DELTA ZIMBABWE LIMITED t/a DELTA BEVERAGES
versus
MUTESWA WHOLESALERS (PVT) LTD
and
LAWRENCE MUTESWA
and
TAKAADINI LANGTON MUTESWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29, 30 & 31 May 2017

Civil Trial

T. Mudhara, for the plaintiff
Z. Makwanya, for the defendants

ZHOU J: This is an application for absolution from the instance which was made after the first defendant, which is the plaintiff in the counterclaim, closed its case. For convenience, the parties will be referred to as they appear in the pleadings filed of record. The brief background to the matter is as follows:

The plaintiff instituted an action, the main claim, against the first defendant and second and third defendants claiming a sum of US$249 169-00 in respect of beverages sold and delivered to the first defendant. The liability of the second and third defendants in that claim was predicated upon the sureties which they executed as co-principal debtors in favour of the plaintiff for the obligations of the first defendant to the plaintiff. The defendants filed a plea, together with the first defendant's counterclaim against the plaintiff for payment of a sum of US$705 982-17. The first defendant's claim is in respect of damages allegedly caused by breach of contract by the plaintiffs.

The main claim was resolved, in that judgment was granted in favour of the plaintiff in the sum claimed in the summons together with interest and costs of suit. That judgment was granted on 9 February 2017 by DUBE J. The matter was therefore referred to trial only in respect of the counterclaim.

In the counterclaim the first defendant's case if that the agreement between it and the plaintiff entitled it to a 5% discount on all goods supplied by the plaintiff. According to the

first defendant the plaintiff breached the agreement by unilaterally reducing the discount rate to 2.6% thereby prejudicing it of the 2.4% on all the goods which it purchased from the plaintiff. It is also alleged in the counterclaim that the plaintiff unilaterally withheld supplies to the first defendant's outlets whenever one of the outlets failed to settle its debt within a period of 10 days. That payment term had been introduced by the plaintiff after reducing the period for settling the amount due from 30 to 10 days from the date of invoice.

The first defendant led evidence from 2 witnesses, namely, Lawrence Muteswa who is the second defendant and Gerald Mazwi who is the first defendant's operations manager.

The evidence of Lawrence Muteswa was that the first defendant took over the wholesale business of a Ms T. Chitago which was operating under the name Charehwa Wholesalers. The takeover was agreed upon between Ms Chitago, the plaintiff's representatives and himself. According to him, the arrangement entailed that the first respondent would assume the obligations of Charehwa Wholesalers. Pursuant to that arrangement the first defendant paid a sum of US$3000-00 to the plaintiff, after which it started to operate the wholesale business. The witness referred to a letter, p 1 of exh 1, dated 24 May 2011. That letter is addressed to the Sales Manager of the plaintiff. It refers to a meeting held at the plaintiff's premises on 23 May 2011 and confirms that Charehwa Wholesalers would be leased to the witness "with immediate effect for one year." The letter acknowledged the indebtedness of the writer to the plaintiff and undertook to settle the debt in monthly instalments of US$3000-00 until the full debt of $28000-00 was liquidated. The first instalment would be paid immediately. The letter further stated that the witness would be operating Charehwa Wholesale in his own capacity.

Lawrence Muteswa testified that the first defendant went on to execute a mortgage bond in favour of the plaintiff as security for its debts. The first defendant was entitled to delivery of stock from the plaintiff for as long as the value thereof remained within the amount of US$570 000-00 which was secured by the mortgage bond. The witness testified that problems started when the plaintiff reduced the discount from 5% to 2.6%. That, coupled with the further reduction of the payment terms from 30 days to 7 days and later cash upfront crippled the first defendant financially, and made it default on its payments to the plaintiff for goods supplied. An association, the Beverages Wholesale and Retailers Association, representing the first defendant and other affected traders took the dispute regarding the reduction of the discount rate to arbitration pursuant to the provisions of the agreement which had been concluded between the plaintiff and Charehwa Wholesale. The arbitrator rendered

an award in which he concluded that the respondent was entitled to vary the discount rate unilaterally. He, however, directed that the parties appoint a mediator to resolve the issue of the discount.

The second witness, Gerald Mazwi, testified that he was involved in the operations of the first defendant. His evidence was also that the plaintiff unilaterally varied the terms of the agreement, and that as a result of that variation the first defendant's business suffered as it could not meet its obligations to the plaintiff, as well as pay rentals and staff salaries and wages. The exact amount of the loss suffered by the first defendant was unknown to him as only the person in the plaintiff's accounting department would know that.

