MOSES JIRI
versus
TOTAL ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MUZOFAJ
HARARE, 9, 10, 11, 24 July 2018 & 20 September 2018

Civil Trial

S Chirorwe, for the plaintiff
T Pasirayi, for the defendant

MUZOFA J: The plaintiff issued summons against the defendant claiming $83 000 for money deducted by defendant from plaintiff's guarantee account, $82 836.00 for loss suffered by the plaintiff at the instance of the defendant, $24 000 for loss of business, $12 000 for loss shop revenue, $7 000 being value of goods lost and $1 000 being a refundable money paid to statutory bodies, interest at 14.25% *per* annum from April 2015 to the date of payment in full and costs of suit.

At the commencement of trial the plaintiff withdrew the second to the fifth claims. The only claim for trial is for $83 000.

The defendant filed a counter claim for the payment of $29 626.46 with interest at the prescribed rate from June 2016 to date of payment in full for unpaid fuel invoices delivered to the plaintiff.

The common cause facts in the matter are that the parties entered into a Marketing Licence Agreement (the agreement) in November 2010. In terms of the agreement the defendant supplied fuel and other lubricants for plaintiff to sell. The plaintiff rented the plaintiff's buildings and garage

at Chivhu Total Service Station for a fee. It was a term of the agreement that a guarantee account was to be established where plaintiff deposited a certain amount of money. The guarantee account was held by the defendant. It was security for any indebtedness to the defendant. The defendant was entitled to appropriate any funds in the account to settle outstanding liabilities on plaintiff's account to facilitate continuing business.

The defendant effected three deductions from the guarantee account as follows, $20 000 on 4 October 2013, $20 000 on 12 June 2014 and $43 836 on 22 October 2015 totaling $83 000. At the time of making the deductions the plaintiff's trading account had outstanding balances. At that time there was a dispute as to the causes of the negative balance in the plaintiff's trading account. In 2013 plaintiff was compensated $8 900 for loss of fuel resulting from faulty equipment.

Plaintiff's claim is for the refund of the $83 000 transferred from the guarantee account by the defendant. He said this was his money and defendant was not entitled to transfer the money as the negative balance in his trading account was due to faulty equipment and was entitled to compensation for such losses. In the alternative, that the clause in the agreement authorizing defendant to transfer money from the guarantee account is unfair on the plaintiff and contrary to public policy. It was said it allowed the defendant to unilaterally confiscate the money without proving its claims in a court of law.

On the counter claim, plaintiff denies any form of liability and insisted that the outstanding balance was due to faulty equipment.

The defendant's plea is that it acted in accordance with the agreement that the parties entered into and is well within the law. Its counter claim is based on the unpaid invoices for fuel delivered to the plaintiff.

Plaintiff's case

The plaintiff gave evidence to substantiate his case. His evidence apart from the common cause facts established the following. He said he was aware of the provision in the agreement regulating the guarantee account and the procedure to be followed in the event of faults in the equipment. He confirmed that he always had outstanding balances in his trading account and this was due to leaks of fuel caused by faulty equipment. The faults developed from 2011 until 2015 when he left the service station. He reported the faults to the defendant. He was advised to continue

trading while the engineers attended to the equipment. The engineers could not satisfactorily address the problems the job cards showing the work done were produced as exhibits. Mr Dhana one of the defendant's representatives promised to reimburse the losses resulting from faulty equipment. Emails on the communication on reimbursement were produced. At one point he claimed $27 000 for such losses and was reimbursed $8 900 despite provisions in the agreement. He confirmed that he acknowledged his indebtedness to the defendant in an email dated 1 November 2015 and made a proposal to pay the arrears. He insisted that the $83 000 transferred from the guarantee account was his; defendant should not have effected any transfers from the account without his knowledge or consent. In any event the amount owed was in dispute. He had submitted credit notes for reimbursement and these were going to acquit the debt.

