POWERSPEED ELECTRICAL LTD
versus
ENFIELD ZIMBABWE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 31 October 2012, 29 November 2012

Trial Action

E.T. Moyo, for the plaintiff
T Maanda, for the defendant

DUBE J: This is contractual a claim for a debt and interest arising therefrom.

The plaintiff sold various electrical goods to the defendant on credit. The defendant fell into arrears amounting to $22968-00. On 5 May 2010 the defendant's erstwhile managing director signed a final demand agreeing to interest being charged on the overdue account at 4% per month. The plaintiff commenced charging interest on the outstanding amount and payments made were appropriated first to interest and then to the capital amount. At the time of trial, the amount claimed was $12162-00.This figure was revised down to $11 751-00 following adjustments to the account.

The defendant denies that it agreed to pay interest on the outstanding debt and disputes that the debt was one bearing interest. The defendant further avers that the payments it has made so far suffice to liquidate the debt. The defendant denies that its erstwhile Managing Director had authority to enter into an agreement on interest without approval of the other directors. It further denies that the final demand is an agreement to pay interest and that it is binding on the defendant as it is not signed by a representative of the plaintiff. That there are errors in the calculations and the amount claimed has not been proved.

The plaintiff called two witnesses. John Breyten Reid is a financial director for the plaintiff. His evidence is to the following effect. The defendant purchased stock from the plaintiff and a total of $22968-00 was outstanding as at May 2010.When the defendant could not settle the debt, the account was suspended. The parties agreed that the defendant pay interest on the account after the plaintiff made a demand for that money. He communicated with Mr Wallbridge who was the Managing Director of the defendant at the time who

verbally agreed with the plaintiff that the defendant would pay interest on the account at 4% per month on the outstanding balance. The account had been suspended and after the agreement to pay interest, the credit facility that had been suspended was resumed and defendant continued trading with the plaintiff. There was a verbal agreement between the parties before the final demand was reduced to writing. The oral agreement was entered into between Mr Moran and Mr Wallbridge after Mr Moran consulted him. The written agreement is in the form of a final demand to pay interest. He produced a final demand generated by the plaintiff's credit department dated 5 May 2010 which was signed by Mr Wallbridge. Subsequent to the final demand and the summons, certain payments were made. The plaintiff began to charge interest on the outstanding debt and the payments made on the account were appropriated first to interest. The outstanding amount was US$12 162-00 and was revised downwards to $11 751. The plaintiff adjusted the claim to comply with the *induplum* rule.
He explained that the agreement is not signed by the plaintiff because the plaintiff needed it signed by the defendant only. The witness gave his evidence well.

The next witness to be called is the defendant's former managing director Ross Grantly Wallbridge. He left the defendant company in January 2011 after he refused to take a reduction in salary.

His evidence is as follows. He was the Managing Director of the defendant at the time that the debt in issue was created. The defendant approached the plaintiff to supply it with goods for resale. The defendant owed US$22 968-00. He was approached by Mr Moran an employee of the plaintiff and the two discussed the overdue account and further that a final demand would be issued and interest would be charged on the overdue account. He signed the final demand and agreed to interest being charged in his capacity as the Managing Director and had a discretion over the issue. He had authority to sign the final demand by virtue of his authority as the managing director. After he agreed to interest, the plaintiff continued to supply them. Interest was supposed to be calculated from 5 May 2010 on $22 968-00. The final demand refers to outstanding amounts accrued before this date. Any subsequent purchases are not covered by this final demand. The witness accepted that it was a requirement that there be two signatories on purchase orders but contended that this practice was introduced after he had already signed the final demand.

He resigned from the company because they wanted him to take a reduction in salary. He refuted claims that he was testifying in favour of the plaintiff because he had left the defendant's company and had a labour case pending against the defendant. He also refuted

the suggestion that he was conniving with the plaintiff .He contended that his labour issue with the defendant has nothing to do with the parties' dispute. He stated that he has no current dealings with the plaintiff and no personal interest in the matter. The witness gave his evidence well. I found the witness to be fair and honest. He conceded a number of points against the plaintiff's case.

