HC 3050/2001

LEADER TREAD ZIMBABWE (PRIVATE) LIMITED
versus
TERENCE MICHAEL SMITH

HIGH COURT OF ZIMBABWE
NDOU J
HARARE, 18-19, 28 March 2002 and 27 August 2003

Civil Trial

Adv. *G.S Wernberg,* for the plaintiff
Adv. *H. Simpson,* for the defendant

J: The plaintiff claims payment of the sum of $1 288 461.10 from the defendant, together with interest thereon at the prescribed rate from 14 February 2001 to the date of payment in full and costs of suit. The plaintiff's claim is premised upon a simple acknowledgement of debt executed by the defendant in the plaintiff's favour on 5 March 2001.

The defendant originally raised three grounds of defence. First, illegality, on the basis that the acknowledgement was based on a series of illegal transactions. Second, agency, based on the allegation that the defendant acted on the plaintiff's behalf as an agent in transacting foreign currency deals with a third party. And third, duress, alleging that he had been induced by threats to sign the acknowledgement of debt shortly after having suffered a heart attack.

The defendant, however, elected, at the pre-trial conference, to abandon the defence of duress and this was confirmed by his counsel at the commencement of the trial. The remaining issues, therefore, relate to the questions of illegality and agency only.

Plaintiff's Case

The plaintiff called three witnesses *viz.* Messrs Malcolm Evans, Clive Davis and Prosper Marambanika. Mr Evans and Mr Davis are directors of the plaintiff and Mr Marambanika was its accountant.

The main thrust of their evidence is that plaintiff is a manufacturer and depends entirely upon sourcing its raw materials from South Africa through a company known as Leather Tread SA (Proprietary) Limited. Whilst these corporate entities are distinct from one another, there is a

relationship between the two in the sense that the shares of the local company are held by is directors as nominees for the South African Company to which they are in turn, answerable. This is, in addition, a contractual relationship between the two in the sense that the plaintiff is from time to time a debtor of the parent company in respect of materials imported from it and imported to Zimbabwe.

Hitherto payment in respect of goods imported into Zimbabwe by the plaintiff had been made in the ordinary way through the plaintiff's local bank. This involved the submission of an application form together with customs documents and a pro-forma invoice in respect of the goods. Thereafter the local bank would obtain the requisite exchange control authority (if indeed the same was required) and payment would be made by inter-bank transfer to South Africa. During the latter part of the year 2000, due to the exigencies of the declining economic position in the country, foreign currency became very scarce and could no longer be sourced through commercial banks. Around October 2000, the plaintiff, through its witnesses was introduced to the defendant via one Collin Kirkpatrick, an employee of the defendant as being the proprietor of a licenced *bureau de change* who was in a position to assist the plaintiff with the procurement of foreign currency.

The initial meeting between the parties took place at the offices of the plaintiff and involved Messrs Davis, Marambanika, Kirkpatrick and Smith (i.e. the defendant). Preliminary discussions were held where it was made clear to the defendant that authority to use the services of his *bureau de change* would have to be granted by the management of the parent company. At that meeting, however, Davis and Marambanika stated that the issue of legality was very much on the agenda and that they sought assurances that the operation would be legitimate and above-board.

It is common cause that a subsequent meeting was arranged in order to facilitate the introduction of the defendant to the managing director of Leather Tread SA (Pty) Limited, Mr Sprosson. The meeting was held at the Italian Bakery in Avondale, Harare. The meeting was attended by Messrs Sprosson, Evans, Davis, Kirkpatrick and Smith. According to Evans and Davis the main object of the meeting was for Mr Sprosson to receive satisfactory assurance of the defendant's credentials and the legality of the proposed future business to be conducted between the parties. Having been thus assured, it was agreed that, first, the defendant would source foreign currency through the auspices of his *bureau de change.* Second, that the foreign currency was to be obtained by the defendant from legitimate FCAs (Foreign Currency Accounts) operated by his *bureau de change,* Odyssey (Private) Limited. Third, that the payments would be made via this source directly to Leather Tread SA (Pty) Limited and, upon receiving confirmation of these payments, the defendant would be paid by plaintiff the agreed Zimbabwe equivalent. Fourth, that payments were initially to be made directly to a bank account operated by the defendant at Stanbic Bank. This arrangement was specifically requested by the

defendant in order to facilitate prompt payment to him and it was for this reason that the payments were not made to Odyssey. This was possible due to the fact that the plaintiff also had an account with the same bank. It is common cause that the first three payments by plaintiff to defendant were in fact made in exactly this manner by means of an inter-account transfer by means of written letters of request generated by the plaintiff to the bank. Thereafter, it is also common cause that the payments were in the main, made by cheque drawn in the defendant's favour, the proceeds of which could be cleared quickly as the drawer's bank and the collecting bank were one and the same.