In respect of the counter claim plaintiff denied that he owed defendant $29 626, 46 he said the amount was occasioned by losses due to equipment failure which should be borne by the defendant. Under cross-examination he said the terms of the agreement were not implemented to the letter as evidenced by the compensation of $8 900 contrary to the provisions of Article VII (vi) of the agreement. Thus even where the agreement provided that in the event of losses due to faulty equipment trading should cease, he was advised to continue trading. He conceded that the outstanding balance in the counter claim consisted of arrear rentals and also loss due to faulty equipment. He was under the supervision of the defendant at all times and reports were being compiled and submitted to the supervisor. The reports were produced as exhibits.

The plaintiff then closed his case.

At the close of the plaintiff's case defendant applied for absolution from the instance.

I dismissed the application and indicated that the reasons would be incorporated in this judgment. Defendant submitted that plaintiff did not lead sufficient evidence to establish his entitlements to the $83 000 in light of Article (III) (v) of the agreement which gave the defendant a discretion to apply the amount to liquidate any liabilities due and owing from the plaintiff in the event of a default. Plaintiff did not produce any evidence to prove that his reimbursement based on credit notes amount to $83 000.

For the plaintiff it was submitted that at this stage the plaintiff should establish a *prima facie* case against the defendant. In this case plaintiff's evidence was common cause, that the $83 000 belonged to him, there was a dispute as to how much was owed and that defendant transferred

the money without his knowledge or even giving plaintiff an opportunity to be heard. Further that the plaintiff's case raises a question of law whether the clause that defendant relied on is a *pactum commmissurium* or not. The matter should therefore be taken to its logical conclusion where the legal issue has to be argued at the end of the case.

The law applicable in an application for absolution is settled. The principles are set out succinctly in *Gascaine* v *Paul and Hunter* 1972 TPD 170 at p 173 as follows;

> "At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, 'is there such evidence upon which the court ought to give judgment in favour of the plaintiff."

See also *Taunton Enterprises (Pvt) Ltd and Anor* v *Marais* 1996 (2) ZLR 303 (H).

The plaintiff's evidence clearly demonstrated that the $83 000 was his and was transferred by the defendant without his knowledge. It is not in dispute that the money was transferred from the account by the defendant in terms of Article (III) (v) of the agreement. Although the plaintiff raises other issues the main contention is on the legality of Article (III) (v) of the agreement. His claim raises a question of law for this court to determine. The defendant did not address its mind to the question of law. An application for absolution cannot succeed where a question of law arises as in this case. It is only when both parties are heard that the question can be properly determined. On that basis I dismissed the application.

Defendant's case

The defendant led evidence through one witness Kudzai Midzi a retail manager at defendant. In addition to what is common cause in this case he said the transfer of the money was for the benefit of both parties to allow continuing business. The plaintiff was supposed to stop operations once a fault was detected. The plaintiff was compensated for losses due to faulty equipment. The equipment was later attended to and it passed the tests. Apart from the faulty equipment there were other causes of the losses which include the failure to manage the business, theft and stock losses as shown in the retail call reports produced as exhibits. He said the plaintiff was indebted to the defendant for the entire period of the agreement for the fuel deliveries and rentals resulting in the need to pay the liabilities from the guarantee account. Plaintiff was aware of the arrears that is the reason he sent an email to defendant's Fransisca Muziri confirming the

liability and made a proposal on how the debt could be liquidated. The schedule of accounts and statement were produced as exhibits showing plaintiff's indebtedness.