The defendant called Gift Marufu who is the current Managing Director of the defendant company. His evidence is as follows. He was the financial director of the defendant when this final demand was signed by Mr Wallbridge. The defendant never agreed to pay interest at the rate of 4% over the debt. When Mr Wallbridge signed the final demand he was not authorised to sign the document. A system had been put in place requiring all matters that have financial implications on the company to be authorised by two signatories. This policy was put in place in December 2009. The purpose of the new system was to ensure control of all purchases and financial matters including the final demand in issue. The witness was not involved in the agreement concerning interest. He testified that the signature of Mr Wallbridge is not binding on the defendant as he had no authority to sign the final demand on his own. He contended that even assuming that the final demand is binding, it is improper for the plaintiff to claim interest over new purchases made after 5 May 2010. He testified that Mr Wallbridge left the defendant company after a series of loses which emanated from his management style. He deliberately sacrificed the company by putting it into the liability as he was aware that the company had no capacity to pay even the capital amount at the time. As a result the defendant decided to reduce the salaries of all board members.. The company is not liable to pay the amount claimed as there is no agreement between the parties to pay interest of 4% over the debt. He was not sure how the figure of $11751.00 was arrived at. The witness admitted that the relationship between him and Mr Wallbridge was sour. The witness was at times evasive.

The issues referred to trial are as follows:-

"1 whether or not the plaintiff is entitled to charge interest at the rate claimed in the summons, namely 4% per month.

2. whether or not the defendant is liable to pay interest claimed by the plaintiff".

It is common cause that there was a debtor creditor relationship between the parties in respect of a thirty day credit facility where the defendant would draw stock from the plaintiff. As at May 2010 the defendant owed US$ 22 968-84 and Mr Wallbridge, signed a final

demand acknowledging the debt and agreeing to interest at 4% per month. The defendant continued to do business with the plaintiff.

The final demand is on a Powerspeed Electrical letter head and is for US$22 968-84. Part of the letter of demand reads as follows:-

> "In accordance with our agreement this overdue amount will attracted a 4% interest charge per month.
>
> Your credit facilities are hereby suspended until full settlement of overdue monies is received by Powerspeed Electrical Limited. You have 7 calendar days in which to settle this overdue amount or further steps, as is deemed necessary by Powerspeed Electrical Limited will be taken to recover these monies……"

The final demand refers to an agreement were the parties agreed that the overdue account will attract a 4% interest charge per month. Not much detail is known about the agreement referred to in the final demand. The defendant submitted that when the defendant's Managing Director signed the final demand, he had no authority to enter into the arrangement in that he failed to get another director to counter sign and authorise the final demand. The plaintiff contends that they were not aware that he did not have the authority to enter into such an agreement. The final demand was signed by Mr Wallbridge in his capacity as the Managing Director of the defendant company. The plaintiff proposed to charge interest at 4% and the defendant by signing the final demand agreed to be bound by its contents. Its conduct signifies assent to the terms proposed. Any person who deals with a director or manager of a company who did not have actual authority to enter into a contract with third parties may be excused from making assumptions that internal company procedures have been followed.

This position is well captured in s 12 of the Companies Act [*Cap 24:03*]. The section reads as follows:-

> "12 **Presumption of regularity**
>
> Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—
>
> (a) that the company's internal regulations have been duly complied with….."

This section has been interpreted in a number of cases. In *Royal British Bank* v *Turquand* (1856) 6E and B 327 it was held that even if a director of a company did not have actual authority to enter into a contract to bind third parties, he had ostensible authority by virtue of his office to so act. The defendant's erstwhile managing director held himself out as having authority to represent the company when he signed the final demand. If the internal

procedures of the defendant company were not followed, the rule in the Tarquand case applies in this case. The court is satisfied that Mr Wallbridge had ostensible authority to bind the defendant.

The next question is whether a binding contract was entered into. The final demand that the plaintiff relies on is not the ordinary contract where both parties append their signatures to an agreement. It is signed and agreed to by the defendant and is not signed by a representative of the plaintiff. It originates from plaintiff's credit department .The fact that the final demand was on plaintiff's letter head should not be an issue but rather the import of the contents of the letter of demand and the intention of the parties when the contract was signed. The arrangement between the parties is recorded in clear and unequivocal terms. Mr Wallbridge appended his signature thereby acknowledging the terms of the contract. The fact that the plaintiff's representative did not append its signature is inconsequential. The acknowledgement by the defendant that it owes the plaintiff constitutes concurrence to pay interest on the outstanding balance at the rate of 4%.

