it cannot be concluded that it was in the contemplation of the parties that in the event of a default, the Plaintiff would be permitted to recover interest at such a punitive rate.

From all the evidence presentenced by the parties I am of the view that the Plaintiff failed to prove its claim on a preponderance of probabilities.

In the result, I accordingly dismiss the Plaintiff's claims with costs.

*Messrs Cheda and partners*, plaintiff's legal practitioners
*Messrs Dube, Manikai & Hwacha*, defendants' legal practitioners