DELTA CORPORATION LIMITED
versus
FORWARD WHOLESALERS (PRIVATE) LIMITED
and
JOSEPH MUNYONHO

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 6-7 October 2016, 27 January 2017

Civil Trial

Mr. K. Kachambwa, for the plaintiff
Mr.T. K. Madzimbasekwa, for the defendants

CHIGUMBA J: The common law position has always been clear that, 'Judicial admissions are facts which have been formally admitted in pleadings. It is unnecessary for the other party to adduce evidence to prove the admitted fact. It is incompetent for the party who made the admission to adduce evidence to contradict it. The court has a discretion to relieve a party from the consequences of an admission made in error, which discretion may only be exercised through the granting of an amendment of that pleading'[1]. The plaintiff issued summons against the defendant on 30 October 2014, claiming payment of USD$132 813-34, being the value amount of goods supplied to the defendant for resale and for which it is alleged that the defendant made fraudulent misrepresentations and fictitious payments to the financial loss and prejudice of the plaintiff's business, interest thereon at the prescribed rate calculated from the date of the summons to the date of payment in full, an order declaring stand 6251 St Mary's Township held under Deed of Grant Number 1184-2011 dated 10 March 2011 specially executable, and an order for costs of suit on an attorney-client scale. Both the plaintiff and first defendant are private limited companies which are duly incorporated in accordance with the laws of this country. It is common cause that the agreement between the parties was a verbal one in 2010, and that, the parties entered into a written credit facility agreement in July 2011. A

[1] DD Transport v Abbott 1998 (2) ZLR 92 (SC) @ 97G-98B

mortgage bond in the sum of USD$20 000-00 was registered over the second defendant's property.

The defendants entered appearance to defend on 2 December 2014. On 5 May 2015, this court granted an order for the joinder of the second defendant to the proceedings, and granted leave to amend the summons and declaration accordingly. On 28 April 2015, the second defendant entered appearance to defend. On 12 June 2015, the defendants filed a plea and claim in reconvention, in which they denied making fictitious payments to the plaintiff as alleged or at all, and insisted that they had performed their contractual obligations in full. Defendants averred that the written agreement entered into in July 2011 did not cover the period prior to that, when the parties were operating on a verbal agreement. The defendants' claim in reconvention is for cancellation of the credit facility agreement between the parties, cancellation of the mortgage bond executed by the second defendant in favor of the plaintiff, and the release of the title deeds to the second defendant's property. The defendants averred that the agreement to supply them with goods on credit included a stipulation that the goods supplied not exceed the value of the mortgage bond.

They deny being indebted to the plaintiff as alleged or at all. The plaintiff filed a replication and plea in reconvention on 31 July 2015 in which it averred that the defendant's employees made false entries in its system to misrepresent that the goods supplied had been paid for, in cahoots with the plaintiff's employees. The plaintiff denied that the written agreement was a novation of the verbal agreement that the parties initially entered into, or that goods were supposed to be supplied to the value of the mortgage bond only. The plaintiff averred that the defendants are not entitled to the relief which they seek in reconvention, except the cancellation of the credit facility agreement. The following issues were referred to trial in terms of the joint pre-trial conference minute:

1. Whether the 1st defendant is indebted to the plaintiff in the sum claimed in the summons or at all.
2. Whether the immovable property should be declared specially executable.
3. Whether plaintiff breached the terms of the credit facility agreement between the parties.
4. Whether defendants are entitled to the relief sought in reconvention.
5. Costs.

At the hearing of the matter, after opening addresses by both counsel, the plaintiff opened its case by calling Mr *Munyaradzi Tachiona*, its audit manager, as a witness. He told the court that;- the plaintiff's general manager was approached in August 2011 by Mr *Spencer Chihobe,* who blew the whistle and told him that a former employee of the plaintiff, *Kudakwashe Takafakare*, had offered to facilitate false credit payments entries which were not supported by actual payment, in the plaintiff's system. The false entries were to be brought about with the assistance of current employees of the plaintiff. On 30 August 2011 a reconciliation of the entries was done. Some entries which were not supported by source documents were picked up. The plaintiff's customers can make payments using two methods; cash payments will be supported by a receipt-bank deposits will be supported by a deposit slip-copies of these documents will then be verified by a finance team. Five transactions with no proof of payment were picked up. The documents form part of the record as plaintiff's bundle, pp 1-25.

