

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT
PROVINCIAL DIVISION
PRETORIA

Case Number: 39679/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
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In the matter between:

AFRI CORPORATION LIMITED

PLAINTIFF

and

MATHYS IZAK ELOFF

1ST DEFENDANT

ELSABE ELOFF

2ND DEFENDANT

Coram: **HUGHES J**

JUDGMENT

Delivered on: 3 March 2014

Heard on: 15 August 2013

HUGHES J

1. The plaintiff claims from the defendants jointly the following:
 - 1.1 Payment of US \$ 920 844.59;
 - 1.2 Interest on the amount of US \$ 920 844.59, the interest to be compounded monthly at the following rates:
 - 1.2.1 14% per annum from 1 September 2007 to 18 February 2008;
 - 1.2.2 13% per annum from 19 February 2008 to 10 November 2008;
 - 1.2.3 15% per annum from 11 November 2008 to date of payment.
 - 1.3 Costs of the suit.
2. The parties have settled the issue of quantum, the quantum amount having been agreed upon. The only issue to be determined is that of liability.
3. The plaintiff's claim arises from a document titled: "Acknowledgment of Debt, Suretyship, Undertaking and Cession" ("acknowledgment of debt").
4. The parties signed the acknowledgment of debt on 26 December 2007 in Lusaka, Zambia. The *domicilium citandi et executandi* chosen by the parties for the institution of any

action by the plaintiff was, 76 Herman Street, Ellisras, Limpopo Province, Republic of South Africa.

5. The defendants were shareholders of Dumela Farms. The first defendant signed the acknowledgment of debt as a director of Dumela Farms. The defendants also signed the acknowledgement of debt in their personal capacity as sureties and cedents. It was also recorded that the defendants bound themselves as sureties and co-principal debtors *in solidum* with Dumela Farms, in respect of the debt, in favour of the plaintiff.
6. The following are common cause facts regarding the acknowledgment of debt agreement:
 - 6.1 the defendants as at 31 October 2007 acknowledged that they owed the plaintiff an amount of US\$920 844.59 in respect of goods sold and delivered, services rendered and credit facilities granted by the plaintiff at the defendants instance;
 - 6.2 interest on the above amount from 1 November 2007 to date of payment, at rate equal to the base rate charged from time to time by Stanbic in Zambia plus 3% points, the interest to be compounded monthly;
 - 6.3 it was recorded that at signature, the base rate was 11.5% per annum and the interest rate was 14.5% per annum;
 - 6.4 the amount was due and payable on 30 August 2007, however an extension was granted to 31 July 2008;
 - 6.5 in terms of Zambian law an acknowledgement of debt, reduced to writing and signed by the debtors constitutes a cause of action;

- 6.6 likewise a suretyship reduced to writing and signed by the surety/guarantee, the breach thereof, in Zambian law, gives rise to a cause of action.
7. The plaintiff alleges that it has established its cause of action in that the acknowledgement of debt complies with the requirements of Zambian Law and it is now left to the defendant to prove their defence to the plaintiff's claim. The defence raised by the defendants is that the plaintiff has been paid in full alternatively the debt has been reduced by virtue of the fact that the plaintiff became the owner of 2 900 metric tons of maize which the defendants claim constituted payment in terms of the mechanism provided for in the acknowledgement of debt.
 8. The duty to begin was imposed upon the defendants by an agreement by the parties which arose as a result of a pre-trial held prior to the commencement of the trial. Documents were exchanged and handed into court and the defendant called two witnesses, whilst the plaintiff called none. The plaintiff stated in its opening address that it sought judgment on the strength of the acknowledgement of debt which constituted a novation and functioned independently from any other agreements which arose.
 9. It is important to set out that after the evidence of the defendant's first witness, Mr Eloff, the defendant proceeded to amend its plea and this time it averred that the debt had been extinguished by performance or payment. In that performance or payment took place on 31 August 2007 when the debt was reduced by US \$ 623 500.00 and finally on 31 July 2008 the debt was extinguished. The defendant concluded that it had

performed and paid, in that the acknowledgement of debt made provision for mechanism of payment in clause 9.5, read with 9.3 and 9.4. Thus the delivery of the 2 900 metric tons of maize constituted payment in terms of the mechanism provided in the acknowledgement of debt. In saying so the maize became the property of the plaintiff in terms of the stipulations contained in acknowledgement of debt.

