WINDMILL (PRIVATE) LIMITED
versus
ZIMBABWE COMMERCIAL FARMERS UNION
and
JUPITER INSURANCE

HIGH COURT ZIMBABWE
MTSHIYA J
HARARE, 10 & 31 July 2014, 6 August 2014
and 22 October 2014

Trial

E.T. Moyo, for the plaintiff
P. Kawonde, for the defendant

MTSHIYA J: In this action the plaintiff claims:-

"(a) Payment by the Defendants jointly and severally, the one paying the other to be absolved of the sum of the sum of USD 898 194.12 being an amount due and owing to the Plaintiff by the Defendants.

(b) Interest on the above amount at the prescribed rate calculated with effect from the date of summons to the date of full and final payment both dates inclusive.

(c) Costs of suit"

On 8 February 2012 the plaintiff obtained default judgment against the second defendant for the same amount claimed above. The second defendant had stood as guarantor for the full debt owed to the plaintiff by the first defendant. The second defendant has not yet satisfied the plaintiff's claim as ordered on 8 February 2012.

The record confirms that on 12 September 2012 this court refused to grant the plaintiff summary judgment against the first defendant and hence this trial.

It is common cause that on 17 December 2010 the plaintiff and the first defendant entered into an agreement with the first defendant for the supply of various types of fertiliser to the first defendant's members. Subsequent to the agreement, the plaintiff supplied fertilisers to a number of the first defendant's members. The total value of the fertiliser supplied was US$1 215 373-00 (One million two hundred and fifteen thousand three hundred and seventy three United States Dollars). The amount was 'inclusive of a fixed interest

charge of 10% on the prevailing prices of fertilisers". The first defendant and its members have since paid US$ 317 178-88 (Three hundred and seventeen thousand one hundred and seventy eight United States Dollars eighty eight cents) leaving the balance claimed herein. The first defendant has disputed the claim arguing that its members/beneficiaries were the principal debtors.

In the joint Pre-Trial Conference Minute, filed on 26 July 2013, the parties identified the issues for determination as:-

"2. What were the material terms of the agreement between the Plaintiff and the Defendants regarding the sale of fertilisers to farmers who were members of the first defendant?

3. Does the 1st defendant have any obligation to the farmers on credit by the Plaintiff?

4. Has the 1st Defendant been released from any of its obligation under the agreement with the Plaintiff?

5. Is the 1st Defendant liable to pay to the plaintiff the sum of US$898 194-12 (eight hundred and ninety eight thousand one hundred and ninety four United States Dollars and twelve cents)?

The plaintiff led evidence through its Finance Manager, Miss Jacqui Joseph (Joseph). Her evidence was brief. She confirmed the agreement of 17 December 2010 and said the second defendant had stood as guarantor for the first defendant who was the principal debtor. She said the plaintiff did not look for payment from the farmers i.e. the first defendant's members. This was so because the first defendant was the contracting party and had never ben released from its obligations under the agreement. She admitted under cross examination, that the plaintiff and the defendants had joined hands to trace farmers who had actually benefited under the fertiliser scheme i.e. joint recovery efforts.

After Joseph's evidence, the first defendant applied for absolution from the instance. I immediately dismissed the application for absolution from the instance because I believed the plaintiff had presented a *prima facie* case.

The first defendant then called in Mr Jeremiah Tevera (Tevera) to give evidence on its behalf. Tevera said he was an Acting Director of the first defendant. He said the first defendant was a non-profit making organisation catering for the interests of farmers. He confirmed that the claim was premised on the agreement of 17 December 2010 and that some fertiliser(s) had indeed not been paid for. He said the farmers, and not the first defendant,

were the principal debtors. He went further to say that the first defendant was not a corporate entity capable of being sued. He confirmed that joint efforts were made to recover the outstanding amounts. He did not dispute the amount claimed.

As already indicated, judgment in default has already been obtained against the second defendant who stood as guarantor for the first defendant. Accordingly the determination herein relates to the first defendant only.

My view is that this is a very straight forward case.

Given the provisions of the agreement between the parties, I think the best that the first defendant could have done was to negotiate an out of court settlement with the plaintiff. Clauses 3 and 4 clearly lay out the obligations of the parties under the agreement of 17 December 2010. The said clause provide as follows:-

"3. ZCFU OBLIGATIONS

For the purposes of this agreement, ZCFU shall be responsible for the following:

2.1 Mobilization, identification, selection and vetting o eligible farmers.

2.2 Shall be the customers and principal debtors to WINDMILL

2.3 Collection of 30% deposit being deposit payment thereof to WINDMILL and 2.5% deposit to Jupiter Insurance Co (Pvt) Ltd.

2.4 Issuing of fertilizer collection documents to the eligible farmers

2.5 Collecting repayments from farmers and forwarding same to WINDMILL before due dates.

3. OBLIGATIONS OF WINDMILL (PVT) LTD

3.1 It is recorded that WINDMILL acknowledge that Jupiter Insurance will guarantee payment on all fertilisers supplied to bona-fide approved ZCFU members whose lists ZCFU shall provide and update from time to time.

3.2 WINDMILL shall produce the required quantities and types of fertilizers and have them available at agreed collection points and time.

3.3 Upon receipt of the required deposits and presentation of vouchers or other agreed documentation to authenticate that a farmer is indeed an approved member of this scheme, supply the fertilizer to the approved farmers.

3.4 WINDMILL undertakes to exercise due care and skill in the performance of their services.

4.0 OBLIGATIONS OF JUPITER INSURANCE

4.1 Upon failure by ZCFU to pay WINDMILL on agreed due dates, then Jupiter Insurance guarantees payment to WINDMILL within 45 days of the due date.