The second defendant was presented with these documents and he undertook to provide proof of payment. He proved payment for three out of the identified irregular transactions. (rp17) is a list of all the transactions where the second defendant was unable to provide proof of payment. During cross examination, it was admitted that the claim arises from an audit report, that it was not reasonable to misplace proof of payment of so many transactions, and that there were no receipts available for these transactions. The plaintiff's second witness was Ms *Chenai Jacqueline Chawafambira*, its legal services manager who produced the agreement between the parties for the supply of beverages on credit (rp38), as well as the Deed of Grant and Mortgage Bond. During cross examination she insisted that the mortgage bond covered the period preceding the written agreement, and that the first defendant breached the agreement between the parties by failing to pay what was due in full. The plaintiff closed its case.

Mr *Joseph Munyonho*, a director of the first defendant, gave evidence and told the court that;-there was no money which was due to the plaintiff from the defendants which had not been paid. Each invoice raised by the plaintiff was paid for in cash. From 2011 the plaintiff allowed the first defendant a seven day account payment method. Each invoice was to be paid before the expiry of seven days from the date of issue, failing which the next consignment would not be delivered. In August 2011 the parties entered into a written agreement in terms of which a mortgage bond to guarantee payments was hypothecated over the second defendant's property.

The plaintiff was supplied with 60 receipts to prove payment when it sought to recover the sum of USD$237 000-00 from the defendants. The receipts were verified and the sum was reduced to USD$162 000-00. The rest of the receipts could not be found, resulting in the allegation of connivance with plaintiff's employees to create false credit entries in plaintiff's accounts system. Up to 2 July 2012, the plaintiff continued to supply goods to the first defendant.

During cross examination it was admitted that goods worth USD$132 000-00 had been received. The payments were made in cash or by electronic transfer, and by the second defendant or any of the first defendant's employees. The second defendant told the court that the receipts were kept in a cardboard box and that some of them were eaten by rats. The defendant then closed its case. We are grateful to counsel for the defendant for the following line of cases which are cited in the defendant's heads of argument, which were very much on point in setting out the law on the standard or degree of proof required in civil cases. It is trite that;- "…in a civil case, the standard of proof is never anything other than proof on a balance of probabilities. The reason for the difference in onus in civil and criminal cases is that, in civil cases the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. See *City of Gweru* v *Mbaluka*[2]. In the case of *Zimbabwe Electricity Supply Authority* v *Dera*[3] the court said the following, on the issue of proof in civil cases:

> "The degree of proof required by the civil standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. The civil standard has been formulated by Lord Denning as follows:
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> "It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not".

It is clear that what is being weighed in the balance is not the quantum of the evidence or its weight, but the probabilities which arise from the circumstances of the case. See *Selamalele* v *Makhado*[4]. It has also been said that;- 'It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favor of

[2] HH 93-14 (one of my own judgments)
[3] 1998 (1) ZLR 500 (S), Miller v Minister of pensions [1947 2 All ER 372 @ 374
[4] 1988 (2) SA 372 @ 375D-E The preponderance of probability in favor of the party bearing the onus must be strong.

the party who relies on it. It must be of sufficient weight to show the onus on the other side to rebut it". See *West Road Estates Ltd* v *New Zealand Insurance Company Ltd* [5]. Put differently, 'he who alleges must prove'. See *Pillay* v *Krishna* [6]. It is equally trite that:

> "…the true onus never shifts. However in some cases the impression of shifting may be derived from the fact that there are different issues in the pleadings. The onus on the different issues is fixed initially by the pleadings and does not change". See *Klaasen* v *Benjamin*[7].

