HC 11755/99

T.A. HOLDINGS LIMITED
versus
DAVID GOVERE

HIGH COURT OF ZIMBABWE
SMITH J
HARARE 5 September 2001, 9 and 16 April 2003

Ms *E. Mushore,* for the plaintiff
Mr *D. Mehta,* for the defendant

SMITH J: The defendant (hereinafter referred to as "Govere") was employed by the plaintiff (hereinafter referred to as "TA") as Managing Director of Aroma Bakeries, which was a subsidiary of TA. He left his employment on 3 February 1999. On that date Govere signed an acknowledgement of debt to TA in the sum of $920 008,55 in respect of loans granted to purchase vehicles, which was payable on 2 July 1999, together with interest thereon on at the rate of 3% above the bank's prime lending rate from time to time. The due date for repayment was extended to 2 August 1999. When Govere did not pay the amount due under the acknowledgement of debt TA issued summons.

Govere admitted being indebted to TA in the sum of $737 583,44. He claimed that TA had agreed that the net book value of the vehicle he had purchased would be reduced by 20% and therefore he was liable for the lesser amount. However, Govere claimed that his indebtedness to TA was extinguished by set-off, in that the parties had entered into a restraint of trade agreement in terms of which TA undertook to pay him $1 169 138,97. Govere filed a counter-claim for that amount. After setting off what he alleged he owed TA, he claimed payment of $431 555,53 from TA.

TA called only one witness, Mr Bhekithemba Ndebele. He testified as follows. TA had sold a car to Govere in August 1997, payment for which was to be made in monthly instalments over a period of 4 years. When Govere left TA he had not paid for the car. By that time he had

received two motor vehicle loans. On 3 February 1999 he and Govere signed a number of documents. Govere signed an acknowledgement of debt in which he acknowledged that he was indebted to TA in the sum of $920 008,55, to be paid on 2 July 1999. He undertook to pay that amount and accepted that any amounts outstanding after 2 July 1999 would attract interest at a rate of 3% per annum above the bank's lending rate from time to time. Govere had not paid the amount due neither had he returned the car to TA. In a letter dated 7 July addressed to TA, Govere said that he should have a longer period in which to repay the loans and that he had been offered a 20% reduction representing the depreciation component for 1999. He had replied to Govere saying that he agreed that Govere would pay for the car or return it to TA on 2 August 1999 and the net book value of the car at 31 December 1998 would be reduced by 20%, being the depreciation for 1999. Despite a rigorous cross-examination Ndebele was not shaken and stuck to his testimony.

Govere then testified as follows. He had been employed as Managing Director of TA for 3 years and was Deputy Managing Director of TA for 2 years. Differences arose between him and the management at TA and it was mutually agreed that his employment would be terminated. As a result of the discussions between him and the chairman of TA, he met Ndebele on 3 February to work out his terminal benefits and resolve other issues. He signed the acknowledgement of debt relating to the motor vehicle loans he had received. In the clause relating to repayment it was provided that TA would either reclaim the car or else claim payment therefor. If it did reclaim the car, then the net book value of the car as at 30 May 1999 would be applied to set-off the car against any monies paid by him in terms of the acknowledgement of debt. Ndebele had then worked out his monthly package, including basic pay, pension, medical aid, vehicle and fuel allowance, arriving at a figure of $135 032,81. Multiplying that by 4 for the 4 remaining months of his employment and adding in amounts for fees, bonus and

cash in lieu of leave, the total came to $1 016 221,47 as being his terminal benefits. That was the amount that would be paid to 31 May if his service contract was going to be terminated. Also, he had a mortgage with a building society which Ndebele agreed TA would continue to pay until the end of the year. Ndebele agreed that an amount of $16 500 would continue to be paid to the building society each month until 1 January 2000. He and Ndebele also signed a memorandum of agreement in restraint of trade. In that agreement it was acknowledged that he had acquired a detailed knowledge and high degree of expertise in all aspects of the businesses of Aroma Bakeries and its business connections and that TA perceived definite dangers to the profitability of Aroma Bakeries if he competed with it in any way. Accordingly, TA agreed to pay him $1 169 138,97 and in return he agreed that for a period of 2 years he would not engage in any business that was in competition with Aroma Bakeries. Govere said that the figure agreed on had been reached after much discussion. He was not prepared to accept anything less than $1 000 000. He understood that the money paid to him would not be taxable in his hands.

Govere said that at the meeting with Ndebele on 3 February he also signed a document headed "Renunciation of Claims". He acknowledged receipt of $1 016 221,47 from TA "being my terminal benefits relating to my resignation" from TA. He confirmed that the amount was in final settlement and that he had no further claims against TA or any of its subsidiary companies. The figure referred to was solely in relation to the terminal benefits for the remaining 4 months of his contract of employment i.e. February to the end of May. It did not refer to the mortgage bond payments. When Ndebele contacted him on 7 July about the return of the car, he said that he had not returned it on 2 July because he thought that they had made a mistake about when it should be returned and also he wanted to know what the figure for depreciation would be. He felt he should have been able to keep the car for 6 months after the end of May when his

contract would have terminated. He then wrote to Ndebele and received a reply extending the date for the return of the car to 2 August and saying that the net book value of the car would be reduced by 20%, being the depreciation for 1999. He went to TA offices on 10 July to pay for the car and to get the money he was owed in terms of the restraint of trade agreement. He thought that either there would be an exchange of cheques or that they would agree on the specific amount each party owed and, as he was owed more, TA would give him a cheque for the difference. Unfortunately the meeting was not a pleasant one and no agreement was reached so he left. He had no further contact with TA until the summons was served on him.