Analysis of evidence

Most of the evidence in this case is not in dispute. The plaintiff did not deny that he was indebted to the defendant in the sum of $83 000.The debt was due to outstanding payments for the products delivered to the plaintiff and rentals. His only issue was that part of the debt was due to leakages from faulty equipment. He said he had submitted some credit notes to the defendant that were going to acquit the debt. The credit notes were for losses occasioned by the faulty equipment. Both the plaintiff and defendant's evidence show that at some point there were faults in the equipment. The evidence also shows that despite the provisions of the agreement that a lessee would not be compensated for losses due to equipment failure; in 2013 the plaintiff was compensated for losses due to equipment failure. Despite the fact that plaintiff submitted credit notes to the defendant which he believed would acquit the debt the defendant's evidence shows that credit notes were not paid upon presentation but would be subject to its own internal processes to confirm the losses due to the faulty equipment. That is why the plaintiff's claim in 2013 for $27 000 only $8 900 was paid. So even if the plaintiff submitted credit notes in the amount of $83 000 or more there is no guarantee that the debt would be acquitted. In any event the debt and the credit notes relate to separate transactions that plaintiff cannot successfully plead set off. In my view if the plaintiff believes the defendant owes him anything based on the credit notes that would be a cause of action if he is so advised to pursue. In this case the only issue is whether he owed the defendant the $83 000.He did not deny that he received products and that he was supposed to pay rentals. No evidence was adduced to show that he was up to date with his rental payments and payments for the products received for the relevant periods that the deductions were made. I accept the evidence of the defendant that the plaintiff's account was in arrears. The only issue for determination is on the point of law whether Article (III) (v) of the agreement is a *pactum commmissurium* .

The law.

A *pactum commisorium* is defined as 'a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of

the fixed time, the full property in the thing will irrevocably pass to the creditor in payment of the debt'. See *Van Rensberg* v *Weiblen* 1916 OPD 247 at 252.

In our jurisdiction the courts have applied the principle and set aside clauses considered to be such. In *Smartstart Advanced Technologies (Pvt) Ltd* v *Austin Mushangwe and Anor* HH 31/04 the court made a finding that the clause granting the applicant the right to sell the property attached as security was not enforceable. This was because upon default the applicant sold the respondent's property without notice of the exact amount due.

In *Upper class Enterprises (Pvt) Ltd* v *Oceaner t/a Engigma Promotions and 2 Ors* SC 88/02 the court found an agreement pledging certain property as security a *pactum commissorium*. The reasoning inter alia was that a debtor should be in a position to redeem the property pledged when the time for payment arrives.

In *Chimutanda Motor Spares (Pvt) Ltd* v *Musare and Anor* 1994 (1) ZLR 310 HC the court held that a clause in the agreement the consequence of defaulting was the surrender of the property was a *pactum commisorium* and therefore unenforceable.

The rationale in not enforcing a *pactum commissorium* was succinctly set out by *DE VILLIERS AJA in Mapenduka* v *Ashington* 1919 AD 343 at 351 where, quoting Voet 20.1.25, he said such a pact has been reprobated by the law since the time of Emperor Constantine as being unduly oppressive to debtors:

> "In as much as if it might be agreed that when a debt is not paid within a certain time the creditor is to retain (as his own) the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a very trifling debt; the debtor, needy and pressed by the straitened condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of day fixed by the pactum commissorium, and hoping that the asperity of the pact will be averted from him by payment, a slippery and fallacious hope, however, to which the event not rarely fails to respond" *(Gane's translation of Voet 20.1.25)*. See also *Abbott v Cawood 1982 (2) SA (NC) 153 at 155H-156A* .

And in *Eastwood v Shepstone 1902 TS 294 at 302* INNES CJ held that

> 'Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is not a power to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void'

Article III (v) of the Agreement provides,

> 'At the commencement of this License, the Licensee shall pay the refundable sum stated in Appendix 3 of this License to the Licensor as a Guarantee (Guarantee), which shall be retained by the Licensor free of interest during the continuance of this License as a guarantee of payment by the Licensee of all amounts due to the Licensor by virtue of this License.
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> The Licensor may at its discretion , accept to deduct or withhold such part of the Licensee's margins as maybe agreed between them over a period of time to make up the Guarantee.
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> The Guarantee may at any time be applied by the Licensor towards the payment of any amount whatsoever which may become due and owing to or claimable by the Licensor from the Licensee, including but not limited to the License fees , the value of unpaid products delivered to the Licensee and damage caused to the Station or equipment.'

