

DISTRIBUTABLE (15)

DOWOOD SERVICES (PRIVATE) LIMITED
t/a BRADFIELD MOTORS
v
RAILINGS ENTERPRISES (PRIVATE) LIMITED
t/a PAROAN TRUCKING

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GOWORA JA & MUTEMA AJA
BULAWAYO JULY 28, 2014

H Malinga, for the appellant

P Dube, for the respondent

MUTEMA AJA: This is an appeal against the judgment of the High Court in which summary judgment was granted against the appellant. After hearing argument by the appellant's legal practitioner we did not consider it necessary to hear counsel for the respondent. We dismissed the appeal in its entirety with costs on the scale of attorney and client and intimated that the reasons for the dismissal of the appeal will follow. These are they.

The respondent supplied various consignments of fuel to the appellant over a period spanning from March 2011 to February 2012 at the latter’s specific instance and request. The agreement between the parties was that once the fuel has been sold by the appellant in respect of each consignment then payment is made for that particular consignment. During the period in question the appellant made erratic payments thereby incurring a debt amounting to US\$58 335,00.

On 17 April 2012 the parties’ representatives drafted and signed an acknowledgment of debt couched in pertinent part in these words:

“RE: OUTSTANDING FUEL PAYMENTS BY BRADFIELD SERVICE STATION

.... Attached is a schedule of all deliveries made to Bradfield Service Station and corresponding payments, leaving a balance therefore of U\$58 335,00 (sic) owing by Bradfield Service Station. The two parties have agreed that interest at the rate of one and half percent will be paid monthly by Bradfield Service Station.

With regards (sic) to the repayment of the capital owing, Mr Luwo has applied for a loan (sic) which was promised to him by the end of March 2012 and he is still waiting for it, should the loan not be received by him by the end of April 2012, the parties need to agree on an alternative repayment plan for the amount owing.

Signed P Pliosof

Signed D Luwo”

Following several unsuccessful demands the respondent caused summons to be issued against the appellant on 28 January 2013 claiming:

- (a) Payment of the sum of US\$58 335,00 as per the acknowledgment of debt;
- (b) Interest thereon at the rate of 1,5% per month calculated from the date of the acknowledgment of debt, being 17 April, 2012, to date of payment in full;
- (c) Costs of suit.

The appellant entered appearance to defend and filed what it termed a special plea averring:

“The defendant specially pleads that the same matter between substantially the same parties is still pending in this court under case number HC 3595/12 which matter the plaintiff purportedly withdrew from this court on 26 January 2013 but which withdrawal is null and void. Wherefore defendant prays for the dismissal of the plaintiff’s claims with costs on the attorney – client scale.”

Thereafter the respondent made an application for summary judgment premised upon the acknowledgment of debt alluded to *supra*. The appellant opposed the application by raising a number of preliminary issues which were essentially not germane to the resolution of the real issue between the parties. The court *a quo* properly was not detained by those issues. On the merits the appellant claimed that it had a *bona fide* defence set out in paragraph 4.1 of the opposing affidavit which reads:

“4.1 Whilst I admit having signed, on behalf of respondent, the document annexed to applicant’s papers as Annexure “B” that document makes it clear that payment of the amount due was conditional upon my receiving a loan from a financial institution. In other words a condition precedent to the payment of the amount outstanding has not been met.”

The issue for resolution by the court *a quo* was simply whether the penultimate paragraph in the acknowledgment of debt cited above constituted a condition let alone a suspensive condition of the contract that was concluded between the parties.

The contract between the parties was concluded sometime in March, 2011 for the supply of fuel by respondent to the appellant with the latter paying for each consignment soon after it had been sold. The appellant breached the contract by failing to pay as agreed upon thereby incurring arrear payments amounting to \$58 335,00 by 17 April 2012, the date of signing of the acknowledgment of debt. The acknowledgment of debt, in essence, is not the contract concluded by the parties. It simply constitutes an admission by the appellant of the amount owing and an undertaking by the same party of how it proposed to pay off the debt. It certainly cannot amount to a condition which renders the operation of the contract dependent upon the occurrence of a future uncertain event. Its nature is not suspensive, at least not post end of April 2012 and it cannot be made so merely by it being called a condition precedent.

It certainly cannot be said that when the parties drafted and signed the acknowledgment of debt in that vein it was within their contemplation to upgrade the proposed

modality of payment of the outstanding amount to a suspensive condition of the contract, otherwise a novation of the original agreement would have taken place. If the modality of payment suggested in the acknowledgment of debt were to be interpreted in the sense contended for by the appellant, it would “lead to a conclusion that flouts business common sense, [and] it must be made to yield to business common sense.” Per LORD DIPLOCK in *Antaios Compania Naviera S.A. v Salen Rederierna A. B.* [1985] AC 191 @ 201.

Clearly the appellant had no defence to respondent’s claim, let alone one *bona fide*. It did nothing for one year seven months that is from the signing of the acknowledgment of debt to 12 December 2013 when the application for summary judgment was heard, to ensure that the alleged promised loan was availed to it or engaged respondent for an alternative repayment plan. Surely the respondent cannot be expected to wait for payment forever in vain. The “defence” raised by the appellant was rightly dismissed by the learned Judge *a quo* as spurious and simply meant to buy time.

It is on the basis of the foregoing reasons that the appeal was dismissed in its entirety with costs on an attorney – client scale.

CHIDYAUSIKU CJ: I Agree

GOWORA JA: I Agree

Job Sibanda & Associates, appellant's legal practitioners

Webb, Low & Barry Incorporating Ben Baron & Partners, respondent's legal practitioners