**HH 206-02**
**HC 14119/99**
**Ref Case No 9857/99**

UNITED TRANSPORT GROUP SERVICES LIMITED
(UNIFREIGHT - SWIFT DIVISION)
versus
SCOTFIN LIMITED
and
MALCOLM FRASER N.O. being the Liquidator of
ZIMASAZA (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 22 March, 2001 and 20 November, 2002

*A P de Bourbon*, SC for first claimant
*E W W Morris* for second claimant

Opposed Application

HUNGWE J: Applicant filed an interpleader notice after it was sued by the first claimant ("Scotfin") for payment of the sum of $1 898 750,00 being 31 instalments in respect of the rental agreement to the 30 June, 1999; interest at the prescribed rate on each sum of $61 250,00 from the first day of the month on which it was due to the date of payment; an order directing the defendant to make timeous payment of all future rentals to the plaintiff with effect from lst July 1999 and costs of suit. Applicant joined second claimant, as it expected to be sued over the same payments.

The history of this claim is clearly set out in the pleadings and the second claimant's Heads of Argument. It may be summarised as follows -

First claimant is a financial institution. In the furtherance of its business objective, it conducts various types of agreements which enables it to finance business operated by its customers. First claimant entered into an agreement with Zimasaza. It would take over the collection of the rentals due under the respective rental agreements

entered into by Zimasaza with its clients. Scotfin had the right to approve the clients, and once the rights under the rental agreements have been transferred, then the customer was obligated to pay the rentals directly to first claimant.

Zimasaza leased communication equipment to the applicant. The agreement of lease set out the period of lease, the rental and the equipment that was the subject of the lease. The agreement signed on 30 August, 1996 between the parties indicated that rentals were payable to the lessor at a given address. This agreement was preceded by the agreement between applicant and Zimasaza dated 4 June, 1996 wherein applicant agreed to take assignment of the rental agreements which Zimasaza was to conclude with its customers.

Zimasaza went into liquidation. By then, although applicant had been advised to forward all rentals in terms of the agreement between it and Zimasaza to Scotfin, applicant had not made any payment.

The liquidator of Zimasaza claims that he is entitled to the payments due from applicant in respect of the rentals of the radios. First claimant holds that by virtue of the "assignment" of its rights to receiving the rentals as reflected in the agreement of June 1996, second claimant cannot be entitled to receipt of the rentals due on the radios.

Mr *de Bourbon* appearing for the first claimant, urged this Court to find that although the first claimant and Zimasaza used the word "assignment", the true character of the transaction flowing from their agreement was cession rather than assignment. He pointed to the fact that in an assignment, the assignee steps entirely into the shoes of the

assignor *Talas Properties of Rhodesia (Pvt) Ltd* v *Abdullah* 1971 AD SA 369 (R) at p 371 R; 1971 (1) RLR 19 at page 22.

The assignee assumes the right as well as the obligations of the assignor. On the other hand, this agreement amounts to a cession which denotes a transfer of right only. The agreement between first claimant and Zimasaza was a cession of the right to receive the rental. Under the law of cession the debtor is not entitled to give or withhold his consent to the cession. He is entitled to pay the original creditor until he receives notice of the cession - *Goode, Durrant & Murray (SA) Ltd* v *Glen & Wright* 1961 (4) SA 617.

Mr *Morris* for the second claimant, very forcefully argued against any finding that there was a cession of the right to receive rental by Zimasaza in favour of the first claimant. He attacked the first claimant's position from three angles. Firstly, he argued that having pleaded assignment, first claimant could not seek to shift its position without risk to its credibility. It must be held to its pleadings. Secondly, that there was no proof, on the papers, of the existence of either an assignment or a cession. Thirdly, that the document relied upon by the first claimant does not support its claim of cession in that it refers to different radio equipment and conditions.

In *Bon Accord Irrigation Board* v *Baine* 1923 AD 480 at 490 KOTZE JA said -

> "In agreements, we should examine what is the common intention of the contracting parties as expressed by themselves, and must construe the words in that sense which is most agreeable to the nature of the agreement".

An examination of the Agreement between the first and second claimants leaves the clear impression that the parties created, for the first claimant, the right to claim

payment of the rental from Zimasaza, once it approved the rental agreement passed on to it by Zimasaza. Its only obligation was to pay the discounted value and advise the approved customer by way of a monthly statement of account. It has been said that the conduct of the parties did not strictly comply with this agreement and strictly, therefore, no proper assignment or cession existed. On the face of it, this is a valid criticism of the manner in which the parties' affairs were conducted, but the essence of the agreement remained intact. Each party regulated, as much as possible, its affairs so as to fulfil its part of the agreement. Thus, the initial radios subject of the Zimasaza/Unifreight agreement were replaced and the necessary paper work effected to reflect the correct equipment and the relevant documentation was amended to reflect the change in the subject matter.

On its part first claimant had always looked at the applicant for the due discharge of its obligations under the agreement.

I am persuaded to interpret the documents relied on by the parties as reflecting a cession rather than an assignment. In any event, I am not persuaded by the argument that since the first claimant has failed to establish the legal basis for a claim of an assignment its claim must fail. Second claimant does not deny that Zimasaza received payment from first claimant for the discounted value of the lease agreements between it and the applicant.

I am satisfied that second claimant is not entitled to the proceeds of the judgment which must follow in HC 9857/99. In the premises, I must first enter judgment as prayed in HC 9857/99 and declare as follows -

That judgment is entered in favour of the first claimant as follows -

1. Payment of the sum of $1 898 750,00, being 31 instalments in respect of the rental agreements to 30 June, 1999;

2. Payment of interest at the prescribed rate on each sum of $61 250,00 from the first day of the month in which it was due to date of payment in full;

3. Applicant is to make timeous payment of all future rentals to the first claimant with effect from l July 1999;

4. Second claimant to pay costs of suit.

*Wintertons*, legal practitioners for applicant

*Gill, Godlonton & Gerrans*, legal practitioners for first claimant

*Coghlan, Welsh & Guest*, legal practitioners for second claimant