HH 39-03
HC 10151/00

TANGANDA TEA COMPANY (PRIVATE) LIMITED
versus
AMTEC (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 5, 6 and 19 March, 2003

A P de Bourbon SC for plaintiff
R Fitches, for defendant

SMITH J: The plaintiff (hereinafter referred to as "Tanganda") issued summons claiming from the defendant (hereinafter referred to as "Amtec") the payment of $2 595 556,92 as being due and owing by Amtec, in respect of monies overpaid by Tanganda during the period November, 1998 to December 2000. It is Tanganda's case that the said amount was paid in consequence of invoices and statements sent by Amtec in respect of fuel allegedly supplied by Amtec in the *bona fide*but mistaken belief that the fuel had in fact been supplied by Amtec, when in fact it had not been supplied. Amtec denies that the fuel was not supplied and further denies that the payment was made *indebito*.

Tanganda called only one witness, being Henry Nemaire, its Chief Internal Auditor, who testified as follows. Amtec's garage in Bulawayo has been supplying Tanganda with fuel for its vehicles since before 1996. When he joined Tanganda in 2000 he was asked to audit the fuel account at the Bulawayo Branch. Tanganda had a system whereby pre-numbered requisition forms for fuel were printed. When a driver required fuel he was supplied with a requisition form addressed to the supplier, duly completed with the name of the driver and the registration number of the vehicle. When fuel was supplied, the registration number of the vehicle, together with the quantity of fuel, and oil if any, and the cost thereof, and the date were entered on the invoice, which was then signed by the driver and the petrol attendant. The driver was given the top copy of the invoice. The second copy was retained by the petrol attendant and was later sent to Tanganda attached to the statement showing the amount owed. At the Bulawayo Branch log sheets for each vehicle in use were kept. There was a separate sheet for each month which showed the mileage travelled for the

month in question, how much of that was on official business and how much on private business, the quantity of fuel and oil drawn and the cost thereof. At the end of the month the figures in each column were totalled and the consumption of fuel used for each kilometre travelled was calculated.

Nemaire said that in carrying out the audit exercise, for each vehicle used at the branch the invoices for fuel supplied to that vehicle, the requisitions issued for fuel and the log sheets were pulled out from the files and tabulated. In respect of the month of May 1997, every instance of fuel supplied was supported by a requisition form, an invoice and an entry in the log book. Similarly, for the month of July 1997, every supply of fuel was fully supported by the appropriate documents. It was in March 1998 that the system started to leak. He had done a full and complete analysis for each month from November 1998 to October 2000. There were 24 volumes, one for each month, of the documentation he had extracted from the files. His investigations showed that there were many instances where fuel was supplied without any requisition form being issued. Furthermore, there were instances when the registration shown on the invoice was that of a motor vehicle which was a non-runner or which had been damaged in an accident and been written off. In some instances the signature on the invoice which purported to be that of the Tanganda driver was different from what was accepted as his usual signature. In many instances, fuel shown on an invoice as having been supplied to a particular vehicle was not reflected on the log sheet. If the amount of fuel allegedly supplied was to be inserted on the log sheet, the resultant figure would show that the consumption of fuel per kilometre travelled was very high. In some instances there were two invoices showing that the same quantity of fuel had been supplied, which quantity was not a round figure like 20 or 30 litres. The amount claimed from Amtec was the total of amounts shown in 822 invoices issued during the period in question which were not supported by a requisition form or an entry in a log sheet.

Nemaire was subjected to a lengthy cross-examination. It was put to him that the central system at Tanganda was slack. He replied that no system was perfect. The system then in force met the minimum standards required by the audit profession but it has since been improved.

Amtec called three witnesses. The first was Mr Moyo, the manager of the forecourt, who testified as follows. All the Tanganda vehicles which came to the Amtec garage for fuel were clearly marked with the Tanganda logo. In addition, the driver would be wearing the Tanganda uniform. The drivers were well known to the attendants at the garage. Requisition forms were required sometimes but not at the weekends or after hours. There was no list of Tanganda vehicles but such vehicles were easily recognised. The attendants were never instructed that requisition forms were required before any fuel would be supplied to a Tanganda vehicle. When the fuel was supplied the attendant would hand the invoice book to the driver and the driver would fill in the registration number of the vehicle and the quantity and cost of the fuel supplied. He would then append his signature, as would the attendant. The top copy of the invoice was then torn out of the book and handed to the driver.