After the first defendant upon whom the onus to prove the counterclaim fell closed its case, the plaintiff made an application for absolution from the instance. In the application Mr Mudhara for the plaintiff advanced three grounds upon which he urged the court to absolve the plaintiff from the instance. The first ground, which is contained in the plaintiff's plea to the counterclaim, was that the evidence led by the defendant showed that its counterclaim has prescribed. The second ground is that the evidence led did not establish the breach alleged. The third leg of the application was that no evidence was led to prove the quantum of loss claimed and that such loss was attributable to the alleged breaches by the plaintiff.

In the case of *Gascoyne* v *Paul Hunter* 1917 TPD 170, which is the *locus classicus* on absolution from the instance, the court said at p 173:

> "At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, 'is there such evidence upon which the court ought to give judgment in favour of the plaintiff?"

In the case of *Supreme Service Station* (1969) *(Pvt) Ltd* v *Fox Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at p 5 D, BEADLE CJ said:

> "The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying it is the sort of mistake a reasonable court might make, a definition which helps not at all."

The above principles have been consistently accepted in this jurisdiction, See *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87 (S) at 94F-G, and *Taunton Enterprises (Pvt) Ltd & Anor* v *Marais* 1996 (2) ZLR 303 (H) at 313C, *United Air Carriers (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S) at 343 B-C.

The authorities show that the court must consider whether the evidence led on behalf of the first defendant in support of its counterclaim is such that on such evidence the court could or might (not should or ought to) find for it. This application, as held in the authorities cited above, is akin to and stands on much the same footing as an application for the discharge of an accused at the close of the case for the prosecution. *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd, supra,* at p 4C-D.

It is common cause, from the evidence led through the first defendant's witnesses, that its complaint is that the plaintiff varied the agreement by reducing the discount rate from 5% to 2.6%. The witnesses who testified stated that communication to that effect was received in March 2012, and the effective date of the new rate was to be 26 March 2012. The counterclaim was instituted on 23 June 2016. That is more than four years after the cause of action arose. Mr Makwanya for the first defendant submitted that the running of prescription was interrupted by the arbitration proceedings referred to earlier on in the evidence of the first defendant's witness. The first defendant was not a party to the arbitration proceedings in question. As noted earlier on, the claimant in those proceedings was the Beverages Wholesale and Retailers Association. Section 19 (2) states that what would interrupt prescription, where judicial interruption is relied upon, would be "the service on the debtor of any process whereby the creditor claims payment of the debt." The first defendant was not the creditor in the arbitration proceedings. Equally, the claim in the arbitration proceedings was not for payment of damages, which is the cause of action *in casu*. In any event that claim was not successfully prosecuted to final judgment, as required by s 19 (2) of the Prescription Act [*Chapter 8:11*]. The arbitrator found that the plaintiff was entitled to vary the terms of the agreement. It is also doubtful that papers exchanged in arbitration proceedings would fall within the definition of "process" given in s 19 (1) of the Prescription Act.

Thus, on the evidence led, the first defendant's claim is clearly prescribed to the extent that it is founded upon the reduction of the discount rate from 5% to 2.6%.

Even if the court was to find that the debt had not prescribed or that the counterclaim is, in addition to the reduction of the discount rate, also based on other grounds such as the demand for payment within 10 or 7 days of the invoice or payment up front, the evidence led does not prove any of the figures stated in the first defendant's counterclaim. The schedule produced as part of exh 1A is not evidence of the deliveries made to the first defendant by the plaintiff or the value of such deliveries. It is a schedule prepared by the defendant's own representative. Evidence of the amounts stated in that schedule is what would be required to

sustain the quantum claimed. Also, no evidence was led to show what, if any, amounts were attributed to the reduction of the discount rate, the reduction of the payment period from 30 days to 10 or 7 days and ultimately to cash up front. The plaintiff would therefore be entitled to be absolved from the instance in respect of quantum.

All in all, the evidence led on behalf of the defendant in support of its counterclaim is not such that a reasonable court might make a mistake and find for the first defendant. It is not evidence upon which the court could or might find for the defendant on its counterclaim.

In the result, it is ordered that:

1. The application for absolution from the instance be and is hereby granted.
2. The first defendant shall, pay the plaintiff's costs.

Mundia & Mudhara, plaintiff's legal practitioners
Kwiriwiri Law Chambers, defendants' legal practitioners