AL SHAMS GLOBAL BVI LIMITED
versus
KITCHEN DÉCOR (PRIVATE) LIMITED
and
INTERFIN BANK LIMITED (In liquidation being represented by the Deposit Protection Corporation in its capacity as the duly appointed Liquidator)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 10, 11 July and 11 October 2017

Civil Trial

L Uriri, for the plaintiff
G Gomwe, for the 1st defendant
D Halimani, for the 2nd defendant

TAGU J: The plaintiff is the holder of Bankers Acceptance number LN/11/0587 in the sum of USD 267 291.67 executed by the defendant and accepted by Interfin Banking Corporation Limited (now in liquidation). The plaintiff had purchased and took delivery of the above mentioned Bankers Acceptance from Interfin Bank with no notice of defect in title therein. The plaintiff became the holder of the Bankers Acceptance and this fact is not disputed by the defendant. The plaintiff presented the Bankers Acceptance to Interfin Bank for payment at Block 4, Tendeseka Office Park, Samora Machel Avenue, Eastlea, Harare, Zimbabwe on its maturity date on 8 December 2011. The Bankers Acceptance was dishonoured by the defendant failing to make payment in full, in accordance with the Bankers Acceptance to plaintiff who was the holder thereof. The defendant only paid the sum of USD 121 994.18 pursuant to its admission of indebtedness to plaintiff leaving the sum of approximately USD93 214.36 together interest on the sum of USD217 511.11 at the rate of 25% per annum from 8 December 2011 to date of payment in full remaining due and payable to the plaintiff.

At a Pre-trial conference before MTSHIYA J on the 27th day of July 2016 the following were agreed as issues for trial. As between the plaintiff and the second defendant the sole issue

was whether or not the action ought to be stayed pending the appeal in SC-359-2016. As between the plaintiff and the first defendant two issues were agreed. These were whether or not the first defendant has fully discharged its obligation in terms of Bankers Acceptance number LN/11/0587 with interest thereon at the rate of 20% per annum from 8 December 2011 to date of payment in full and whether or not the plaintiff is the holder in due course of Bankers Acceptance number LN/11/0587. As between the first and second defendant the sole issue was whether or not the amount of USD93 214.36 paid by the first defendant into the second defendant remains a liability of the second defendant to the plaintiff. Lastly as between all parties the sole issue was whether or not the placement of the second defendant under curatorship and subsequently, under liquidation, coupled with the freezing of deposits constitute a supervening impossibility over which the first and second defendant cannot be held liable.

On 10 July 2017 counsel for the first defendant made an application for recusal of this court on the basis that this court had dealt with a similar matter in the case of *Al Shams Global BVI Limited* v *John Chikura N.O. and Deposit Protection Corporation* in HC 6644/15 where the court made the statements to the effect that "in terms of the Security Trust Deed signed in April 2012, Interfin Bank Limited confirmed that all its rights to and in the security furnished to it by the drawers and or issuers of the Bankers Acceptances were held in trust and for the benefit of the applicant."

He said the first defendant being one such drawer of Bankers Acceptances it can be inferred that whatever the decision the court would make will be coloured in favour of Al Shams. This application was opposed by the counsel for the plaintiff, firstly on the ground that the case in HC 6644/15 dealt with a completely different issue of a declarator and that Interfin Bank was not a party. Secondly the counsel for the first defendant was making delaying tactics and had not indicated way back when the matter was set down that they were to make such an application. In his view there was no merit in the application given that no perception had been shown that this court would be biased.

I summarily dismissed this application and indicated that my reasons would follow. These are they.

The reason why I dismissed this application was that the parties in the case HC 6644/15 and the current case a totally different serve for the plaintiff and the relief sought in HC 6644/15 and in the present case are also different. No basis for inferring bias was advanced other than

that it was a delaying tactic to avoid trial. In any case from the pleadings the defendant is not disputing the fact that the plaintiff is the holder of the Bankers Acceptance in issue.

Having dismissed the preliminary point raised by the counsel for the first defendant the matter was postponed to the 11th of July 2017 for trial. At the commencement of the trial it was agreed by all parties that no relief was being sought against the second defendant. The second defendant indicated that it would abide by the decision of the court and applied to be excused. The second defendant was duly excused.

It having been agreed and the first defendant having conceded and made an admission that Interfin Bank limited (in liquidation) had ceded the said Bankers Acceptances to the plaintiff and that part of the judgment had already been granted by way of summary judgment in favour of the plaintiff, in respect of the Bankers Acceptances, the duty to begin fell on the first defendant to prove its issues which were now outstanding. There was therefore no more need for the plaintiff to prove that which had been admitted. See *Tekere* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (HC).

The first defendant led evidence and produced some documentary exhibits through its sole witness FARIDABAI TICKLEY. At the close of the defendant's evidence the plaintiff made an oral application for judgment on the basis that the defendant had failed to prove its case without the plaintiff having testified. The court being not so sure of the propriety of that procedure asked the parties to file detailed heads of argument. Usually where the plaintiff begins, and fails to establish a prima facie case the defendant can apply for absolution from the instance. The issue is whether the plaintiff can apply for judgment in a trial where defendant has duty to begin and fails to prove its case? The court is indebted to both counsels for filing detailed heads of argument on the issue.

