GIBBS PAUL GOTORA
versus
GRAIN MARKETING BOARD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 24 November 2017 & 14 February 2018

Trial

Mr *C.W Gumiro*, for the plaintiff
Mr *G.H Muzondo,* for the defendant

MATANDA-MOYO J: Plaintiff's claim against the defendant is in two parts; Firstly plaintiff claims for payment of $7 789.15 being the value of 14.162 tonnes of wheat sold and delivered to defendant, and $15 500.00 being the value of 30 tonnes of compound fertilisers purchased by plaintiff from defendant which defendant failed to deliver. Secondly the plaintiff sought damages in the sum of $2 790 000.00 for loss of production due to breach of contract by the defendant.

In his declaration plaintiff alleges that in December 2007, he delivered 14.162 tonnes of wheat to defendant's Concession depot. Defendant was to pay for the wheat within 14 days from date of delivery. At the time of summons the value of the wheat was $550.00 per tonne.

On 15 June 2007 plaintiff alleged he bought 30 tonnes of compound D fertiliser from the defendant and paid for it in full. The plaintiff was to collect the fertiliser upon payment. Plaintiff could not collect the fertiliser as it was not in stock. The market value of a bag of fertilizer was $27.50 per 50 kg bag.

Plaintiff averred that because of failure to get delivery of fertiliser, he was incapacitated from performing his commercial business from then onward 2007/8. Plaintiff averred that were it

not for the breach he could have done 100 hectares of maize with a potential yield of 5 tonnes per hectare and would have earned a net profit of $1 125 000.00 for 9 years.

Plaintiff stated that he could also have done 100 hectares of wheat per season and would have earned $1 665 000 net profit for 9 years.

Defendant denied being liable to the plaintiff in any sums claimed. The defendant pleaded prescription. It is defendant's case that plaintiff's claims arose in 2007 and three years had lapsed by the time the claims were instituted. Defendant also pleaded that none citation of the Minister of Finance, Minister of Agriculture and Mechanisation was fatal to the plaintiff's claim.

On the merits defendant denied that after delivery, payment of grain was to be effected within 14 days. In any case defendant pleaded that payment to the plaintiff for wheat delivered was done on 28 February 2008 under cheque number 95995. Further defendant pleaded that it was the wrong defendant herein as it simply acted as an agent for Fiscoop (Pvt) Ltd – an entity responsible for payment of deliveries. The legal tender then was the Zimbabwean dollar. The defendant pleaded that plaintiff should be estopped from claiming in United States dollars. On the fertilizer issue it is defendant's case that such fertilizer was never bought from the defendant but from government. Defendant denied being liable to the plaintiff for damages from non-delivery of the fertilizer.

The issues referred for trial were;

1. Whether or not the plaintiff's claim has prescribed;
2. Whether or not the plaintiff has been paid for wheat delivered.
3. Whether or not defendant breached the agreement as alleged by plaintiff.
4. If so the quantum of damages suffered and
5. The currency to be used for such payment.

The plaintiff testified that he is a commercial farmer. In 2007 plaintiff purchased 30 tonnes of compound D from the defendant. He produced proof of transfer done from his Agribank account. The beneficiary was stated as the defendant. He testified that the terms of the purchase agreement were that delivery was to be taken upon payment. To date plaintiff has not received the fertilisers from the defendant.

Plaintiff also testified that he delivered 14, 162 tonnes of wheat to the defendant. Such delivery was acknowledged by the defendant. At the time of delivery the agreement was that he

would be paid by way of a cheque and such a cheque was to be collected from the defendant's Concession depot within 14 days of delivery. That did not happen. Sometime in 2010 this witness was advised that a cheque had been made out to him. However he never got the cheque. If the cheque was ever made it was sent to the wrong address. At one stage he was told the cheque was sent to Agribank Bindura.

On the issue of prescription this witness stated that he was in communication with the defendant who kept on promising to pay. In a letter to plaintiff dated 21 December 2010 the defendant advised the plaintiff that his name was on a list submitted to Ministry of Finance for payment. On the fertilizer issue defendant through a letter dated 6 December 2013 to the plaintiff advised that a decision was taken by government in April 2010 to reimburse farmers for inputs not delivered. Defendant was awaiting the fertilizer funding to be availed so as to honour the reimbursements. This witness denied that and maintained that the claims are not 9prescribed.

On the issue of damages this witness testified that he approached Agronomist who did a crop budget. Damages were calculated for 9 years from 2007. The figure was based on an average yield of 5 tonnes per hectare. The defendant's omissions caused this witness not to farm. He testified the defendant was liable to pay for those damages. Asked whether he mitigated his losses this witness testified that without resources it was impossible to do so.

Under cross-examination this witness conceded that in a letter from his erstwhile legal practitioners it was stated that the sale agreement for fertilisers was cancelled as at September 2010. In that letter the defendant was given 7 days to pay or face legal action. The plaintiff conceded that he did nothing after the expiry of the 7 days. He conceded he only issued summons six years later. His explanation was that he had no money for legal fees. On proof of damages this witness conceded he did not produce any projections done by the experts. He said he got the figures verbally. He also conceded the figures were based on the national performance average and not on his previous performance records. He also conceded he did not take into account various other factors like drought.

Mr Rodney Mzeyece testified on behalf of the defendant. He is employed by defendant as its corporate secretary. He conceded that indeed the plaintiff delivered 14 162 tonnes of wheat at Concession GMB depot in 2007. He testified that a cheque was done and sent to Bindura Agribank

for collection by the plaintiff in 2008. However he could not produce the cheque nor any evidence to support that averment. He testified though that although cheque was sent it was never collected.

