

REDAN PETROLEUM (PRIVATE) LIMITED
versus
GERALD ASHLEY MUZVIDZWA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 June 2011, 13 July 2011, 28 July 2011,
15 September 2011, 26 September 2011, 5 October 2011,
20 October 2011 and 8 February 2012

G V Mamvura, for the plaintiff
Advocate Zhou, for the defendant

MTSHIYA J: On 10 February 2010 the plaintiff issued summons against the defendant claiming:

- “a) Delivery to it by the defendant of 1600000 litres of diesel or alternatively payment by the defendant of a sum of money in United States Dollars sufficient to purchase 1600000 litres of diesel in Zimbabwe; and
- b) Cost of suit.”

The record shows that on 29 March 2010 the plaintiff obtained a default judgment in terms of the above claim. The default order was, however, rescinded on 2 June 2010.

The defendant also has a claim in reconvention. He claims:

- a) Payment of the sum of US\$159 000-00
- b) Return of trailer and fuel tank or payment of its value of US\$15 000-00
- c) Return of 50 000 litre fuel tanks or their value of US\$40 000-00
- d) Surrender and return all documents of title and share certificate pertaining to the entire shareholding in Carmelo Investments (Pvt) Limited and 50% shareholding in Auxiliary Services (Pvt) Limited
- e) The rendering of an account of 50% of dividend and profits paid to the plaintiff by Auxiliary Services (Pvt) Limited from the business known as Title It and the payment of same.
- f) The return of documents of title pertaining to Flat No. 9 Monte Serino, Johannesburg, Republic of South Africa

- g) The return of agreements of sale between the Savanna Trust and Lindsay and Dave Capsopoulos pertaining to the acquisition of shareholding in Capsopoulos Enterprises (Pvt) Limited and the purchase of household goods situate at House No. 28 Blair Road, Ballantyne Park, Harare.
- h) The return of documents of title pertaining to immovable property known as No. 28 Blair Road, Ballantyne Park, Harare; and
- i) Costs of suit.”

The facts of the case, not wholly accepted by the defendant, are briefly that in October 2008, in Harare, the defendant borrowed 1600 000 litres of diesel from the plaintiff with a promise of delivering back the litres of diesel within six months. The plaintiff also states that as security for the loan of diesel the defendant offered his property known as No. 28 Blair Road, Ballantyne Park, Harare, (No. 28 Blair Road) ; shares in his company known as Auxilliary Services (Pvt) Ltd (Auxiliary Services Shares) and title deeds for his flat in South Africa known as No. 9 Monte Serino, Johannesburg. On the basis of the security provided, the plaintiff duly delivered the borrowed 1600 000 litres of diesel to the defendant. The defendant has, however, to this date failed to deliver back the said litres of diesel and hence this action.

The plaintiff led evidence from two witnesses namely Nigel Joseph Earle (Earle) and Lindsay Earle (Lindsay).

The first witness, Earle, told the court that at the time of the diesel loan he was one of the two directors of the plaintiff. He left the plaintiff in January 2011. Earle said he knew the defendant as a friend with whom he had done business. He said the defendant had approached him and asked for a loan of 16 00 000 litres of diesel in order to deal with a problem that had arisen in his (defendant’s) diesel supply arrangements. He had then discussed the defendant’s request with his co-director, a Mr Tafadzwa Chigumbu (Chigumbu), and it was then agreed to lend the defendant the 1600000 litres of diesel for a period of six weeks. The defendant, he said, had offered as security for the loan “number 28 Blair Road”, plus some other assets which were various properties in South Africa and a 50% share in a business in Harare trading as Tile It”. Earle said Tile It was owned by a company called Carmelo Investments in which the defendant had 50% shares. The other shares in the company, HE SAID, were owned by one Tapiwa Chanakira (Chanakira). It was his evidence that, contrary to the contents of the letter at p 1 of exh 1, the Tile It business was never transferred to him. He said

Chanakira was not forthcoming on the transaction because he had financial issues to settle with the defendant and hence the failure to have the business transferred to him.

