RURAL ELECTRIFICATION FUND
versus
LOMAGUNDI POLES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 February 2016 & 23 March 2016

Opposed Application – Special Case

Ms *F. Mahere,* for the plaintiff
T.K. Hove, for the defendant

MUREMBA J: The plaintiff issued summons on 8 April 2013 against the defendant for the payment of US$681 862-00, interest on that amount at the rate of 17.85% per annum reckoned from 30 September 2012, to date of payment and payment of costs on the legal practitioner and client scale. According to the summons and declaration, the cause of action is a Notarial General Covering Bond that was executed by the defendant in favour of the plaintiff and was duly registered at the Deeds Office.

The defendant entered an appearance to defend and the matter progressed to the pre-trial conference stage. At the pre-trial conference the parties agreed to proceed by way of a special case in terms of order 29 of the High Court Rules, 1971. As a result, they prepared a statement of the special case wherein the defendant admitted the factual narrative as presented in the plaintiff's summary of evidence as supported by the documents in the plaintiff's bundle. The defendant abandoned its plea.

The facts of the case as presented in the plaintiff's summary of evidence are as follows. The plaintiff is involved in numerous electrification projects across rural Zimbabwe. In implementing these projects it purchases treated poles from the defendant. The arrangement or dealing between the two parties was always that the plaintiff would pay in advance for the treated poles, and the defendant would in turn deliver the poles to the plaintiff's various sites, in accordance with agreed schedules. In the third quarter of 2011 the defendant started defaulting on the delivery of the treated poles that the plaintiff had paid for.

As at 1 June 2012, the defendant owed the plaintiff the sum of US$642 152.75. The plaintiff called upon the defendant which agreed to sign an acknowledgement of debt for the said sum on that date. The defendant's Managing Director, Jasper Makunun'unu is the one who signed the acknowledgment of debt on behalf of the defendant. In the acknowledgement of debt the defendant agreed to execute a Notarial General Covering Bond whereby it was to hypothecate its chattels, stock in trade and book debts in favour of the plaintiff as security for the due discharge of its debt. The defendant agreed to pay interest at the rate of 17.85% per annum. The acknowledgment of debt had as an attachment, a schedule that showed the breakdown of the debt as at that date. The defendant's Managing Director signed the said attachment.

On 17 July 2012, the defendant's Managing Director, Jasper Makunun'unu, then executed a Notarial General Covering Bond in the sum of US$ 670 913-03 in favour of the plaintiff. The said bond was duly registered at the Deeds Office at Harare under reference number 2593/2012 on 23 July 2012.

In executing the said Notarial General Covering Bond, the defendant acknowledged being indebted to the plaintiff in the sum of US$670 913-03, hypothecated its chattels located at various sites in Zimbabwe, agreed to pay interest on the said sum together with costs of any legal proceedings on the scale of legal practitioner and client, agreed that a certificate of balance signed by or on behalf of the plaintiff would be *prima facie* proof in any legal proceedings of the level of the defendant's indebtedness to the plaintiff, and the defendant renounced the benefits of the legal exceptions together with any other exception capable of being taken to avoid payment of the debt. The defendant also undertook to pay its indebtedness under the Notarial General Covering Bond in 3 equal instalments, but it failed to discharge its liability.

Following the defendant's breach, the plaintiff on 11 December 2012, caused to be prepared and signed, a Certificate of Balance, in terms of which it was stated that as at 30 September 2012, the defendant's liability stood at US$681 862-00. This is what resulted in the issuance of summons by the plaintiff on 8 April 2013. So the US$681 862-00 which appears on the face of the summons is the amount that appears on the certificate of balance as at 30 September 2012.

It is stated in the statement of the special case that the defendant seeks to avoid liability to the plaintiff on the ground that the Notarial General Covering Bond is not enforceable because it stipulates an interest rate that is higher than the prescribed rate and/or

if the agreed interest rate of 17.85% per annum should be declared unlawful, the plaintiff will not be entitled to recover the undisputed capital plus interest at the prescribed or any other interest rate.