The question of legality was significantly discussed and the defendant indicated that he would source the currency from legitimate so-called FCAs i.e. Foreign Currency Accounts held by him. In the circumstances, there was never any question at all of the defendant having acted as an agent for the plaintiff by obtaining foreign currency via third parties. Both Evans and Davis categorically denied that there was to have been any illegality in the procurement of the foreign currency. Evans stated unequivocally that had defendant acted illegally in obtaining this money, he would have acted outside his mandate. The question of legality was important to the plaintiff as it was its *raison d'etre* to being able to continue to obtain currency and it did not want any problems in this respect. Eventually the defendant approached Mr Sprosson directly in South Africa and requested a change to the hitherto accepted way of doing business. Defendant indicated that the plaintiff should pay him up-front in Zimbabwe currency and the defendant would thereafter source the rand and deposit this to Leader Tread SA (Pty) Limited. By now, a relationship of trust had been established between the parties. Thereafter payments totalling $1 925 000.00 were made to the defendant but no reciprocal payment was received in South Africa. This litigation is as a result of this failure. It was at this time that the defendant became elusive in the extreme. He kept his mobile phone switched off. Promises by his wife that he would return the plaintiff's representative's calls amounted to nought. The plaintiff's representative became increasingly anxious and suspected that something was solely amiss. Eventually, a visit was made by Messrs Marambanika and Davis to the defendant's business premises in Central Avenue, Harare. A heated exchange resulted and tempers flared on both sides. Eventually, however, calm, returned and the parties shook hands and appeared to be reconciled.

It is common cause that at that point the defendant issued the plaintiff with a cheque for $500 000.00 with the request that plaintiff's representative waits two days before banking the same. The defendant simultaneously drew the Acknowledgement of Debt annexed herewith to summons as Annexure "A". The acknowledgement of debt was drawn in favour of the plaintiff. The cheque was subsequently deposited and honoured but no further payments have, however, been made resulting in these proceedings.

Defendant's Case

The defendant's evidence is similar or identical in many respects to that of the plaintiff regarding the means by which the parties were introduced and the purpose of that introduction. After the initial mention of the plaintiff's name and requirements by Kirkpatrick, the defendant for a while forgot about this because, he said, there were many other purchasers looking for foreign currency at the time. It is common cause, however, that the two meetings took place as outlined by the plaintiff's witnesses. It is also common cause that at the first meeting, Davis indicated that he did not have authority to close a deal and required his South African Chief Executive Officer's say-so. The latter apparently required to be personally assured regarding the integrity of the defendant. The central issue in this regard revolved upon the reason why Mr Sprosson wanted to meet the defendant in person. Was this an indication that the plaintiff was concerned about the question of illegality? The original arrangement was that no payments would be made to the defendant until payment had been received in South Africa. There was, therefore, no risk to the plaintiff of losing money. According to the defendant, he gave the plaintiff two options. One was the "legal route" which would utilise FCAs as the means of securing the money and would be done via his *bureau de change.* The other was the "illegal route" in terms of which the defendant would directly seek foreign currency on the open market or the parallel market as it commonly referred to. The plaintiff, according to the defendant, opted for the later because it was under pressure from Leader Tread SA (Pty) Limited having been in arrears with payments. Evidently, the so-called illegal route would provide foreign currency faster and at a slightly cheaper rate. The defendant alleged that the plaintiff's representatives told him that the plaintiff was indebted to Leader Tread SA (Pty) Limited in the sum of about ZAR3 000 000,00 and that they wished to purchase currency in tranches of ZAR100 000.00. The defendant stated that it was agreed that he would receive a commission of 10% and that there was no negotiation regarding that rate: it was a case of "take-it-or-leave-it". The defendant further testified that to export

currency without following the appropriate channels was an offence and that the plaintiff made an informed choice to pursue the illegal route.

