RUSITU AGENCIES (PRIVATE) LIMITED
versus
PETER FUNGAYI KANGARA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 21, 22, 23 and 24 November, 1 and 2 December 2011 and 16 January 2013

Civil Action

J.B. Wood, for the plaintiff
G. Machingambi, for the defendant

MAVANGIRA J: The plaintiff's claim against the defendant is for the sum of US$14 287 in respect of which the defendant signed an acknowledgment of debt. The plaintiff contends that the said amount is due to it for cigarettes sold by it to the defendant. The defendant on the other hand alleges that the acknowledgment of debt relied upon is a forgery and denies being indebted to the plaintiff.

The issues that were referred for trial were the following:

"(a) Whether the defendant is indebted to the plaintiff in the sum claimed or at all.

(b) Whether the defendant signed the acknowledgement of debt that forms the subject of the plaintiff's claim.

(c) Whether the signature on the said acknowledgment of debt is that of the defendant".

One Elijah Michael Chiwara was the plaintiff's first witness. His evidence was to the following effect. He is the plaintiff's Managing Director. The plaintiff company is in the business of distributing cigarettes manufactured by British American Tobacco Zimbabwe Limited (BAT). The plaintiff is supplied with cigarettes from BAT on a 7 day credit basis. The plaintiff in turn sells the cigarettes to its customers on a cash basis and also on 7 days' credit to approved stockists. The plaintiff has been dealing with the defendant for a long time and has been supplying cigarettes to the defendant on a 7 day credit invoice. Upon payment for the supply the plaintiff would supply the defendant with his next order. The witness also

said that in order to place an order the defendant would normally phone the plaintiff's salesman who would then deliver the required stocks to the defendant's designated point of his choice.

The witness said that the plaintiff's claim in this matter arises from two invoices. The defendant made part payment on the first invoice and promised to pay the balance two days later. Because he had run out of stocks the defendant successfully pleaded with the plaintiff's salesman to give him another supply on 7 days credit basis. The witness got to know of this when the salesman, one Vincent Bushu (Bushu), advised him about the non-payment by the defendant. The witness telephoned the defendant and they agreed to meet at the defendant's shop in Norton. The witness went with Bushu, the salesman. The defendant was not at his shop. When he contacted the defendant on his mobile phone the defendant said that his vehicle had broken down on his way from Mhondoro to Norton. The witness and Bushu went and they brought the defendant and his wife back to Norton. The defendant's shop was very busy and so they discussed the matter whilst they were in the vehicle where the defendant's wife left them as she went inside the shop.

The witness said that he asked the defendant whether he was aware that payment was overdue for two invoices; this being for a balance on a previous invoice and the full amount on what was then a current invoice. He also asked the defendant how he was going to liquidate his indebtedness. The defendant agreed that he owed the monies and said that as he had no stocks left he was planning to sell his house which he had already advertised in the papers. He said that the defendant pleaded with him for more time to raise the money as the responses to the advertisement were slow. The witness explained to the defendant that as the plaintiff was an agent of BAT, it also needed to pay back to BAT within its own 7 days credit period. The witness said that he asked the defendant if he would mind signing an acknowledgment of debt which he would then be able to show to BAT as the reason for the plaintiff's failure to pay within the given time. The witness pulled a piece of paper out of his folder and on it he wrote down the defendant's details that were furnished to him by the defendant. The details included the defendant's full name, his identification number and his residential address, details which the witness said he did not know before. The witness said that he asked the defendant to read what he had written down and to sign the document. The defendant was happy with the contents and he signed. The witness asked the defendant if he had any objection to Bushu being a witness to his signing of the document and the defendant said that he was agreeable. Bushu signed. The witness and Bushu left thereafter. They never

received any payment from the defendant who kept saying that it was turning out to be difficult to find buyers for his house.

The acknowledgment of debt produced by the witness reads:

> "I Peter Fungayi Kangara ID. 47-089667V47 resident of Stand No. 3891 Mhofu Street Nharira Suburb Norton hereby acknowledge debt of $14,287.00 (Fourteen thousand two hundred eighty seven dollars only) for purchases of cigarettes from Rusitu Agencies on 2nd October 2010 including balance of $1,717.00 (One thousand seven hundred and seventeen dollars only prior to 2nd October 2010 which was due within 7 days (Seven days) from date of Invoice for payment. (*sic*)
>
> Signed by. Peter Fungayi Kangara
>
> Proprietor of Super Groceries
>
> Signature: (signature)
>
> Cell No. 0772931174
>
> Date: 14 October 2010
>
> Witness: Vincent Bushu 66-054469K-66 (signature)"

The witness gave clear evidence and was not shaken in cross examination. He gave a clear account of what happened and his involvement in the matter. He was a credible witness.

