

HC 6160/96
SMALL ENTERPRISES DEVELOPMENT CORPORATION
versus
WIN-MAR PRINT AGENCIES
and
PETER T S MUCHANYUKA
and
WINNET N MUCHANYUKA

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 21 and 30 January, 2002

Civil Trial

**Advocate *L Mazonde* for plaintiff
Mr *B Wabatagora* for defendant**

HUNGWE J: The plaintiff issued summons out of this Court claiming damages in the sum of \$901 745,25 together with interest thereon at the rate of 25% *per annum* calculated from 1st June 1996, collection commission calculated in terms of the Law Society Tariff, as well as costs of suit on a legal practitioner and client scale.

The basis of the claim is set out in the particulars of claim and may be summarised as follows.

On or about 29 September, 1995 plaintiff obtained judgment under case number HC 3226/95 against first defendant, Win-Mar Print Agencies (Pvt) Ltd for the return of certain property namely a HAMADA Industrial Printing Machinery, which machinery plaintiff had been leasing to the first defendant. In terms of clause 11.2 of the lease agreement which was entered into between plaintiff and first defendant, plaintiff was entitled to claim damages it may suffer as a result of any breach of the lease agreement by the first defendant.

Plaintiff has suffered damages in the sum of \$907 745,24 due to the first

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defendant's breach of the lease agreement. The second third defendants stood guarantor for first defendant in terms of a deed of suretyship.

At the pre-trial conference it was admitted by the defendants that indeed on 29

September 1995 under case No HC 3226/95 plaintiff obtained judgment against 1st

defendant for the return of the Hameda Industrial Printing Machinery; that the

judgment remained unsatisfactory that 2nd and 3rd defendants stood guarantor for

the 1st defendant, binding themselves jointly and severally as co-principal debtors

for the repayment of all monies due and owing by 1st defendant to plaintiff and to be

liable for all legal costs on a legal practitioner and client scale as well as collection

commission.

Both Plaintiff and defendants called one witness each.

Wilbert Fungara was at the time the plaintiff's branch manager. His evidence was that the affairs of the plaintiff and the respondents were governed by an Agreement entered between plaintiff and 1st defendant on 8 July 1992. A notarial bond had been passed on the HAMADA Industrial printing machine which was the subject of a lease between the parties. The machine remained the property of the plaintiff. The first defendant had breached the lease agreement as he had suffered execution against the leased property. He had failed to notify plaintiff of this serious development. On being called upon to explain the machinery's predicament, second defendant, who is the alter ego of the first defendant admitted that he had fallen into arrears with his rentals which had led his landlord to attach the machinery to satisfy this debt. It was explained to him that should he sign a notice of seizure, plaintiff would be in a position to proceed in terms of the relevant governing Small Enterprises Development Corporation Act Chapter 16 of 1983 and save the machinery from execution. He refused. The plaintiff then approached the first defendant's creditor and debtor with a similar proposal. Machinire, the landlord refused to allude to the proposal relying on the strength of the legal process already noting in his favour. As such, plaintiff was unable to repossess the machinery. It issue process and obtained judgment against first defendant under case no HC 3226/95. Fungira purchased correspondence and notes to substantiate the efforts plaintiff took to save the machinery from execution. In order to safeguard its interests, plaintiff demanded to be issued by the Messenger of Court Interpleader summons. The effect of this was to save temporarily the machinery from the purchaser. When however the plaintiff sought to satisfy its judgment by way of attachment it then discovered that the machinery had already been sold. It received only \$70 681,26 from the eventual sale.

Fungira mentioned that plaintiff suffered a loss in the sum claimed in the summons as a result of the second defendant's conduct which frustrated the plaintiff's

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efforts at rescinding the machinery.

Second defendant gave evidence on behalf of all the defendants.

The thrust of his evidence was to deny the important factual averments by Fungira for the plaintiff.

He disputed that he had frustrated plaintiff's efforts to secure the machinery after his landlord had effected judicial management. He claimed that it was within plaintiff's powers both in terms of the Lease Agreement and the SEDCO Act to effect control over the machinery. He denied that he was asked to sign a notice of seizure by plaintiff's agents. He maintained that all along Sedco was aware of his financial plight and the exposure of the machinery to litigation that he was faced with. He said that he had actually pleaded with officers of the plaintiff to come to his aid to no avail.

He even indicated to the officer at Sedco that he had found a buyer who was prepared to pay at the current market value which could help wipe out his indebtedness to both plaintiff and his landlord. Yet the plaintiff's officers remained unco-operative. He claimed that the reason he had to rely on plaintiff's officers was that the machinery had been locked away and therefore out of his physical control.

In order to find for the Defendants this court would have to disbelieve the plaintiff's witness, Fungira.

Yet he gave the better and more probable version of events. His evidence was well given. It was corroborated by documentary evidence which the Defendants were unable to refute. I refer here to the correspondence which recorded the events concerning then, the responses given by 2nd defendant, the legal process plaintiff resorted to, in order to rescue its property. Fungira was forthright in his evidence and admitted the limitation faced by his office. He described the attitude of the 2nd defendant as less than honest leading plaintiff to seek to repossess the equipment. I accept his version as the more probable one.

Mr Muchinyaka gave his denials of the specific approaches plaintiff made in connection with the machinery.

His conduct from the evidence did not his word.
He would promise to pay off the debt that defendant owed to the landlord but do nothing in that regard. He would promise to come back to brief plaintiff but again did nothing about it. If anybody did not tell the truth about these events, it was the defendant's witness Muchinyaka.

It was argued for the defendants that the plaintiff was the author of its misfortune and therefore not entitled to the damages it claimed. Alternatively because it failed to mitigate its loss, it is not entitled to the sum claimed.

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It was argued for the defendants that by accepting the sum of \$70 681,26 the plaintiff waived its right to claim damages.

I am not persuaded by these arguments for the defendants. First it is important to note the clear terms of the lease agreement which clearly state that the machinery remains the property of the plaintiff. The notarial bond passed over the property serves to emphasize the rights plaintiff enjoyed over the machinery. By refusing to sign the notice of seizure as requested by plaintiff second defendant exposed the plaintiff's rights in the machinery to extinction. He had no right to withhold his consent when the subject matter of the lease was under threat of a judicial sale in execution. On that basis alone the defendants are liable for the damages suffered as a result of the extinction of their rights in the machinery and the resulted prejudice plaintiff suffered.

In any event, the defendants are still liable on another ground. The judgment in case No HC 3226/95 remains unsatisfied. Once judgment is entered unless rescinded, it stands. In the absence of any efforts at challenging it, that judgment forms a sound basis for upholding the claim for damages in this matter. This ground was not advanced by plaintiff but as the admission is given by the defendants, the Court is entitled to pronounce it.

In the result it is ordered against the defendants jointly and severally as follows -

1. Judgment be and is hereby entered for plaintiff in the sum of \$831 063,99'
2. Interest in the sum of \$831 063,99 at the rate of 25% *per annum* calculated from 1st June, 1996 to date of payment;
3. Collection commission calculated in terms of the Law Society tariffs;
4. Costs of suit on a legal practitioner and client scale.

Guni Wabatagore & Company, *applicants' legal practitioners*
Scanlen & Holderness, *respondent's legal practitioners*