N.R BARBER (PRIVATE) LIMITED
versus
ZAMBEZI GAS ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 13, 14 18 and 25 June 2018

Civil Trial

L. Matapura, for the plaintiff
E. Matinenga, for the defendant

MUZENDA J: The plaintiff, N.R Barber (Private) Limited (hereinafter referred to as "plaintiff") is a company duly registered in terms of the laws of Zimbabwe, whose registered office is 114 Seke Road, Graniteside, Harare. The plaintiff specialises in mining operations, underground, open cast, mining plans, transport logistics for ferrying the ore from one place to the supplier and related business. The first letters of the plaintiff stand for Nolan Robert whose surname is Barber. Incidentally he is the Managing Director and *alter ego* of the plaintiff.

The defendant, Zambezi Gas Zimbabwe (Private) Limited (hereinafter referred to as the "defendant") is equally a duly registered company in terms of the law of Zimbabwe whose offices are situated at Number 28 Transtobac Complex, Hillside Road Extension, Msasa, Harare. Mr Francis Chirimuuta the managing partner of Chirimuuta and Associates is the Board Chairman of the defendant, Mr E. Raradza is the Managing Director, Mr Thomas Nherera is the Executive Director, for Finance and Administration, Mr M. Raradza is the Executive Director for Operations and Marketing, Mrs R.M Kajese being the fifth Director.

The defendant is a proprietor and hence holder of a coal mine situated in Hwange under a special Grant Number 4084 in respect of coal reserves which comprise of approximately 20,000 000 (twenty million) tonnes mineable and extractable *in situ tons* of coal.

The defendant then formed a Special Purpose Vehicle under the name of Entuba Coal Fields of Zimbabwe (Private) Limited whose registered office address is given as 28 Hillside Road Extension Transtobac Complex, Msasa, Harare whose directors are Dr C. Msipa, Mr

Hlongwani, Mr E. Raradza, Mr T. Nherera and Mr M. Raradza. Dr C. Msipa and Mr Hlongwani are directors of on other entity called Coal Brick which company is known to the plaintiff. Hence Mr E. Raradza and Mr T. Nherera are both directors of defendant and Entuba Coal Fields.

On 28 August 2017 the plaintiff issued summons against the defendant for the following relief.

(a) payment of the amount of USD3 885 000, being payment of money due and owed to the plaintiff by the defendant in terms of an acknowledgment of debt which was executed by the defendant in favour of the plaintiff on the 15th February 2017.
(b) interest on the amount at the prescribed rate of 5% per annum calculated from the date of summons to the date of payment in full, and
(c) costs of suit on attorney client scale.

In para 3 of the plaintiff's declaration it summarises the plaintiff's cause of action as follows:

> "3. On the 15th of February 2017 the defendant executed an acknowledgement of debt in favour of the plaintiff wherein it admitted that the amount of $3 885 000 (three million eight hundred and eighty five thousand United States dollars) was due and owed to the plaintiff as a debt arising from the work done by the plaintiff at Entuba Mine at the instance and request of the defendant."

In para 5 of its declaration the plaintiff adds:

> "the defendant failed to pay the monthly instalments as per the acknowledgement of debt and the amount of US$3 885 000-00 is now due and owed to the plaintiff."

The defendant entered appearance and filed its plea and the gravamen of its plea is contained in para 3 which states the following:

> "3: Ad Paragraph 3
> Defendant denies
>
> (a) The existence of any privity of contract between plaintiff and itself and denies that any work was allegedly performed on its behalf.
> (b) That plaintiff performed work on its behalf or for whomsoever at its special instance and request.
>
> It puts plaintiff to the proof thereof.
>
> Defendant consequently denies that there was any legal cause for the alleged acknowledgement of debt."

On the strength of this plea, the defendant prays that the plaintiff's claim be dismissed with costs.

On 29 January 2018 the parties signed a joint pre-trial conference minute which streamlined issues for trial as follows:

1. Whether there was legal cause for the acknowledgement of debt.
2. Whether the debt acknowledged by the defendant arises from work done by the plaintiff at the instance and request of the defendant;
3. What amount is due by the defendant to the plaintiff?"

On 13 June 2018 the matter proceeded to trial.

Mr NR Barber, the plaintiff's Managing Director gave evidence. He stated that between 2013 and 2014 he was tasked to do work at Hwange by Entuba Mine, a company owned by the defendant company. The total amount due from Entuba was $3012 493-46 and on 12 May 2016 the defendant's Chief Executive Officer Mr Thomas Nherera wrote to the plaintiff acknowledging it indebtedness to the plaintiff for that amount. The first acknowledgement of debt authored and signed by the defendant's directors was produced by the plaintiff in court and accepted as exh number 1.

