TONOTA CAPITAL PARTNERS (PVT) LTD
and
DEAT CAPITAL (PVT) LTD
versus
CENTRAL AFRICA BUILDING SOICETY

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 15 January 2019 & 30 May 2019

Civil Trial

Mrs *N.P Gonese,* for the 1st plaintiff
D. Dube, for the 2nd plaintiff
R. Moyo, for the defendant

MATANDA-MOYO J: The first plaintiff issued summons against the defendant for payment of USD50 000-00 (fifty thousand dollars) plus interest at the rate of 2.45% per month from 24 June 2016 to date of payment plus costs of suit.

The claim emanated from an agreement entered into between the first plaintiff and defendant sometime in 2011 whereby the first plaintiff was engaged as defendant's financial advisor with specific mandate to revise debt and facilitate or secure affordable lines of credit for defendant. The parties agreed that the first plaintiff would be paid 1% of capital amount raised.

The first plaintiff alleged that in pursuance of the above agreement it secured a debt of USD25 000 000-00 (twenty-five million dollars) with African Development Bank in April 2016. The defendant signed its acceptance of the terms of the credit facility.

At that point the first plaintiff was entitled to payment of the 1% as agreed. It was also part of the agreement that in the case of default of payment when amount became due, the first plaintiff would be entitled to 1 month London Interbank offered rate (Libor) plus 2% per month a total of 2.45% per month.

The second plaintiff issued summons against the defendant for payment of the sum of USD$125 000-00 being outstanding fees due to second plaintiff in terms of an agreement entered into between the second plaintiff and defendant on 22 September 2014. The second plaintiff also claimed interest on the above amount at the rate of 5% per annum from 20 April

2016 to date of payment. The second plaintiff also claimed $12 500 as collection commission plus costs of suit.

The second defendant alleged that on 22 February 2014 the defendant mandated the second plaintiff to raise USD$25 000 000-00 Trade Finance line of credit on its behalf. It was a term of the agreement that should second plaintiff successfully raise the USD $25 000 000.00 it would be entitled to a fee of 0.5% of the amount. On 16 November 2014 the second plaintiff alleged that it contacted the African Development Bank (AFDB) and made the request. AFDB respondent positively on 17 November 2014 resulting in it approving the Trade Finance Line of credit in the sum of USD $25 000 000.00 to the defendant. The second plaintiff is therefore entitled to 0.5% of 25 000 000 which is USD $125 000 which despite demand defendant has failed or neglected to pay.

The defendant conceded that it indeed mandated the two plaintiff's above to secure lines of credit for the defendant. However only $25 000 000.00 was secured for the defendant. Both plaintiffs claim to have secured the same USD$25 000.00 facility. The defendant is prepared to pay one of the plaintiffs but is failing to identify the company which secured the line of credit and would want the court to determine who between the two plaintiffs above is entitled to payment.

As a result the two claims were consolidated and heard as one.

The only issue to be determined by the court is;

Who is entitled to payment? In other words which plaintiff secured the line of credit on behalf of the defendant?

Mr Gabriel Mapondera testified on behalf of the first plaintiff. He is the Managing Director to the first plaintiff. Through this witness the first plaintiff tendered exhibit 1 to the court, which is the first plaintiff's bundle of documents. The bundle was admitted by consent of all parties. On 29 July 2011 the first plaintiff was retained by the defendant as its transaction advised. The defendant intended a rising about USD50 million or any other amounts as maybe determined for defendant's capital expenditure and working capital requirements. The parties signed an agreement and in terms of that agreement the first plaintiff was entitled to a success fee of 1% of the capital amount raised.

He explained how he worked with defendant's management team to come up with a credit information proposal document sometime in October/November 2011. Thereafter he gave detailed evidence on how he submitted and marketed the proposal to international lenders including AFDB. In November 2011 the first plaintiff submitted a credit request on behalf of

the defendant to AFDB. He produced the email to AFDB of the 7th of November 2011. It was a request of USD$50 million to cover housing development loans. He also submitted response by AFDB. The first plaintiff continued engaging AFDB. It also offered AFDB other products on offer which included trade finance. AFDB requested additional information. The first plaintiff appraised defendant of the additional information required, which defendant supplied. By December 2012 the first plaintiff had submitted to AFDB all information required. AFDB would also communicate directly with defendant on matters deemed confidential and discretionary. From 2013 and 2014 there was minimal integration between first plaintiff and AFDB. AFDB indicated it was now working on the application.