Another consideration is the conduct of the parties after the signing of the final demand. The approach that this court will adopt is the one followed in *Levy* v *Banket Holdings Pvt Ltd* R&N 98 where TREDGOLD CJ in relying on the remarks of CENTLIVRES, J.A in *Collen* v *Rietfontein Engineering Works,* 1948 (1) SA 413 (AD) F said the following,

> "in considering whether a contract is concluded between two parties, a court is not interested in the state of mind of the parties considered in the abstract. It must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said or done."

After the signing of the final demand, supply of goods resumed. What can be inferred is that credit facilities resumed because the defendant agreed to pay interest. The defendant continued to service the debt. A credit guarantee arrangement was also put in place. The defendant did not express any disquiet about the charges. The final demand amounts to an acknowledgement by the defendant that it owes and is an agreement to pay interest. There is no doubt in my mind that a binding contract was entered into between the parties.

The final demand relates to an amount of $22 968-00. The defendant continued to service the debt. The plaintiff originally claimed an outstanding balance of $12662-00. This figure was reduced by the sums of $60-00 and $351-00 being interest which it stated was

over claimed leaving a balance of $11751-00. The final demand states that "this overdue amount will attract a 4% interest charge per month". The date from which interest would be levied is not specified. The claim for interest is limited to $22968-00 which is the capital amount and interest carrying amount. The claimable interest does not in terms of this agreement extend to debts incurred after the final demand. Mr Wallbridge conceded that it would be wrong to charge interest on any purchases after 5 May 2010. The concession was properly made. It makes sense to me that this arrangement should take effect from the date of agreement which is 5 May 2010.

The plaintiff levied interest for the months of March and April 2010 in the amounts of $434-00 and $880-00 respectively totalling $1314-00.The defendant conceded in its submissions that this interest was charged in error and suggests a deduction of this figure from the amount claimed leaving a balance of $10437-00.

The interest to be charged was limited to $22968-00 which is the interest bearing amount. Mr Wallbridge conceded that it would be wrong to charge interest on any purchases after May 2010. Again, the concession was properly made. The statement of account, Exhibit 2, outlines all transactions from March 2010 to October 2011. The statement does reveal that that the plaintiff calculated interest including the new purchases, contrary to the agreement between the parties. As more purchases were made, interest was being charged both on the amount due and on the subsequent purchases. Despite that the interest calculations were challenged, the plaintiff made no effort to explain and or do a breakdown of these figures in order to refute the assertion that interest was charged in respect of the new purchases. Instead the plaintiff contended that the burden was on the defendant to prove that it owes less than what is claimed or nothing at all. The plaintiff does not deal directly with the defence allegation in its submissions but shifts the onus onto the defendant. It is wrong to try to shift the onus onto the defendants when the plaintiff has not established how it arrived at the figure claimed first. No attempt was made to demonstrate how the calculations were arrived at. I am concerned about the cavalier approach the plaintiff adopted in the presentation of its case. Simple recalculations of the interest payable for June and July 2010 reveal that interest was calculated inclusive of the new purchases. For example, in order to arrive at interest of $923.00, for the month of June, June purchases amounting to 115 were added to the capital amount of 22 968 in order to get a total of 23,083. The interest was calculated at 4% as follows.

23083 x 0,04 = 923

This figure includes interest on new purchases.

In the month of July interest payable was calculated as follows.

July purchases amounted to 2110 and were added to 25 193 to give a total of 25193.The interest was calculated at 4% as follows,

25193 x 0.04 = 1007.72, this was rounded off to 1008.-00.

This approach is clearly wrong. If interest had been calculated on the interest carrying amount of $ 22 968-00 as agreed, the interest levied per month for May and June 2010 would have been 918,72 for both months. There is no doubt in my mind that interest was calculated contrary to the agreement that was in place. As more purchases were made, interest was being levied on the amounts due and on the subsequent purchases. The basis of the calculation of the interest was wrong and as a result all the figures are distorted and incorrect.

I have not bothered to recalculate the total interest based on the interest carrying amount because it is not my function. All I have done is to show that the approach adopted in calculating the interest owed was wrong. Ultimately it is not known what amount of money is owed, if any. It was the plaintiff’s duty to ensure that it put correct figures before the court. The plaintiff dismally failed to do that.

I am unable to find that the plaintiff has proved its case on a balance of probabilities.

The plaintiff’s claim is dismissed with costs.

Costs follow the event.

Scalen& Holderness, plaintiff’s legal practitioners
Maunga, Maenda & Associates, defendant’s legal practitioners