LAFARGE CEMENT ZIMBABWE LIMITED
versus
OVERNELL INVESTMENTS (PRIVATE) LIMITED
and
TENDAI KASHIRI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 18, 20 & 21 September 2017 and 16 & 19 October 2017

Civil Trial

T. Zhuwarara, for the plaintiff
P. Chakanyuka, for the defendant

ZHOU J: The plaintiff issued summons against the two defendants claiming payment of a sum of US$ 131 046-22, interest thereon at the prescribed rate from 28 February 2014 to date of full payment and costs of suit on the legal practitioner and client scale. The claim, according to the plaintiff, is in respect of cement sold and delivered to the first defendant in terms of a credit facility agreement between the parties. The second defendant is being sued in his capacity as surely and co-principal debtor. Both defendants dispute the claim and state that the first defendant never had a credit facility agreement with the plaintiff but always paid cash for the cement supplied or, in some instances, even made advance payments. The first defendant also counter-claimed for payment of US$460 317-97.

The plaintiff led evidence from its Financial Accountant, Laymond Moyo, who testified that the first defendant applied for and was granted a credit facility in 2009. The first defendant accessed cement in terms of that agreement. A sum of US$131 046-22 which is being claimed remains outstanding on the cement account. The witness stated that the transport agreement between the plaintiff and first defendant was instituted as a debt repayment plan to enable the first defendant to settle its debt to the plaintiff.

The second defendant, Tendai Kashiri, testified on behalf of the defendants. His evidence was that the first defendant's application for a credit facility was rejected by the plaintiff, such that the defendant paid cash or made advance payment for all the cement which it purchased from the plaintiff. He stated, further, that he availed his trucks for use in

transporting cement to the plaintiff's clients on the basis that the plaintiff would take thirty percent while the first defendant received seventy percent of the money paid as transport charges for the trucks. Later the plaintiff unilaterally took all the money earned by the defendants' trucks. That prompted him to withdraw the trucks. The plaintiff, according to him, owes the first defendant a total sum of US$460 000-00 in respect of the services rendered by the trucks under the transportation agreement. In his evidence, the plaintiff's previous management had promised to refund him the advance payments which he made for the cement but a new management was put in place before he was paid which refused to pay back his money but instead demanded money from him. During cross-examination the witness was not in a position to explain the amounts which the defendant is counter-claiming which he said would be explained by the first defendant's accountant. That accountant was not called to testify.

The issue of prescription which is contained in the joint pre-trial conference minute was not pursued by the defendants. No evidence was led in connection with it. Even in the closing submissions the defendants' counsel made no reference to the issue of prescription. It was thus clearly abandoned.

On whether the defendants are indebted to the plaintiff in the sum of money claimed or any other amount, the plaintiff led evidence of such indebtedness through not just acknowledgments of debts signed on behalf of the first defendant but also the statement of account of the first defendant. The plaintiff's witness related to the statement and highlighted the invoices which have not been settled from which the sum of US$131 046-22 which is being claimed arose. The same statement was also produced by the defendants in their bundle of documents – exh 2. The defendants have not challenged those figures which are said to be outstanding.

The defendants' case that the first defendant always paid cash or made advance payments for cement purchased from the plaintiff is contradicted by the documentary evidence produced. On 14 January 2014 the first defendant through its accountant acknowledged that as at 31 December 2013 it owed the plaintiff a sum of US$125 324-00. On 14 January 2015 the first defendant again acknowledged, in writing, that it owed the plaintiff a sum of US$136 633-04. These acknowledgments of debt contradict the defendants' case that all purchases were on a cash basis or that they made advance payments for cement purchased from the plaintiff. The defendants did not produce proof of payments made after 14 January 2015 to show that the amount acknowledged was paid.

The witness for the plaintiff testified that the transportation agreement was a debt recovery scheme instituted to enable the first defendant to settle the debt. That evidence accords with the probabilities. The defendants give no sound explanation as to why they would agree that the plaintiff takes a portion of the transport fees and, later, the whole amount paid for the services given through the first defendant's trucks if there was no debt owed to the plaintiff. The suggestion that the defendants were threatened into acknowledging indebtedness to the plaintiff is clearly false not only because no evidence was led to prove such threats but also because it is simply unconvincing and is controverted by the documentary evidence which illustrates how the indebtedness of the first defendant arose. The witness for the defendants did nothing to disprove the figures. He promised that the first defendant's accountant would be called to testify as the second defendant professed ignorance of the matters relevant to the amounts being claimed. That accountant was not called to testify. The second defendant contradicted himself later in his evidence in chief by stating that at the time that he withdrew his trucks a sum of $131 000 was still owed to the plaintiff. That contradiction constitutes an abandonment of his defence.

In their plea the defendants denied that the second defendant guaranteed the first defendant's indebtedness to the plaintiff as surety. The guarantee form at p 44 of exh 1 bears his name and signature. In that document which the second defendant admitted to signing he explicitly bound himself and even renounced the benefits of excursion and division. He cannot, therefore, escape liability for the debts of the first defendant.

From the evidence led, the plaintiff has proved its claim against both defendants. The plaintiff's claim for interest from 28 February 2014 has not been justified by evidence. It is therefore only fair that the defendants be ordered to pay interest from 29 October, 2015 which is the date by which payment was demanded to be due in terms of the letter of demand dated 22 October 2015. The letter is at p 54 of exh 2.

As for the claim in reconvention, the defendants produced a bundle of documents, exh 2. However, the witness for the defendants stated on his evidence under cross examination that he was not conversant with the figures, including those which the defendants are claiming against the plaintiff. As far as the witness was concerned the accountant was the appropriate person to testify on that matter. The accountant, as noted earlier on, did not give evidence. The effect of that is that no evidence was placed before the court to enable it to assess the services which were rendered by the defendants under the transportation agreement as well as the amounts, if any, which have not been paid by the plaintiff in respect of such services. The

second defendant testified that he had some receipts and invoices at his residence which were relevant to the defendant's case. Those documents were not produced in this court.

The defendants have therefore failed to discharge the onus in respect of the counter claim.

In the closing submissions Mr *Zhuwarara* for the plaintiff invited the court to order that the defendants' title deeds be declared specially executable. That is a startling submission given that title deeds are only proof of ownership, and are not the property to which they relate. In any event, the plaintiff only had a photostat copy of the title deeds which does not constitute security. Furthermore, the plaintiff's declaration has no prayer relating to leave to execute upon the property to which the photocopy of the deed of transfer relates. The summons, on the other hand simply asks for a property which is not described therein to be declared to be executable. From the foregoing, there is no basis for ordering that any property be declared to be specifically executable.

The plaintiff has asked for costs to be awarded on the attorney – client scale. That is a special order of costs which is granted only where the parties have agreed that it be granted or there is some ground which justifies penalizing a party by making such an award of costs. The guarantee form signed by the second defendant shows that he agreed to pay attorney – client costs. In any case, the court would still order attorney – client costs on the ground that the defendants have been manifestly dishonest in persisting with the assertion that cement purchased from the plaintiff was paid for in cash or in advance. That assertion is persisted with in the face of acknowledgments of debt signed on behalf of the first defendant, as well as the clear evidence that the transport agreement was entered into the enable the defendants to settle debts outstanding to the plaintiff in respect of cement delivered. The second defendant categorically stated that at the time that he withdrew his motor vehicles the debt owed to the plaintiff had not been settled in full.

In the result, IT IS ORDERED THAT:

1. Judgment be and is hereby granted in favour of the plaintiff against both defendants jointly and severally the one paying the other to be absolved for payment of the sum of US$131 046.22, together with interest thereon at the prescribed rate from 29 October 2015, that being the date of demand, to the date of full payment.
2. The defendants' claim in reconvention is dismissed.

3. The defendants, jointly and severally the one paying the other to be absolved, shall pay the costs of suit on the attorney – client scale.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Antonio & Dzvetero, defendant's legal practitioners