The defendant stated that on one occasion after the relationship between the parties had begun to sour due to the non-performance by him of this obligations under the agreement, he paid a large sum of foreign currency directly to the plaintiff in Harare in order to reduce the debt owed by him to the plaintiff. He alleged that he was subsequently told by Evans that the latter had thereafter smuggled the money out of the country. The defendant testified some time thereafter he suffered a heart attack and was hospitalised for some time. By the time he recovered, Kershaw had gone to ground and he was unable to track him down. He stated that he was up to that point in time perfectly willing, and fully intended to pay in terms of the acknowledgement of debt. When, however, the plaintiff resorted to these proceedings to recover the acknowledged outstanding amount, he changed his mind and sought to rely upon, principally, the defence of illegality. His reason for having adopted this stance was an angry reaction to the plaintiff's alleged temerity in approaching the court for assistance in recovering the debt due to it.

The court has to decide the vital issues on the evidence of the witnesses and the probabilities. The defendant's pleadings differ markedly from his evidence in important respects. In order to set up the defence that he acted as an agent for the plaintiff in the plaintiff's dealings with a third party, the defendant alleged in his further particulars filed on 10 July 2001 that "Defendant was to source foreign currency as an agent for the plaintiff from a Mr Rob Kershaw, a South African". In a similar vein, the defendant, in his amended plea filed on 12 November 2001 alleged (in paragraphs 2(a) and (b) that:

> "Defendant avers that when he received the $1 288 461,10 from the plaintiff he did so as the agent of the plaintiff and received specific instructions to purchase South African Rand from his contact in South Africa, Rob Kershaw. Defendant avers that he handed the full amount to Mr Kershaw in terms of his mandate and scope of his authority together with a request to provide South African rand at an agreed exchange rate."

The defendant in his plea claimed that Mr Kershaw neither delivered the rand or accounted for the Zimbabwean currency allegedly given to him and alleged that there was no lack of diligence on his part in this respect. On 22 November 2001 the plaintiff asked defendant to supply *inter alia*, the following further particulars to the amended pleas:

> "Was the plaintiff specifically instructed by the plaintiff to hand over all the money to this Mr Kershaw? What measures did the defendant put in place to ensure that the plaintiff's said instructions would be carried out?"

The defendant responded to these questions on 27 November 2001 as follows –

> "Yes. Defendant paid the sum of $2 750 000,00 to Mr Rob Kershaw, and believed that Mr Rob Kershaw would in turn pay the sum of ZAR250 000,00 to the plaintiff's parent company in South Africa, as had happened on previous occasions."

Advocate *Simpson,* for the defendant, in his cross-examination of the plaintiff's witnesses, gave the impression that the said Rob Kershaw was known to them. Against this background of these pleadings, and questions to the plaintiff's witnesses under cross-examination, it is strange that the defendant, in his testimony, stated that he never mentioned Mr Kershaw's name to any of the plaintiff's representatives at any time. He categorically confirmed that these representatives were not even aware Mr Kershaw's existence. The only possible inferences that I draw from this is that either Mr Kershaw does not exist and is figment of defendant's imagination and he forgot his earlier fabrication. Alternatively, unknown to the plaintiff and contrary to its clear instructions, the defendant used Mr Kershaw for his own purposes but thereafter elected in the pleadings to use his name for the express purpose of avoiding liability.

Assessment of the evidence

I am satisfied that the plaintiff's witnesses gave credible evidence. They supported each in all material respects. They, mainly, gave a credible account on how the agreement was concluded and its terms and conditions. Their understanding was that the defendant was procuring the foreign currency legally through the use of FCAs. That is what the defendant assured them of. On the other hand, the defendant gave false evidence. I have already alluded to the question of the existence of Mr Kershaw. The defendant deliberately lied and changed his story. It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see *Tumahole Bereng* v *R* [1949] AC 253 and *South African Law of Evidence* by L H Hoffmann and D T Zeffertt (3 ed) at page 472. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide. *In casu*, I am satisfied that he deliberately lied to mislead the court on the nature of the agreement with plaintiff to escape liability. If the defendant sourced the foreign currency the "illegal route" he deliberately deceived the plaintiff in this regard. In

my view, the defendant lied on the question of Mr Kershaw because the defence of agency cannot be sustained. He is lying to try and escape an obligation under the contract.