It is this ground which the defendant raised which necessitated the parties to agree to proceed by way of a special case. I will thus proceed to deal with the ground in question.

The legal practitioners did not file heads of arguments, but made oral submissions on the law. It was Mr. *Hove*'s argument that notwithstanding the defendant's signature and agreement to a higher interest rate which is above the prescribed rate of interest in terms of the Prescribed Rate of Interest Act [*Chapter* 8:10], the plaintiff has an onus to justify why interest should be above the prescribed rate of interest. In arguing this point Mr. *Hove* made reference to the case of *ZB Bank Limited* v *Eric Rosen (Private) Ltd and 2 Ors* HH 183/15 at p 18. It was Mr. *Hove*'s argument that the plaintiff had not successfully discharged that onus.

Mr. *Hove* also argued that in terms of the Consumer Contracts Act [*Chapter 8:03*] the contract or agreement which was entered into by and between the parties is unfair to the defendant warranting the court to cancel the whole agreement. He argued that the contract between the plaintiff and the defendant is a consumer contract for it involved the sale and supply of goods.

It was Mr. *Hove*'s further argument that the plaintiff not being a bank, the provisions of the Banking Act [*Chapter* 24:20] are not applicable to it, and as such it cannot charge interest which is above or higher than the prescribed rate of interest in terms of the Prescribed Rate of Interest Act.

Mr. *Hove* also argued that s 8 (1) of the Money Lending and Rates of Interest Act [*Chapter 14:14*] is also applicable in this case. Section 8 (1) states that no lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest.

Mr. *Hove* argued that since the interest that was charged is higher than the prescribed rate of interest which is 5% per annum in terms of the Prescribed Rate of Interest, the whole agreement becomes a nullity because of the greediness of the plaintiff. Mr. *Hove* went on to dispute even the capital amount of $681 862-00 that the defendant acknowledged in the Notarial General Covering Bond, his argument being that, that amount is inclusive of interest which was calculated at the rate of 17.85% per annum, which is illegal and usurious. He said that there is need for recomputation of the whole debt because the amount appearing on the face of the summons is premised and predicated on a wrong interest rate. He said that while

the defendant admits owing the plaintiff, it disputes the amount and the question which remains unanswered is how much does the defendant owe? It was Mr. *Hove*'s argument that since the capital amount owed was in dispute I should refer this matter to trial as what happened in the *ZB Bank* case *supra*, wherein the judge ended up referring the case to trial when he realised that there was need for evidence to be led on the issue of interest which was disputed. The case had come to the judge as a special case. Mr *Hove* averred that in *casu* when they agreed to proceed by way of a special case he had thought that they would only argue on the law, but he was now realising that there was a factual dispute on the capital amount owed.

Ms *Mahere* vehemently opposed that the matter be referred to trial. Her reasons were that when it was resolved at the pre-trial conference that the matter proceeds by way of a special case the legal practitioners prepared a statement of the special case. She said that it is Mr. *Hove* himself who was acting on behalf of the defendant and he is the one who signed the statement. In para 5 thereof it is stated that:

> "At the pre-trial conference aforesaid, the defendant admitted the factual narrative as presented in the plaintiff's summary of evidence, and as supported by the documents in plaintiff's bundle as marked 'C'".

Ms *Mahere* also made reference to para 4 of the plaintiff's summary of evidence which says, "As at the 1st day of June 2012, the defendant owed the plaintiff the sum of US$642 152.75". She further referred to para 9 of the summary of evidence wherein it is stated that the defendant admitted that as at 30 September 2012, the debt level stood at US$681 862.00. Ms *Mahere* argued that in the result, Mr. *Hove* could not now turn around on the admission that he once made. Ms *Mahere* pointed out that in the bundle of documents which was prepared by the plaintiff, there is a certificate of balance wherein it is stated that as at 30 September 2012 the defendant owed the plaintiff US$681 862.00.