10. Only two witnesses gave evidence on behalf of the defendant and the plaintiff closed its case thereafter. Thus the plaintiff places reliance on the acknowledgement of debt in seeking judgment against the defendants, the said acknowledgment being a novation of previous agreement.
11. Mr Eloff testified that 2005/2006 season was particularly a good season in that Dumela produce in excess of 10 000 metric tons of maize. In the next season 2006/2007 Dumela produced 7 500 metric tons of maize. Financing was obtained from three institutions inclusive of the plaintiff.
12. Mr Eloff testified that input finance for the next season was obtained from the plaintiff on the basis that Dumela indicate the number of hectares it intended to plant for that season. Calculations were done according to a formula, application forms were completed and a credit application was completed. The terms upon which the plaintiff was prepared to advance the finance was set out in this later application form. Thereafter purchase and sales agreements were entered into for the sale of the maize to be produced and moneys were advanced by the plaintiff for said production. In the

circumstances Agricultural charges were to be granted and registered.

13. Due to the good relationship between the parties it often happened that money was advanced before the formal documents were completed and registered. In 2008 Dumela was placed under receivership and at that time there was 2 900 metric tons of maize stored at the plaintiff's depot. Eloff testified that records were kept but when the receiver took control, all documents were confiscated by the receiver. Eloff's testimony is that the maize mentioned in the acknowledgment is that maize kept at the depot of the plaintiff.
14. Eloff further testified and read into the record part of an affidavit deposed to by the plaintiff's Mr Ian Mitchell Lindsay which reads as follows: *"It is true that plaintiff advanced the moneys to Dumela to finance the input of crops to the be planted and produced in terms of annexure MIE2 to the defendants answering affidavit. As appears from the said annexure, repayment of the loan was to be made by means of delivery to the plaintiff of the maize to be produced with the input finance. In terms of clause 3.2 the loan had to be repaid, either by delivery of the grain, or by payment of the loan before 30 September 2007..."* .
15. Eloff also made reference to a letter by Mr Kiran Naik, one of the joint receivers, addressed to the plaintiff's attorneys in Lusaka, wherein Naik referred to a letter by the plaintiff's attorney in which the plaintiff claimed to be the owner of the 2 570 metric tons of maize stored at Dumela Farms Ltd (in receivership) which is confirmed by Lindsay in his replying

affidavit to the provisional sentence proceedings. This factor of the plaintiff claiming ownership of the maize is further compounded by the terms of the credit application that was read into the record by Eloff.

16. I set out the portion that relevant from the document read into the record by Eloff " *...This paid out will not be cash flow item, as the value of the transaction will be credited against the summer and winter 2006 debt and asset finance instalments. This value will be settled against his debt as soon as all securities and documentation are in place. The client has already signed the sale contract for the wheat and the purchase and sale agreement for the maize... Ownership of each consignment of maize will not pass to the client until the client has paid the maize in full, including interest and inspection charges. The ownership of the grain whilst in storage vest with Afgri Corporation. "* .
17. Eloff also testified that the plaintiff and Dumela entered into a number of purchase and repurchase agreements. In all such agreements ownership of the maize was to be retained with the plaintiff. He pointed out that the repurchase agreement for the tune of US\$647 520.00, being the credit application in question, is clearly evident in the letter of offer that forms part of the agricultural charge. He emphasised that the plaintiff has not discovered this specific sales contract, which was clearly mentioned as forming part of the agricultural charge.
18. It is relevant to point out that the plaintiff did not dispute the existence of such agreements and did not call any witnesses as regards the particularity of such agreements and the

whereabouts of the last repurchase agreement mentioned above.