4.2 Notwithstanding the provisions of paragraph 4.1 above, Jupiter Insurance guarantees payment of all outstanding payments from ZCFU to WINDMILL after 180 days from date of commencement of this agreement on all supplies done to bona fide and approved WINDMILL members on the lists supplied by ZCFU.

4.3 All the potential beneficiaries of the scheme shall take an all risks insurance policy with Jupiter Insurance 7.5% and will have to produce an insurance certificate to this effect to ZCFU before accessing this scheme. Out of the 7.5% insurance, 2.5% shall be paid before collection of fertilizer and 5% shall be paid at marketing time.

4.4 All claim settlement shall be payable to WINDMILL" (My own underlining).

It is clear from the above that Jupiter was guaranteeing the first defendant and not its members.

Clause 6 of the agreement also spells out how fertilizer releases were to be effected by the plaintiff to the first defendant's approved members. The clause provides as follows:

"6.0 DISBURSEMENT MODALITIES FOR FERTILIZERS

ZCFU shall issue out the following documentation for presentation to WINDMILL:

6.1 A disbursement letter, voucher or some other agreed document to a nominated WINDMILL depot, stating the quantity, value of fertilizer, and the preferred collection depot".

Notwithstanding the understanding between the parties that the beneficiaries under the agreement were the members of the first defendant, clause 3.2.2. above clearly tells the world that under the fertiliser scheme, the first defendant is the principal debtor. That provision was never varied.

True, for practical and operational reasons, the plaintiff might have, in certain circumstances, dealt directly with the first defendant's members. However, its dealings were restricted to those members vetted and approved by the first defendant in terms of the agreement. Furthermore such dealings did not in any way release the first defendant from its obligations.

The agreement between the parties was properly recorded and was never varied.

I therefore agree with the plaintiff's submission that:-

> "13. The starting premise in this matter is that there is a written record of the agreement between the parties clearly stipulating explicitly and lucidly the express terms of the agreement between the parties. Suffice to point out the rule of law as observed in **Lowrey v Steedman 1914 AD 535 at page 543** 'that when a contract has once been reduced to *writing* *no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence".*

The argument that the first defendant was not a corporate entity was not valid and was correctly never pursued. However, it was submitted that the first defendant entered into the agreement as an agent of its members. That argument was presented as follows:-

> "10. APPLYING THE LAW TO THE FACTS
>
> Three parties contracted i.e. Plaintiff, 1st Defendant and 3rd Defendant. The contract was designed to enable a third party, i.e. individual members of the 1st Defendant to come into a contractual relationship with Plaintiff. The contract between the three parties obliged Plaintiff to make an offer to the individual members of the Plaintiff. This was done through 1st defendant which mobilized farmers and gave them letters of recommendation to take to the Plaintiff. The farmers then accepted the offer to purchase fertilizer by paying directly to the Plaintiff 30% of the value of the consignment. By the acceptance of that offer, in that manner, a contract was entered into by the Plaintiff and the individual farmer a member of the plaintiff. 1st Defendant the representative body then dropped out of the arrangement.
>
> 11. A special defect invalidates the alleged contract between Plaintiff and Defendant. Enforcement of the contract would be against public policy which demands fairness and reciprocity in the enforcement of obligations. 1st Defendant cannot pay the sum of **US $898 194-12** in a situation where it never received a cent of value. Such a result is an affront to common sense. It would be unconstitutional as the pr3eceeding remarks aptly demonstrate".

With due respect, the above submissions are not supported by the agreement of 17 December 2010. The plaintiff never entered into separate contracts with the first defendant's individual members.

I believe that if the parties wanted to indicate that the plaintiff was in fact contracting with the individual farmers vetted under clause 6 of the agreement, they would have said so. The parties even went further to look for the second defendant to guarantee the obligations of the first defendant – not the obligations of the first defendant's members. The conduct of the parties remains regulated by the provisions of the document they signed on 17 December 2010. It would therefore be inappropriate for this court to draw up another "document" for the parties.

The evidence led in court supported only one agreement, which agreement lays liability squarely on the shoulders of the first defendant as the principal debtor.

Given the fact that the first defendant was never released from its obligations under the contract, that finding alone disposes of issues 2,3 and 5 listed in the Joint Pre-Trial Conference Minute. Joint efforts to recover money from the first defendant's members did not in anyway vary the contract. (See *Tavenhave & Machingauta* v *Messenger of Court* 53/14).

The plaintiff's claim was never denied. A futile attempt was made though during closing submissions to the effect that the amount claimed had not been verified. A careful perusal of the pleadings does not support that assertion. I therefore agree that what is not denied must be taken as having been admitted. (See *Fawecett Security Operations (Pvt) Ltd* v *Director of Customs and Excise & Ors* 1993(2) ZLR 121 (S).

Indeed the amount claimed is substantial, but we are *in casu* not dealing with issues of sympathy. Irrespective of the hardships the law obliges the defendant to pay. In *Kundai Magodora and Ors* v *Care International Zimbabwe* it was said:-

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73: Christie: *The Law of Contract in South Africa* (3rd ed.) at pp 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H".

I associate myself with the above principles of law.

In view of the foregoing, I order as follows:-

1. The 1st defendant be and is hereby ordered to pay the plaintiff the sum of US$898 194-12 (Eight hundred and ninety-eight thousand and one hundred and ninety four United States Dollars and twelve cents) with interest at the prescribed rate from 7 October 2011 to the date of full and final payment; and
2. The defendant be and is hereby ordered to pay costs of suit.

Scanlen and Holderness, plaintiff's legal practitioners
Kawonde & Associates, 1st defendant's legal practitioners