DAIRIBORD MALAWI LIMITED
versus
PITIEL MUDYANADZO

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 11 July 2007

Civil Trial

Advocate *H Zhou,* for the plaintiff
A Muchandiona, for the defendant

GOWORA J: The defendant was employed by Dairiboard Zimbabwe Limited. On 1st January 1998 he was seconded to the plaintiff as a Finance Manager and Company Secretary for a period of two years, subject to annual review by the plaintiff's managing director. Apart from the question of remuneration due to the defendant, the contract of assignment also provided for the defendant to be provided with a vehicle as part of his remuneration package with the plaintiff. The plaintiff has now instituted proceedings against the defendant for the recovery of monies it states are due in respect of that vehicle. The parties agreed that there were no factual disputes between them and requested that the matter be dealt with as a special case in terms of Order 29 Rules 199 and 202 of the Rules of the High Court. To that end they filed a minute which stated the agreed facts and spelt out the issues for determination by this court. I set out hereunder the contents of the minute.

> On 1st January 1998 whilst employed by Dairiboard Zimbabwe Limited (DZL) as a Finance Controller the defendant was seconded by DZL to assume the position of Finance Manager and Company Secretary with the plaintiff, a sister company of DZL. A copy of the contract of assignment appears from pages 1-7 of the bundle of documents marked
> "Defendant's Bundle of Documents".

During the defendant's secondment to the plaintiff the parties hereto entered into a motor vehicle loan agreement. A copy of the agreement appears at pages 8-10 of the Bundle of Documents prepared by the defendant.

On the 1st March 2003 Defendant's secondment to the plaintiff was terminated by DZL for reasons which are not relevant to this action. Defendant was recalled by DZL.
Following the termination of the secondment the Defendant duly left the plaintiff with the motor vehicle which is the subject-matter of the loan agreement, and rejoined DZL IN Zimbabwe.

At the time that the defendant's secondment to the plaintiff was terminated the defendant still owed to the plaintiff the sum of nine hundred and eighty-nine thousand three hundred and fifty-five Malawi Kwacha (MK 989 355.84), which amount has not been paid to date. That amount is the subject of the action in this case.

The question for the Honourable Court's determination is as follows:

Whether, in view of the fact that the defendant was transferred to DZL on 3rd March 2003, the plaintiff has the locus *standi* to claim from the
defendant the balance due under the motor vehicle loan agreement.

The resolution of this matter turns on what interpretation should be given to the clause in the loan agreement relating to the transfer of the defendant from the plaintiff to a new employing dairy. There is no dispute that there is money still owing on the vehicle loan scheme, and further to that, that even though the defendant was recalled by DZL, no payment has made by the latter in respect of the defendant's indebtedness on the vehicle loan scheme. The pertinent passage in the agreement is couched in the following terms:

> "In the event that the employee is transferred to another region, the arrangement is ceded by DML to the new employing dairy upon the new employing dairy making good what is owed to DML. The loan recipient will then make repayment to the employing dairy without prejudicing to the company."

It seems to me that the interpretation of the paragraph hinges on what meaning should placed on the phrase "is ceded". It is

common cause that there has been no formal cession of the plaintiff's right in terms of the contract to DZL. The defendant takes the view that there is no need for formality as the cession would have been effective when he was transferred from DML and that therefore the plaintiff is non suited in that it does not have locus *standi* to sue by virtue of his transfer.

The plaintiff contends on the other hand that a cession is a bilateral juristic act whereby the cedent transfers his right of action to the cessionary with the latter taking the place of the former as creditor.

The agreement exhibited to the court by the defendant is the loan agreement between the parties. DZL is not a party to that particular agreement. The only agreement where DZL is a party is the agreement of assignment. The deed of assignment does make reference to a vehicle, which would be provided to the defendant at the expense of the plaintiff and which the defendant would, if an offer was made to that effect, purchase the same from the plaintiff. The agreement of assignment does not make mention of the possibility of a cession of the plaintiff's rights to DZL. The loan scheme under which the defendant obtained a vehicle from the plaintiff is not referred to in the deed of assignment. In his plea the defendant averred that in terms of the loan scheme, upon the defendant being transferred to another region the loan scheme would be ceded to the transferee region and such transferee would then make good what would have been owed to the plaintiff at the time of such transfer. The defendant avers that since he was transferred from the plaintiff to DZL on 1st March 2003, then the motor car loan scheme was ceded by the plaintiff to DZL in terms of the scheme. Consequently the plaintiff no longer had locus *standi* to sue for recovery of monies owing under the loan scheme.

A cession is a bilateral juristic act whereby the cedent transfers his right to the cessionary, with the latter taking over as creditor. The transfer is accomplished by means of an agreement concluded between the cedent and the cessionary arising out of a *justa causa* from which the intention of the cedent to transfer and for the cessionary to become the holder of the right to claim appears or can be inferred. The intention of the parties has to be deduced from the agreement that has been entered into by them. In this instance, there is no agreement produced whereby the plaintiff has evinced an intention to cede its rights under the loan agreement to DZL. See *Johnson v Incorporated General Insurance Ltd.*[1]

It is correct that in the loan agreement the plaintiff indicated that it ceded its right to claim repayment of outstanding amounts from the entity within the region that the defendant would be transferred to, assuming that such transfer occurred during the currency of the loan agreement. In order to succeed on the basis of an agreement of cession between the plaintiff and DZL the defendant had to allege and prove the existence of such agreement. No such agreement has been

[1] 1983 (1) SA 318 (AA)

produced or proved and there is in fact no contract of cession between the plaintiff and the said DZL. The defendant has not suggested that a separate contract of cession exists between the plaintiff and DZL.