Vincent Bushu was called next. He testified to the following effect. He is a sales representative of the plaintiff company and has been so for 7 years. The defendant has been their customer for two years and was on a 7 day account. The witness would first collect from the defendant the money for the previous invoice which had to be settled first before he could supply him with any further stock that he may then order and which would be reflected on the next invoice. On 22 September 2010 the witness supplied the defendant's manager, one Kaunda, with stock after he had settled the previous invoice. On 2 October 2010 at Pamuzinda Lodge he met with the defendant's manager who paid for part of the consignment supplied on 22 September 2010, leaving a balance of US$1 717. As Kaunda wanted more stock, the witness contacted his superiors and was given the go-ahead to give him another supply as he had paid a large proportion of the amount owed on that invoice. He had paid US$10 430. Kaunda asked for a receipt for him to show his employer, the defendant, that there was an unpaid balance. After talking to the defendant on the phone, Kaunda told the witness to come to the shop on the Monday to receive payment of the balance. When the witness supplied the stock to Kaunda, Kaunda did not sign for it. The witness spoke to the defendant over the phone and asked if he could sign for the invoices to show that he agreed

with the stock supplied and the balance on the previous invoice. The defendant asked the witness to come to the shop on the Monday for him to sign the documents. The witness said that on the Monday he went to the defendant's shop where the defendant signed for the invoices and agreed on the balance for the previous invoice as well as the then current one. The defendant did not pay the balance owing citing poor sales at the shop. The defendant advised the witness to contact him on the Wednesday which he did. The witness said that on the Wednesday the defendant said that he had no money and that he was working out a plan to raise the money so that he could pay his debt. The witness then sought advice from his employer's offices. Eventually the last witness, Chiwara, was advised and he arranged to meet with the defendant at his shop.

The witness accompanied Chiwara to the defendant's shop in Norton where they found out that the defendant had gone to his other shop in Mhondoro and that he had had a breakdown somewhere along the way. The rest of the witness' evidence from this stage is similar to and corroborates that of the last witness. The witness also said that when he went to Norton with Chiwara it was about a week after all the transactions had been done and the defendant acknowledged that the invoices had not been paid for fully and that he was willing to pay for them as soon as he could; hence his agreement to sign the acknowledgment of debt. The witness also said that the acknowledgment of debt was drafted by Chiwara in his own handwriting in the presence of the witness and also in the presence of the defendant who then signed it. The witness said that he only wrote his name and ID number as well as signing the document as a witness thereto after he had read it through. The witness generally gave his evidence well and was clear about the events and issues between the parties. He was also a credible witness. The plaintiff's case was closed after this witness

The defendant gave evidence. He said that initially he applied for a credit facility with BAT and the ensuing agreed relationship entailed BAT supplying him with cigarettes on a 7 day credit basis. Then during the period of hyper-inflation when prices of goods would rise twice or thrice a day, BAT stopped supplying cigarettes to him saying it was no longer viable for them to supply stock on credit because of the prevailing hyper-inflation. Thereafter, during the period when the multi-currency system was introduced the plaintiff came onto the scene and started supplying cigarettes to him on a cash basis. He said that all business transactions between him and the plaintiff were always on a cash basis. Payment would be made as soon as they were supplied with the cigarettes and this was always done at the shop in Norton. He would also buy cigarettes for all his other shops when he made the purchases at

the Norton shop. Kaunda, the manager or any other supervisor would normally receive these goods at the Norton shop. Sometimes the defendant would receive the goods. Payment would be made by whoever received the goods. He denied that he had a credit facility with the plaintiff. He also said that he never made any application to the plaintiff for such a facility. The defendant said that when payments were made the plaintiff would issue them with a cash invoice to show that payment had been made. He also said that the plaintiff was not the only supplier who issued them with cash invoices as proof of payment. It was also his evidence that he was seeing the receipt at p 5 of the plaintiff's bundle of documents for the first time in court; he had never seen it before, neither had he been issued with any receipt of that type before.

The defendant said that when they increased the quantity of cigarettes that they would buy from the plaintiff, the plaintiff started giving them discounts and that the plaintiff would not supply the cigarettes if they did not have the cash. He denied having had any dealings with Chiwara at any stage and said that Chiwara must have based his evidence on hearsay. He denied ever having had a meeting with Chiwara and Bushu who were following up on payment. He denied ever having had a vehicle breakdown after which Chiwara and Bushu came to his rescue.