ANALYSIS OF EVIDENCE

In her evidence -in -chief which was very brief FARIDABAI TICKLEY told the court that she was the Finance Manager for the first defendant and in that capacity she was in constant contact with the curator of Interfin Bank Limited Mr Peter L Bailey who advised her by letters dated 21 March and 30 April 2013 that the Bank did receive a total of USD 93 214.36 between 1 November 2011 and 25 April 2012 which was not remitted on to Al Shams for the Bankers Acceptances that had been ceded to them and that the said amount remains a frozen liability of the Bank to Al Shams. She was further advised that their debt in the books presently stood at USD 121 994.18 and was accruing interest at a rate of 20% per annum until full repayment.

Lastly she further confirmed that the first defendant had loan account with Interfin Bank and that Interfin Bank notified them to pay Al Shams when they had already deposited the money with the Bank. According to her they had settled their account with Al Shams.

However, under cross examination by the counsel for the plaintiff the witness was seriously discredited by Advocate *Uriri* as I will show. She made several concessions. She conceded that by 30th April 2013 they knew that Al Shams was the holder of Bankers Acceptance number LN/ 11/0587 for USD 267 291.67 and that it was presented on the 8th December 2011 and bounced because Kitchen Décor (Private) Limited did not have sufficient funds in their account with Interfin Bank. She further conceded that by letter dated 22nd June 2012 they were advised to pay USD 137 390.92 plus accrued interest and in response they admitted they owed Interfin Bank USD 121 634.83. She also admitted that the money that was locked up in their account with Interfin Bank to the tune of USD 93 214.36 belonged to them and was supposed to be passed on to Al Shams. She admitted under cross examination that they never instructed Interfin Bank to pay out the amount of USD 93 214.36 to Al Shams the holder of the Bankers Acceptances. Lastly she conceded that the total interest rate came to 25% per annum and not the 20% which she had said earlier in her evidence- in- chief. In short while she claimed to have paid the money due to Al Shams she failed dismally to prove it. This prompted the plaintiff to apply for judgment at the close of the defendant's case.

APPLICATION OF THE LAW TO THE FACTS

The facts of this matter are common cause. The long and short of it is that the plaintiff sued out provisional sentence summons against the first defendant for the sum of USD 217 511.11 on a dishonoured and unsatisfied Banker's Acceptance. This followed partial satisfaction of the face value of USD 267 291.67 of bill consequent to a notice of dishonour and protest of non-payment. The first defendant filed a notice of opposition to the summons for provisional sentence in terms of Order 4 Rule 25 (1) of the High Court Rules, 1971. In its opposing affidavit the first defendant confessed the plaintiff's cause of action as follows:

> "It is admitted that Defendant borrowed a total sum of US$378 226.49 from Interfin Banking Corporation Limited, t/a Interfin Bank under the following Bankers Acceptance numbers:
>
> LN/0587 US$267 291.67
>
> LN11/0853 US$110 934.82."
>
> It further confessed that the plaintiff is the holder of the Banker's Acceptance as follows:

"It is admitted that Interfin Bank ceded the said Bankers' Acceptance to plaintiff."

It did not take issue with the plaintiff's title or right to hold the Bankers' Acceptance or demand payment thereon. It did not dispute liability to pay thereon. It conceded to judgment in the lesser sum of USD 121 994.18 as follows:

> "6. It is denied that Defendant is liable to pay Plaintiff the sum of US$ 217 511.11 as Defendant has made payments in the sum of US$93 214.36 to Interfin bank…towards reduction of its indebtedness to Interfin bank and defendant's debt stands at US$121 994.18..
>
> …
>
> 9. The defendant accepts liability to the plaintiff in the sum of US 121 994.18 which it proposes to pay by 30th October 2013."

The first defendant took issue with the interest rate, which it argued should be 20% and not 25%. Provisional sentence was entered by consent in the conceded sum of USD 121 994.18. The balance of USD 93 214.36 was confessed but the defence was one of avoidance. But for the avoidance, the plaintiff would have been entitled to provisional sentence on the whole amount claimed. It is this that necessitated the trial in respect of the defence of avoidance. The first defendant as I said took issue with the rate of interest and contended that it had as a consequence of the application of the wrong rate of interest overpaid its liability by USD 5 344.00 in respect of which it was entitled to a reimbursement though it did not file a counter claim.

