POTATO SEED PRODUCTION (PROPRIETARY) LTD
versus
PRINCEWOOD ENTERPRISES (PVT) LTD
and
PLATINUM AGRICULTURE (PVT) LTD
and
DAKARAI MAPURANGA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 23, 24, and 26 May & 2016 and 25 January 2017

Civil Trial

S Hashiti, for the plaintiff
M. E Motsi, for the defendants

FOROMA J: In this matter the plaintiff a company duly incorporated and registered in terms of the laws of the Republic of South Africa sued the first, second and third defendants jointly and severally the one paying the others to be absolved for (a) payment of the sum of ZAR 716 250.00 (b) interest at the prescribed rate from 1 April 2013 to the date of full and final payment and (c) costs of suit on a higher scale.

The plaintiff's claim arises from a sale on 19 August 2013 to the first and second defendants of 3 truckloads of 350 pockets each of potato seed weighing 25 kilograms per pocket. The third defendant, so plaintiff avers bound himself as surety and co-principal debtor in respect of the first and second defendants'' obligations to plaintiff. The 3 truckloads of seed potato were duly delivered to the defendants is not in dispute. In fact the 3 truckloads containing a total of 4 050 pockets of potato seed were delivered at Rollex Warehouse at Harare International Air Port by the plaintiff on instructions of the defendant and receipt of same was duly acknowledged. The sum of ZAR 716 250.00 is made up as follows - (1) the total price (tax inclusive) of $584 250-00 to which should be added the sum of ZAR 132 000-000 for transport. The total value of the

potato seed was invoiced to Princewood Enterprises t/a Platinum Agriculture which the plaintiff claimed was a misrepresentation of the first and the second defendants identities by the third defendant which the plaintiff acted on. It is not in dispute that the first and second defendants were separate legal entities closely linked to the third defendant. The plaintiff claimed that the agreement between the plaintiff and the defendants was that once delivery of potato seed had been effected which happened to be on 19 March 2013 the defendants would pay the cumulative sum of ZAR 716 250-00 on or before 1 April 2013. The plaintiff averred that the defendants collected all the potato seed from Rollex Warehouse and sold same but did not pay the plaintiff despite demand.

The defendants defended the plaintiff's claims and it is important to note that in their plea the defendants dealt with the essential averments in the plaintiff's declaration as follows:

> "3 Ad paragraph 5 – this is admitted
> 4 Ad paragraph 6 – 7- this is admitted"

Paragraphs 5-7 were pleaded in the plaintiff's declaration as follows:

> "5 - Sometime in March 2013 the First and second defendants represented by the third Defendant entered into negotiations with the plaintiff for the supply of potato seed. The Defendants then verbally placed an order for the aforesaid potato seed. During the negotiations and placement of an order the third defendant bound himself as surety and co-principal debtor in respect of the First and Second Defendants' obligations.
>
> 6 - On the 19th March 2013 the plaintiff sent three (3) truckloads, each with 350 pockets of potato seed, with each pocket weighing 25 kg to Rollex Warehouse at the Harare International Airport, where they were to be stored prior to collection by the defendants. The three (3) truckloads left Lydenburg, South Africa on the 5th March 2013. Accordingly a total of 4 050 pockets of potato seed with each pocket weighing 25 kilograms were delivered.
>
> 7 - For the first delivery, a copy of tax invoice Number 5989 dated 15 March 2013 and which was raised against the defendants in the sum of ZAR 202 500.00 is attached hereto and marked Annexure "A1". Copies of the delivery note dated 16th March 2013 Customs Road Freight Manifest dated 18th March 2013 and the acknowledgement of receipt at Rollex Warehouse dated 19th March 2013 are attached hereto and marked Annexures "A2," "A3"and "A4""

The defendants did not plead to paras 8 and 9 of the plaintiff's declaration as they proceeded to address para 10 of the plaintiff's declaration.

It is necessary to quote paras 8 and 9 of the plaintiff's declaration and they are as follows:

> "8 - For the second delivery a copy of tax invoice number 5990 dated 15th March 2013 and which was raised against the defendants in the sum of ZAR 202 500.00 is attached hereto and marked Annexure "B1". Copies of the delivery note dated 16th March 2013 Customs Road Freight Manifest dated 18th March 2013 and the acknowledgement of receipt at

Rollex warehouse dated 19th March 2013 are attached hereto and marked "B2", "B3", and "B4" respectively.