In the contents of exh 1 the witness pointed out that the defendant thought it acknowledged its indebtedness to the plaintiff in the sum of $3 012 493-46, a reconciliation of the total capital owed was going to be carried out and factor in any amount towards fuel expense issued to the plaintiff during the operations, thereafter interest was going to be added to the capital.

On 15 February 2017 Mr N.R. Barber told the court that indeed a second acknowledgement of debt showing a deduction in capital and a figure of interest was signed by the defendant. The second acknowledgement of debt, exh 2 was produced in court.

Mr NR Barber further clarified and confirmed that although all the invoices were reflecting Entuba Coal Mine, those were subsequently accepted by the defendant and the defendant acknowledged its indebtedness to the plaintiff and what was more crucial to the plaintiff were the acknowledgements of debt specifically created, authored and signed by the defendants which formed the plaintiff's cause of action. He clearly testified that Entuba Mine was a special purpose vehicle formed by the defendant and he was not surprised when the defendants delivered to him exh(s) 1 and 2. He believed the defendant when it told him that it was going to take over the debt. In any case according to the witness the defendant was the beneficiary of the product the plaintiff produced. He added that at all material times Mr T Nherera was aware of all the invoices issued to Entuba and Mr T. Nherera used the same

invoices to prepare and reconcile figures which he ultimately used to compile the acknowledgement of debts.

Mr N.R. Barber was extensively cross examined by the defendant's counsel but he maintained his stance and further added that although the defendant was joined by Linos Masimura well after the signing of the acknowledgement of debt the defendant did not challenge the authenticity of the acknowledgment. Mr NR Barber was actually surprised when Mr E Raradza and Mr T Nherera refused to honour the defendant's indebtedness. The amount of $3 885 000 was calculated and reconciled by the defendant and it ought to be honoured, he contended.

The plaintiff's second witness was Mr Antiock Kuraone who was appointed as agent by the plaintiff to recover the outstanding debt.

When the witness was appointed he engaged, the directors of the defendant, the Managing Director Mr E Raradza and Mr T. Nherera. The defendants unreservedly acknowledged owing the plaintiff an amount of $3885 000-00 and they produced exh No. 2 where the defendant indicated the proposed date of payment with a cut-off date for last payment being February 2020. The witness reiterated the fact that in as far as the legal cause of the acknowledgement of debt was concerned, the acknowledgements themselves prepared by the defendant succinctly disclosed the cause, that is, for payment of money for the work done for the defendants at Entuba Mine in Marange. Exh 2 was signed by the Managing Director Mr E Raradza and Director Finance and Administration Mr T Nherera. The two were not forced and cooperated throughout the engagement, he said. He also clarified that at no time did the defendant raise the issue of liability, the sticking issue that arose when he came into the matter was basically reconciliation, more particularly, of factoring in the fuel aspect. Otherwise the parties were in agreement as to the amount.

During cross examination by the defendant's counsel, the witness remained adamant that the issue of legal causa did not arise during the engagement. Mr T. Nherera was fully aware of all the verifications and he (Mr T Nherera) is the one who did the reconciliation. Mr Kuraone rejected the amount of $896 884 as the correct amount and denied that Mr Masimura engaged him for a revisit on the alleged reconciliation of the figures contained on the acknowledgements. After the acknowledgement what Mr Kuraone and the plaintiff were waiting for was payment. When the defendant did not honour the payment he advised the plaintiff to take legal action, which the plaintiff did. Mr Kurauone impressed the court as an honest witness, he did not exaggerate but remained forthright. He actually confirmed Mr N.R.

Barber's testimony and both witnesses were credible. Their evidence tallies with the exhibits produced in court.

Application for absolution at the close of plaintiff's case

When the plaintiff closed its case, the defendant made an application for absolution from the instance. I dismissed the application and indicated that the plaintiff has established a *prima facie* case on a balance of probabilities and the court has to hear the side of the defendants. The reasons for the decision will be dealt with below.

Defendant's evidence

The defendant called Mr Edward Raradza, its Managing Director; to give evidence. I will deal with portions of his evidence relevant to the matter before me. He told the court that sometime in September 2013 the defendant and Coal Producers and Processors Trust Zimbabwe entered into a joint venture agreement where the two parties formed a Special Purpose Vehicle, Entuba Coalfields (Private) Limited. The defendant was to avail its mining concession to the joint venture and Coal Producers Trust was to provide resources to mine the coal.