He testified that the plaintiff transferred money into the defendant's account but did not specify purpose. He denied the fertiliser program was a GMB program. He testified it was a government program.

On damages claimed this witness said the plaintiff had not proffered evidence on how he arrived at the figures claimed. The figure was based on speculation. Under cross-examination he conceded that the plaintiff delivered the said wheat to the defendant in 2007. He conceded the sale agreement for fertiliser was between the plaintiff and defendant. He also conceded he had not joined the defendant then and had no first-hand information of what exactly transpired. He conceded that the defendant had an obligation to pay them but insisted claim is prescribed.

Analysis of Evidence

From this witnesses evidence the facts of this matter are to a large extent common cause. The plaintiff in 2007 delivered 14,162 tonnes of wheat to the defendant. He never received payment for the wheat. The defendant's claim that a cheque was written to the plaintiff was not backed by evidence and could not be believed. If the plaintiff's cheque had been delivered to Concession depot as alleged by the defendants, that could have been said to the plaintiff all the years he was following up on payment. All correspondence between the parties point to the fact that no payment was ever made to the plaintiff. The value of the wheat delivered at the time of summons is also common cause. A tonne of wheat was valued at $550 then. The value of 14 162 tonnes came to $7 789.10.

It is also not in dispute that the plaintiff bought 30 tonnes of compound D fertilisers from the defendant. The defendant attempted to riggle out of the matter by claiming that the fertilisers belonged to government. The defendant produced no evidence to that effect. However the defendant's witness conceded that the sale agreement was between the plaintiff and the defendant. With that concession it becomes common cause that the sale agreement was between the plaintiff and the defendant. It is common cause that such fertilisers were never delivered to the plaintiff and remained owing to the plaintiff.

On issue of damages no evidence was placed before the court to prove the amounts claimed. That damages were suffered by the plaintiff is indisputable. However the plaintiff thumb sucked figures from the air.

The Law

This first part of the claim involves firstly the law of sale. A sale agreement is a contract for the exchange of goods or services that are the subject of exchange from seller to buyer for an agreed upon value in money paid or the promise to pay same. The seller must agree to sell and buyer must agree to buy. The plaintiff entered into a contract of sale with the defendant for 14 162 tonnes of wheat. The defendant promised to pay after delivery. The wheat was delivered. The defendant to date has failed to pay and the debt is owing. The plaintiff has managed to show that such debt remains owing to date. The plaintiff also proved that he purchased 30 tonnes of compound D from the defendant. Such fertilisers were never delivered. The plaintiff cancelled the agreement in 2010 and demanded a refund. To date such refund remains owing. The amounts claimed have also been proven. The parties are agreed to the value of wheat delivered and the value of the fertilisers and I shall not be labour the point.

However the defendant argued that the plaintiff's claims are prescribed.

The claim by the plaintiff obviously fall under the definition of a debt as defined in s 2 of the Prescription Act [*Chapter 8:11*]. The period of prescription for a debt such as the present is three years (see *Syfin Holdings* v *Pickering* 1981 ZLR 344 (H)).

Section 16 of the Act provides that prescription commences to run as soon as a debt becomes due- see also *Chirinda* v *Konrad Vander Merwe and Minister of Lands and Rural Resettlement* HH 51/13. *Zimasco (Pvt) Ltd* v *San He Mining (Pvt) Ltd* HH 654/15.

Jourbet *The Law of South Africa* volume 21 para 99 states that

> "Prescription begins to run as soon as the debt is due. The date on which a debt becomes due usually coincides with the date on which a debt arises but this is not always the case. The difference relates to the coming into existence of the debt in the one hand and its recoverability on the other. In the ordinary meaning, therefore, a debt is "due" when it is immediately claimable by the creditor and as its correlative it is immediately payable to the debtor."

The plaintiff testified that the debt for the wheat became due fourteen days after delivery. The plaintiff also testified that the delivery of the fertilizers was immediately on payment. In respect of the wheat, it is common cause the wheat was delivered in 2007 and prescription began to run from December 2007. Without interruption it would haverun its full course by December

2010. Equally the fertilizers were bought in June 2007 and were to be delivered in June 2007. It also follows that without interruption prescription ran from June 2007 to June 2010.

Let me move on to determine whether prescription was interrupted. It is common cause that the plaintiff followed up payment with the defendant. The defendant acknowledged owing and promised to pay. In terms of ss 18 and 19 of the Prescription Act, prescription can be interrupted by service of process or through acknowledgement of liability – see *Pocock* v *Agricultural Finance Corporation* 1995 (2) ZLR 365 (5). I am of the opinion that the acknowledgement of debt by the defendant did interrupt prescription. However on 18 March 2010 the plaintiff's lawyers cancelled the contract and demanded reimbursement within seven days failure of which summons would be issued against the defendant. It follows that prescription started running seven days from the 18 March 2010. That meant the debt would have run its course in March 2013. The plaintiff relied on a letter from the Ministry of Finance on 25 August 2014 where it submitted that the Ministry acknowledged liability to the plaintiff. Since the Minister of Finance is not a party to these proceedings the Minister's purported acknowledgement is neither here nor there.

In the result I am satisfied that the debts had prescribed at the time of issuing the summons. On the issue of damages as pointed out earlier the plaintiff has failed to produce any evidence linking the non-payment to the subsequent damages suffered nor proving the amount.

However considering the defendant won on a technicality where it has been unjustifiably enriched, I do not believe it is entitled to costs.

In the result the plaintiff's claim fails *in toto* and is dismissed without any order as to costs.

Ngarava Moyo & Chikono, plaintiff's legal practitioners
G H Muzondo & Partners, defendant's legal practitioners