SEED CO [PVT] LTD
versus
CREDCORP INVESTMENTS [PVT] LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 23 June 2023

Date of judgment: 30 January 2024

Civil Trial

T.W. Nyamakura, for the plaintiff
E.R. Samukange, for the defendant

MAFUSIRE J

Introduction

[1] The plaintiff claims from the defendant payment of the sum of US$1 517 465-00, reduced to US$1 461 000-00 by an amendment to the summons and declaration, and finally to US$1 014 483-00 at trial. The claim is for damages for breach of contract. The nature of such damages is not finely pleaded. They are supposed to be consequential or anticipatory damages flowing from the alleged breach.

[2] The defendant has opposed the claim. Its plea is basically a confession and an avoidance. In essence, the defendant admits the breach but alleges that the parties subsequently settled their differences amicably through a compromise agreement. It says it performed its side of the bargain and thereby brought the dispute to an end. The plaintiff denies that there was such a compromise. Therefore, it has persisted with its claim.

[3] In the end there were only two broad issues referred to trial. The first was whether or not there was a compromise agreement between the parties on the plaintiff's claim. The second was whether or not the defendant breached the contract between the parties, if so, whether the plaintiff is due some damages, and if so, the quantum thereof.

Background facts

[4] The plaintiff is a private company registered and operating in Zimbabwe but with shareholders across Africa. The defendant is also a registered company involved in crop production in Zimbabwe. In terms of some standard contracts, the plaintiff sponsors the growing and production of seed crops by various farmers or growers. In essence, the plaintiff supplies to the farmer the stock or parent seed and funds the production costs. The value of the seed is agreed upon. Stringent control measures for the preparation of the fields, the planting of, and care for the crop in the fields, the harvesting and processing of the new seed, and so on, are put in place to ensure a quality product. After harvest and processing the grower delivers the new seed to the plaintiff. The value of the seed is agreed upon. The plaintiff recoups the production costs and the cost of the parent seed. It pays over the balance to the farmer. The plaintiff then sells the new seed to foreign and domestic markets.

[5] The case on hand concerns the production of three types of crops during the 2018/2019 agricultural season, namely sugar beans, soya beans and sorghum. They were grown on four farms operated by the defendant: Sanyati, Impalavale, Doreen's Pride and Antelope. The plaintiff's case is that it funded the full cost of production in anticipation of the defendant delivering all the new seed to it, but that the defendant, in stark breach of the agreement, only delivered 44.7 metric tonnes of sugar bean seed and sold the rest to third parties. The quantity of the seed the defended side marketed, in metric tonnes["***Mt***"], was 75 sorghum, 70 sugar beans and 560 soya beans. The plaintiff further alleges that at a meeting of the parties on 24 September 2019 ["***the September meeting***"] it was agreed that the defendant would trace the seed which it had side marketed. It was also agreed it would repay the production costs plus the cost of some centre pivot. The plaintiff admits the defendant paid.

[6] In regards to its claim before the court, the plaintiff avers that the defendant was at all times aware that all the seed that it had been contracted to grow would be sold to third parties by the plaintiff, that the plaintiff had ready markets for such seed, that by reason of the defendant's breach it has suffered damages and that the defendant

should make good those damages, together with costs of suit on the legal practitioner and client scale.

[7] In its plea the defendant simply makes a bare denial of everything of substance alleged by the plaintiff. From there the defendant pleads the alleged compromise. It avers that the compromise was reached at the September meeting. It alleges that in terms of that compromise, among other things, on or before 30 September 2019 the plaintiff was to provide a price for 44Mt of sugar beans delivered and that the defendant was to pay in full the balance of the debt owed by it on or before 15 October 2019. It alleges that pursuant to that arrangement, it paid the plaintiff an amount in the sum of $364 265-62 on 15 October 2019 in full and final settlement of its claim and that therefore the plaintiff's case before the court is bad in law.

[8] The defendant further alleges that having paid in full the value of the inputs advanced to it by the plaintiff, the contractual relationship between the parties had effectively come to an end, that the claim for damages has no basis at all and that after the breach the seed crop would only be regarded as commodity which fetches only normal commodity prices. It puts the plaintiff to the "strictest" proof of all its claims and seeks dismissal with costs.