Under cross-examination Moyo said that he was not aware that Tanganda had printed requisition forms for fuel. He had come across some, but not often.

The next two witnesses called by Amtec were petrol attendants. Their evidence was similar to that given by Moyo. They knew the Tanganda vehicles, because of the logo, and the drivers, because always they wore a Tanganda uniform. They supplied fuel on demand, without requiring a requisition form, and then the driver completed the invoice which was then duly signed.

Mr *de Bourbon*submitted that Tanganda was entitled to reclaim the money paid to Amtec for fuel that was not delivered by virtue of the *indictio indebiti*. The money was paid by virtue of a mistake of fact. The mistake was made in all innocence. It was part of the agreement between the parties that the Tanganda drivers would hand over a requisition for the fuel required. When the requisition forms that were printed for supplies from Amtec ran out, Tanganda then started using requisition forms made out to another supplier, Forrester. If Tanganda had stopped using the requisition form system it would not have started using forms made out for another supplier. In the summary provided by Amtec of the evidence it would lead, it is said that the Manager of the Amtec Bulawayo Branch would give evidence as to the arrangements made between the parties regarding the supply of fuel to Tanganda. However, the only witnesses called by Amtec were the forecourt manager and two petrol attendants, none of whom was able to give evidence as to such arrangements. Therefore, the evidence of Nemaire is not disputed. In most cases when fuel was supplied, the Tanganda drivers handed over a requisition form. On that form it is printed that the form is to be returned with the suppliers' invoice. That was not done by Amtec. When the statements and invoices were received by Tanganda for payment, each invoice was checked by the accounts staff to ensure that it contained the registration number of a Tanganda vehicle and a signature which purported to be that of a Tanganda driver. There was no negligence on the part of Tanganda in making the payments. It took all reasonable steps to ensure that the payments were due. The testimony of Nemaire showed that very comprehensive investigations were made to establish which invoices related to fuel that had not been supplied to Tanganda. Where there was any doubt, Amtec was given the benefit thereof. Nemaire's evidence was not challenged. He was an impressive witness and very credible. The witnesses called by Amtec were, on the other hand very unimpressive. Their evidence was largely irrelevant and what little was relevant could not be relied on.

Mr *Fitches*argued that in **Wessels Law of Contract**, 2 ed at paras 3688 and 3690 it is stated that a party cannot bring a *condictio indebiti*if there has been inertia on its part. Tanganda had the means of getting knowledge as to whether or not the payments were due and carelessly refrained from doing so. It did too little too late to remedy the position. Mr *Fitches*said that the *quantum*of the

claim by Tanganda is not disputed. It is only liability which Amtec disputes.

A payment made to a third party can be recovered under the *condictio indebiti*if three essential elements are satisfied : firstly, the sum paid must not have been due; secondly, there must not have been a reasonable cause for the payment even if it was not due; thirdly, the person paying must not know that the money is not due - see **Wessels Law of Contract**2 ed para 3637. In *Govender*v *Standard Bank of S A Ltd*1984(4) SA 392 ROSE-INNES J at 401 D-F, after referring to *Rahim*v *Minister of Justice*1964(4) SA 630 (A), said -

> "The learned Judge of Appeal found that the messenger's conduct was inexcusably slack and that accordingly the State could not avail itself of the *condictio indebiti*. Despite *Voet's*explanation that a mistake concerning what is common knowledge or concerning one's own affairs is *supina aut affectata*, there are many instances where ignorance of one's own affairs is not unreasonable and will satisfy the requirements of a *condictio indebiti*, especially where the matters concerned are remote or involved. *Union Government*v *National Bank of SA Ltd (supra), Divisional Council of Aliwal North*v *De Wet(supra)*. The state of authority does not leave it open to question that in order for a plaintiff to recover by *condictio indebiti*, the mistake causing the payment must be reasonable and therefore justifiable or excusable. Not all negligence excludes the *condictio*, since 'excusable negligence' does not preclude the claim. Gross negligence and negligence of a certain kind, or degree of culpability, to render it *aut supina aut affectata*or 'inexcusable' is thus a defence to the *condictio indebiti*. *Rahim's*case has been followed in a number of decisions."