When the first plaintiff realised that at that time most lenders were not interested in investing in Zimbabwe singularly, it then requested AFDB to consider financing defendant by way of syndicating or what is termed clubbing with other international lenders. The plaintiff discussed the above proposal with defendant. Defendant accepted the proposal. The first plaintiff then approached PTA Bank which warmed up to the idea and started discussions with AFDB. The two agreed to lend money to defendant. On 21 October 2015 the first plaintiff wrote to the defendant advising same that PTA Bank and AFDB had agreed to lend defendant by way of syndicating. Such email is on page 18 of Exh 1. The first plaintiff continued meeting with AFDB and updated defendant on progress. In one of its discussion with AFDB the first plaintiff was advised of AFDB's preference to co-financing rather that syndicating. On 1 March 2016 the first plaintiff wrote defendant advising it of such changes.

In April 2016 AFDB approved a USD$25 million trade facility to the defendant. Defendant on 22 April 2016 acknowledged receiving report. AFDB advised first plaintiff that it had also communicated its approval to the defendant. The timing and approval of the facility was done in accordance with the first plaintiff's report of February 2016.

In June 2016 this witness met with defendant's Managing Director Mr Cecil Ndoro. The purpose of meeting was to congratulate defendant on the success of the mandate and to advise defendant that first plaintiff would be submitting its invoice. First plaintiff was asked to present a summary of activities leading to the facility being availed which it did. First plaintiff also submitted its invoice on 21 June 2016. To date such invoice has not been settled despite first plaintiff having performed its part in terms of the agreement.

This witness testified that the claim for interest was guided by clause 3:2 of the agreement. Interest is to run from the date the invoice became due.

Under cross examination this witness stuck to its evidence above. On being asked why this witness was bringing in PTA Bank facility into a matter involving AFDB, this witness responded that it was to show that the loaning by AFDB was not singular but co-financing with other international lenders like PTA Bank. This witness also testified that the defendant had always accepted liability but wanted to pay once defendant had signed the time sheets. This witness said it claimed interest from April 2016 because of lack of knowledge when time sheets were issued. The defendant kept that information away from the first plaintiff. The first plaintiff closd its case.

The second plaintiff opened its case by calling in a Mr Nicky Moyo to testify. He is the Managing Director of second plaintiff. He testified that second plaintiffs are transactional advisors to AFDB and other international lenders. He testified that on 22 September 2014 he was mandated by the defendant to secure of US$25 000 000 trade finance line of credit with AFDB such letter is on p 56 of exh 1. Pursuant to that mandate they made contact with AFDB in November 2014. This witness testified that second plaintiff had various discussions with AFDB representative and defendant representatives. In 2014 the last communication presented before the court is of December 11.

The next communication to the defendant by this witness where he was on 25 April 2016 congratulating defendant on successfully securing the USD 25 million credit line with AFDB. This witness believed it is the second plaintiff who secured that line of credit for the defendant. He also testified that the defendant should pay both plaintiffs if it is clear they both played some roles in securing the line of credit. This witness said second plaintiff only engaged AFDB. It did not involve any other parties.

Under cross-examination this witness conceded that this mandate represented the second plaintiff's initial dealings with defendant. He testified that the defendant never disclosed that they were dealing with another advisor.

Under cross-examination by the defendant, this witness was asked why he failed to take the court through activities carried out by second plaintiff from the day it got the mandate to the time of success. He responded that the emails were already in the bundle. Second plaintiff closed its case.

The defendant called in Saymore Muhwandi to testify on its behalf. He testified that he is the senior client relationship manager with defendant. He was involved in this transaction from the onset to execution stage. The defendant started drawing down from the facility from

September 2018. This witness believed that the second plaintiff did the job. He was surprised that the second plaintiff is saying the two plaintiffs both did the job.

Under cross-examination he conceded that defendant mandated both plaintiffs to source and secure lines of credits for the defendant.

He conceded that the first plaintiff was given the mandate before second plaintiff. He also conceded that when second plaintiff was given the same mandate, defendant did not disclose the existence of an earlier mandate to the first plaintiff. This witness however explained that had the plaintiffs approached different lenders there would not be a problem. The problem is that both claim to have secured a single transaction.

This witness said the first plaintiff pursued syndicated and co-financed facilities whereas the second plaintiff pursued bilateral one. The defendant closed its case.

ANALYSIS OF EVIDENCE

From the evidence above it is clear that the defendant mandated two companies to raise lines of credit on defendant's behalf. First plaintiff's witness gave a detailed account of how it engaged various lenders. The witness spoke to the various correspondences between first plaintiff and AFDB; the first plaintiff and defendant; and also AFDB and defendant. His account detailed everything done. In particular he explained how he sold the proposal of syndicate financing to AFDB. On the other hand Mr Nicky Moyo on behalf of the second plaintiff testified that he pursued a bilateral type of arrangement and that he only dealt with AFDB. He did not approach any other international lenders.

On page 62 of exhibit 1 is an email from Nekati Bleming from AFDB headed "the board approval of the Trade Finance Line of credit for CABS." It reads:

> "Dear Simon & Cecil
>
> We wish to advise you that the Board of Directors of the African Development Bank, today approved a Trade Finance Line of credit for CABS amounting to US$ 25 million.
>
> Board members took note of the AFDB's role <u>in crowding in other lenders by forging closer</u> working arrangements with institutions such as PTA Bank in this instance and potentially others going forward.
> ……." (my own underlining).