Compromise

[9] The onus of proof on the defence of compromise was on the defendant. It had the right to begin. It called three witnesses, Dean le Roux ["***Dean***"], Tanaka Wonenyika ["***Tanaka***"] and Onias Sanangura ["***Onias***"]. At all relevant times Dean was the founder and chairman of the defendant. Tanaka was the finance director, and Onias the managing director. Central to the defence of compromise was a document that was discovered and produced in evidence by both parties. It was the document on which the minutes of the September meeting had been recorded.

[10] Dean and Tanaka, captioned DLR and TW respectively, attended the meeting on behalf of the defendant. The resolutions from the meeting were recorded in bullet paragraphs as follows:

- DLR to engage Bruce Macmillan to establish the where about [*sic*] of the Doreen's Pride soya beans seed. DLR to give feedback on or before 30th September 2019.
- DLR to engage Johny du Rand on the where about [*sic*] of 75Mt of sorghum seed from Impalavale.
- TW to arrange that all seed Co [*sic*] bags be delivered from the farms to Seed Co.
- 44Mt of seed sugar beans from Antelope delivered, 17Mt is not available.
- 50Mt of sugar beans from Sanyati is not available.
- Credcorp to invoice Seed Co on the 44Mt of sugar bean delivered. Prices to be provided by Seed Co on or before the 27th of September 2019.
- Credcorp to pay in full the balance of the debt owed to Seed Co by the 15th of October 2019.

[11] The gist of the evidence from the defendant's witnesses was as follows:

- ✓ they accept the contract growers' agreements;
- ✓ the defendant did not deliver to the plaintiff all the seed that it had produced during the farming season in question because part of the crop had failed and had simply been donated to the local farmers and the remainder sold to third parties to defray expenses and relieve pressure over mounting debts since the plaintiff had a history of not paying on time for previous seed delivered to it;
- ✓ the September meeting settled the parties' differences in regards to both the issue of the undelivered seed and the issue of the costs of production;
- ✓ the payment referred to in the last bullet paragraph of the minutes was to extinguish all type of the defendant's indebtedness to the plaintiff;
- ✓ the delay of two years by the defendant in bringing the present suit can only be evidence that indeed a compromise had been reached between the parties, the present suit being just an afterthought.
- ✓ After the breach by the defendant, the outstanding seed could only be regarded as commodity the value for which would be less than the seed price.

[12] The witnesses, Dean in particular, testified that the reason it was agreed that he would establish the whereabouts of the seed that the defendant had already disposed of to third parties was so that such seed would be retrieved and re-sold to the plaintiff. However, it could no longer be retrieved because it had already been used by those buyers. He further testified that his understanding of the agreement at the meeting was that if the defendant paid off the input costs and he followed up with looking for the seed, the defendant would have discharged all its outstanding obligations to the

plaintiff. The defendant was surprised that the plaintiff was taking it to court two years later.

[13] In cross-examination, Dean conceded, among other things, that the agreement of the September meeting treated the two aspects of the missing seed and the outstanding balance separately; that the agreement in relation to the debt had been fulfilled but that the one in respect of the seed had not. He confirmed that by the time of the September meeting the defendant had already sold the seed to third parties. He did not disclose the price. He accepted that both the plaintiff and the defendant had interests in the proceeds of the sale and that the defendant had taken them all. He was not sure as to why, if the payment for the inputs as recorded in the last bullet paragraph would settle the defendant's entire obligation to the plaintiff, including in respect of the missing seed, this was not captured in the minutes. Finally, Dean admitted that the defendant was in breach of the agreement in respect of the seed.

[14] Tanaka's evidence largely corroborated Dean's. In cross-examination, he was taken to task on how, among other issues, at the September meeting the parties could possibly agree that the defendant's payment for the input costs could wipe off the plaintiff's interest in the value of the undelivered seed when even the value of the 44Mt that the defendant had delivered had not yet been ascertained, let alone settled. However, he insisted that the reference to "the balance of the debt" in the last bullet paragraph was in relation to everything owed by the defendant.

