

HC 10557/00

PETER LEWIS BAILEY N.O.

Versus

EDMORE TAPER MAZAMBANI

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, September 2002 and 14 August 2003

TRIAL CRIMEMr *W. Ncube*, for the plaintiffMr *C. Chinyama*, for the defendant

HUNGWE J: Plaintiff who is the liquidator of the United Merchant Bank, sued the defendant, a farmer, for the payment of \$1 336 371, 12 being the balance of a loan granted to the defendant in terms of a facility letter dated 29 September 1997, interest at the rate of 27% from 1st February 2002 to the date of payment in full; collection commission as well as costs of suit on an attorney and chest scale.

In his plea the defendant admitted that at one stage he was indebted to the plaintiff in the various sums claimed. He however pleaded that he discharged his liability in full by paying through a stop order facility registered with United Merchant Bank through the bank's agent; Boka Tobacco Auction Floors. He averred that this was a condition precedent to the grant of the loan. In replication the plaintiff denied that Boka Tobacco Auction Floors was an agent of the bank. Plaintiff claimed that the registration of the stop order was a condition precedent to the grant of the loan. Plaintiff denied that defendant's indebtedness to it was discharged.

At the first pre-trial conference held on 25 May 2002 before BLACKIE J it was recorded that the conference was postponed to 26 June 2002

to enable defendant to produce to plaintiff proof of payment of the plaintiff's claim to Boka Tobacco Auction Floors. At the reconvened pre trial conference on 26 June 2002 it was recorded:

"Defendant states that he now has an affidavit that all

payments due in terms of the registered stop order have been paid. This affidavit will be used as evidence. The matter is referred to trial on the issues set out in the Defendant's issues as amended on the document."

That document which his lordship amended in long hand states as follows:

"Issues

1. Whether or not Boka Tobacco Auction Floors was an agent of the defendant or United Merchant Bank.
2. Whether or not Defendant repaid the loan in full through Boka Tobacco Auction Floors."

At the commencement of the trial it was agreed that as the onus was on the defendant to prove that he had discharged his liability to the United Merchant Bank, the duty to begin was on him. He gave evidence himself and called two witnesses.

His evidence was to the following effect. He had applied for a loan facility with the UMB bank and was granted the facility to draw down \$650 000,00 and \$245 000,00 for the 1997/98 farming season. As a precondition to the grant of the loan an applicant had to register a stop order against a given crop. He grew tobacco. His stop order would operate in favour of the United Merchant Bank against deliveries he made at Tobacco Auction Floors. As this instruction was given as a precondition by the bank, he considered the Boka Tobacco Auction Floors as the bank's agent.

Between April and August 1998 he delivered tobacco through transporters to Boka Tobacco Auction Floors. They would, by arrangement, be paid by Boka Tobacco Auction Floors on making the

delivery. At the end of each sale he was furnished with a tobacco sales sheet, which gave a narration of the amount paid for the tobacco sold and amounts remitted to the bank in compliance with the stop order.

On his last delivery which was on 13 August 1998 he had been furnished a sales sheet which reflected a deduction of \$38 702,12. He deposited this deduction as, according to him, by then, he had fully discharged his total indebtedness to the bank. In order to convince the floor he took his tobacco sales sheets there and was

referred back to Rudo Boka whom he says was running both the bank and the floors. He left the sheets with her. When he returned the next day he could not find Rudo Boka nor was he able to retrieve his sheets. His endeavours to get this sorted out were unsuccessful.

Exhibit I is the last tobacco sales sheet he says erroneously reflected a payment of \$38 702-12 by the floor to the bank on his behalf. It also reflects that he does not owe anything to the bank. His enquiries with the stop order office showed that he did not owe any institution anything.

In his estimation the tobacco deliveries would have yielded at least \$1 4million enough to have covered what he owed United Merchant Bank. This is why the last sales sheet reflects no outstanding balance.

The defendant gave his evidence that evidence, uncorroborated, did not however push his case. The Systems Analyst at Tobacco Sales Floor (TSF) Marshall Makomborero gave evidence in support of the defendants' contention that there is no outstanding balance against the defendants' growers' number in the TSF stop order section. According to him this means that the defendant has not whatever

indebtedness was outstanding to institution in favour of who a stop order is registered.