Earle said upon a verbal agreement the 1600000 litres of diesel were duly supplied to the defendant's nominated customer. He said the defendant did not, however, settle the debt as verbally agreed.

Earle said the failure by the defendant to honour his obligation, led to settlement discussions which hinged on the securities provided. He said the settlement discussions revealed that the defendant faced a variety of claims amounting to US\$2 million from other organisations with whom he had done business. He said meetings with other creditors resulted in the plaintiff clearing some of the defendant's debts. Earle said this had been done so that in the end the defendant would then allow the plaintiff to dispose of number 28 Blair Road. He said the proceeds from the sale of the house would have been adequate to clear the plaintiff's claim. That arrangement, according to Earle, rendered the issue of other securities irrelevant. He said it was this arrangement that later led to the signing of the document at p 3 of exh 1 by both himself and the defendant, (generally, referred to in the papers filed as "Acknowledgment of Debt"). He said he and the defendant had put their signatures to the said document which read as follows:

"TO WHOM IT MAY CONCERN

This serves to confirm that Redan Petroleum (Pvt) Ltd is owed an amount of

1, 600,000 Lts of Diesel (in tank Harare inclusive of costs, duties, levies, transport, storage and handling etc) by Ashley Muzvidzwa in respect of product loaned in 2008.

In addition, Redan Petroleum (Pvt) Ltd is owed the sum of US 600, 000-00 in respect of additional product advanced in 2008. This amount is payable into Redan/NOCZIM FCA SUB ACCOUNT IN US\$ at Stanbic bank.

On settlement of this debt in full, Redan Petroleum will release the securities held in terms of this debt to include – 28 Blair Road, Shares in Auxilliary Services (Pvt) Ltd, and the title deeds to 9, Monte Serino.

Redan Petroleum (Pvt) Ltd reserves the right to dispose of the securities held at any time without reference to Ashley Muzvidzwa in order to recover its debt."

Earle said the defendant had said he wanted the above document for the purposes of raising funds to clear the plaintiff's claim.

Earle said despite assurances from the defendant's lawyers that he would honour his obligations, nothing was ever paid or delivered to the plaintiff as evidenced by letters from the defendant's lawyers at pp 5 – 7 of exh 1.

Earle went on to say that, apart from this case, there was another case in this court where the plaintiff was suing the defendant for cash. He said all the plaintiff wanted in *casu* was to be granted ownership of No. 28 Blair Road so that they could sell same to settle the plaintiff's claim.

Lindsay was called in as the second and last witness of the plaintiff. She said she worked as personal assistant to Chigumbu, (one of the plaintiff's directors). Her responsibilities covered human resources, debt collection, and accompanying the director to meetings. She knew the defendant as her father's friend, namely Earle. She said Chigumbu and her father had asked her to engage the defendant in discussions over the outstanding diesel loan. To that end, she had met the defendant on several occasions to settle the matter. She confirmed that the defendant had offered certain assets as security and had at one stage agreed that No. 28 Blair Road should be sold at the highest value in order to meet the Redan claim. The defendant, she said had later refused to dispose of No. 28 Blair Road, arguing that it was a family home.

Lindsay said the reconciliation at p 18 of exh 1 was prepared by the defendant.

The said reconciliation reads as follows:

“RECONCILIATION OF AMOUNT OWING TO REDAN BY ASHLEY MUZVIDZWA			
Diesel ex noczim	1 100 000	0.6	660,000.00
Diesel ex bp	500 000	0.7	350,000.00
Cash due			413,000.00
Amount due to Redan before sale of assets			1,423,000.00
Less: Monte Sereno flat			(100,000.00)
: Tile it shares			(420,000.00)
Amount due after sale of assets			903,000.00

NOTE: Blair road house to remain as security against the remaining debt due to Redan

Blair road house title deeds to be used to get mortgage to settle remainder of debt due to Redan.