[15] Onias' evidence was not relevant on the aspect of the compromise. He had not attended the September meeting. His evidence hinged more on some two letters written by himself on behalf of the defendant to the plaintiff subsequent to the meeting. The letters were written on 1 October 2019 and 7 November 2019. Their purpose, summarised, was to inform the plaintiff that the effort to trace the seed had failed; that the balance for the input costs would be settled on the due date, which had been done, and that the relationship between the parties should continue in the forthcoming 2019/2020 cropping season. He said there had been no response from the plaintiff to those letters.

[16] On its part, the plaintiff gave evidence through two witnesses, Edmore Madzivire ["***Edmore***"] and Farai Zvavamwe ["***Farai***"]. At all relevant times Edmore was the plaintiff's credit controller and Farai the production manager. Both denied that there had been such a compromise at the September meeting as alleged. They said the agreement was only in relation to the production costs. Edmore spoke on the contract growers' agreements in general and said their dominant purpose is the facilitation of the assistance the plaintiff renders to crop growers in terms of seed and the input costs in return for all the new seed. The price for the new seed is determined at the time of delivery. He denied that the plaintiff had been dilatory in making payments in the previous contracts. He insisted that contrary to the defendant's witnesses' allegations that the purpose of the agreement at the September meeting was so that the defendant would trace the outstanding seed for the plaintiff to retrieve and buy it, the arrangement was simply that once the seed had been traced, the defendant would then have to deliver it to the plaintiff.

[17] Edmore further testified that the last bullet paragraph in the minutes of the September meeting was just in reference to the balance of the input costs, which included an advance for the purchase of a centre pivot by the defendant, and that it had nothing to do with the outstanding seed. He said that in terms of those contract growers' agreements, whether the seed is delivered or not the input costs still have to be paid for by the farmer. In regards to the defendant's two letters aforesaid, Edmore said they did respond to them, though not in writing. He said the parties were in constant communication with the plaintiff insisting on the seed being delivered to it and that there had been no question of the payment for the input costs being taken to cover the price for the missing seed.

[18] Farai said he was the one responsible for, among other things, the issuing of the contract growers' agreements to the farmers. His evidence corroborated that of Edmore in respect of the purpose of the September meeting and the resolutions passed thereat. Both witnesses alleged that the delay in taking legal action was occasioned by the need to consult members of the plaintiff's board who are scattered across Africa.

Compromise

[19] Compromise is a form of novation. Novation is the replacement of an existing obligation by a new one: see *Tauber* v *Von Abo* 1984 (4) SA 482 (E), at p 484. Compromise is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either diminishing his claim or increasing his liability: *Tauber, supra*. In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S), GUBBAY CJ explained the purpose of a compromise as follows, at p 496E – G:

> "The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar v Nagar* 1982 (2) SA 263 (ZH) at 268E – H."

Ruling on the defence of compromise

[20] In the present case, the defendant has failed to prove that there was a compromise in regards to the plaintiff's right to receive the seed for which the parties had executed and consummated those contract growers' agreements. The minutes of the September meeting upon which the defence of compromise hinges do not in the least support the defendant's case. It is clear from those minutes that the meeting treated the two issues of the missing seed and of the outstanding debt separately.

[21] The evidence clarified that the reference to "debt" in the last bullet paragraph of the September meeting was in relation to the input costs for the parent seed, fertilizers, chemicals, centre pivot, and so on, but not the missing seed. To construe "debt" in that agreement as having included the proceeds or value of the missing seed, as the defendant's witnesses insist on, is to do violence to the preceding resolutions. It is clear from those minutes that the defendant was tasked to, among other things, trace the missing seed, and report back by not later than 30 September 2019. By the time of that meeting it was common cause between the parties that the defendant had already sold the seed to third parties. Therefore, if the payment to be made by the defendant

by 15 October 2019 would be inclusive of the value of the missing seed, there would have been no need to task the defendant to trace the seed.

[22] The plaintiff's explanation for the delay of two years to take action may be unconvincing. But on its own, this finding is no proof that the plaintiff had waived its right to claim in respect of the missing seed. Such a finding would simply be at variance with the rest of the resolutions at the September meeting. At any rate, the defendant has not seriously challenged the plaintiff's explanation that the delay was occasioned by the need to consult board members across Africa.