I am in agreement with Ms *Mahere* that by jointly preparing and signing the statement of the special case, Mr *Hove* admitted to the facts as they stand in the statement. Order 29 r 204 states that, "if the question in dispute is one of law, and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence". However, the use of the word 'may' means that it is not mandatory that the parties be bound by the facts they would have agreed upon. It means that they can resile from those facts. This therefore means that in the present matter the defendant can resile from the facts that it initially agreed upon. The court has a discretion to allow an

admission to be withdrawn; for example, where the admission is clearly contrary to the facts and it is clear that an injustice will result from adherence to the admission[1]. In the present matter I will therefore decide if the admission of the capital amount which was made in the statement of the special case is contrary to the facts and whether or not an adherence to the admission will not result in an injustice. In order for me to determine this I will need to look at the issue of the rate of interest which the defendant says is usurious thereby rendering the agreement illegal.

Ms *Mahere* correctly submitted that the Money Lending and Rates of Interest Act is not applicable in the present matter because this Act only regulates money lending. The present case is not a case where the defendant was lent money by the plaintiff. The cause of action emanates from an acknowledgment of debt which was signed by the defendant. That acknowledgment of debt emanated from money paid in advance by the plaintiff to the defendant for the purchase of poles which poles the defendant later failed to deliver. So even the original contract that gave rise to the signing of the acknowledgement of debt had nothing to do with money lending between the parties. If the cause of action in this matter was based on money lending i.e. a contract of loan of money to the defendant by the plaintiff, then the plaintiff would not be entitled to recover interest above the prescribed rate of interest in terms of the said Act, even if the parties had agreed on 17.85% in their agreement. This would be so because s 8 (1) thereof prohibits charging of interest by a lender which is greater than the prescribed rate of interest.

I do not see how the original contract which was entered into by and between the parties for the purchase and supply of poles can be said to be unfair to the defendant warranting it to be nullified in terms of the Consumer Contract Act. In any case the original contract is not the cause of action in this matter. In the acknowledgment of debt the defendant admitted that it was paid money in advance for the supply of poles by the plaintiff, but it failed to supply the poles. It said that consequently, it owes the plaintiff the money that it received from it. So how on earth can the defendant then argue that this is unfair in terms of the Consumer Contract Act? If anything that is unfair, it is the defendant which agreed to sell poles, received money in advance, did not deliver the poles and is now turning around saying that the contract was unfair to it.

[1] *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1)310 @ 318 (H);

It is common cause that the plaintiff is not a bank and as such it is not entitled to charge interest in terms of the Banking Act. Coming to the Prescribed Rate of Interest Act, section 4 thereof reads,

> "If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or **by an agreement** or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise." (My emphasis)

Ms *Mahere* argued that once parties have agreed on a rate of interest which is higher than that set out in the Act, it is that rate of interest which will govern them. In the case of *Chikomo* v *Yehudah* 2012 (1) ZLR 187 (H) that Ms *Mahere* referred to, Mavangira J (as she then was) held that under s 4 of the Prescribed Rate of Interest Act, interest is to be calculated at the prescribed rate only if the rate "is not governed by any other law or ***by an agreement*** or trade custom or in any other manner" (My emphasis). In that case the parties had agreed on the interest rate of 25% (whether annually, monthly or weekly it was not specified) on money lent to the respondent by the applicant. The learned judge held that since there was an agreement governing the rate of interest between the parties, the respondent could not escape from the provisions of the agreement.

In *casu*, the parties entered into an agreement, the acknowledgment of debt, which culminated in the execution of a notarial bond by the defendant in favour of the plaintiff. In the acknowledgement of debt the parties agreed on an interest rate of 17.85% per annum. Their rate of interest is therefore governed by the agreement that they entered into and not by the Prescribed Rate of Interest Act. Had the parties not agreed on an interest rate in their agreement, then the interest rate which is prescribed in the Prescribed Rate of Interest Act would be applicable.