Lindsay to sign off assets given.”

Lindsay went further to testify that the defendant had not surrendered to the plaintiff any of the securities offered and the plaintiff’s claim remained unsettled.

After Lyndsay’s evidence, the plaintiff formally closed its case and the defendant then gave evidence.

The defendant said he was a truck and fuel dealer. He said as from 2010 his company, Haul It, has been buying fuel from Mozambique for resale in Zimbabwe. Prior to that (i.e. from 2004) he was a shareholder in a company called Megabeck Investments where he owned 50% shares and also had 100% ownership of a company called Coppleridge Oils.

The defendant said he did not personally borrow 1.6 million litres of diesel from the plaintiff. He said he used to supply Cotton Company of Zimbabwe Limited (COTTCO) with fuel and that in 2007 COTTCO required 3.4 million litres of diesel. He said supplies to COTTCO were done through Megadeck (Private) Limited (Megadeck). He said Megadeck had two sources of supply namely BP (Beira) and Xaton (Mauritius)). He said, after delivery, Megadeck would be paid cash in Zimbabwe dollars.

The defendant said that when he received the order for 3.4 million litres of diesel, he approached Earle and one Tom Sopper (“Sopper”) of the plaintiff with a view to having them join him in the supply arrangements. He said at that stage of the transaction Lindsay was not involved (the fact also confirmed by Lindsay in her evidence). He said Sopper was the plaintiff’s Finance Director who also, on a part time basis, controlled the Xaton account in Zimbabwe.

The defendant said Megadeck and Cottco had entered into a written supply agreement for the 3.4 million litres of diesel as indicated at pp 12 – 16 of exh 2 (i.e the supply agreement). He said he used to supply big fuel orders jointly with the plaintiff and hence his approach to Earle and Tom Sopper (Sopper) in July 2007 for supplies to cover the 2008 cotton season.

It was the defendant’s evidence that the plaintiff had indicated that of the 3.4 million litres of diesel, in the supply contract, it could only supply 1.6 million litres. The balance, he

said, would be supplied the defendant's his company called Coppleridge Oils. The defendant said in agreeing to supply the 1.6 million litres of diesel, Messrs Earle and Sopper were fully aware that they were dealing with Megadeck and not with him in his personal capacity. The witness went further to state that Sopper, with the help of a lawyer called Florence, was involved in the drafting of the agreement signed in September 2007.

The defendant said the arrangement was that upon being paid by Cottco in Zimbabwe dollars the plaintiff would then change the money into foreign currency for onward transmission to Xaton, the foreign supplier of fuel. He referred to pp 25 – 26 of exh 2 where money transactions were signed for. He also referred to Xaton invoices at pp 7 – 11 of exh 2. The defendant said due to fast and unpredictable changes in the rate of exchange, the plaintiff was not able to buy foreign currency as per arrangement from the parallel market for transfer to Xaton. He said an attempt to pay the plaintiff in Zimbabwe dollars had failed because the plaintiff refused to accept payment in Zimbabwe dollars, preferring payment in foreign currency. That had led to a three months arrangement where the defendant surrendered his customers to the plaintiff. That arrangement, however, collapsed because the plaintiff was not crediting the defendant with any profits from the deal. The witness said the supply agreement was a joint venture transaction between the plaintiff and the defendant (i.e. joint venture to supply Cottco with diesel).

The witness said No. 28 Blair Road was owned by a family Trust (Capsopolus Enterprises) and that the title deeds of the property had been taken by the plaintiff from his Accountants as security for the money owed by Megadeck. He said no mortgage bond had, however, been registered against the property.