The effect of the Acknowledgement of Debt signed by the parties on March 2001

As I understand the plaintiff's submission the acknowledgement of debt resulted in a compromise, i.e. *transactio* or a novation and therefore the defence of illegality falls away. I do not think that this statement of law is correct in its entirety. There is a difference between compromise and novation. In general compromise differs from novation in that the existence of a valid prior obligation is not a requirement. The intention to novate presupposes the existence of a valid existing obligation. If this assumption is false, no new obligation arises from the purported novation agreement – see *Tauber* v *Von Abo* 1984 (4) SA 284 (E). Compromise may, however, in appropriate circumstances constitute a novation. In my view, an acknowledgement of debt signed by the parties is a compromise which falls in this category. It constitutes a novation and as such on failure of the defendant to comply with compromise agreement (i.e. the acknowledgement of debt), the plaintiff cannot fall back on the old obligation but must base his claim on breach of the new agreement, unless an express or implied term in the latter empowers the plaintiff to base its claim on the obligation – there is no such term *in casu – see Van Zyl Neimann* 1964 (4) SA 661 (A) at 669-670 and *Law of Novation* by L R Caney. At page 44 the learned author Caney observed –

> "A compromise (*transactio)* is a novation, with a difference, however, that a novation of an invalid contract it itself invalid, but if a compromise is made about a contract the validity of which is in doubt, this cannot be upset on the ground that the contract which was compromised was invalid, the purpose is to replace uncertainty with certainty. It is a novation designed to effect settlement of a dispute and many be arrived at by novation in the narrower sense of the word or by delegation."

The defendant paid the plaintiff $500 000.00 by cheque with an arrangement that it be deposited after two days. This was accepted by the plaintiff. The defendant simultaneously drew and signed an

acknowledgement of debt in favour of the plaintiff. The cheques, as per arrangement, was subsequently deposited and honoured. The defendant made these arrangements to avoid litigation. The effect, therefore, is that the original agreement was extinguished and replaced by the new one. This is compromise and as such any defence which the defendant might have relied upon had he been sued upon the original agreement falls away – see *Denis Peters Investment (Pty) Ltd* v *Ollerenshow and Others* 1977 (1) SA 197 (W) and *Viola* v *GJ Harvey (Pty) Ltd* 1964 (2) SA 535 (T). Viewed in its proper context, compromise is on of the various ways in which the obligations under a contract are terminated – see *The Introduction to South African Law and Legal Theory* by W J Hosten; A B Edwards; F Bosman and K Church (2ed) at pages 759 and 765. The compromise between the plaintiff and the defendant substituted the original agreement between the parties for the supply of foreign currency. The validity of the compromise did not depend on the legality of the first agreement.

The purpose of the *transactio* between the plaintiff and the defendant was to prevent or avoid litigation. This was admirably stated in *Estate Erasmus* v *Church*, 1927 TPD 20 at page 24 –

> "A *transactio* is an agreement between two or more persons, who, for preventing or ending a lawsuit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing."

Transactio is not limited to parties who are litigants. According to Voet, 2.15.1 *transactio* includes settlement of matters in dispute between parties who are not litigants and later at 2.15.10, he includes within the scope of *transatio*, agreements on doubtful matters arising from the uncertainty of pending conditions "even though no suit is then in being or apprehended. (Gane's translation, Vol 1 page 452).

In light of the above, I do not have to consider the illegality of the first agreement. Because the effect of the Acknowledgement of Debt of March 2001 between the parties constituted a compromise, as a matter of law the defendant's defence of illegality falls away.

The defendant has no other legal way of avoiding performance in terms of the Acknowledgement of Debt of March 2001. The latter agreement is not tainted with illegality. The plaintiff's claim must, therefore, succeed.

It is accordingly ordered:

1. That judgment be and is hereby entered in favour of the plaintiff against the defendant for the payment of $1 288 461,10 together with interest at the prescribed rate with effect from 14 February 2001 to date of payment in full.

2. Costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners
Manase and Manase, defendant's legal practitioners