

BETA HOLDINGS
versus
RIOZIM LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 31 May 2017 & 4 October 2017

Trial

P. Nyeperai, for the plaintiff
T.S. Manjengwa, for the defendant

MATANDA-MOYO J: The plaintiff issued summons against the defendant for the payment of US\$160 000-00 together with interest at the prescribed rate from date of summons to date of payment in full. The claim is based on an acknowledgment of debt. The plaintiff also sought costs of suit.

The defendant objected to the claim firstly on the basis that it has prescribed. It is defendant's case that the plaintiff based its claim on an acknowledgment of debt executed in 2011. The plaintiff's claim became due in 2011 but the plaintiff only served its summons upon the defendant on 13 May 2016 more than three years after the date on which the claim arose. The defendant pleaded therefore that the plaintiff's claim has prescribed in terms of s 14 of the Prescription Act [*Chapter 8:11*].

On the merits the defendant denied that the parties agreed to assume the rights and obligations of their subsidiaries. The defendant pleaded that in terms of the law the plaintiff has no *locus standi in judicio* to claim a debt owed to its subsidiary.

The defendant also denied having acknowledged the debt of \$160 000-00. The defendant disputed that the letter referred to constituted indebtedness to the plaintiff by the defendant. The letter is simply an invitation to treat or a proposal to resolve a dispute between Beta Coal (Pvt) Ltd and the defendant. The plaintiff made a counter offer to the proposal hence no agreement was ever reached pertaining to the dispute between the parties. The defendant also averred that the agreement between the parties in so far as it stipulates the transaction in foreign currency was illegal and un-enforceable. The defendant averred that even assuming

that parties could contract in foreign currency the correct contract price was US\$7 032-00. The defendant prayed that the plaintiff's claim be dismissed with costs on a higher scale.

The matter came up for pre-trial conference and the issues referred for trial were:

- (1) whether or not there was an agreement between the parties and
- (2) whether or not the plaintiff's claim has prescribed.

The evidence

Godfrey Manhambara, the Chief Executive Officer was the only witness for the plaintiff. He explained the relationship between the plaintiff and Beta Coal (Pvt) Ltd. It was his evidence that Beta Coal (Pvt) Ltd was a subsidiary of the plaintiff and Beta Coal was one hundred percent owned by the plaintiff. He testified that Beta Coal entered into a contract with the defendant's subsidiary to mine coal at Sengwa. This relationship commenced in 2006 and lasted up until 2012. He explained how some drilling work for the defendant was carried out by Beta Coal, after which an invoice was made. There was a dispute between Beta Coal and the defendant on the amount due. The Managing Director of Beta Coal referred the matter to this witness. This witness decided to engage the Chief Executive Officer of the defendant who was Mr Sachikonye then. It was his evidence that the two discussed the matter and agreed to reduce the invoiced amount from \$299 513-67 to \$160 000-00. The figure of \$160 000-00 was initiated by Mr Sachikonye and this witness accepted the figure. The two shook hands as a sign of sealing the agreement.

Thereafter Mr Sachikonye wrote a letter to the "Group CEO Beta Holdings" which letter forms the basis of this claim. In particular in the second paragraph from the last he wrote:

"I suggest that the outstanding amount is considered a shared cost and RioZim acknowledges a debt of USD160 000-00 that will be due and payable on final removal of the duff stockpile and Beta's plant and equipment from the mine site and satisfying all of the environmental closure requirements for that operation."

This witness testified that after that meeting he had believed that the payment of the agreed \$160 000-00 would be done soonest. This witness tried in vain to get that invoice paid. However the defendant maintained that the conditions in their letter of acknowledgement be fulfilled first. This witness testified that he then accepted that payment be done after the stated conditions. Removal of the duff stock pile was done in 2014. A report by the Environmental Management Authority was done. Thereafter this witness followed up payment verbally and in writing to no avail. Mr Sachikonye left RioZim and this witness engaged his successors in particular Mr Ndhlovu and Mr Matimba. They advised him that they were in discussions with

shareholders pertaining to payment. This witness decided to handover matter to the lawyers for collection.

Under cross-examination he agreed the initial contract was between Beta Coal and RioZim. He also admitted the invoice which is the subject matter of the compromise was raised by Beta Coal. The signatures on the EMA report were for and on behalf of Beta Coal. He also admitted he was collecting the amount on behalf of Beta Coal. He insisted the agreement was born out of discussions and subsequent letters. He answered that RioZim understood that all obligations which were supposed to be undertaken by Beta Coal were now being taken over by Beta Holdings as represented by this witness. He, under intense questioning maintained that after several discussions and exchange of letters he agreed to the conditions set out by Mr Sachikonye. This witness maintained that the letter of September 2011 was delivered to the defendant. He maintained that the \$160 000-00 was never challenged. Discussions centred on when it was to be paid not whether it should be paid.