The defendant agreed that the exhibit ("acknowledgement of debt") at p 3 of exh 1 was signed by himself and Earle. He said the document was intended for one Rezanna Brahim (Rezanna) who owned a company called Ravens Court. He said Rezanna wanted to help him in stopping a threatened sale of No. 28 Blair Road by Lindsay who was acting on behalf of the plaintiff. He said Rezanna was willing to assist with finances which would extinguish the Megadeck debt. He maintained that the loan of 1.6 million litres of diesel was never extended to him in his personal capacity.

The defendant's case was closed after his testimony..

The agreed issues agreed for determination in *casu* on 10 December 2010 are listed as follows:

- “1. Whether the defendant borrowed 1 600 000 litres of diesel from the plaintiff or whether the plaintiff entered into an agreement with Megadeck (Private) Limited.
2. Whether the agreement was tainted with illegality.
3. Whether the debt was secured by immovable property known as No. 28 Blair Road, Ballantyne Park, Harare and shares in Auxilliary (Private) Limited and title deeds in respect of immovable property situated in Johannesburg, South Africa known as No 9 Monte Serino.
4. Whether the defendant freely and voluntarily signed an acknowledgement of debt in respect of the 1 600 000 litres of diesel.
5. Whether the plaintiff should refund to the defendant all payments made to the plaintiff.
6. Whether the defendant has a valid counter-claim against the plaintiff.”

In his submissions Mr *Mamvura*, for the plaintiff, argued that there were only two issues for determination in *casu*, namely:

- “1. Whether the defendant borrowed 1 600 000 litres of diesel from the plaintiff; and
2. Whether the debt was secured by immovable property known as No. 28 Blair Road, Ballantyne Park, Harare and shares in Auxilliary (Private) Limited trading as Tile it and title deeds in respect of immovable property situated in Johannesburg, South Africa known as No. 9 Monthe Serino.”

In support of his submissions, Mr *Mamvura* relied largely on two major documents. The first document is the undated document quoted in full at p 3 of this judgment, which document the plaintiff has referred to as “an acknowledgement of debt.”

The second document is a reconciliation prepared by the defendant’s accountant on the defendant’s instructions. The document is quoted in full at p 4 of this judgment.

Mr *Mamvura* submitted that in his plea and summary of evidence and claim in reconvention, the defendant referred to the first document as “an acknowledgement of debt.” He said there was no evidence to support the allegation by the defendant that the said document was signed under duress. The document in question, he said, confirmed the loan to the defendant of 1.6 million litres of diesel and the security offered for the loan, namely No. 28 Blair Road, Auxiliary Services shares and title deeds to No. 9 Monte Serino.

Mr *Mamvura* said the acknowledgment of debt made no mention of Megadeck. The document, he argued, specified the defendant as the debtor. He further noted that the parties

to the supply agreement relied upon by the defendant were Cottco and Megadeck. There was no reference in the agreement to joint obligations (i.e. the plaintiff and the defendant acting jointly) and, furthermore, the personal security given by the defendant under that agreement was in favour of Xaton. He argued that the Megadeck debt had nothing to do with the plaintiff and as such all the documents relied on in exh 2 were irrelevant to the plaintiff's claim.

Mr *Mamvura* pointed out that the supply agreement was signed on 7 September 2007 and yet the loan was granted in October 2008. He said, even the defendants' lawyers were fully aware that the plaintiff had no joint arrangement with Megadeck for the supply of diesel to Cottco and hence the defendant's willingness to personally and individually settle the debt.

Mr *Mamvura* also noted that, in his evidence under oath, the defendant told the court that he does not own No. 28 Blair Road whereas correspondence from his lawyers indicated that the property was his.

On the issue of the reconciliation (i.e. second document appearing at p 4 of this judgment), Mr *Mamvura* submitted that the document confirmed the defendant as the debtor. The reconciliation made no reference to Megadeck. The reconciliation also gave a breakdown of the figures and thus revealing that the 1.6 million litres of diesel were delivered to Cottco by the plaintiff as follows:

- “a) 1000 000 litres from NOCZIM
- b) 500 000 litres from BP”

The above information, he said, confirmed Earle's evidence. He said the cash amount appearing in the reconciliation was subject of a pending case (i.e. HC 2344/10) in which the defendant was being sued.