The email above shows that AFDB in the present transaction worked with PTA Bank. This letter tend to corroborate first plaintiff's position that first plaintiff convinced AFDB to work with other institutions so as to spread the risk. The trade facility was secured as co-financing rather than bilateral. Co-financing describes a type of financing in which different

lenders agree to fund under the same documentation and security packages but may have different interest rates, repayment profiles and terms.

The AFDB itself acknowledged having worked with the PTA Bank in the trade financing. Second plaintiff has categorically denied ever approaching any other international lenders. It only approached AFDB. The first plaintiff testified how it approached the AFDB and the PTA Banks marketing the proposal for syndicating or co-financing. From the evidence available, I can safely conclude that the facility was secured as a result of efforts by the first plaintiff.

The first plaintiff's witness led evidence in a clear and detailed manner. The court was quite impressed. He struck me as an honest person. In contrast the witness for the second plaintiff was dodgy. He led evidence without referring to a single document. The court was not impressed by this witness at all. He struck me as someone who wanted to reap where he did not sow.

In any case the second plaintiff did not challenge the first plaintiff's detailed evidence. As correctly put by the defendant which referred me to the case of *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs and Excise and Others* 1993 (2) ZLR 121 (5) at 121 where the court said:

"The simple rule of law is that what is not denied…must be taken as admitted."

See also *Doctor Daniel Shumba and Anor* v *Zimbabwe Electronical Commission and Another* SC 11/16. First plaintiff's case was not challenged by both first plaintiff and the defendant.

On the issue of the date interest started to run the parties agreed that interest started to run from the date the term sheets were signed. Defendant conceded that what was referred to as indicative terms sheets would make the date from which payment would be due to first plaintiff.

The Law

The second plaintiff argued that the defendant's papers from the onset indicated that it was the second plaintiff who was entitled to payment. That position was conceded by defendant's witness Mr Seymore Muwandi. The second plaintiff argued therefore that it had no onus of proving anything as its claim had been admitted by the defendant. Second plaintiff referred me to the case of *Doctor Daniel Shumba and Another* v *ZEC and Another* SC 11/08 where the court said;

> "the proposition that what is not denied in affidavits must be taken as admitted is not disputed and it supported by authorities. See *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs and Excise & Others* 1993 (2) ZLR 121 (S) at 127 F; *Nhidza* v *Unifreight Ltd* SC 27/99 and *Minister of Lands* v *Commercial Farmers Union* SC 11/2001 at 60."

The second plaintiff submitted that it had no onus to prove anything.

Whilst the law as submitted by the second plaintiff is correct I do not believe that second plaintiff's evidence was not controverted. When the claims by first and second plaintiffs were consolidated it became clear to second plaintiff that first plaintiff was claiming to be paid the same fees. Once that became clear to the second plaintiff's, second plaintiff should have realised that its claim was now competing against first plaintiff's claim. There was need to show to the court that the decision of the defendant on the claim was correct. Second plaintiff conceded in its submissions that it did not produce any compelling evidence before the court to prove it was entitled to payment. Second plaintiff's contention would have been correct if it was only itself and defendant before the court. Once another party was before the court seeking the same relief, second plaintiff ought to have realised that the court was not bound by the defendant's concession alone. The court was bound to look at the totality of evidence before it. It was not up to second plaintiff to anticipate the court's ruling on the matter.

The second plaintiff has not produced any evidence on a balance of probabilities to show that it is the one which secured Trade Finance credit line agreement on behalf of the defendant. I am satisfied that the first plaintiff has discharged the onus of showing that it is the the one entitled to payment.

As reiterated above the parties agreed that interest commenced to run on 9 March 2015, the date defendant and AFDB signed the mandate agreement.

On the issue of costs defendant has not persuaded me on why costs should not follow the event as was enumerated in *Smiths Super Track (Pvt) Ltd* v *Zimbabwe Electricity Transmission Distribution Company (Pvt) Ltd* HH 190/17.

In the result I order as follows;

That judgment is entered in favour of the first plaintiff in the following;

1. a) that defendant pays to the plaintiff the sum of USD50 000.00 (fifty thousand United States Dollars) being term sheet milestone fees, and
   b) Interest on the above amount at the rate of 2.45% per month from 24 June 2016 to date of full and final payment; and
   c) Costs of suit.

2. That second plaintiff's claim against the defendant be and is hereby dismissed with costs.

Gonese and Associates, 1st plaintiff's legal practitioners
Mathonsi Ncube, 2nd plaintiff's legal practitioners
Gill Godlonton & Gerrans, defendant's legal practitioners