19. It was argued on behalf of the defendants that Eloff's testimony established that the plaintiff was the owner of the 2 900 metric tons of maize referred to in the acknowledgement of debt and the plaintiff failed to credit Dumela with the purchase considerations contained in the sale and repurchase agreements. It was submitted that this establishes the defendant's plea.
20. Mr Moonga, an assistant farm manager based at Mukonchi farm testified on behalf of the defendant that during January 2008 there were 109 000 bags of maize stored at Mukonchi farm. Thus there was 5 450 metric tons of maize at this farm when the receiver took over during January 2008.
21. The storage of the bags was as follows: Afgri depot had 58 000 bags; B2 had 20 000 bags; B1 had 1 000 bags and C1 had 30 000 bags. If one converted the bags at Afgri depot by the applicable formula then it would amount to 2 900 metric tons of maize. He also testified that he kept a record of the amount of bags because his bonus was dependant on the yield of crop produced.
22. In 2007 one Moses arrived at the Mukonchi farm to guard the maize on behalf of the plaintiff. When the receiver took over the records he had were confiscated. He was adamant that the 2 900 metric tons of maize stored at the plaintiff's depot comprised of 10% of 2005/2006 harvest and 90% of 2006/2007 harvest. He remained in the employ of the

landowner of Mukonchi farm until 2011 and as such he together with Moses witnessed the maize being removed from the plaintiff's depot.

23. The plaintiff argued that the delivery of the 2 900 metric tons before 31 August 2007 did not constitute payment or performance of the debt in terms of the acknowledgement of debt. As it was signed for an amount of US\$ 920 844.59 on 26 December 2007. Thus the debt only arose on 26 December 2007 and delivery of the maize before the cause of action could not constitute payment of the debt.
24. As at 16 November 2006 the plaintiff confirmed in a credit application on behalf of Dumela farm that the plaintiff had *"purchase(d) from Dumela Farms 2 500 t of maize at \$152/t (\$190 x 80%) on a purchase and sale agreement (\$380 000)..."* The plaintiff was to lease space from Dumela farms to store the maize and ownership was to pass as soon as 100% of the purchase price of the value of the grain was paid. The plaintiff was to resell the maize to Dumela at the price of \$152/t plus costs (interest plus inspection fees).
25. Could the plaintiff under the circumstance become the owner of the maize so purchased?

The receivership that the defendants were placed under was in respect of a debenture that the Zambian National Commercial Bank(" Zanaco") had received from Dumela on 10 October 1994 over all Dumela's property whatsoever both present and future. Two further supplementary debentures that included floating charges were issued in favour of Zanaco on 30 September 1999 and on 10 April 2000 respectively. The

floating charge covered all the property, assets and rights whatsoever and wheresoever of Dumela.

A floating charge in terms of the *Zambian Agricultural Credit Act* ("the act") operated as security over the assets described in the charging document. Now a floating charge "floats" over the assets until crystallization takes place. This occurs at such time that an event of default by the borrower or the appointment of a receiver over the borrower's assets takes place. When the charge crystallises it then attaches to the charged assets. In this instance Dumela defaulted which resulted in Zananco placing the defendants under receivership on 6 February 2008, thereby crystallising the floating charge over all property, assets, and rights whatsoever and wheresoever of Dumela.

Bearing in mind that a borrower can only charge assets he owns, if one creates a charge over assets that one did not own, it amounts to fraud. According to the *Zambian Agricultural Credit Act* priority is given to the rights of the first holder of the agricultural charge, in respect of the time that they were registered. This is in terms of section 7(2) of the said act, agricultural charges shall, in relation to one another, have priority in accordance with the time that they were respectively registered under the act, and an earlier charge will enjoy priority over a later charge.