Mr *Mamvura*, said all the securities under the loan (i.e. diesel loan of 1.6 million litres to the defendant) were never realised despite the fact that delivery of diesel was made to Cottco as directed by the defendant.

In the main, Mr *Mamvura* submitted that both Earle and Lindsay were credible witnesses whose evidence was not challenged. However, Mr *Mamvura* went on, the defendant's evidence could not be relied on because he was not honest regarding the acknowledgment of debt, the supply contract and the reconciliation which was prepared by

his accountant under his instruction. He said the defendant could also not satisfactorily explain why he did not call Sopper in order to bring out the truth about the supply contract.

Notwithstanding the plaintiff's claim and prayer in the summons, at pp 1 and 2 of his reply, filed on 20 October 2010, Mr *Mamvura* submits as follows:

- “1. In *Trotman and Anor v Edwick* 1951 (1) SA 443 VAN DEN HEEVER, J.A. said at p 449 B

‘A Litigant who sues on contract sues to have his bargain or its equivalent in money and kind. The Litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him; and

2. In *Sommer v Widong* 1984 (3) SA 647 (A) it was held that in a claim for damages arising from a breach of contract the plaintiff should be placed in the same position as if the contract had been properly performed.
3. By the same token the plaintiff approaches this honourable court seeking to have his bargain or its equivalent in money and kind. Should this be granted it is respectfully submitted that a period of 14 days from the date of the order of the court is a reasonable period within which the defendant should be ordered to deliver to the plaintiff, the 1 600 000 litres of diesel, failing which immovable property known as No. 28 Blair Road Ballantyne Park, Harare in terms of which the loan was securitized be declared executable in settlement of the debt in accordance with the terms of the loan and security arrangements concluded by the parties.” (My own underlining)

Mr *Mamvura* submitted that the plaintiff had made out its case and was entitled to the relief it was seeking. Furthermore, he submitted, the defendant had failed to offer a defence to the claim and had also failed to lead evidence to prove his counterclaim. He said there was nothing to support the counterclaim.

Advocate *Zhou*, for the defendant, submitted that, contrary to the plaintiff's claim, there were six issues for determination and not two. He therefore urged the court to find in favour of the defendant in respect of the other four issues not referred to by the plaintiff.

Advocate *Zhou* said it was fatal on the part of the plaintiff not to call Sopper who handled all the documentation. He said it was the plaintiff's obligation to call Sopper who was its employee. The failure to call Sopper had resulted in the court being asked to rely on improbable evidence regarding the Megadeck transaction. He said it was improbable that a

company like the plaintiff would loan such a large quantity of diesel to an individual like the defendant on a verbal basis.

Advocate *Zhou* submitted that the plaintiff's submissions indicated that the cause of action was based on two doubtful documents, namely the document said to be an acknowledgement of debt and a reconciliation statement. He noted that, in the main, the plaintiff's particulars of claim read, in part as follows:

“Sometime in October, 2008 in Harare the defendant borrowed from the plaintiff 1 6 00 000 litres in tank, Harare. As security for the debt the defendant provided property known as No. 28 Blair Road, Ballantyne Park, Harare, shares in Auxiliary Services (Private) Limited and title deeds to 9, Monte Seriro.”

He also noted that the plaintiff in his summons and declaration made no claim to the security offered and as such reference to same was superfluous. He argued that the onus to prove the existence of a loan was on the plaintiff but the plaintiff had, however, failed to discharge that onus.

Advocate *Zhou* said evidence indicated that the parties were to jointly supply Cottco because Megadeck had failed to supply the full quantity of diesel.