The parties to an agreement of cession are the cedent and the cessionary. A cession cannot be created through an agreement concluded between the creditor and his debtor. This is why notice of the cession to the debtor is not necessary in giving validity to the cession agreement. All that has been placed before this court is the loan agreement itself. In the absence of the existence of such an agreement, there can be no cession.

The defendant has invited the court, in determining the dispute, to correctly interpret the contract between the parties in order to give effect to the intention of the parties as embodied in the agreement itself. It is further contended on behalf of the defendant that the golden rule of interpretation is to give to the language in the document its ordinary and grammatical meaning unless to do so would result in an absurdity or repugnancy or inconsistency with the rest of the instrument. Mr *Muchandiona* has stated the principle in the interpretation correctly. See *Coopers v Bryant.*[2]

The point I believe he has missed though, is that I do not have the agreement of cession between the plaintiff and DZL before me which means that when refers to 'parties' he is clearly not including the new employing dairy in that category. Yet such agreement would have been the cornerstone to the defence of any attempt to sue the defendant where plaintiff had in fact abandoned its right to do so to a cessionary. It is not even the contention of the defendant that such an agreement in fact exists or was concluded. If it was then in order to rely on the cession the defendant should have proved it the court.

I will however examine the loan agreement to ascertain whether or not the reliance on it by the defendant in raising the issue of plaintiff's lack of locus *standi* in instituting the present proceedings is legally sustainable. The contents of the loan agreement in so far as it makes to a cession of outstanding amounts as at the date that the defendant is transferred to another entity with ties to the plaintiff have already been stated above. It only remains for me to seek to give meaning to the words in that clause. I believe that the pertinent clause in the paragraph is the following-

> " the arrangement is ceded by DML to the new employing dairy upon the new employing dairy making good what is owed to DML."

It is not always easy to embark upon the interpretation of a clause in a document and I undertake this task with humility and due deference to those jurists who have done so before me. What I can deduce from the clause is that the arrangement of loan facilities between the plaintiff and the defendant can be ceded if the defendant were to leave employment by being transferred to another dairy within

[2] 1995 (3) SA 761

the region. The cession of the amounts owed by the defendant under the loan agreement will be ceded by the plaintiff. Such cession is however dependant upon the new employing dairy making good to the plaintiff what is owed to it by the defendant. It is therefore not the transfer itself that brings the cession agreement into being.

As I have already observed above, there is no evidence in the papers placed before me that indeed such cession took place as between the plaintiff and the new employing dairy, in this DZL. More importantly however, there is no evidence that DZL, in order for the cession to become effective, had undertaken to make good to the plaintiff whatever it was owed by the defendant. I do not have here, evidence of the cession by the plaintiff of its rights under the loan agreement. The clause in the loan agreement has not created the cession agreement between the plaintiff and DZL. It is only an agreement between the plaintiff and the defendant, subject to the fulfillment of the conditions stated therein, to then create a cession with the new employing dairy. Before those conditions are fulfilled there can be no cession by the plaintiff of its rights under the loan agreement. The reliance placed by the defendant on the clause to defeat the plaintiff's claim is consequently ill-conceived.

I turn now to deal with the aspect of locus *standi* raised by the defendant. The plaintiff extended loan facilities to the defendant. The defendant has not disputed that he owes money to the plaintiff arising out of the agreement concluded between the parties. The defendant has not proffered any defence as it relates to indebtedness arising from the loan facilities. The plaintiff clearly has a direct and substantial interest in the subject matter which is before the court. See *Zimbabwe Teachers Association & Ors v Minister of Education.*[3]

It is my view consequently that based on the absence of a contract of cession as alleged by the defendant, the plaintiff has not given up its rights to claim from the defendant what it is owed by him. In the circumstances I find that the plaintiff has locus *standi in judicio* to bring these proceedings against the defendant.

As there is no dispute on the amount claimed in the summons the plaintiff is in my view entitled to judgment as prayed for therein. I note that interest is claimed at 14% per annum which is the amount agreed in the loan agreement. No representations have been made by either of the parties herein as to the rate of interest. I assume therefore that this is the rate chargeable against the Malawi Kwacha.

In the result I make the following order;

IT IS ORDERED THAT:

1. The defendant shall pay to the plaintiff the sum of Malawi Kwacha K 989 355 .84 together with interest thereon at the rate of 14% per annum with effect from 31 August 2003 to the date of payment in full.

[3] 1990 (2) ZLR 48

2. The defendant shall pay the plaintiff's costs.

Dube Manikai & Hwacha, legal practitioners for the plaintiff
Danziger & Partners, legal practitioners for the defendant