Four issues were referred to trial, other than the question of costs, which always follow the cause. The interpretation of the written agreement between the parties, and its effect on the question of liability , the period during which the indebtedness accrued, the quantum of liability, cancellation of the agreement between the parties, and whether the immovable property which was hypothecated should be sold in execution. In order to do justice to these parties, the court must weigh the probabilities which arise from the evidence which they have placed before it. We must determine if it is more probable than not that the defendants connived with the plaintiff's employees to falsify credit entries in order to create the false impression that the defendants had paid in full for all the invoices raised for goods sold and delivered by the plaintiff. On the converse side, we must decide if it is more probable than not that the defendants did not connive with the plaintiff's employees as alleged, but that they simply lost their receipts which prove that they paid, to rats which chewed them in a cardboard box. Clearly, the true onus is on the plaintiff on the first issue, and on the defendants on the second issue. The plaintiff must prove what it alleges, and the defendant must prove its defence, on a balance of probabilities. The probabilities must be weighed by the court, in other words, 'the preponderance of probability in favor of the party bearing the onus must be strong'. Put simply, from the evidence on record, which story seems more likely to be true?

The court is equally grateful to counsel for the plaintiff for the rendition of the law which governs the issue of admissions. The effect of a formal admission, as stated in s 36 of *The Civil Evidence Act [Chapter 8:01]* was explained in the case of *Mining Industry Pension Fund* v *Dab Marketing (Private) Limited*[8], as follows:

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[5] 1925 AD 245 @ 263
[6] 1946 AD 946
[7] 1941 TPD 80
[8] S-25-02 @ 8-9

"A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus where liability in full, as in *casu*, is admitted, no evidence is permissible to prove or disprove the defendant's admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedure before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted".

Section 36 of the Civil Evidence Act codifies the common law position regarding the effect of 'judicial admissions'. In *DD Transport Supra,* the Supreme Court stated that:

The effect of a formal admission made in pleadings was underscored in *Gordon* v *Tarnow* 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 Wigmore (paras 2588-2590) calls 'a judicial admission' (of the confession judicialis of Voet (42.2.6) 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. (See Phipson 7 ed p18). Wigmore loc cit, speaking of judicial admissions in general, refers to the Court's discretion to relieve a party from the consequences of an admission made in error. It does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading. These dicta were approved by MACDONALD ACJ (as he then was) in Moresby-White v Moresby-White 1972 (1) RLR 199 AD) @ 203E-H; 1972 (3) SA 222 (RAD) @ 224*"*.

In the case of *Nyahondo* v *Hokonya & Ors* [9], it was held that:

"The general principle is that he makes an affirmative assertion, whether plaintiff or defendant, bears the onus of proving the facts so asserted. However, where a negative assertion can be said to be an essential element of the party's claim or defence, that party bears the burden of proving it…when a person against whom a claim is made is not content with a mere denial, but sets up a special defence or raises a fresh issue (when he confesses and avoids), then he is regarded in respect of that defence as being the claimant; for his defence to be upheld he bears the onus of satisfying the court that he is entitled to succeed on it".

The defendant's plea and claim in reconvention is at rp 23-28. It is admitted that the parties entered into a credit facility agreement in terms of which plaintiff would supply products to the first defendant on credit, and the defendant was required to pay for the product within seven days of the date of delivery (Rp 23 para 5, rp25 para 4 and 5). It is common cause that the 2nd defendant, in his personal capacity, executed a mortgage bond in favor of the plaintiff, over his property in St Marys Township. (Rp23 para 5, Rp3 para 6, Rp11-12 para 4, Rp26 para 7).

[9] 1997 (2) ZLR 457 (SC) @ 459 C

The court agrees with the submissions made on behalf of the plaintiff that the defendants in their plea did not deny receiving the product valued in the amount claimed by the plaintiff. The defendants were provided with spreadsheets of the amounts of the products supplied, in response to their request for further particulars. The defendants confessed then avoided by averring that they duly fulfilled their contractual obligations. The defendants were obliged to pay for product supplied within seven days of delivery. If the defendants formally admitted that they received all the product supplied by the plaintiff so at law, the plaintiffs were no longer required to adduce evidence to prove delivery of the quantities of the product supplied and delivered. There is a 'judicial admission' in the pleadings that the defendants received all the product alleged to have been delivered to them by the plaintiff. Those pleadings were not amended. The probabilities support the conclusion that the defendants received product in the sum claimed by the plaintiff. The court accepts, as a matter of law, that it is incompetent for the defendants, after having made this 'judicial admission', to seek to or appear to contradict it in any manner.

