INTERNATIONAL FINANCE CORPORATION

versus

ITACHI PLASTICS (PVT) LTD

and

GODFREY KAITANO

and

VIOLET CHIWONISO KAITANO

and

TAO TRADE (PVT) LTD

and

OBERT TAONWA MHERE

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE 19 March & 19 November 2008

Civil trial

Mr O. Mutero, for the plaintiff,

Advocate Morris, for the defendants,

CHATUKUTA J: This is a claim by the plaintiff for payment by the defendants jointly and severally one paying the other to be absolved, of:-

(a) US$257 003, 91, being the capital amount;

(b) US$112 248, 94, being interest;

(c) US$85 220, 43 being penalty charges;

(d) Interest on the sum of US$257 003,91 at the rate of 15%.

The claim arises from a loan advanced to the 1st defendant. The following facts are common cause. On or about 27 May 2006, the plaintiff and 1st defendant entered into an agreement in terms of which the plaintiff advanced the 1st defendant the sum of

US$310 000,00. The loan was to be repaid in US dollars in 14 instalments commencing from October 1997. The last payment was due on 15 October 2003. Interest was to accrue on the loan at the rate of 15% per annum with effect from 30 June 1996. In the event of 1st defendant falling to pay the interest on the due date, penalty charges were to accrue thereon at the rate of 16% per annum. The 2nd, 3rd, 4th and 5th defendants bound themselves jointly and severally as sureties and co-principal debtors. The 1st defendant defaulted on making due and punctual payments of both the capital amount and the interest thereby incurring penalty charges.

It is also common cause that following its failure to service the loan, the 1st defendant was technically insolvent. It was required, under the agreement to seek the approval of the plaintiff if it intended to assume enter into any transaction which would increase its debts. In 2002, the 1st defendant purchased a property holding company called Maydean Chemicals (Private) Limited for $18 million. In March 2004, it purchased machinery from TS Intertrade (Pty) Limited at a cost of US$202 700. Payment of the machinery was to be made in local currency. The above purchases were not approved by the plaintiff as was required under the loan agreement.

It is further common cause that it is the responsibility of the Reserve Bank of Zimbabwe (the RBZ) and the Minister of Finance to issue a notice to the public pronouncing any shortage in foreign currency. No such notice was issued any of the relevant authorities.

The present suit was resisted and in their plea, the defendants pleaded impossibility of performance, stating that the failure to make the timeous payments was due to no fault of theirs. They contended that there was known shortage of foreign currency which rendered payment in foreign currency impossible . They tendered an amount of $64 250 977.50 as discharged of the outstanding balance of US$257 003.91.

At the commencement of the trial, the parties agreed that the following were the issues for determination:

1. Whether it is impossible for the defendants to repay the debt in US dollars; and
2. Whether defendants are entitled to counter-*prestate per aequipollens* and settle the debt as tendered in local currency.

1. Whether it is impossible for the defendants to repay the debt in US dollars

The 2nd defendant gave the following evidence on behalf of all the defendants. In 1997, the Zimbabwe dollar collapsed. The exchange rate for the US dollar escalated making it difficult to effect payment. In the early 2000, the invasion of farm resulted in a decline in the farming activities. The 1st defendant relied on the agricultural sector in its operations. The decline in the farming activities resulted in one out of its four machines not functioning at optimum level. This again made it difficult to service its loan obligation. After 2000 the RBZ introduced a priority system in allocation of foreign currency. Debt repayment was not classified as a priority. The 1st defendant made more that 60 applications for foreign currency. Only one application was successful.

The purchases that the 1st defendant made were intended to improve its operations resulting in a corresponding improvement in the servicing of the loan. The Maydean company was purchased with money which has been set aside to secure foreign currency to pay off the loan. However, as it was difficult to get foreign currency, it was considered viable to use the money to purchase the company. The amount would have obtained US$25 000. The Korean machinery was purchased at zero deposit and would pay for itself from the money generated from its use. The purchase was intended to boast production. The 1st defendant would then export the produce and pay the plaintiff on time.

The 2nd defendant further testified that the RBZ issued directives prioritized the allocation of foreign currency on the inter-bank market. The witness produced two such directives issued on 21 October 2005 and 2 October 2007. The witness testified that debt servicing was at the bottom of the list in the 2005 directive. It did not appear at all on the 2007 priority list.

However, under cross examination, the 2nd defendant conceded that the 1st defendant had difficulties in making repayments from the onset. He testified that the difficulties arose from the fact that the company had just commenced operations. It therefore had heavy expenditure and cash flow problems. He further conceded that it was not correct to say that the 1st defendant failed to make payments as a result of bottlenecks created by the RBZ. He testified that the production rates did not make it possible to

service the loan. The concession by the 2nd defendant was consistent with his evidence in chief.

The 2nd defended conceded that the plaintiff was seeking judgment in foreign currency and not immediate payment. He conceded that there was the possibility that foreign currency could be available in the future.

The second witness for the defendant was Casper Chibanga. He testified as follows. He was employed by CBZ Bank Limited who were the 1st defendant's bankers. He was in charge of the 1st defendant's portfolio. Between 1997 and 2000 foreign currency was easily available. One would walk into a bank with invoices and depending on availability, one could immediately obtain foreign currency. Difficulties were felt from around October 2005. After October 2005, the auction system was introduced. A user or importer would apply to the RBZ through his or her bank. The bank would then bid at the auction on behalf of the user or importer. Later on, the Reserve Bank introduced the twinning arrangement. The arrangement enabled those who had foreign currency but required local currency to twin with those who needed the foreign currency and had local currency. Identification of a twinning partner could be made by the bank or by the individual seeking the foreign currency. The 1st defendant did not approach the bank for assistance in this regard. The arrangement was abolished in 2007. After the abolition, the allotment system was introduced in theory but had not yet been operationalised. Priority was given to those requiring foreign currency for imports. Those requiring foreign currency for debt settlement were not considered a priority. Allocation of foreign currency was at the discretion of the RBZ and there was nothing to preclude the defendant from making an application to the RBZ for special consideration.