Advocate *Zhou* said there was no proof from the plaintiff that the fuel was delivered in October 2008 instead of 2007 as indicated by the defendant. Furthermore the acknowledgement of debt relied on by the plaintiff was not dated and so was the affidavit at p4 of exh 1.

Advocate *Zhou* went further to submit that initially Earle had denied knowledge of Megadeck and it was only under cross examination that he admitted having dealt with the company. He said the plaintiff had not refuted the evidence that Sopper had caused the defendant to sign a deed of suretyship for Megadeck's obligations to it. He said in the absence of a registered mortgage bond, no real security existed. The debt, he argued was not proved.

Advocate *Zhou* urged the court to either declare the agreement illegal or that the debt is owed by Megadeck and not the defendant. The court would then proceed to grant the defendant the relief he seeks in his counter claim.

Having carefully considered all the evidence in this matter and the submissions by both counsel, I am persuaded to narrow the issues for determination to two as submitted by the plaintiff. The plaintiff, in my view, correctly submits that the issues for determination can be reduced to two, namely:

- “1. Whether the defendant borrowed 1 600 000 litres of diesel from the plaintiff.
2. Whether the debt was secured by immovable property known as No. 28 Blair Road, Ballantyne Park, Harare and shares in Auxilliary (Private Limited trading as Tile it and title deeds in respect of immovable property situated in Johannesburg, South Africa known as No. 9 Monte Serino.

I believe that a finding on the above two issues will properly address the plaintiff's claim and the defendant's counterclaim. I do not read the plaintiff's submission to mean that the other four issues are admitted. Instead, what I make of the plaintiff's submission is that the sum total of the evidence led in court reveals only two issues for determination. That therefore means that, in its view, which view I agree with, the other four issues are rendered non-issues in terms of the evidence now before the court.

In the main there was no evidence to show that:

- 1) it was illegal to lend 1 600 000 litres of diesel to the defendant or that the lending was for illegal purposes;
- 2) The acknowledgement of debt was not signed voluntarily;
- 3) The defendant ever made any payments to the plaintiff; and
- 4) The plaintiff benefitted from the securities offered.

Having said the above, I shall now proceed to determine the two remaining issues.

1. Whether or not the defendant borrowed 1 600 000 litres of diesel from the plaintiff

The evidence before the Court indicates that the diesel was loaned in October 2008 on the basis of a verbal agreement. Earle said the defendant was a trusted friend who also dealt in fuels. That, it was said, was the basis upon which the loan was granted under the security of No. 28 Blair Road, Auxiliary Services shares and title deeds for flat No. 9 Monte Serino, Johannesburg.

The defendant, however, produced, under exh 2, an agreement signed between Cottco and Megadeck on 7 September 2007. He said the diesel was borrowed under that agreement and the plaintiff and him were operating as joint suppliers. There was, however, no evidence to support joint obligations under the supply agreement.

Although initially Earle denied any knowledge of Megadeck, he later admitted that the defendant had told him about that company. I did not put much value in the witness' "change of mind". I formed the impression that the witness was clear in his mind as regard

the actual detail relating to the loan of 1.6 million litres of diesel to the defendant. That was a direct transaction between the plaintiff and the defendant. There was no third party involvement. The defendant did not deny that his discussions with Lindsay were centred on the 1.6 million litres of diesel and during those discussions the defendant never raised the issue of joint supply to Cottco. That, in my view, would have been a legitimate defence in favour of the defendant. Added to his silence on the plaintiff's alleged involvement with Megadeck, the defendant did not find it necessary to call Sopper to the witness's stand. I believe exposing Sopper to cross examination would have been necessary. The defendant alleged that Sopper drafted the September 2007 agreement. It was therefore necessary for the defendant to call Sopper as a witness. The fear of bias, on the part of Sopper, would have been tested under cross examination. It was not proper to make conclusions without having spoken to Sopper.