In view of the foregoing I make a finding that the rate of interest which was agreed upon by the parties in this case governs them. There is nothing usurious about that interest rate. The defendant is bound. Having made this finding I will now turn to deal with the issue of the capital amount which Mr. *Hove* argued to be wrong on the basis that it is inclusive of usurious interest. In the plaintiff's declaration the capital amount was said to be US$681 862. 00 as at 30 September 2012, in terms of the certificate of balance which the plaintiff prepared. According to the summons and declaration, the cause of action is the notarial bond which the defendant executed on 17 July 2012. The plaintiff's summary of evidence gives a historical background which shows that the notarial bond was executed pursuant to an

acknowledgement of debt the defendant signed on 1 July 2012 which showed a capital amount of US$ 642 152.75. I feel obliged to remark that a notarial bond cannot be a cause of action because it is not an agreement, but a form of security. It was therefore wrong for the plaintiff to make its claim based on the notarial bond as its cause of action as is reflected in its summons and declaration. The cause of action should have been the acknowledgement of debt which was the agreement between the parties. What it therefore means is that if the plaintiff had issued its summons on the basis of the acknowledgement of debt it would have claimed the capital amount reflected in it, which is US$642 152.75. This is the amount that the defendant admitted owing as at 1 June 2012. The US$681 862.00 that is claimed as the capital amount in the summons, as was correctly argued by Mr. *Hove* during the hearing, is inclusive of compound interest. The schedule to the acknowledgment of debt which shows the breakdown of the defendant's debt as at 1 June 2012 shows that the interest rate of 17.85% was agreed upon as compound interest. Compound interest is interest added to the principal or capital amount so that the added interest also earns interest.

Since I have made a finding that the interest rate of 17.85% per annum that the parties agreed upon in the acknowledgement of debt is lawful and binding on them. There is therefore no basis for Mr. *Hove* to withdraw the admission that he made on the capital amount in the statement of the special case. The admission is not contrary to the facts and the adherence to it will not cause an injustice in the matter. It is clear that the capital amount of US$681 862.00 was arrived at after interest at the rate of 17.85% per annum had been compounded to US$642 152.75. Since the rate of interest of 17.85% is binding on the parties, the capital amount which is appearing on the face of the plaintiff's summons was not wrongly computated despite the wrong use of the Notarial General Covering Bond as the cause of action. There is no prejudice to the defendant because the factual narrative of what happened is not in dispute. There is therefore no need for the matter to be referred to trial. In that regard the plaintiff is entitled to recover the capital amount of $681 862.00, and interest on that amount at the rate of 17.85% per annum.

COSTS

Mr. *Hove* argued that even if the defendant had agreed to pay costs on a legal practitioner and client scale in the acknowledgment of debt and in the notarial bond, costs should not be awarded on that scale because nothing justifies punitive costs in the matter. Citing the case of *Scotfin (Pvt) Ltd* v *Ngomahuru* 1997 (2) ZLR 567 Ms *Mahere* argued that

the defendant is bound by the agreement that it made to pay costs on a higher scale in the acknowledgement of debt and in the notarial bond. I am entirely in agreement with Ms *Mahere* and what the court said in the *Scotfin* case that where a party agrees to pay costs on a higher scale in the event of litigation it should be bound by the agreement. In any case, in the statement of the special case parties agreed that if the plaintiff succeeds it would be entitled to costs on a higher scale. I do not see why Mr. *Hove* wants to depart from that now.

In the result, I thus order that the defendant pays to the plaintiff:

1. the sum of US$ 681 862.00.
2. interest on US$681 862.00 at the rate of 17.85% per annum from 30 September 2012, to date of full payment.
3. costs of suit on the scale of legal practitioner and client.

Muzangaza Mandaza & Tomana, plaintiff's legal practitioners
T.K Hove and Partners, defendant's legal practitioners