9 - For the third delivery, a copy of tax invoice number 5991 dated 15th march 2013 and which was raised against the defendants in the sum of ZAR 179 250.00 is attached hereto and marked Annexure "C1". Copies of the delivery note dated 16th March 2013. Customs Road Freight Manifest dated 18th March 2013 and acknowledgement of receipt at Rollex warehouse are attached hereto and marked Annexure "C2", "C3" and "C4" respectively."

Once defendants admitted paras 5, 6 and 7 of the plaintiff's declaration they could not be heard to deny or dispute paras 8 and 9 of the said declaration as these were inextricably linked. The defendants were required in their plea to deal with every allegation in the declaration specifically by either admitting or denying every allegation or stating that they had no knowledge of it or confess and avoid it Order 15 r 104 (2). The defendants' omission to deal with any allegation accordingly leads to a conclusion that they admit same.

Besides the law relating to pleading is very clear. That which a party does not dispute or place in issue in its plea is deemed to have been admitted - see Order 15 Rule 104 (2) of the High Court Rules.

Accordingly defendants are taken to have admitted paras 8 and 9 of the plaintiffs declaration as well as paras 11, 12, 13, 14 of the plaintiff's declaration in their plea. In their plea to para 10 of the plaintiff's declaration, the defendants denied the plaintiff's claim to transport charges. It is significant to note that despite the position adopted in regard to para 10 the defendants did not dispute that they owed the plaintiff the total sum of ZAR 716 250 which includes the ZAR 132 000-00 in respect of the transport charge as averred in para 11 of the plaintiff's declaration.

At the pre-trial conference issues were agreed upon as follows:

(1) Whether the agreement between the plaintiff and the first and second defendants was a sale or a joint venture.
(2) Whether in the event that the agreement between the parties was that of a joint venture the proceedings should be stayed in order for the dispute to be referred to arbitration?
(3) What was the value of the potato seed delivered by the plaintiff?
(4) Whether the plaintiff is entitled to recover the transport costs from the defendants.
(5) Who should bear the loss for the consignment which had rotten potatoes?

Prior to the pre-trial conference the defendants applied to amend their plea at the pre – trial conference in order to raise a point *in limine* namely that the plaintiff prematurely approached the High Court when the joint venture agreement provided for dispute resolution through arbitration. This explains how pre-trial conference issue number 2 arose after amendment had been granted by consent.

The detailing of specific paragraphs of the pleadings given above was deliberate. It was meant to illustrate a conclusion inescapable that the plaintiff burdened itself and the court by not applying for summary judgment in light of the admissions expressly made or deemed to have been made by the defendants in their plea as highlighted herein above. Order 10 Rule 64 (1) of the High Court Rules 1971 provides that a party can apply for summary judgment at any time before the pre – trial conference. The plea filed by the defendants *in casu* admitted expressly the essential averments that the plaintiff made for plaintiff to succeed in obtaining a judgment against the defendants by way of an application for summary judgment. The defendants as highlighted above admitted the following paragraphs of the plaintiff's declaration 5, 6, 7, 8, 9, 11, 12, 13 and 14. Paragraph 16 was also admitted as highlighted by the plaintiff's counsel in the closing submissions.

The defendants did not seek to amend its plea in order to withdraw or retract the admissions aforesaid. As argued by the plaintiff the defendants did not retract the admissions or recant them. They left them undisturbed and to date they remain extant.

Indeed the effect of an admission is settled law. Once made it binds its maker with the attendant consequences see *Kettex Holdingis P/L* v *S Kencor Management Services P/L* HH 236-15. The defendants admitted the averments contained in the declaration and as stated by UCHENA J in *Mauro (nee Nyambo)* v *Mauro* HH 365-13, it is presumed that when it did so, it knew what it was doing. There can be no room for an error except an error in how to evade an otherwise genuine and undisputable claim. In that regard, I am mindful of the provisions of s 36 of the Civil Evidence Act [*Chapter 8:01*] that:

> "(1) An admission as to any fact in issue in civil proceedings shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.
> (2) ……..
> (3) It shall not be necessary for any party to civil proceedings to disprove any fact admitted on the record of proceedings provided that this subsection shall not prevent any such admission being withdrawn with leave of the court."