Further, the defendant merely said any reference in his papers to the year 2008 would have been a typographical error. That, unfortunately, was not convincing at all. There is evidence that the supply contract was signed in 2007 but there is nothing linking the plaintiff to the contract.

We have, in *casu*, apart from the supply contract, other important documents which cannot just be thrown away. These as we have already seen are:

1. the document quoted in full at p 3 of this judgment signed by the defendant acknowledging the loan to him of 1.6 million litres of diesel and the securities he gave for the loan; and
2. the reconciliation quoted in full at p 4 of this judgment and prepared by the defendant's accountant on the defendant's instructions. The reconciliation also confirms the loan and the remaining security.

There is, as matters stand, nothing in the evidence before me that can, in any way, compel me to accept that:-

- (a) the acknowledgment of debt was not voluntarily signed; and
- (b) the reconciliation was a "making" of Lindsay without the defendant's in-put.

The documents, in my view, reflect the true position regarding the diesel loan and that true position is indeed confirmed by the defendant himself through his own actions. He signed the acknowledgement of debt and directed the preparation of the reconciliation.

The defendant himself testified that he wanted to use the acknowledgment of debt for purposes of obtaining funds from Rezanna and that the reconciliation was prepared by his accountant under his instruction. That evidence supports the plaintiff's case.

The defendant is an educated and experienced businessman who, I believe, knows his rights.

Accordingly, taking into account all the evidence given in this case and the submissions made, I find, on a balance of probabilities, that the plaintiff did indeed, in October 2008, loan to the plaintiff a quantity of diesel amounting to 1.6 million litres and that to date the defendant has not given back to the plaintiff the said quantity litres of diesel.

I now move to determine the second issue, namely:

2. Whether the debt was secured by immovable property known as No. 28 Blair Road, Ballantyne Park, Harare and Shares in Auxiliary (Private) Limited trading as Tile and title deeds in respect of immovable property situated in Johannesburg, South Africa known as No. 9 Monte Serino

Apart from alleging that title deeds for No. 28 Blair Road were not properly taken away from the custody of his Auditors/Accountants, the defendant, in his discussions with Lindsay does not deny the entire basis upon which the 1.6 million litres of diesel were loaned to him. The loan according to the plaintiff's evidence was granted on the basis of friendship in business and the securities offered by the defendant. Earle pointed out that once the arrangement to pay some of the defendant's debts was put in place, the earlier arrangements regarding security for the loan fell away except for holding onto No 28 Blair Road. That was not denied and the reconciliation confirms that position. Furthermore, the discussion between the defendant and Lindsay confirmed that position.

There is nothing in the evidence adduced that suggests that the plaintiff ever benefited from the securities offered by the defendant. There is also no evidence of any cash payments that were made to the plaintiff by the defendant. That being the case, the defendant's counter claim has no basis and falls away.

In view of the foregoing, my finding is that the plaintiff's claim must succeed. The defendant should not be allowed to resile from a clear contract. He ought to be prepared to meet his obligations under the contract. In that vein I associate myself with the Late ROBINSON J, who, in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1998 (1) ZLR (H) said:

“I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is: businessmen beware. If you fail to honour your contracts, then don’t start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value at the time of the breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them ...”.

I note that in its submissions the plaintiff sought to have No 28 Blair executable. That request is not in line with the plaintiff’s claim in the summons. That amendment cannot, in my view, be accepted at this stage. The request cannot therefore be granted.

Accordingly, I now order as follows:

1. The defendant’s claim in reconvention be and is hereby dismissed.
2. The defendant be and is hereby ordered to deliver 1 600 000 litres of diesel to the plaintiff or alternatively pay the plaintiff a sum of money in United States Dollars sufficient to purchase the said 1 600 000 litres of diesel in Zimbabwe, and
3. The defendant be and is hereby ordered to pay costs of suit.

Scanlen & Holderness, plaintiff’s legal practitioners
Manase & Manase defendant’s legal practitioners