Mr Sachikonye testified on behalf of the defendant. He alluded to the relationship between Beta Coal and the defendant. His testimony was similar to the plaintiff's up to the discussions involving the lowering of the invoice to \$160 000-00. He testified that indeed Mr Manhambara discussed with him pertaining to the invoice. It was his evidence that during the initial discussions no agreement was reached. It was only after the initial discussion with Mr Manhambara that this witness proposed a figure of \$160 000-00 together with the conditions of removal of the duff. As far as he was concerned such offer was never accepted by the plaintiff. Mr Manhambara continued making counter offers and counter proposals. This witness left RioZim before any agreement was reached between the parties. He however acknowledged having received the letter of 29 August 2011.

Under cross-examination he accepted he had authority at all times to act on behalf of the defendant. He also accepted that all correspondence with Mr Manhambara were in his capacity as Group CEO of Beta Holdings. He also agreed that he never at any point raised the issue that Mr Manhambara could not act on behalf of Beta Coal. He also insisted that Mr Manhambara changed the offer of \$160 000-00 when he suggested that \$140 000-00 be paid immediately and the \$20 000-00 be paid after removal of duff. After intense cross-examination he conceded that after meeting the conditions set out the plaintiff was entitled to receive payment.

Analysis of evidence

From the evidence adduced by both parties, it is common cause that Beta Coal a subsidiary company of the plaintiff entered into a contract with the defendant, in terms of which Beta Coal was to drill exploration holes for the defendant at its Sengwa mining site. Beta Coal after drilling presented an invoice of \$299 513-67 which the defendant refused to accept. The Managing Director of Beta Coal failed to resolve the matter with the defendant and referred the matter to the Chief Executive Officer. The Chief Executive Officer Mr Manhambara engaged the Chief Executive Officer of RioZim. Initially the two held a verbal meeting. The parties differed on the outcome of the meeting.

Mr Manhambara for the plaintiff insisted that at that meeting the parties found each other and agreed that the invoice amounts be reduced to \$160 000.00. On the other hand Mr Sachikonye refuted that any figures were suggested. He testified that he only offered the figure of \$160 000 after the meeting in his letter to Mr Manhamba which is undated. Once he made that offer Mr Manhambara never accepted it.

The first factual issue to be resolved is whether the parties agreed on the figure of \$160 000 at a meeting held between Mr Manhambara and Mr Sachikonye. Both parties in their communications spoke of \$160 000.00. A careful reading of correspondence between the parties show that at no time was any other figure suggested. The figure of \$160 000 remained constant in all communications. At no time did the parties argue nor differ on that amount. The parties failed to agree on when the amount was to be paid initially. Mr Manhambara wanted the amount to be paid immediately but Mr Sachikonye insisted the amount would only be paid after certain conditions were met. I am satisfied that the figure of \$160 000 was agreed to from the onset.

What is also not in dispute is that the plaintiff later attended to the conditions and removed the duff. A report by EMA was produced to the effect that such removal satisfied the environmental concerns. Both parties signed the agreement. The parties again differ on whether the removal was as a result of conditions placed by Mr Sachikonye or whether such removal was done in accordance with the initial agreement between the parties. Mr Manhambara testified that the removal was in satisfaction of conditions precedent to payment of \$160 000 whilst Mr Sachikonye insisted removal was as per the agreement between Beta Coal and the defendant.

From analysis of how discussions between the parties progressed I believe the removal of the duff was done as per the agreement between Mr Manhambara and Mr Sachikonye. It is

true Mr Manhambara tried to get payment before such removal which was not acceptable to Mr Sachikonye. In a letter dated 1 August 2011. Mr Sachikonye even wrote;

“I refer to your letters of 7 June and 28 July.....
..... Accordingly we are retaining this payment until such time as the duff stock pile and the plant and equipment has been removed from the site and all outstanding environmental closure requirements have been met....
.....”

He was responding to a request to pay \$160 000-00. Even under cross-examination Mr Sachikonye conceded that after conditions were met payment became due. He however said he is no longer the Chief Executive Officer of RioZim and as such he had no authority to make any decisions. It became clear to me that if he was still the Chief Executive Officer he was inclined to pay.

Then there is the letter from the plaintiff dated 29 August 2011 which the defendant denied ever receiving. The letter clearly accepts the conditions set out by the defendant. It is my belief that such letter was received by the defendant but the defendant had decided to lie about not receiving letter in a bid to avoid payment. The fact that after that day the plaintiff commenced removing the duff points to the likelihood of the plaintiff having written that letter and delivered it to the defendant. From a look at all correspondence between the parties, there was no culture of signing for such letters by the parties as a way of acknowledging receipt. These are companies who had a long standing business relationship. The fact that the letter was not signed for is not evidence of non-receipt. The conduct of the parties thereafter shows that both parties were aware that they had agreed on all material issues. The parties had agreed that a sum of \$160 000-00 will be paid upon removal of the stockpile and Beta's plant and equipment from the mine and upon satisfying the environment closure requirements for that operation.