Under cross-examination he admitted that he was unable to say whether at any point, any amount of money was ever deducted from the proceeds of tobacco sales by the defendant. The reason for this was that there was no information at TSF on the defendant.

Robert Kayera's evidence was that he had delivered tobacco on behalf of the defendant in 1998. He carried 5 loads with each load containing 38 to 40 bales whose weight he does not know. He was unable to agree the value of the tobacco he delivered in pursuance of the defendant's instructions.

His evidence did notthe defendant's cause.

The first issue tois whether Boka Tobacco Auction Floors acted as the bank's agent in accepting deliveries of the defendant's tobacco crop or as an agent for the defendants.

The defendant relied on the provisions of the letter of facility for the proposition that as he had delivered to Boka Tobacco Auction Floors

a tobacco crop whose value exceeded his liability to the bank to the bank's agent, he had fully discharged any indebtedness that may have been lawfully outstanding. In any event the bank by making it a condition for the loan, it impliedly appointed the floor as its agent.

It seems to me that it is incorrect to say that the registration of a stop order against the defendant's tobacco crop was a precondition to the grant of the loan. In Exhibit 2 the loan facility letter, reference CS a stop order appears under paragraph 6 dealing with security. This seems to suggest that defendant would provide security, as the loan

granted a material general covering bond over movables for \$700 000,00, a stop-order against the tobacco crop, and cession of the paprika crop.

Even if one were to be so generous as to accept that a provision for security against a loan advanced is a condition for the grant of that loan, that to me is not sufficient to imply that the bank appointed BTAF as its agent. Like any other contract, the contract whereby the agent is appointed maybe entered into not only by express language written or oral, but by conduct. In addition to an actual agency, implied by conduct; there may be circumstances where no agency in fact exists, but the conduct of one person prevents or estoppels him from denying that some other person is his agent. Where one person by words or conduct which could reasonably be expected to mislead another person does in fact mislead him into behaving that a third person has authority to act for him, then if the said person enters to his prejudice; into a transaction with the third; first person is bound by the transaction.

Munzali v Smith 1929 A.D. 382.

In this case had defendant ... that on a number of occasions the bank allowed BTAF to recover money from him but only failed on the one and subsequent occasion to pass it on to it, then it could have been estoppel from denying that the money was paid to its agent. In that case agency by estoppel would have clearly been established. It on the facts of the present case, has not been so

established.

I therefore find that the BTAF was not an agent of the bank. But the first hurdle for the defendant is to show that he delivered a quantity of tobacco; and that the quantity of tobacco was sufficient to cover his indebtedness. Defendant had in the second pre trial conference indicated that he had an affidavit to be used at trial

indicating that all payments due in terms of the registered stop order have been paid. No such affidavit was produced at trial. No reference was made to the existence of such an affidavit. In short, the evidence which was said to exist was not shown to exist. Thus on his own evidence, the defendant has failed to prove that he has paid off his indebtedness.

I have indicated, if it had been shown that he delivered a given amount of tobacco to the Boka Tobacco Auction Floors, then the question of agency would have arisen. Defendant has not shown what quantities of tobacco he delivered besides the 19 bales weighing 1459kg reflected in Exhibit I.

Exhibit one reflects that for that season the defendant delivered only 19 bales. The value for that delivery was paid over to the bank. There is no other evidence of any other deliveries to BTAF by defendant. None of the witnesses called by the defendant would testify as to the quantities of the tobacco delivered by defendant to BTAF.

The plaintiff's case is that the defendant has not fully discharged his indebtedness to the bank. The defendant has not shown that he has. In the premises there is entered judgment in the following terms:

- "1. Defendant is to pay to plaintiff the sum of \$1 338 371,12 together with interest at the rate of 27% per annum from 1st February 2000 to date of payment in fully capitalized at the end of each calendar month.
2. Costs of suit."

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Coghlan, Welsh & Guest, legal practitioners for the plaintiff

Messrs *Chinyama & Partners*, legal practitioners for the defendant