Liability

[23] It being common cause that the defendant breached the agreement by engaging in side marketing of the contract seed and thereby failing to deliver, and the defence of compromise having failed, liability cannot be in issue. The nature of the damages claimed flowed naturally from the breach. The whole purpose of the contract growers' agreements is so that the plaintiff has seed for stock and sale to its own markets. Once delivered, the seed would belong to the plaintiff. The defendant knew it was growing the seed for the plaintiff. Its own interest would be catered for by the delivery by the plaintiff of the parent seed and the input costs which it would have to pay for. The breach prevented the plaintiff from assuming ownership and control of the seed. It prevented it from selling the seed for profit. The plaintiff has to be placed in the position that it would have been in had the defendant performed its side of the contract in so far as this can be done by the payment of money. That is the whole essence of damages for breach of contract: see *Victoria Falls and Transvaal Power Company v Consolidated Langlaagte Mines Ltd* 1915 AD 1.

Quantum

[24] The plaintiff had ready markets for the seed here and abroad. It produced sample invoices for customers in Zimbabwe, Madagascar, Namibia and Mozambique. There were several enquiries from customers whose orders the plaintiff could not fulfil. It was proved at the trial that the seed the defendant had diverted had been of exceptionally high quality. The measures put in place, among other things, to inspect and supervise the production of the seed, had ensured a good quality product.

[25] The plaintiff's sample invoices aforesaid inevitably referred to different crops, different tonnages, different retail values per tonne, and so on. The plaintiff's evidence was that the retail value of the 75Mt of the sorghum seed side marketed by the defendant was USD75 000-00 at USD1 000-00 per tonne; for the 70Mt of the sugar beans, USD154 000-00, at USD2 200-00 per tonne, and for the 560Mt, USD1 232 000-00 at USD2 200-00 per tonne, to bring the total claim to USD1 461 000-00. At trial the plaintiff conceded the defendant was entitled to a share of the value of the seed. It proceeded to reduce its claim to USD1 014 483-00 to cater for the defendant's share.

[26] There has not been much informed challenge on the quantum of the plaintiff's claim. The defendant's plea was just a bare denial. More importantly, neither in the plea nor in evidence has the defendant disclosed the price at which it sold the seed in contention. The figures would have been useful to test or challenge the plaintiff's quantum. As it is, the plaintiff's figures stand unchallenged. The defendant's requirement for the "strictest proof" of the plaintiff's claim is alien to our legal system. The plaintiff only needs to proof its claim on a balance of probabilities. It has.

[27] The other challenge by the defendant was that all its dealings with the plaintiff was in the local currency, and not in foreign currency, that even the debt of $364 265-62 that it cleared after the September meeting had been paid off in the local currency, and that therefore whatever the court might find due by it to the plaintiff must be expressed in Zimbabwean dollars. Edmore seemed to concede the point. However, he insisted that in the plaintiff's dealings with the defendant, all values and computations had been expressed in United States dollars to cushion against the instability of the local currency.

[28] A party is entitled to express his or her loss in the currency in which it is incurred. I find no irregularity in the plaintiff expressing its loss in United States dollars if that was the currency of the invoices, which it was. However, given that this is not a foreign obligation as contemplated by s 22 and 23 of the Finance (No. 2) Act No. 7 of 2019, and, at any rate, in line with the previous dealings between the parties, the defendant shall have the option to pay in the local currency.

[29] The plaintiff seeks costs on the higher scale. I see no justification for it. I do not believe the defendant has been in any way abusive of the court process or guilty of any errant behaviour. It was within its rights to defend a claim that it felt had been settled by compromise and was being brought scarcely within the prescription period. Therefore, whilst the costs shall follow the result, this shall be on the ordinary scale.

Disposition

[30] The following order is hereby made:

> The defendant shall pay the plaintiff the sum of USD1 014 483-00 [one million and fourteen thousand four hundred and eighty-three United States dollars], or the equivalent thereof in local currency at the rate of exchange prevailing at the time of payment, together with interest thereon at the prescribed rate from the date of this judgment to the date of payment in full, plus costs of suit.

30 January 2024

Honey & Blanckenberg, plaintiff's legal practitioners
Samukange Hungwe Attorneys, defendant's legal practitioners