Mr Sachikonye suggested that he for the first time suggested the figure of \$160 000 in the undated letter attached to the meeting soon after the meeting. Such is improbable as the subsequent correspondent tended to show that the \$160 000 was a figure agreed by the parties. Correspondence proved that the figure was never disputed by any party, making it probable that the figure was never disputed by any party. It is only probable that the figure had been earlier on agreed to by the parties. This makes the version of Mr Manhambara the truthful one, that the parties agreed on \$160 000 at a prior meeting.

At times Mr Sachikonye was evasive and at times gave contradictory evidence.

On the other hand Mr Manhambara gave his evidence well and was not shaken under cross-examination.

The Law

The plaintiff is suing the defendant on an acknowledgement of debt. An acknowledgement of debt is defined as “a document containing unequivocal admission of liability by the debtor.” It is a document whereby a debtor acknowledges that he or she owes a particular sum to the creditor and undertakes to pay on terms so agreed between the parties. The first legal issue is whether the undated letter by Mr Sachikonye attached to the summons constitutes an acknowledgement of debt.

Page 2 of the letter para 2 thereof is what the plaintiff terms an acknowledgement of debt. It reads;

“I suggest that the outstanding amount is considered as shared cost and RioZim acknowledges a debt of \$160 000 that will be due and payable on final removal of the duff stockpile and Beta plant and equipment from the mine site and satisfying all the environmental closure requirements for that operation.”

The above paragraph does not constitute an acknowledgement of debt. It is a suggestion or a proposal, which proposal was based on the oral agreement reached between the parties. The above was to constitute the basis upon which the defendant was acknowledging its indebtedness to the tune of \$160 000 to the plaintiff. Such acknowledgement only took place later after the plaintiff agreed in writing to the suggestion by the defendant.

An acknowledgement of debt should contain unambiguous, plain and unmistakable admission to liability. In other words it is an “I owe you” document where a party specifically recognizes and accepts that it owes the other party and intends settling such indebtedness in a particular manner, agreeable between the parties.

It is common cause that although the parties had earlier on verbally agreed to the sum of \$160 000, such acknowledgement was to be reduced to writing. It is permissible to sue on an acknowledgment of debt see *Chimutanda Motor (Pvt) Ltd v Musore* 1994 (1) ZLR 310. However one of the essential elements is that it must be written. The paragraph above on its own does not in any way constitute an acknowledgement of debt. Firstly it starts by the words;

“I suggest that

Those words signify a proposal. They do not admit to owing a debt. Let me now look at other correspondences between the parties and establish whether as read together with the above paragraph defendant indeed acknowledged the debt. From reading the letters I have noticed that the parties later found each other and agreed that \$160 000 would be paid to the

plaintiff upon removal of duff and equipment from the mining site. The rehabilitation report was signed by officials from Beta Holdings on behalf of Beta Coal on 7 August 2014 which report signified the conclusion of the matter. Payment became due thereafter.

Letters have been held to be admissible to prove acknowledgement. Although the letter attached to the summons on its own cannot qualify as an acknowledgment, such letter as read with the subsequent correspondence between the parties constitute an acknowledgment of debt. See *Bradford P/L v Rashid* [2006] UKHL 37, [2006] I. WLR 2066.

What therefore amounts to an acknowledgment is therefore a matter of construction. All that is required is an admission by the debtor that there is a debt outstanding and that he debtor has a legal obligation to pay. A letter from the defendant of 1st August 2011 in particular paragraph 2 thereof states;

“.....accordingly, we are retaining this payment until such time as the duff stockpile and the plant equipment has been removed from the site and all outstanding environmental closure requirements have been met.”

The above clearly signified the defendant (a debtor) acknowledging its liability to pay once the conditions set out are met. Payment was due upon removal of duff stockpile and plant equipment and meeting environmental closure requirements.

The letter of the 26th of September 2011 specifically sealed the whole matter when the plaintiff accepted the terms. The conduct of the parties thereafter also supports the agreement between the parties. Representatives of the defendant signed the rehabilitation report.

I am of the view that overallly the legal requirements for an acknowledgement of debt have been proven. The acknowledgment by the plaintiff as per the correspondences between the parties clearly illustrates an acceptance of an obligation to pay the plaintiff on the part of the defendant. See *James Braithwaite v Daniel Braithwaite* [2010] ZAKZP HC 25. It is clear that such acknowledgment was based on novation *voluntario*. The parties through the acknowledgment of debt replaced whatever agreements they had before, and plaintiff has managed to prove the existence of such acknowledgment of debt on a balance of probabilities. See also *Swadif (Pvt) Ltd v Dyke N.O* 1978 (W) SA 928A, *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N).

