Judgment No. HB 106/2003
Case No. HC 2203/2002

MICHELLE FILLANINO

Versus

AHMED MOOSA ESAT

And

FERUK MEMENIAT

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 16 OCTOBER 2003

D M Campbell for the applicant
A P de Bourbon SC for the respondents

Opposed Matter

CHIWESHE J: The plaintiff sued the respondents seeking payment of certain sums of money as follows:

"1. The Zimbabwe Dollar equivalent of US23 560,91 converted at the parallel market exchange rate at the date of payment or, alternatively, at the official rate of exchange at the date of payment provided that the official rate of exchange is equal to or greater than the parallel market exchange rate.
2. Interest on the sum of US$23 560,91 at 4.5% per annum, from the 3rd April 2001 to date of payment or, alternatively, at the official rate of payment provided that the official rate of exchange is equal to or greater than the parallel market exchange rate.
3. Cost of suit."

The cause of action arose out of two acknowledgements of debt whose terms are identical. These were signed by the defendants in favour of the plaintiff on 8 May 1996 and on 29 October 1996 respectively. Notable is clause 7 thereof which provides:

"7. No variation of the terms and conditions of this acknowledgement shall be of any force or effect unless reduced to writing and signed by the Debtors and the Creditor."

Clause 7 notwithstanding the parties subsequently purported by oral agreement to reduce the rate of interest from 32% (as provided for in the Acknowledgements of Debt) to 4.5% and to fix the conversion rate in line with the parallel market rates. The Acknowledgement of Debt is silent as to the rate of exchange to be applied. It should be noted that the money of account was expressed in US dollars whereas the money of repayment was expressed in the equivalent Zimbabwe currency. In the absence of a provision governing the rate of exchange to be applied it stands to reason that the parties must apply the official rate of exchange applicable in Zimbabwe. That appears to have been the understanding between the parties prior to the subsequent oral agreement. Their conduct at the time confirms that position.

The defendants have excepted to the summons on the grounds that the cause of action as formulated by the plaintiff includes a claim for repayment of the debt based on the exchange rate obtaining on the parallel market. They contend that the written agreement on which the action is based does not provide for such an exchange rate and that the oral amendment to the agreement is in terms of clause 7 thereof of no force or effect as it was not reduced to writing and signed by the parties. They have not excepted to the amendment reducing the interest rate to 4.5%.

The plaintiff on the other hand argues that he is perfectly entitled to claim payment based on the parallel market rates because by their conduct the parties had waived their right of recourse to the non-variation clause under clause 7 of the agreement. He contends that he would be entitled at the trial to lead evidence to show that there had been by oral agreement a waiver of the non-variation clause. It is only where an agreement contains both a non-variation

clause and a non-waiver clause that such variation would not be permissible, so argues the plaintiff. I am referred in this regard to the following cases, *SA Sentral Ko-op Graanmaatskappy Bpk* v *Shifren en Andere* 1964 (4) SA 760A, and *Agricultural Finance Corporation* v *Pocock* 1986 (2) ZLR 229 (SC).

I was unable to read the full text of the decision in the SA *Sentral Koop Graanmaatskappy* case as the report is in Afrikaans. I gather however from the head note that the question that came for consideration was whether a contract whose terms included a non variation clause providing that "any variation in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect" could be altered verbally. It was held that such contract could not be altered verbally.

In the other case between the *Agricultural Finance Corporation* and *Pocock* the Supreme Court came to a similar decision having considered the effect of a non variation clause operating in conjunction with a non waiver clause. The plaintiff seeks to argue that the acknowledgement of debt in the present case does not in addition to a non variation clause contain a non waiver clause. He argues therefore that in the absence of a non waiver clause there is room for the argument that the parties by word or conduct did waive their rights in terms of the non variation clause.

I disagree. Firstly clause 6 of the acknowledgement of debt provides as follows:

> "6. Notwithstanding any expressed or implied provision in this acknowledgement to the contrary, any latitude or extension of time which may be allowed by the creditor in respect of payment or any relaxation of any of the provisions of this acknowledgement shall not, under any circumstances be deemed to be a waiver of the creditor's rights hereunder."

Clearly this is a non waiver clause. Its terms and conditions are not materially different from those of clause 15 of the agreement in *Agricultural Finance Corporation v Pocock*. Similar arguments were advanced on behalf of the respondent in that case, namely that the appellant by means of a subsequent oral agreement had waived his right to rely on the non variation clauses or alternatively that the oral agreement should estop the appellant from pursuing its remedies for breach of contract. It was held that the appellant's position was unassailable given the existence of a non-variation clause coupled with a non-waiver clause.

Although the oral agreement referred to in that case was held to be nothing more than a *pactum de non petendo* existing alongside and independent of the written agreement and therefore not purporting to vary the written agreement itself, I do not think that that distinction given the terms of the agreement in the present case, would warrant a different conclusion to this case. I am satisfied that on a reading of the agreement and a correct application of the principles of the law of contract, the exception should succeed.

Having come to that conclusion it is not necessary that I consider the second wrung of the exception, namely whether the oral agreement in so far as it sought to establish an arrangement based on the parallel market exchange rate was in fact illegal.

I note that in the two cases cited, it was the creditors who sought to enforce the written agreement and in the case of the *Agricultural Finance Corporation* to rely in addition on a non-waiver clause. The non-waiver clause in the present case applies only to the creditor (the plaintiff) and not to the debtors (the defendants). In other words the debtors are not protected by a non-waiver clause. In my view nothing

much should be read into that position. This is an agreement in which all the rights virtually rest in the creditor, that is the right to recover the debt and to expect timeous payment on the part of the debtors. On the other hand all the debtors have is the obligation to pay in terms of the agreement. They really have no rights to speak of and therefore, nothing to waive. Their obligations are defined by the written agreement. They are entitled to demand that they be treated accordingly. It is difficult to imagine a situation where they may be regarded as having waived the obligation to meet their debts in terms of the written agreement in favour of doing so on terms more onerous than originally envisaged. If that was the intention as agreed by the parties, then surely the written agreement would have been amended in terms of the non-variation clause. Both parties knew or ought to have known of the existence of that clause. In the result the oral agreement to amend the written contract was of no legal force or effect, unless reduced to writing and signed by the parties.

Accordingly, it is ordered as follows:

(1) The exception be and is hereby upheld with costs.
(2) The plaintiff be and is hereby granted leave to file appropriate amendments to his declaration in line with the exception.

Calderwood, Bryce Hendrie & Partners applicant's legal practitioners
Ben Baron & Partners respondent's legal practitioners