It was the defendant's evidence that he was never made aware at any time by Kaunda that there was an outstanding balance of US$1 717. In any event during that period sales were so high such that the plaintiff's agent would have been paid on the same day or the following day. The defendant also said that he personally paid for the second invoice in full to Vincent Bushu at his Norton shop and that this was in the presence of Kaunda, his manager. He disputed the material aspects of the evidence of both of the plaintiff's witnesses and said that he saw the acknowledgment of debt for the first time at court. He said that after the receipt of the supply reflected at p 6 of exh 1 as having been made on 4 October 2010, he advised Bushu that their prices had become comparatively higher than others. Bushu offered him a discount of US$480 but the price remained too high. After that date he started buying cigarettes from other suppliers whose prices were slightly cheaper. He never received any communication from Bushu until he saw the summons which came as a surprise to him. No one ever asked for any outstanding monies from him and the plaintiff's witnesses' testimony to that effect also shocked him. The defendant said that the signature on the acknowledgment of debt was not his. He said that the cash invoice was proof of the payment that he made to Bushu. The defendant said that Kaunda later left employment and he was not sure of his

current whereabouts. Certain unsatisfactory aspects of the witness' evidence will be highlighted later in this judgment. He was not an impressive witness.

Chikowa Kaunda was the next witness for the defence. He said that he was employed by the defendant as a manager for close to a year and that he left employment in November 2010. He said that the plaintiff company used to supply them with cigarettes. The plaintiff company would advise them as to when they would come to make deliveries and they in turn would raise the money in order to pay for the cigarettes. They would pay for the delivered consignment immediately upon receipt of it. The plaintiff's sales agents would issue them with a cash invoice as proof of payment. He said that Vincent Bushu told them that they only issued cash receipts. He said that they were not afforded credit facilities by the plaintiff. He agreed that he met with Bushu at Pamuzinda where he received a consignment of cigarettes and paid $10 430 to Bushu leaving a balance of $1 717. Bushu wrote the amount of the outstanding balance at the bottom of the cash invoice and said that he would collect the balance on that same day from their shop in Norton. The defendant's case was closed after this witness had testified.

The acknowledgment of debt relied on by the plaintiff was attached to the summons commencing this action. The defendant's claim that he was seeing the document for the first time in court cannot therefore possibly be true. The court does not believe him. In fact para 2 of the defendant's summary of evidence states:

> "Defendant will say that he learned with shock and total disbelief when he received a summons to which was attached a document purporting to be an acknowledgment of debt allegedly signed by him."

The defendant denied having speculated as to who may have forged the document whose authenticity he challenged. He was however unable to explain why his counsel had put it to Bushu that the defendant considered that he was probably responsible for concocting the document. That suggestion to Bushu was laid to rest by Chiwara who stated in his evidence that he was the author of the document and this was corroborated by Bushu. Both Chiwara and Bushu said that the defendant signed the document in their presence and whilst they were in Chiwara's vehicle which was parked outside the defendant's Norton shop. The defendant's witness identified the signature on the document as that of the defendant. He was the defendant's manager for more than a year. He would therefore be expected to have been familiar with the defendant's signature. His evidence in this respect thus tends to lend credence to the plaintiff's version of events. It would have made sense for the defendant to

call his wife to corroborate his denial of ever having been rescued by Chiwara and Bushu after having had a vehicle breakdown in Mhondoro and of his wife having left them in Chiwara's vehicle whilst discussing the defendant's indebtedness to the plaintiff company. He did not.

Besides denying having signed the acknowledgment of debt, the defendant also denied owing any of the monies claimed by the plaintiff in its summons. During the trial the defendant led evidence to the effect that the monies claimed had been paid to Bushu at or around the time of the deliveries. Yet the defendant did not in his plea make such an averment that the monies claimed had all been paid (to Bushu) as he might reasonably be expected to do if the monies had in fact been so paid. This would be expected especially as the detailed acknowledgment of debt was attached to the summons. It is highly improbable that Chiwara would have connived with Bushu to fabricate or forge the acknowledgment of debt as well as the defendant's signature on it in order, and with a specific purpose, to defeat what would have to be an anticipated defence by the defendant that all the money had been paid to Bushu. Such a conspiracy would require that Chiwara knew that the money had been paid to Bushu and that he was aware that Bushu had decided not to account for it to his employer and had converted it to his own use. In such a scenario Chiwara would be in a deliberate conspiracy with a thief to deceive the court into believing a false defence. Furthermore, the thief would have been allowed to remain in employment by an employer whose management was aware of the salesman's dishonesty. Alternatively, Chiwara would have been fooled or misled by Bushu into believing that the defendant had not paid what was due to the plaintiff. Such a possibility is decimated by the evidence of Chiwara regarding how the acknowledgment of debt came into being. The corroboration of Chiwara's evidence by Bushu with regard to the acknowledgment of debt would have been not only an unexpected but also a most welcome surprise to Bushu, the supposed con artist, but would also have been a surprise to the plaintiff's counsel. I find both scenarios to be also highly improbable on the evidence adduced before this court.