Once an admission is made in a plea and no attempt is made to withdraw it would be unnecessary to prove those facts that have been admitted and the party making such admission would be precluded from contradicting such admission : "See also *Alder* v *Elliot* 1988 (2) ZLR 283 (S) 288 (C) *Copper Trading Co (Pvt) Ltd* v *City of Bulawayo* 1992 (1) ZLR 134 (S) 144 G. *Wamambo* v *Municipality of Chegutu* 2012 ZLR 452 (H) 458 C – F and *DD Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 92; 98 F, 99A – B."

Thus evidence led against an admission is of no moment and binds the testator to his admission unless he withdraws it. In *casu* the admission made by the defendants were not withdrawn thus any evidence that is meant to contradict the said admissions is of no consequence or moment. Clearly therefore all evidence led by the defendants at trial through the third defendant which contradicts the admissions made is of no moment – *Mauro (Nee Nyambo*) v *Mauro* HH 365/13.

In the circumstances all the plaintiff's testimony confirmatory of the admissions made by the defendant was not only unnecessary but stands uncontradicted. Counsel for the defendants sought to lead evidence against his clients' admission. This is not permissible.

In *D D Transport Pvt Ltd* v *Assot* 1988 (2) ZLR 925L 98 at p 97 GUBBAY CJ had the following to say:

> "The effect of a formal admission made in pleadings was underscored in *Gordon* v *Takudzwa"* 1947 (3) SA 525 AD where DAVIS AJA at 531-532 said:
>
> "But this admission in the plea is of the greatest importance for it is what …… (para(s) 2580-2590) calls judicial admission (of the *confessio judicialis of Voet* (4226) which is conclusive rendering it unnecessary for the other party to adduce evidence to prove the admitted fact and incompetent for the party making it to adduce evidence to contradict it".

The effect of making a formal admission in pleadings is that the opposing party need not adduce evidence to prove the admitted fact, while it is incompetent for the party making the admission to adduce evidence to contradict it (the admission).

Where an admission has been made in error the court has a very wide discretion to relieve the party concerned from the consequences of that error by granting an amendment of the pleading. In *casu* no suggestion that an error occurred in the drafting of the pleading was made neither did the defendants apply for an amendment of the plea in order to withdraw the admission. Evidence led on behalf of the defendants to suggest that the agreement between the

parties was a joint venture as opposed to a sale is tantamount to leading evidence to contradict an admission which the defendant is not allowed to do. In any event the suggestion that the parties entered into a joint venture agreement cannot stand on defendants' own version as in an e-mail of Dakarai Mapuranga (third defendant) to Jackie Mellet dated 13/03/2013 Dakarai stated "I believe you have also had a chance to look at Tendai (Musara)'s joint venture agreement if you can let me know your thoughts soonest". In response Jackie Mellet said "I am however a bit worried about the last load that I've sent and haven't received any payment from Dakarai. We were supposed to go into the deal as one third partners but just myself and Tendai contributed towards the risk. What is your plan Dakarai? When are we seeing the profit of the load seeing that everything is sold by now and you should have the money to pay. Once I have answers on this issue I will give my thought on the e-mail below". This response puts paid to any suggestion that the parties had agreed on a joint venture agreement per Tendai Musara draft agreement which Jackie Mellet (it is common cause) refused to sign. Jackie Mellet's refusal to sign the joint venture draft agreement proves beyond any shadow of doubt that he was not prepared to go into the proposed joint venture agreement on the terms and conditions proposed in the draft by Tendai Musara.

In the circumstances and considering that the defendants effectively conceded the plaintiff's claim through admissions aforesaid which admissions the defendants have not withdrawn the court finds that the plaintiff's case is unassailable. For the same reasons the issue of referring the parties' dispute to an arbitrator cannot arise.

Re: Costs

The plaintiff claimed costs on the higher scale of legal practitioner and client. A punitive order of costs has to be specially justified. The plaintiff could have curtailed proceedings by applying for summary judgment in light of the admissions made by the defendants. This plaintiff did not do and no explanation was proffered for not pursing this short cut to a successful result as clearly the defendants had no defence to the plaintiff's claim. To award a punitive order of costs where costs have unjustifiably been incurred and increased would be inequitable. In the circumstances costs will be granted on the ordinary scale. Accordingly it is ordered:

That the defendants pay the plaintiff jointly and severally the one paying the others to be absolved.

1. ZAR 716 250.00
2. Interest at the legally prescribed rate from the 1st April 2013 to the date of full and final payment.
3. Costs of suit.

Wintertons, plaintiff's legal practitioners
M. E Motsi & Associates, defendants' legal practitioners