

MABEL CANVAS (PVT) LTD  
versus  
MUCHANETA THEODORA CHIMBANDI

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 30 September 2019 & 15 January 2020

### **Civil Trial**

*O. Mushuma*, for the plaintiff  
*A. Masango*, for the defendant

PHIRI J: In this matter the plaintiff made a claim, as against, defendant for the sum of US\$58 500.00 being the balance due in respect of 1 500 Army rucksacks bags manufactured and delivered to the defendant at the defendant's specific instance.

Plaintiff also claimed prescribed interest on the aforesaid amount from the 31<sup>st</sup> December, 2013 to the date of payment and, costs of suit on a legal practitioner and client scale.

The issue for trial was whether or not the plaintiff's claim had prescribed?

The pre-trial conference judge directed that both parties file heads of argument dealing with this issue.

However in addition the matter was referred to trial for further evidence.

#### Admission made

At the pre-trial conference the following admission was made by the defendant;

“Subject to the resolution of the issue whether the plaintiff's claim has prescribed, defendant admits that she owes the plaintiff US\$58 500.00.”

This court had the opportunity to hear evidence from a witness from either side to this dispute.

#### Plaintiff's evidence

Mabel Mucherere gave evidence on behalf of the plaintiff. She testified that she was the managing director of the plaintiff. Defendant Muchaneta Theodora Chimbandi, gave her an order for the manufacture of 1 500 army rucksack bags. This was for the contract price of US\$64 000.00 and the full amount was payable upon delivery.

Plaintiff duly delivered 1 500 bags in three batches of 500 bags per batch on the 3<sup>rd</sup> May, 2013, 6<sup>th</sup> May and 21<sup>st</sup> May, 2013.

Defendant paid US\$5 500.00 and indicated that the balance was to be paid by mid June, 2013. She met defendant on 10<sup>th</sup> September, 2013 and defendant duly executed an acknowledgment of debt undertaking to effect full payment by the 30<sup>th</sup> September, 2013.

The document signed by the defendant read as follows;

Affidavit

“I Muchaneta Theodora Chimbandi residing at 227 Sherwood Drive Avondale West, Harare do hereby solemnly swear / declare the following that I shall pay Mable Canvas, the sum of \$58 500.00US for the 1500 rucksack bags, delivered to Army, I shall be able to pay the whole amount by the mid June 2013. The funds will be transferred from Farrils Trading account with CBZ, Westgate Account number 03020705540037, corporate account.

Definitely I will pay the whole amount, without fail. Next of kin Virginia Munzeiwa Midzi  
0712 794 224 0772 336 277  
0772 690 318  
0712 211 257  
Landline / 04-335018”

She led evidence that no payment was made in terms of the aforesaid undertaking. Defendant addressed a letter to the plaintiff on the 10<sup>th</sup> September, 2013 and it stated;

“Re : Outstanding amount of \$58500-00 for any rucksack bag.  
Reference to the above outstanding amount, we will be able to pay off by 30<sup>th</sup> September, 2013.

We are sorry for the inconvenience caused.”

Defendant then pleaded with plaintiff to extend payment to the 3<sup>rd</sup> October, 2013. This plea was made on the 3<sup>rd</sup> October, 2013.

No payment was forthcoming up until a letter of Demand was addressed to defendant.

Defendant gave the reason for failure to pay being that her brother was deceased, and also that the “Army” did not pay her. She had subcontracted this work from the army.

The witness testified that the request to extend payment to October was made by way of a telephonic conversation.

The Evidence of Muchaneta Theodora Chimbandi

She testified that it was common cause that she contracted with plaintiff to manufacture 1500 sack bags. The terms of the agreement was that she would pay when the army paid.

She admitted that there had been an agreement to extend payment to 30<sup>th</sup> September, 2013. She agreed to writing the letter of the 10<sup>th</sup> September, 2013 in which she requested that payment would be made by the 30<sup>th</sup> September, 2019.

She testified that after 30<sup>th</sup> September, 2013 plaintiff called her and asked for copies of invoices, which plaintiff would present to the army for payment. Plaintiff offered her ten (10) percent if this payment was made.

She denied that plaintiff called her on the 30<sup>th</sup> October, 2-13 as alleged. She also denied any agreement being reached for payment to be extended to the 3<sup>rd</sup> October, 2013.

She admitted to signing the acknowledgement of debt because plaintiff was insisting on payment of the money owed.

She also testified that plaintiff's claim had prescribed.

#### Court's analysis of the evidence

It is this court's finding after hearing the evidence of the witnesses and submissions by counsel that the balance of convenience, is in favour of the plaintiff.

In her plea the defendant submitted that the bags were never delivered to her but to the Zimbabwe National Army.

The invoices at pages 36 to 38 of the record, do show that the bags in issue were delivered and signed for by the defendant. Defendant did not challenge the plaintiff's evidence that the bags were delivered to her in 3 batches.

In paragraphs 11 to 12 of the defendants plea, defendant denied ever making any acknowledgement of debt.

Similarly in para 11 of her Summary of Evidence she denied ever making an acknowledgement of debt and averred that the documents are clearly forged.

Contrary to this, at the trial the defendant admitted that she signed the acknowledgement of debt executed on 21 May, 2013.

She also admitted to directly effecting a cash payment to the plaintiff of US\$9 000.00 and admitted at the pre-trial conference that she owes the plaintiff US\$58 500.

#### Prescription

Under cross examination the defendant failed to disprove the fact that in her pleadings or at the trial, she failed to disprove the fact that she had been given up to December, 2013 to effect payment.

This court accordingly finds in favour of the plaintiff that there was an extension of payment terms to 31 December, 2013.

This court accepts the plaintiff's submission, in terms of r 104 (2) of the High Court rules, that defendant did not specifically challenge the fact that "She requested more time to settle the debt" and that "the plaintiff gave the defendant up to 31 December, 2013 to pay the

debt.” Similarly, in regard this court also accepts in favour of the plaintiff the common law principle that:

The simple rule of law is that what is not denied in affidavits must be taken to be admitted a per MCNALLY JA, as he then was, in *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise and Ors 1993 (2) 121 (S)* at p 127. This court also holds therefore that the debt in dispute was interrupted by acknowledge of liability. Section 18 provides that:

- “1. The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.
2. If the running of prescription is interrupted in terms of subsection (1) prescription shall commence to run afresh
  - (a) from the date on which the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.”

Wherefore it is hereby ordered that defendant pays:

- (a) Judgment in the sum of US\$58 500 or its equivalent at the intermarket bank rate
- (b) interests on the said sum of US\$58 500 or its equivalent at the prescribed rate from 31 December, 2013 to the date of payment in full; and
- (c) Costs of suit on a legal practitioners and client scale.

*Mushuma Law Chambers*, plaintiff’s legal practitioners  
*Muronda Malinga Legal Practice*, defendant’s legal practitioners