Therefore the defence tendered in respect of the balance of USD 93 214.36 is thus one of confession and avoidance. It is an admission which seeks to avoid the consequence thereof by asserting some other facts which negate the natural implications of such admission. Like all admissions, it cannot be withdrawn without the leave of the court. In *Kanonhuwa* v *Mukahuru Bus Service* 1994 (2) ZLR 382 (H) this court said at 384 H-385A that:

> "In para 3 of the declaration, the averment is made in clear terms that it is the defendant who concluded the agreement with the plaintiff and that in doing so the defendant was represented by F Manjengwa. Paragraph 2 of the plea, which constitutes the defendant's response to para 3 of the declaration, is a confession and avoidance. It admits the agreement as pleaded by the plaintiff but seeks to avoid its impact by giving a reason for concluding the agreement. To allow the defendant to amend its plea in the manner sought would have amounted to sanctioning the withdrawal of an admission. A pleader cannot be permitted to withdraw an admission without making a formal application for the purpose. At the very least an explanation must be given for the intended withdrawal of an admission. See *DD Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 92 (S) and *Adler v Elliot* 1988 (2) ZLR 283 (S)."

The effect of the plea of confession and avoidance as we have observed, is an admission of the facts the plaintiff relies upon to obtain judgment. Thus the admissions made as set out elsewhere above are that the facts the plaintiff requires to obtain judgment were common cause at the beginning of the trial, save for the avoidance of USD 93 214.36. This is because every factual allegation that had been made by the plaintiff and not traversed by the defendant in denial was deemed admitted, Order 15 Rule 104 (2) and (4) of the rules, which read as follows:

> "(2) Except as provided by rule 117, every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He shall admit or deny every allegation, or state that he has no knowledge concerning it, or confess and avoid it. Every allegation not so dealt with shall be taken to be admitted. The same rule shall apply to every allegation in subsequent pleadings, except where a joinder of issue is justified.
>
> (3)…
>
> (4) When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance."

In the present case there had been direct admission of the cause of action save for the defence of avoidance. The effect of the admission is that the plaintiff does not have to prove that which is admitted, see *Mining Industry Pension Fund* v *DAB Marketing (Pvt) Ltd* SC -25-12 where MAKARAU JA said that:

> "The importance of the admission is that it is thus seen as limiting or curtailing the procedure before the Court in that where it is not withdrawn, it is binding on the Court and in its face, the Court cannot allow any party to lead or call for evidence to prove the facts that have been admitted. (See *Rance* v *Union Mercantile Co. Ltd* 1922 AD 312, *Gordon* v *Tarnow* 1947 (3) SA 525 (AD); *Van Deventer* v *de Villiers* 1953 (4) SA 72 (C); *Moresby- White* v *Moresby-White* 1972 (1) RLR 199 (AD) at 203 E-H; 1972 (3) AS 222 (RAD) at 224; *DD Transport (Private) Limited* v *Abbot* 1988 (2) ZLR 98 and *Liquidator of M& C Holdings (Pty) Ltd* v *Guard Alert (Pty) Ltd* 19893 (2) ZLR 299 (HC)."

In *casu*, at the close of the defendant's case the following facts were common cause: That the plaintiff is the holder of the Bankers Acceptance in question for value and without notice of any defect in the title of Interfin; that the first defendant is the drawer of that Bankers Acceptance and is liable thereon; that the Bankers Acceptance had been presented for payment on due date and had been dishonoured and that the first defendant admitted liability on the lower sum in respect of which provisional sentence had been entered.

The three issues as gleaned from the pleadings were thus whether the first defendant had acquitted the sum of USD 93 214.36, what was the correct interest rate applicable? and whether there was supervening impossibility. In short, but for the plea of avoidance the plaintiff

was entitled to judgment upon the first defendant's confession of its claim. These in my view, were the only issues joined on the pleadings.

The first defendant thus assumed the onus to discharge its avoidance. An incident of this onus was the duty to begin. If it failed to discharge this onus, it meant that the only material before the court is the plaintiff's admitted claim. The plaintiff would be entitled to judgment. See *Nkambule* v *Minister of Law & Order* 1993 (1) SA 848 at 852 where it was said:

> "In my view the therefore the first defendant did not discharge the onus of proving that the death was covered by the avian endorsement. Consequently the plaintiff is entitled to judgment against the first defendant for the amounts claimed."

In the present case it is clear that at the end of the first defendant's case, the first defendant failed to discharge the onus of establishing its avoidance. It failed to prove that it paid the USD 93 214.36 to the plaintiff. It failed to prove that the correct rate of interest was 20% and not 25%. Finally, the defence of supervening impossibility though not pleaded but raised as an issue in the pre-trial conference minute was not proved in that the first defendant did not lead any evidence in respect of that defence. When cross examined on it the first defendant conceded that it retains the obligation to pay the plaintiff since it was still trading and had other bank account elsewhere from which it could have paid the plaintiff other than the money frozen in its account with the second defendant. In my view, the facts which the plaintiff needed to prove to have judgment entered for it being common cause, the plaintiff is entitled to judgment at the close of the defendant's case. The application for judgment at the close of the defendant's case was therefore properly taken.

IT IS ORDERED THAT

a) The first defendant shall pay the sum of USD 93 214.36 to the plaintiff together with interest on the said sum at the rate of 25% per annum from 8th December 2011 to date of full payment.
b) The defendant shall pay costs of suit.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Mutamangira And Associates, 1st defendant's legal practitioners
Wintertons, 2nd defendant's legal practitioners