Under cross examination the witness confirmed that default in making payments between 1996 and late 2000 could not have been as a result of foreign currency shortages as foreign currency was then easily available. He conceded that although it was general knowledge that there was a shortage of foreign currency, neither the RBZ or Minister of Finance had issued notices stating that there was such a shortage. He further conceded that although there was a shortage of foreign currency and it was very difficult to obtain the same, it was not impossible to obtain the foreign currency.

Under reexamination of the witness the defendants produced a letter from CBZ Limited dated 12 March 2007 to the effect that no foreign was available at the time of writing of the letter. However, the witness conceded that letter did not state that it was impossible to get foreign currency in the future.

The plaintiff called Godfrey Tapela, its Investments Officer responsible for supervising the 1st defendant's portfolio. He testified that despite having defaulted in making payments to the plaintiff and being technically insolvent, the 1st defendant continued to incur capital expenses. He stated that the purchase of Maydean and the Korean equipment was an indication that the plaintiff had the resources to make the required payments. The plaintiff produced through this witness a letter dated 25 January 2005 written by the 2nd defendant in which the latter justified the purchases made by the 1st defendant. The witness testified that the letter arrayed the plaintiff's fears that the 1st defendant would not be able to service its loan. It was testified that the 2nd defendant undertook in that letter to repay plaintiff's loan between 31/01/05 and 31/12/05. It was the witness' evidence that the undertaking was a clear indication that 1st defendant had the capacity to service the loan in foreign currency and that performance was therefore possible.

1. Whether it is impossible for the defendants to repay the debt in foreign currency

It is my view that the defendants have failed to establish that it was impossible for the 1st defendant to service the loan due to foreign currency shortages. The 2nd defendant testified in his evidence in chief that failure to service the loan was as a result of low production and not foreign currency shortages. Despite attempts by *Mr Morris* to redirect the witness to the question of foreign currency, the concessions made by the witness in cross examination were not supportive of the contention that it was impossible to service the loan. The failure to service the loan was from the onset, when the agreement was concluded. At the time obtaining foreign currency from the banks was not a problem. In fact in 2006 the 1st defendant obtained and made a payment in foreign currency. The payment was made despite the fact that debt servicing was at the bottom of the priority list for foreign currency payments published in the RBZ Directive

of 21 October 2005. It is interesting to note that despite the directive of 2 October 2007 which did not prioritise debt servicing, on 12 March 2007 the RBZ again approved the 1st defendant's application for foreign currency to service its loan to the plaintiff. On 25 January 2005 the 2nd defendant made an undertaking to the plaintiff to make payments in foreign currency. If it was impossible to obtain foreign currency surely the 2nd defendant would not have made that undertaking.

As observed by CHINENGO J in *Victor Mujubeck Chigara v Japhet Phaskani Msimuko* HH 167-2002 at p9

> "In any case, an acute shortage of foreign currency, even if it existed, does not mean a complete shortage or complete unavailability. Some people must be able to secure foreign currency, even in a situation of acute shortage."

Mr. Tapela did in fact confirm that some of the plaintiff's debtors in Zimbabwe were indeed settling their debts in foreign currency. In the result, I find that the defendants failed to establish that it is impossible to discharge their obligations.

2. Whether the defendants are entitled to perform per-aequipollens

It was submitted by *Mr. Morris* that as the defendants had contended that repayment of the loan *in forma specifica* had become impossible, it followed that there must be performance *per aequipollens*. The defendants tendered payment in Zimbabwean dollars.

Mr. Mutero, for the plaintiff, submitted that the tender of payment in local currency does not comply with the terms of the contract. It was submitted that the contract between the parties stipulated that performance should be in US dollars. The requirement was made in view of the fact that the plaintiff is based in USA and has no operations in Zimbabwe. It therefore has no use of local currency which is not convertible on the international market.

Performance must be *in forma specifica* unless a party has proved impossibility. (see *Lowveld Leather Products (Private) Limited v International Finance Corporation Limited & Anor* SC 114/2002, Watergate (Private) Limited v Commercial Bank of

Zimbabwe SC. 78/05 and *Zimbabwe Development Bank v Zambezi Safari Lodges (Private) Limited & Ors* HH 95/2006. I am inclined to agree with *Mr. Mutero* that the defendants did not established impossibility of performance. As a result of the failure, it appears to me that there is no basis for this court to vary the terms of the agreement between the parties and order performance *per aequipollens.*

It is therefore ordered that the defendants be and are hereby ordered jointly and severally, one paying the others to be absolved to pay to the plaintiff-

(a) the sum of US$257 003.91, being the capital amount;

(b) US$112 249.94, being interest on the capital amount;

(c) US$85 220, 43 being penalty charges;

(d) Interest on the sum of US$257 003.91 at the rate of 15% per annum with effect from 19 April 2006 to the date of payment; and

(e) Cost of suit on a legal practitioner and client scale.

Sawyer & Mkushi, plaintiff's legal practitioners
Atherstone & Cook, defendants' legal practitioners