

CREDIT INSURANCE OF ZIMBABWE
versus
TEXTBOOK SALES

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 24 July 2013 and 19 February 2014

Opposed matter

Ms *M. Mafo*, for the applicant
E.N.M. Phiri, for the respondent

TAKUVA J: Applicant issued summons in this court claiming \$11 001,88 from respondent. The latter entered appearance to defend and the former applied for summary judgment.

The facts are that between 2010 and 2011, Fleximail, a division of ART Corporation Ltd sold and delivered stationery on credit to the respondent. Fleximail has an insurance policy with the applicant under policy number DSCNB 11115. On 26 of January 2012, Fleximail ceded its right, title and interest in its claim (for any dividend or other payment which may accrue to it from respondent) to the applicant. The cession of dividend was reduced to writing and signed by the insured (cedent) and the insurer (cessionary) who is the applicant in this matter. The document appears on p 9 of the record.

The applicant's claim against the respondent is supported by several invoices referred to in its founding affidavit. On 10 January 2012, the applicant demanded payment of the outstanding amount and respondent failed or neglected to make payment. The respondent acknowledged its indebtedness to the applicant in its letter dated 25 January 2012. The letter appears on page 16 of the record. It reads:

“REF: DSCNB 11112 – Fleximail OUTSTANDING BALANCE

Your letter dated 10 January 2012 which we received on the 25th January 2012 refers.

Our records are showing \$11 001,88 a different amount to the one shown on your letter. We would appreciate if the documents can be reconciled so that we can provide you with our payment plan.

Your urgent attention to the matter will be appreciated.

Yours faithfully

Question Maisera

GROUP FINANCE DIRECTOR

For and behalf (*sic*) of TEXTBOOK SALES duly authorized to act hereto.”

Later, the same Group Finance Director addressed another letter to applicant's legal practitioners on the same subject matter. The letter reads:

“The above matter refers in which we acknowledge receipt of your correspondence dated 23 February 2012.

We kindly request further particulars in the form of invoices and delivery notes for the \$10 000,00 claim against us as these will assist us to approach you shortly with a settlement plan which we hope your client will be agreeable to. We would like to avoid litigation at all costs hence it is imperative that you furnish us with the particulars of claim as soon as possible.

We anticipate a good working relationship with your esteemed office in the amicable resolution of this matter ...” (my emphasis)

Despite this assurance, respondent did not endeavor to resolve the matter amicably. It has strenuously opposed the application for summary judgment. Respondent's grounds for opposing the matter are as follows:

- (i) the invoices are not conclusive proof of delivery of goods since they were raised by the cedent. These invoices show a total of \$11 297,77 yet the amount claimed in the summons is US\$11 0001,88.
- (ii) respondent has always disputed the extent of indebtedness and requested delivery notes so that a reconciliation of its account can be done.
- (iii) the respondent has a good defence at law in that the applicant has not fully indemnified the cedent's claim for US\$10 000,00. Thus the applicant has no right to sue until it has fully compensated the cedent. Further, applicant is “not entitled at law to sue for more than it has reimbursed to the cedent” that is US\$8 000,00 since its claim is based on subrogation.”
- (iv) the document relied upon by applicant as a cession is not actually a cession. Even assuming it to be one clause 8 thereof does not help applicant.

Respondent relied on the following cases:

- (a) *Chrismar (Pvt) Ltd v Stutchburg & Anor* 1973 (1) RLR 277;
- (b) *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H); and
- (c) *Shingadia v Shingadia* 1966 (1) RLR 285

On the other hand applicant's case is that its application for summary judgment is substantiated by proof and its claim is unimpeachable. Further, it was submitted that respondent's defence that applicant has not fully indemnified the cedent is *mala fide* as it has no bearing on applicant's claim against respondent. Therefore, the respondent entered appearance to defend for the purposes of delaying proceedings. The respondent's request that it be furnished with delivery notes after being provided with copies of various invoices that relate to the goods delivered and amount owed is a clear delaying tactic. Applicant also relied on the *Chrismar* and *Hales* cases *supra*.

Applicant's application is one for summary judgment in terms of Rule 64 of the High Court Rules, 1971. In such applications, the respondent must prove that he has a *bona fide* defence. What amounts to a *bona fide* defence was stated by DE VILLIER JP in *Bentley Maudesley & Co (Pty) Ltd v Carburol (Pty) Ltd*, 1949 (4) SA 873 as "a *bona fide* defence means a defence set up *bona fide* or honestly and which if proved will constitute a defence to the plaintiff."