That brings me to the question of prescription, whether or not the plaintiff's claim has prescribed. A debt normally becomes due and prescription begins to run when it is recoverable and payable. See *List v Jungers* 1979 (3) SA 106 (A) at 121 C. The debt herein as per the acknowledgment became due and payable upon meeting the environmental closure

requirements. In other words it became due after the signing of the rehabilitation report on 5 September 2014. The summons were therefore instituted within the three year period. I am satisfied the question of prescription does not arise.

The other issue falling for determination is whether plaintiff can sue on a debt owed to Beta Coal (Pvt) Ltd. The doctrine of separate legal entities entails that a company is a legal persona, separate from its shareholders. A company has its own property rights and interests which it alone is entitled to. Where a company is defrauded by a wrong doer it is only the company itself which has the right to sue for the damage.

The defendant submitted that the matter or the debt was owed to Beta Coal (Pvt) Ltd and not to the plaintiff. The defendant only accepted to deal with Mr Manhambara as an agent or representative of Beta Coal. It is defendant's submission therefore that the plaintiff has no *locus standi* to sue on behalf of Beta Coal. Defendant for this proposition referred me to *SWA Almalgameerde Afslaers (EDms) Bplc v Louw* 1956 (3) SA 540 (A). Defendant also correctly submitted that a party must show that it has a direct and substantial interest in the subject matter to prove *locus standi*. Counsel for the defendant referred me to the case of *Zimbabwe Teachers Association and Ors v Minister of Education and Culture* 1990 (2) ZLR 48 (HC). Counsel said in all correspondences Mr Manhambara indicated he was following up on a debt to be paid to Beta Coal and not to Beta Holdings.

On the other hand the plaintiff argued that it has direct and substantial interest in the matter and has therefore *locus standi* to bring these proceedings. I was referred to the case of *Bindura Nickel Corporation Ltd v Zimbabwe Revenue Authority* 2008 (1) ZLR 152 (H) in particular page 155 where the Honourable Justice CHATUKUTA said;

“It is trite that for a party to be able to sue it must have an interest in the subject matter of the suit and that such interest must be a direct one. There is a plethora of authority in this regard. The Supreme Court in *Law Society of Zimbabwe and Ors v Minister of Finance (Attorney-General intervening) supra* cited with approval the meaning ascribed to direct and substantial interest” in *Zimbabwe Teachers Association and Ors v Ministry of Education supra* by EBHAHIM J (as he then was). At 52E, it was observed that a party needs to show that it has an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.”

Substantial interest is a term not capable of a precise definition. It may be defined as a percentage of ownership, but usually refers to an interest not too remote or nominal and affects a proprietary or pecuniary interest. In the case of *Judicial Service Commission and Anor v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) the court held at paragraph 12 that:

“It had now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience if that party has a direct and substantial interest which may be affected prejudicially by the judgment....”

“What a direct and substantial interest is defined as follows by CORBETT CJ in *United Watch and Diamond Company (Pvt) Ltd v Disa Hotels Limited and Another* 1972 (4) SA 409 (c) at 415 E- F.

“A direct and substantial interest can be connoted as an interest in the right which is subject matter of litigation and not merely financial interest is only an indirect interest in such litigation. This view of what constitutes direct and substantial interest has been referred to and adopted in a number of subsequent decisions and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment or order.”

The evidence before me is that the plaintiff took over in ensuring that the conditions set up by the defendant were met. The persons who signed the rehabilitation report were from plaintiff. Also that plaintiff own Beta Coal has not been disputed by the parties. Clearly plaintiff has legal interest in the matter. As, I said earlier on the law would create an absurdity if a holding company, which is covered by the veil of incorporation in the subsidiary were to turn a blind eye on the decimation of its interest thereon. The defendant also urged the plaintiff on by engaging with plaintiff and seemingly not taking any issue with the plaintiff taking over the responsibilities of Beta Coal. I agree with the sentiments by CHATUKUTA J in *Bindura Nickel* case (*supra*) that in certain instances the defendants should not be allowed to raise certain issues at the late hour. Defendant clearly wants to run away from a debt which it owes. Mr Sachikonye conceded that after the conditions were met defendant was supposed to effect payment. I can therefore not allow the defendant to escape a debt due on technicalities.

In the result I am satisfied that the plaintiff has proven its case on a balance of probabilities and is entitled to judgment.

In the result I order as follows;

1. That the defendant pays to the plaintiff the sum of \$160 000.00 together with interest at the prescribed rate from date of summons to date of payment.
2. That the defendant pays costs of suit.

Costa & Madzonga, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners