PARKHORSE SERVICE (PRIVATE) LIMITED

t/a PIONEER MOTOR COMPANY

versus

ZIMBABWE UNITED PASSENGER COMPANY

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 7 and 8 June 2010 and 18 July 2012

**Civil Trial**

*A Moyo,* for the plaintiff

*T Magwaliba*, for the defendant

HUNGWE J: On 7 August 2007, the plaintiff issued summons against the defendant claiming:

1. Payment of the sum of US$763 068-00 being the balance due and payable by the defendant to the plaintiff in respect of buses sold and delivered to the defendant by the plaintiff at the defendant’s special instance and request which, despite demand, the defendant has failed and or neglected to pay to the plaintiff.
2. Interest on the sum of US$763 068-00 at the rate prevailing from time to time in the Supreme Court of the United States of America with effect from 22 August 2004 to date of final payment.
3. Payment of collection commission on the above sums calculated in accordance with By-Law 70 of the Law Society of Zimbabwe By-Laws, 1982 and costs of suit on a legal practitioner and client scale to the extent that such costs are permitted in proviso (iii) to By-Law 70 (2).
4. Costs of suit.

The gist of the basis of the claim is captured in para(s) 4 to 9 of the declaration. I repeat its contents.

“4. Pursuant to the agreement the plaintiff delivered to the defendant a total number of 50 Scania buses for a total purchase price of US$4,877,000-00.

5. As security for the due payment of the full purchase price for the 50 Scania buses, the defendant placed at the disposal of the plaintiff case cover in the total sum of ZW$200 000 000-00 in January 2003 and again in May 2003, which amounts was to be held by Metropolitan Bank of Zimbabwe Limited pending to performance by the defendant, that is to say, payment of the full purchase price of the 50 Scania buses.

6. Pursuant to the agreement, the defendant paid a total sum of US$4,113,932-00 leaving a balance in the sum of US$763,068-00 due and payable to plaintiff.

7. In breach of the agreement between the parties, and on or about 21 August 2004, the defendant withdrew and or caused the withdrawal of the cash cover security earlier provided by it to the plaintiff and the balance of the purchase price immediately became due and payable to the plaintiff.

8. The defendant agreed and undertook to pay to the plaintiff collection commission and costs on an attorney and client scale in the event of the plaintiff incurring such charges in the recovery of all and any monies due and payable by the defendant to the plaintiff.

9. It was at all material times within the contemplation and knowledge of the parties that in the event of the defendant failing to pay the purchase price, the plaintiff would be obliged to pay the purchase price in the currency of the United States dollar to the manufacturer of the buses namely Scania SA (Pty) Ltd.”

On 5 October 2007, the defendant pleaded to this Declaration as follows:

“3 Ad para 6

The defendant avers that payments were made by it and by the Government of Zimbabwe which assumed the debt. The balance of this debt subject to the plaintiff’s claim was accordingly assumed by the Government of Zimbabwe and if at all know payment was made of that amount, the plaintiff should look to the Government of Zimbabwe for the payment.

4. Ad para 7

The defendant avers that it did not cause the withdrawal of the cash cover from the Metropolitan Bank of Zimbabwe Limited. Alternatively, if it is found that it did, such withdrawal was made on the assumption of the debt by the government of Zimbabwe and therefore the defendant had been released from payment of the debt.

5. Ad para 8

The contents of this paragraph item made in their entirety and the plaintiff is put to the strict proof thereof.

6. Ad para 9

This is denied and the plaintiff is put to the strict proof thereof. Alternatively, the defendant avers that even if the agreement provided for payment denominated in United States dollars, it is competing for the defendant to discharge such indebtedness in Zimbabwe dollars. In the event of the plaintiff therefore succeeding in his claim, the defendant shall tender performance in the equivalent of the sum claimed at the official exchange rate applicable in Zimbabwe as per the date of the issue of summons.”

In the replication to the defendant’s plea, filed in January 2008, the plaintiff denied that the debt due by the defendant to it was effectually assigned to the Government of Zimbabwe. The plaintiff states that its claim that this is the balance of the contract price as originally agreed between the parties for which the defendant remains liable to pay the plaintiff. Further, the plaintiff denies that it released the defendant from its obligation to pay the full purchase price. And similarly, it denies that the debt due by the defendant was assumed by the Government of Zimbabwe as claimed by the defendant. The plaintiff maintains that the defendant is liable for the balance of the purchase price.

On 23 July 2008 the defendant filed an amended plea in which it denied that the agreement of sale in respect of the buses was entered into between the plaintiff and the defendant. It claimed that the defendant entered into the agreement for the buses between Scania SA (Pty) Ltd which is a South African registered company which in terms of a distributorship agreement nominated the plaintiffs as its local agent. The defendant acknowledged that the price of US$4 877 000-00 was for the purchase of 48 buses and not 50. Further, the defendant averred that a sum deposited with Metropolitan Bank of Zimbabwe totalling ZW$6 200 000 000-00 was cash cover made available to the plaintiff as agent of its South African principal for the purposes of sourcing foreign currency to pay the sellers.

The defendant avers that both it and the Government of Zimbabwe made payments to the seller. The balance of the debt subject to the plaintiff’s claim was accordingly assumed by the Zimbabwe government and that if at all no payment was made of that amount, the plaintiff should look to the Government of Zimbabwe for such payment. In any event, the defendant states that the agreement between the plaintiff’s principals and the Government of Zimbabwe

provided that the last payment made in the sum of US$2 900 000-00 was in full and final settlement of the plaintiff’s principals’ claims against the defendant.

Regarding the withdrawal of the cash cover, the defendant denies that it caused the withdrawal of the said sum and in any event if it is found that it did then such withdrawal was made after the assumption of debt by the Government of Zimbabwe and as such the defendant had been released from payment of the debt.

The rest of the pleadings remained the same.

The plaintiff maintained that the agreement of sale was between it and the defendant although it was known that the supplier of the buses would be Scania SA (Pty) Ltd in terms of the underlying distributorship agreement between it and the plaintiff. As such the plaintiff assumed ownership and risk of the buses supplied to third parties such as the defendant in its own name. The liability to pay Scania SA (Pty) Ltd remained with the plaintiff and the defendant remained liable to pay the plaintiff the agreed purchase price. According to the plaintiff interventions by Scania SA (Pty) Ltd were meant to facilitate exchange control approvals in order to expedite payment.

The plaintiff denied that the debt was assumed by the government of Zimbabwe or that it released the defendant from the obligation to pay the full purchase price.

At the pre-trial conference held before MAKARAU JP (as she then was) the issues were settled as:

1. Whether or not the agreement of sale was between the plaintiff and defendant;
2. Whether not the defendant was released by the plaintiff from liability to pay the balance of the purchase price
3. In the result to whether or not the defendant is indebted to the plaintiff in the sum of US$763 068-00.

**The evidence**

The plaintiff called its Chief Executive Officer one Hamish Bryan Wilburne Rudland to testify on its behalf. His evidence was that the plaintiff is the distributor of Scania buses in Zimbabwe on behalf of Scania South Africa through a distributorship agreement between it and Scania South Africa (exh1). The plaintiff entered into a contract for the supply of 50 Scania

buses with the defendant in terms of an agreement dated 30 May 2003 (exh 5). Because of the tight exchange regime prevailing in Zimbabwe at the time, the parties executed a separate agreement in terms of which the defendant company would deposit a sum of money titled “cash cover” with the plaintiff’s bank (exh 6). In terms of exh 6, the bank would provide ZW$3 130 000 000-00 to the plaintiff “to be held by the bank as a guarantee for the due and faithful performance by ZUPCO of all its obligations in respect of its purchase of 32 Scania buses.” The cover would be released once the defendant had paid for the buses in full. As distributors, the plaintiff would secure the buses from Scania (SA) and sell to clients with their own mark-up. The defendant arranged for the duty free importation of the buses as well as the tender process. Because the defendant decided to ply cross-border routes, some luxury units were included, thereby reducing the number covered by the contract value to 48.

The plaintiff says the defendant failed to pay for the 48 buses which had been delivered despite demand. The result was that the supplier, Scania South Africa, threatened to foreclose on the plaintiff and push it into liquidation. Scaina SA sent its lawyers to verify the cause of the plaintiff’s inability to pay. Because the defendant ran a public fleet, the various political authorities were engaged by Scania SA. In the end the Reserve Bank Governor was involved. According to the witness, the governor ordered the witness to write a cheque in favour of the Central Bank against the funds held by Metropolitan Bank as security for the defendant’s due performance of its legal obligations. He was held in police cells as a way to coerce him to succumb to pressure. After some days he realised that the odds against him were beyond him and he relented.

It later transpired that the Reserve Bank had paid a sum of US$2 900 000-00 directly to Scania South Africa on behalf of the defendant. In terms of an agreement between the governor of the Reserve Bank and Scania South Africa, the effect of the payment was to settle the claim by Scania (SA) against the defendant in full but the agreement explicitly excluded by specific reference, any liability which may remain due to the plaintiff by the defendant. (See clause 3 of exh 4).

The plaintiff’s account with its supplier, Scania (SA) was credited with the sum remitted to Scania (SA) by the governor. The balance remaining is the exact amount which the plaintiff claims against the defendant in these proceedings.

Under cross-examination the witness was steadfast that the two agreements were only related as far as the bigger debt was paid directly to the supplier thereby reducing the liability but not extinguishing the same. In any event, the Governor and Scania were not party to the original agreement and specifically avoided any novation of the original agreement in exh 4.

This evidence was corroborated by Scania (SA)’s legal practitioner, one Marius Theunissen De Bruin. He was dispatched from Scania (SA) to Zimbabwe to collect as much of the outstanding debt as he could. After lengthy negotiations he was able to agree to the terms set out in exh 4. The balance of US$763 068 000-00 would be due to their distributor, the plaintiff. US$2 900 000-00 was paid directly into Scania (SA) account and credited in the books of the plaintiff with Scania (SA). He confirmed that para(s) 1 and 3 of exh 4 were meant to preserve the plaintiff’s rights against the defendant. He denied that the defendant contracted with Scania (SA) for the purchase of the buses but with the plaintiff. According to De Bruin, the governor wanted the agreement in the way it appears in exh 4 before he would pay. It was known by the parties that Scania had not sold buses to ZUPCO but that the plaintiff had but the agreement was meant to facilitate direct foreign exchange payment to Scania (SA).

The defendant did not lead any evidence in support of its claims. As matters stand, the court must decide, on the plaintiff’s evidence which is on record, and the defendant’s pleadings, whether the plaintiff has made its case.

**Findings**

It seems to me that both of the plaintiff’s witnesses gave truthful evidence. Their evidence in court is supported and corroborated by the documentary evidence produced by the plaintiff.

It is clear to me that the agreement for the sale of buses was between the plaintiff and the defendant. The facts show that when the defendant and the plaintiff entered into an agreement of sale, a separate cash cover agreement was executed to guarantee due and faithful performance of the defendant’s obligations. When the defendant failed to perform, the governor of the Reserve Bank intervened and negotiated directly with the supplier for a settlement of the sums due to the supplier and implicitly the manufacturer of the buses. This sum did not include the mark-up to

which the plaintiff was entitled both in terms of its business practice, the distributorship agreement as well as the agreement between it and the defendant.

Having found that the agreement of sale in respect of the buses was between the plaintiff and defendant, it follows that the plaintiff never released the defendant from its liability to pay for the purchase price. What the evidence shows is that because third parties intervened, the bigger portion of the debt was paid by a third party. It is this third party which can benefit from the settlement in full and final settlement which it entered into with the supplier of the buses, not the defendant. In any event, that agreement expressly excludes the extinction of the rights created in the original agreement. For its part, the plaintiff has expressly reduced the amount due to it by the same figure paid to its supplier leaving the amount it now seeks from the defendant.

**Decision**

In the result therefore I find that the defendant is liable to the plaintiff in the sum of US$ 763 068-00 as claimed, together with interest as set out in paragraph (c) of the summons as well as costs of suit.

*Kantor & Immerman*, plaintiff’s legal practitioners

*Magwaliba & Kwirira*, defendant’s legal practitioners