In effect, the 'judicial admission' left the onus of proving payment for the product delivered and admitted to having been received, on the defendants. Did the defendants prove that they paid for the product, at all, or within seven days of the date of delivery as agreed? It is common cause, based on the evidence of the plaintiff's first witness, that an investigation revealed that five (5) transactions of the first defendant were not supported by any source documents to prove that payment was actually made. The five transaction's value was UAS$43 116-00. The investigations were for an audit period April 2010 to August 2011 for debtor's transactions. It is common cause that a further 15 credit sales on the first defendant's account which had been recorded as paid were not supported by proof of payment in plaintiff's records. The 15 transactions value was UAS$119 412-80. All the disputed transactions were processed by plaintiff's debtors' clerk named Jane Muchinguri. One transaction was processed by Memory Mahachi, another debtor's clerk. Both clerks resigned when the audit started. It is common cause that another five transactions were unearthed, bringing the total disputed transactions to twenty.

The audit report and spreadsheet with all these transactions were admitted into evidence as Exhibits. It is common cause that the defendants provided proof of payment for three transactions and requested for time to provide the remaining receipts. It is common cause that the

audit report was finalized after the second defendant promised to provide proof of payment, and failed. The defendants' case was basically that they had lost the receipts which proved that they paid in full. The court was not satisfied with the defendants' explanation for supplying some receipts and not others. The court finds it improbable that the defendants' reason for failing to prove payment was the loss of their receipts due to vandalisation by rodents. The defendants had other means with which to prove payment at their disposal, such as the production of bank statements, or even testimony by its employees that they had made those payments in person. The court accepts that, by registering a mortgage bond over his St Mary's property, the second defendant renounced the legal exceptions *non numeratae pecuniae,* and all other exceptions such as objection to the payment of capital together with interest. It is trite that a mortgage bond is continuing covering security for existing and future sums claimable by the plaintiff. On the effect of renouncing the legal exceptions and the shifting of the onus of proof, see *Venture Capital Co of Zimbabwe* v *Chirovero Investments*[10].

We find that, the evidence on record, coupled with the 'judicial admission' made by the defendants, supports the conclusion that it is more probable than not that the defendants did not provide receipts or proof of payment for the sum claimed by the plaintiff because they simply did not pay. The evidence supports the probability that indeed there was connivance between the defendants and plaintiff's debtors clerks to falsify plaintiff's records to make it appear as if the first defendant had paid in terms of the credit agreement when it had not. If the first defendant had paid in full, its bank should have been able to provide proof of such substantial financial transactions as a matter of routine. It is improbable that some receipts were destroyed by rodents while some others were not. We find that the plaintiff has proved its case on a balance of probabilities, and that the defendants' claim in reconvention is entirely devoid of merit and not sustainable, on the evidence before us. The Court also finds that the defendants did not have a viable defence from the outset, and to discourage such conduct in future, will accede to the prayer for a punitive order as to costs. In the result, the defendants claim in reconvention is dismissed, with costs. The plaintiff's claim is upheld, with costs.

In the result, it be and is hereby ordered, that the first and second defendants, jointly and severally, the one paying the other to be absolved, pay to the plaintiff:

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[10] 2000 (2) ZLR 30 (HC) @ 33-34

1. The sum of USD$132 813-34.
2. Interest on the sum of USD$132 813-34 at the prescribed rate calculated from the date of the summons to the date of payment in full.
3. An order declaring that a certain piece of land situate in the district of Salisbury being stand 6251 St Mary's Township measuring 246 square metres held under Deed of Grant number 1184-2011 dated 10 March 2011 be declared specially executable.
4. Costs of suit on a Legal Practitioner-Client scale.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Mushangwe & Company Legal Practitioners, defendants' legal practitioners