The Guarantee was clearly a form of security in the event the plaintiff defaulted in payments. This was an agreement to ensure sustainability of the plaintiff's business and also to cushion the defendant. Both parties had an interest that this Guarantee fund be available for use in order to ensure continuity of business. At the time of signing the agreement there was no debt, the Guarantee was security in the event of future unpaid invoices in the course of the agreement. However the way the security was administered is different from the retention of property envisaged in the principle relied upon by the plaintiff. The defendant explained that the money would be transferred into the plaintiff's account and that debit balance would be able to acquit the outstanding liabilities. In other words the money was not directly appropriated by the defendant it was in the plaintiff's account and thereafter used to meet the plaintiff's obligations. In the event that the plaintiff's account had no outstanding invoices the money would remain unused. It is my considered opinion that the Article makes business sense. In 2013 the first transfer was made and it assisted the plaintiff to continue in business and he was happy to do so. He did not challenge the transfer. In 2014 the second transfer was made and he continued in business he did not challenge the decision. He only challenged the three transfers after his offer to settle the outstanding balance was rejected in November 2015, he then issued summons in January 2016. I do not think the Article is against public policy if anything it was meant to promote business viability. That is why there is a provision in the agreement for the lessee to actually build up the guarantee fund even after such transfers. The rationale of this clause is different from the rationale in some cases referred to in this case where the debtor stood to lose valuable property. In this case the money in the guarantee fund was actually used to benefit the plaintiff.

The plaintiff relied on case of *Mandala* v *Glens Removals and Storage Zimbabwe, Pvt Ltd* HH 78/13 for his case. That case was decided based on two legal principles the *pactum commissorium* principle and the pactum *executie* clause. I have dealt with the pactum commissorium principle. A *parate executie* clause is the disposal of a pledged article without the intervention of a court. I agree with the defendant that the *parate executie* clause is applicable in our jurisdiction see *Glens Removal and Storage Zimbabwe (Pvt) Ltd* v *Patricia Mandala* CCZ 6/17. In the *Mundala* case supra the court noted that the principle is applicable subject to certain limitations, in that case the immediate execution was held unenforceable because the amount owed was not agreed on and the debtor was not advised. In this case the plaintiff was aware of his outstanding balances as evidenced by his statement of accounts and he did not deny that. His only issue was that he was owed some money by the defendant due to losses from faulty equipment. The *parate executie* clause would still not be applicable in this case.

Counter Claim

The evidence adduced for the defendant showed that as at 6 April 2017 the plaintiff's account was in arrears in the sum of $29 626.46 a statement was produced to establish this fact. The plaintiff did not dispute that he had such arrears. He actually conceded in an email dated the 1st of November 2015 produced as an exhibit that he was indebted to the defendant. The exact amount was not provided. The acknowledgement was made after the defendant had transferred the $43 836.00 on 22 October 2015. It can only be safely concluded that the acknowledgement of debt did not include amounts covered by the guarantee fund. The relevance of the email is that he actually tried to explain why his account had an outstanding balance; he said it was due to rentals. This confirms his knowledge of the debt. I accept the statement of account as at 6 April 2017 that shows that plaintiff's trading account had an outstanding amount of $29 626.46. The amount could not be acquitted by the credit notes submitted by the plaintiff to the defendant but were not before the court.

The plaintiff did not deny liability but said the balance was due to losses occasioned by faulty equipment. There was no documentary evidence to show that the faulty equipment occasioned a loss amounting of $29 626.46. The plaintiff's defence remained a bare denial.

He did not deny that he received products and he did not say he deposited the proceeds of

the sale into the defendant's account neither did he say he had any stock acquitting the $29 626.14. The counter claim must therefore succeed.

Accordingly the following order is made.

IT IS ORDERED THAT,

1. The claims b, c, d, e, and f be and are hereby withdrawn.
2. That the plaintiff be and is hereby ordered to vacate Total Service Station Chivhu on or before the 31st of July 2018.
3. The claim for $83 000, 00 be and is hereby dismissed.
4. The plaintiff be and is hereby ordered to pay $29 626.46 to the defendant.

Plaintiff to pay costs of suit