In *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR), the yardstick was put as "a *prima facie* defence" defined as, "good *prima facie* defence means that the defendant must allege facts which if he can succeed in establishing them at trial would entitle him to succeed in his defence." Further, the purpose of this special procedure was explained in *Chrismar's* case *supra* in the following words;

"The special procedure for summary judgment was conceived so that a *mala fide* defence might summarily be denied except under onerous conditions, the benefit of the fundamental principle on *audi alteram partem* (principle of natural justice to hear both sides of the case) so extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable both in fact and in law that this drastic relief will be afforded to a plaintiff."

The onus to satisfy the court that he has a good *prima facie* defence is on the respondent – see *Hale's* case where it was held that, "where a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at trial ... he must set out the basis for his defence with sufficient clarity and in sufficient detail to allow the court to decide whether if these facts

are proved at the trial, this will constitute a valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalizations or to provide bald and sketchy facts."

Applying these principles to the facts, it must be noted that the cause of action arises from a cession of dividends. "Two of the essentials of a valid cession are an intention to make over to another what belongs to oneself in order that it may in future belong to that other and not to oneself, and in addition delivery or some legal formality equivalent thereto". Per MAARSDORP CJ in *Wilcocks N.O. v Visser & Anor*, 1910 O.P.D. 102. Cession is a way of transferring incorporeal rights and it need not take a particular form.

In casu, I totally agree with Ms *Mafo's* submission that respondent's defences are "clearly unarguable, both in fact and in law." Let me begin with the facts. Respondent's challenge of the figure is *mala fide*, belated and inconsistent with its express position stated in the two letters it addressed to the applicant. The letter dated 25 January 2012 is an acknowledgment of debt in the sum of \$11 001,88. While it is accepted that the respondent challenged applicant's figures, what is relevant is that the figure of \$11 001,88 was mentioned by the respondent as the amount its records showed to be due and owing to the applicant.

Respondent's request for "delivery notes" is surprising in that it came after applicant had furnished respondent with invoices showing the dates the goods were delivered, the product codes, the quantity, unit of issue, unit price, description and the total amount owing. To supply delivery notes would be unnecessary in my view. In any case if at all respondent was *bona fide*, its Group Finance Director would have been more precise in his request. Any reasonable finance manager would have listed those delivery notes he had, as part of his records showing respondent's total indebtedness. Surely when goods were delivered, respondent must have signed delivery notes and kept their own copies. The onus is on the respondent to prove that it only received certain goods and not others. This, it did not do except to make a bald and generalized statement that the figures are incorrect and in dispute. Respondent should have identified and serialized those particulars or specific invoices they were disputing. It is not enough in my view to simply dispute the global figure where the claim has been particularized by an applicant. Respondent's legal argument is flawed in that it is anchored on a misconception of law. Applicant's claim is not based on "subrogation" as put by the respondent in its opposition. It is based on cession of rights. There is a fundamental difference between the two. Subrogation relates to a situation where an insurer makes payment and then steps into the insured's shoes and brings any claim the insured may have against any other party arising out of

the loss. The insurer does not bring the claim in its own name but is absolutely entitled to conduct any consequent legal proceedings in the name of the insured – see R. H. Christie, *Business Law in Zimbabwe* 1st Ed, Juta & Co. 1985 at p 246 – 7.

On the other hand in a cession, the cessionary's action is in *rem suam* in that the *vinculum juris* is the cession itself. *In casu*, there is a valid “cession of dividend” as shown by the memorandum of an agreement to that effect on page 7 of the record. Respondent in my view erroneously terms this agreement a *pastum de non cedendo*. Its argument is that this is so because clause 8 of the same agreement states; “it is hereby recorded that this cession does not constitute a cession to Credsure of the insured's claim against the debtor, but only relates to any dividend or other amount which the insured receive from the debtor arising from such a claim.” This clause shows that the cession can be one of a claim or dividend or other amount. The cession *in casu* clearly states that it is of “DIVIDEND”. Consequently, this clause does not enhance respondent's argument at all.

In a cession, the debtor's consent is not required. Therefore, it is of no consequence to the respondent's debt that the applicant has not fully indemnified the cedent. This issue has no legal bearing to the applicant's claim against the respondent.

For these reasons, I find that the applicant has satisfied the requirements set out in r 64 (2) of the High Court Rules 1971 in that it has set out facts verifying the cause of action and the amount claimed. I find also that the respondent has no bona fide defence to the action in that respondent has no triable or arguable defences in fact and/or in law.

Accordingly, it is ordered that:

1. The application for summary judgment be and is hereby granted.
2. The respondent be and is hereby ordered to pay to the applicant the sum of US\$11 001,88.
3. The respondent is ordered to pay interest on the above amount at the prescribed rate calculated from the 23rd February 2012.
4. The respondent to pay costs of suit.