Govere was subjected to a lengthy cross-examination in the course of which he gave the following responses. In terms of the service contract he had entered into with TA, his employment was for a period of 3 years terminating on 31 May 1999, but either party could terminate the contract before that date on giving the other party 3 months notice. As regards who would be liable for tax on the $1 016 221,47 paid to him, Govere was very evasive and contradictory. As regards the amount payable in terms of the restraint of trade agreement, it was Ndebele who came up with the figure of $1 169 138,97. He did not ask Ndebele how he arrived at that figure. He just accepted it as being reasonable. He had signed the form headed “Renunciation of Claims” soon after Ndebele had calculated his terminal benefits and before they had agreed on the amount payable by TA under the restraint of trade agreement. His statement that he had no further claims against TA related only to his terminal benefits. In his service agreement with TA there was a provision restraining him, during and after the termination of his employment, from divulging information pertaining to any members of the TA Group, including the working of any process or invention. He had never contacted anyone at TA to ask about the payment due in terms of the restraint of trade agreement. He felt it was not necessary, as long as he would keep the car. When he and TA met

the amounts each owed to the other could be set-off. He had had dealings with TA about buying some of its companies and he did not want to upset his relationship with TA by claiming the amount due under the restraint of trade agreement.

Ndebele was recalled to give evidence in rebuttal of the counter-claim. He testified as follows. He had signed the restraint of trade agreement on behalf of TA. That agreement had been entered into in order to ensure that Govere would not be taxed on the amount that was being paid to him. Had the money been paid as terminal benefits, Govere would have had to pay tax thereon but TA would have been able to debut the amount so paid from its taxable income. As it was paid in terms of the restraint of trade agreement, Govere did not pay tax thereon but TA could not deduct that amount from its taxable income and therefore it paid the tax on the amount concerned. All the documents had been signed in his office on 3 February. Govere had been given a cheque for $1 016 221,47 in full and final settlement of all claims he had against TA.

Under cross-examination Ndebele gave the following responses. The amount of $1 016 221 specified in the Renunciation of Claims differed from the $1 169 138,97 specified in the restraint of trade agreement because of the amounts paid by TA to the building society on behalf of Govere. The 20% reduction in the value of the car was offered if the car was returned on 2 August 1999. As the car was not returned, Govere was not entitled to any reduction.

As regards the claim by TA for $920 008,55 in respect of the motor vehicle loans, Govere signed an acknowledgment of debt in which he undertook to pay that amount plus interest as claimed. His only defence in regard to this obligation is that TA agreed that the net book value of the vehicle would be reduced by 20%. I accept Ndebele's explanation that that concession was dependent on Govere paying for the vehicle or returning it by 2 August 1999. He failed to do either and so he is required to pay the full amount. Even if it were to be held that

Govere was entitled to a 20% reduction in the net book value of the car, that would not mean that the debt of $920 008,55 would be reduced by 20%. In the acknowledgment of debt signed by Govere the capital sum is computed as being made up of three elements – leased assets ($7 933), motor vehicle loan 1 ($279 873) and motor vehicle loan 2 ($632 202,55). Therefore it does not reflect the book value of the car.

As regards the counterclaim, Govere's contention is that he is entitled to $1 169 138,98 in terms of the restraint of trade agreement. Ndebele was adamant that the restraint of trade agreement was in fact used as a vehicle to pay Govere his terminal benefits in a manner which would avoid payment of tax thereon by Govere. It would be TA that in effect paid tax on the amount concerned because it would not be able to claim it as a deduction from its taxable income. I consider that Ndebele was a far more credible witness than Govere. Furthermore, the probabilities support Ndebele. It would be very unusual for a party fixing an amount payable in terms of a restraint of trade agreement to fix an amount of $1 016 21,47. In such cases the amount fixed is invariably rounded off to the nearest $100 000. It is extremely unlikely that the amount would be fixed down to cents. Furthermore, if Govere was owed more than $1 million by TA, why did he not try to collect it within a month or two after leaving TA. He made no demand, or even request, for the money until the summons was served on him. The first time he raised the claim was when he filed his plea and counter-claim. In his evidence-in- chief Govere said that the figure was arrived at after much discussion. However, in cross-examination, he said that Ndebele had just come up with the figure, which he accepted because he thought it was reasonable.

The final nail in the coffin of Govere is the renunciation he signed on 3 February 1999. In that he acknowledged receipt of the cheque from TA and went on to confirm that the money he received was "in full settlement" and added "I have no further claims against" TA or its subsidiary companies. There is no qualification that it is only claims to

terminal benefits that he is referring to. The document cannot possibly be interpreted so as to give it a limited meaning. It is headed "Renunciation of Claims" and that is all embracing.
Accordingly the counterclaim must be dismissed.

It is ordered that:

1. The Defendant pay the Plaintiff $920 008,55 with interest thereon at 3% per month above the prime lending rate from time to time of Stanbic Bank (Private) Limited.

2. The Defendant's counter-claim is dismissed.

3. The Defendant pay the Plaintiff's costs on the legal practitioner and client scale.

Atherstone & Cook, legal practitioners for the plaintiff.
Mhiribidi, Ngarava & Moyo, legal practitioners for the defendant.