Section 7(2) reads as follows "Agricultural charges shall, in relation to another, have priority in accordance with the times at which they are respectively registered under this Act: Provided that any agricultural charge created solely to secure the payment of insurance premiums upon farming stock shall

have priority over any other agricultural charge not created for such purpose."

Therefore the charge that was registered on behalf of the plaintiff, which one calls a fixed charge, as it's attached to specific assets, which is pertinent to this dispute, could not have been registered legally in terms of section 7(3) of the act, as there was already a floating agricultural charge in existence, in favour of Zanaco. Dumela was no longer the owner of the assets that it put up in favour of the agricultural charge of the plaintiff. The assets were not Dumela's to assign to the charge in favour of the plaintiff as they belonged, in terms of priority, to Zanaco. In addition the assets were subject to a floating charge of Zanaco.

Section 7(3) reads as follows "When an agricultural charge creating a floating charge has been created, an agricultural charge purporting to create a fixed charge on any of the property comprised in the floating charge shall, as respects the property subject to such floating charge, be of no effect so long as the floating charge remains in force."

In short the plaintiff therefore could not become the owner of assets that Dumela did not possess as they were already subject to an agricultural charge in favour of Zanaco.

26. That being said the defendant cannot under the circumstances prove that ownership of the 2 900 metric tons of maize had passed to the plaintiff, when they concluded the credit agreement, all the purchase and repurchase agreements and the acknowledgment of debt.

27. The defence raised by the defendants is that the plaintiff has been paid in full alternatively the debt has been reduced by virtue of the fact that the plaintiff became the owner of 2 900 metric tons of maize which the defendants claim constituted payment in terms of the mechanism provided for in the acknowledgement of debt. This defence of the defendant cannot stand in the face of what I have concluded above with regards to the agricultural charge that the plaintiff was under impression it had over Dumela.

28. Does a valid contract exist in the form of the acknowledgement of debt relied upon by the plaintiff?

It has been established by the experts in Zambian Law employed by both parties, Mr George Chisannga and Mr Arshad Dudhia ("the experts") who compiled a joint minute which was handed into court by consent, that an acknowledgement of debt, in Zambian Law, constitutes a cause of action. The plaintiff places reliance on this acknowledgment of debt to assert its course of action.

Having established that the defendants did not have the right to contract the assets that they did, does this not make the said acknowledgment of debt invalid? According to section 21(1) of the Sale of Goods Act 1893, applicable in Zambian Law, the sale of goods not that of the owner of those goods amounts to the buyer thereof acquiring no better right than the seller of those goods, if the sale thereof is done without the authority and consent of the owner.

Section 21(1) reads " Subject to the provisions of the Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

The owner is Zanaco and from the documentation and the fact that receivership was enforced by Zanaco it is clear that Dumela did not have authority or consent of Zanaco to enter into the agreement that it did with the plaintiff as regards the goods that were not owned by the defendants in the first place.

29. In terms of section 23 of the Sale of Goods Act, *"when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."* In this instance it cannot be said that the title of the Dumela in the assets had not been avoided as a floating charge had been affected over the said assets. This to my mind reinforced Zanaco's ownership over the assets.
30. Therefore from my understanding no valid contract could have come into existence in the form of the acknowledgement of debt relied upon by the plaintiff.
31. Having established the above it is my conclusion that the document relied upon by the plaintiff to prove its claim against

the defendants is neither a valid document nor agreement and as such the plaintiff cannot rely on same as proof of its claim against the defendants. The claim of the plaintiff falls to be dismissed on the premise that no reliance can be placed upon an invalid document, that being the acknowledgement of debt.

32. Accordingly I make the following order;

29.1 The plaintiff's claim is dismissed with costs.

W. Hughes Judge of the High Court

Delivered on: 3 March 2014

Heard on: 15 August 2013