The law relating to the *condictio indebiti*and the circumstances in which money could not be recovered thereunder was considered by MCNALLY JA in *Harare City*v *Zimucha*1995 (1) ZLR 285 (S). At 291-292 the learned Judge of Appeal said -

> "The law as to when money paid by mistake can be recovered by the *condictio indebiti*has been considered in a number of cases. It used to be said that money paid in mistake of law was not recoverable, whereas money paid in mistake of fact was recoverable. That distinction has been abandoned by the South African Appellate Division in *Willis Faber Enthoven (Pty) Ltd*v *Receiver of Revenue & Anor*1992 (4) SA 202 (A), approved in *Ellis NO*v *CoT*1994 (1) ZLR 423 (S). The reasoning of HEFER JA in the Appellate Division judgment is, to my mind, compelling, and I respectfully adopt it. He concludes that the real test for allowing recovery is whether the payer has been 'inexcusably slack'.
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> On this last point of whether or not the payer was 'inexcusably slack', there was a dissent by VAN DEN HEEVER JA. And indeed the definition of 'inexcusably slack' has caused problems. In our courts there is the judgment of GREENFIELD J in *Calder*v *SA Mutual Life Assurance Soc*1972 (2) RLR 46; 1972 (4) SA 285 (G). In South Africa the varying views are summed up by ROSE-INNES J in *Govender*v *Standard Bank of SA Ltd*1984 (4) SA 392 (C) at 401 *et seq*. Not all would go so far as saying that the negligence must be such as to evince an

> intention to waive the right of recovery. But it is generally accepted that not every degree of negligence on the part of the payer bars him from recovering. And it is probably fair to say that our law is tending more in the direction of the English law as applied in England, Australia and New Zealand, where negligence is irrelevant. After all, however negligent the payer is, the fact is that the recipient is unjustly enriched and the payer is unjustly impoverished.
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> Therefore it would seem right that the money should always be repayable unless equity suggests that a greater wrong would be done by ordering repayment than by declining to do so".

MCNALLY JA did say that the thoughts he expressed relating to the *condictio indebiti*were *obiter*, because the case he was dealing with involved a *condictio sine causa*. However, I consider, with all due respect, that they expressed clearly the principles which a Court should apply in dealing with the *condictio indebiti*.

In *Georgias*v *ZDB Financial Services Ltd*2000 (2) ZLR 447 (H) CHATIKOBO J also considered the requisites of a *condictio indebiti*. After referring to passages in *Calder v South African Mutual Life Assurance Society* (2) RLR 46 (G) and *Rahim v Minister of Justice* (4) SALR 630 (A) at 451 C-D he said -

> "What emerges from these passages is that the mistake of fact which is relied on to justify relief in terms of the *condictio indebiti*, must neither be negligent, slack nor studied; it must not be grossly negligent nor must it involve the plaintiff's own affairs or the affairs of others that are generally known. The absence of these prohibitory factors in a claim based on the *condictio indebiti*is ultimately a matter of evidence. When a claimant fails to put before the court evidence which rebuts the existence of these factors the incidence of the onus becomes decisive against him. In context, the court has no way of knowing if there was negligence on the part of the applicants, or, if there was, whether such negligence was gross or studied and whether the applicants were in any way slack in the way they did or failed to ascertain the full extent of their liability."

Tanganda has led evidence to show the system that was in place to ensure that the claims for payment from Amtec were checked. To verify the amount claimed in the statement, copies of the invoices relating to each individual amount claimed were checked to ensure that the registration number of the vehicle was shown and that the vehicle belonged to Tanganda. In addition, the invoice had to bear two signatures, one purporting to be that of the driver, being a Tanganda employee, and the other that of the attendant who supplied the fuel. The system was not fool-proof. Tanganda could have improved its system by requiring that a copy of the requisition form be supplied with the invoice. It did not do so. However I do not consider that its failure in that regard can result in one concluding that it was "inexcusably slack", or

"grossly negligent". It is clear that one or more petrol attendants at Amtec saw the loophole and exploited it to steal a large amount of money. It is not possible to say whether or not any driver of Tanganda connived with the petrol attendant. It is not necessary, for the determination of this case, to identify the culprits.

Having regard to the evidence before the Court, I consider that the moneys paid by Tanganda to Amtec for fuel that was not supplied should be repaid.

It is ordered that the Defendant pay the Plaintiff -

(a) $2 595,556,92 with interest thereon at the prescribed rate of interest from 14 December 2000 to date of payment; and

(b) costs of suit.

Wintertons, legal practitioners for plaintiff
Coghlan, Welsh & Guest, legal practitioners for defendant