The defendant and his witness both said that the defendant kept a record of all payments made by his business. He then surprisingly said that such records were no longer available as he had destroyed them all. The invoices forming the basis or subject matter of the plaintiff's claim are dated 22 September 2010 on which there was an outstanding balance of US$1 717 and 4 October 2010 in the amount of US$12 570 giving a total amount of US$14 287 as claimed by the plaintiff. These dates are of significance in that the summons in this

matter was issued on 18 October 2010, barely a month after the issuance of the earlier invoice and two weeks after the second invoice. I find it highly improbable that the proprietor of a business would destroy all payment records of such an importance within such a short period of time. It in fact becomes ridiculous that such records would be destroyed after the defendant becomes aware of a suit against him in which he would need such records to prove his defence. In fact his plea would have been more than a bare denial that he owes the claimed amounts.

When the defendant was on the witness stand he said that he did not know the then current whereabouts of his witness Kaunda yet the witness did attend court soon thereafter and stated that he was still using the same mobile number and was still residing at the same address as when he was still employed by the defendant. The defendant only had to make a phone call to get the witness to come to court. According to the defendant he needed to find out from the witness' relatives if his old mobile number was still in use. He was unable to explain why. I find this to be incredible. Furthermore, if it was Kaunda who paid the US$1 717 to Bushu, and if Kaunda was still in the defendant's employ at the time when the US$12 570 is claimed to have been paid, a time well after the issue of summons, one would have expected the defendant to have advised Kaunda of the law suit such that he would have been aware of it before he left the defendant's employ. One would also expect the defendant to have advised Kaunda of the possibility of him having to be a witness should the matter proceed to trial as it eventually did. Alternatively, his counsel would have been aware of the role that he played and thus the need for Kaunda to testify; Kaunda would not have been looked for at a very late stage towards the end of the trial. As it eventually turned out, Kaunda was only a phone call away. There was thus no reason why he was called almost as an afterthought.

Whilst the plaintiff's evidence was to the effect that the relationship between the parties terminated because its practice was not to supply more goods to a customer until all due payments had been made for goods already supplied, the defendant's evidence was to the effect that the relationship had terminated because the plaintiff's prices had become too high. The rest of the evidence adduced before this court does not support the defendant's stance.

Another unsatisfactory feature of the defendant's evidence was to the effect that his details as recorded on the acknowledgment of debt were taken from his application to BAT for credit facilities yet a number of details do not appear on that document. These include the name "Fungai", the address "Mpofu Street" as well as the defendant's ID number. He sought

to explain this by stating that there were other documents that were attached to his application forms to BAT. He did not state what documents these were. He also failed to explain, even to his own counsel, how the application form and the other documents that he was referring to would have come into the possession of the plaintiff. His evidence in this regard is highly improbable.

Initially the defendant said that he started dealing with the plaintiff when he signed the application for credit facilities with BAT. He then said that the relationship started when the plaintiff's salesmen started coming to his shop after the cessation of the credit facilities by BAT. Whilst under cross examination he said that he might have been dealing with the plaintiff even before he dealt with BAT. As submitted by plaintiff's counsel, the question then arises why the defendant could not continue with BAT on a cash basis. In my view, the probabilities point to the fact that the relationship with the plaintiff was a credit facility as testified to by the plaintiff's witnesses and I so find.

On the basis of the above discussion it appears to me that the plaintiff has on a balance of probabilities proved that the defendant signed the acknowledgment of debt forming the basis of its claim. It also seems to me that the plaintiff has also proved that the defendant owes it the amount claimed. In *Pillay* v *Krishna* 1946 AD 946 at 955 the following was stated:

> "There is direct authority for saying, as I suggest, that the rule placing the onus of proving payment on the person who alleges it really depends on the principle that the onus is on the person who affirms and not on him who denies … all the Roman and Roman Dutch authorities who deal with the subject agree on (the rule's) existence."

The plaintiff's counsel aptly referred to other cases in which *Pillay's* case has been followed: *Marchand & Another* v *Butler's Furniture Factory* 1963 (1) SA 885; *Rammorth* v *Bunsee* 1961 (1) SA 394 and *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In liquidation)* 1998 (1) SA 811 (SCA) at 823.

For the above reasons the plaintiff's claim must succeed. The probabilities are overwhelmingly in the plaintiff's favour. Whilst the prayer by the plaintiff for costs on the higher scale is understandable, it appears to me that it would be fair to award costs to the plaintiff on the ordinary scale.

In the result it is ordered as follows:

The defendant shall pay to the plaintiff the sum of US$14 287.00 together with interest thereon at the prescribed rate reckoned from the date of issuing summons to the date of payment in full and costs of suit.

Dhlakama B Attorneys, plaintiff's legal practitioners.
G. Machingambi, Legal Practitioners, defendant's legal practitioners.