The plaintiff was brought on site to Entuba Coalfields to provide mining contractor services. According to the witness it was Coal Producers Trust which brought the plaintiff to Entuba and payment of work done by the plaintiff per Entuba was Coal Producers Trust's responsibility. He repeated what is contained in the defendant's plea, that there was no contractual arrangement between the plaintiff and the defendant. In July 2015 the Special Purpose Vehicle Entuba Coal Mine Company became dysfunctional and the defendant repossessed its mining concession. The defendant was aware of the plaintiff's debt and according to Mr E Raradza the defendant without any legal obligation thereto, executed an acknowledgement of debt in favour of the plaintiff in the amount that the plaintiff had indicated was wrong subject to a reconciliation being conducted. He added that the defendant could not pay because the income flows from the mining operations did not permit fulfilment of such undertakings that the defendant had made. During cross-examinations by the plaintiff's legal practitioner, Mr Raradza unequivocally admitted that the directors and the defendant company confirm that the plaintiff is owed but the only contentious issue was the amount. He accepted the authenticity of both exh 1 and 2 and per exhibit 2 he accepted that he co-signed it but he was not familiar with issues relating to costing mining invoices. He admitted that efforts were made to reconcile the figures acknowledged but was not clear as to when such efforts were

made, before the drafting of exh 2 or after it was already signed. Most of his evidence actually substantiated the plaintiff's case.

The defendant's second witness was Mr Thomas Nherera. In principle the witness dwelt more on corporate divisibility, that as long as there are two existing companies, the liability of one does not cross the demarcating line to the other side. Each company is accountable to its own liabilities. Hence defendant did not enter into any contractual relationship with the plaintiff and as such there was no pretext for the writing of the acknowledgement of debt. He however brought a very crucial revelation which greatly assisted this court. He admitted under cross-examination that the Managing Director of defendant and himself were both directors of Entuba. He was its Chief Executive Officer and he is the one who received all the invoices from the plaintiff. Using those invoices, he prepared exh 1 and 2. However when exh 1 and 2 were prepared and signed the real motive was to retain business relationship and rapport with Mr NR Barber but thus far. He also admitted that Entuba had no assets at all and was fictitious in principle. Mr T Nherera was evasive during cross-examination and had difficulties in answering simple questions. He contradicted Mr E Raradza especially on the aspect of liability of the defendant to the plaintiff.

Mr Linos Masimura was the defendant's third witness. He holds a Masters in Business Leadership and is involved in mining operations in Zimbabwe and South Africa.

He is the Deputy Managing Director of the defendant from June 2017. When he joined the defendant he was briefed about the defendant's status, its employees and liabilities. He was shown exh 1 and 2 and undertook to do a verification exercise. He visited the mine at Hwange with Mr E Raradza the Mining Manager and Mr Kurauone. He worked out a reconciliation thereafter and came out with a figure of $896 884-00 as being the "real" amount per the work done by the plaintiff. He also worked out the total sum of payments made to the plaintiff, by Entuba or payments made to plaintiff for work done. He strengthened the defendant's plea that there was no legal *causa* between the plaintiff and the defendant. During "conciliation" of figures, he worked with Mr Kurauone who was representing the plaintiff but when the witness engaged Mr Kurauone with the figure of $896 884, Mr Kurauone could not accept it. The witness is not an accountant, he did not produce a comprehensive audit report based upon the acknowledgement figures and show the deductions of double invoicing. The document shown by the witness is but scanty. It does not show the reconciliation process for one to come up with the amount of $896 884-00. The witness was cross-examined by the plaintiff's counsel

and was at pains to explain how he arrived at that figure of $896 884.00. He did not agree with the Managing Director's evidence that the defendant owes the plaintiff money.

After the testimony of Mr L Masimura, the defendant closed its case.

Application for Absolution from the instance

As indicated herein above after Mr E Matinenga applied for absolution from the instance. I indicated that I will give my reasons in the main judgment. These are they.

Mr Matinenga submitted that at the close of the plaintiff's case, the defendant has three options open to it.

1. to proceed to the defence case
2. apply for absolution
3. apply for the dismissal of the plaintiff's case.

The defendant opted to apply for absolution from the instance. The defendant attacked the plaintiff's declaration and more particularly the absence of a legal *causa* between the acknowledgement of debt and the defendant. There is no privity of contract between plaintiff and the defendant and that would undermine the fundamentals of the acknowledgment of debt. Plaintiff's relief laid with Entuba and not the defendant, it was argued. Defendant also argued there are instances when the courts went outside the acknowledgment to trace the history of that acknowledgment, Mr Matinenga vehemently argued that there was no evidence placed before the court that could move the court to find in favour of the plaintiff.

Mr Matapura opposed the application and highlighted evidence of the produced exhs 1 – 4. The undisputed acknowledgments of debt. He submitted that in deed a *prima facie* was established by the plaintiff and defendant had to be put on its defence.

The law

In the matter of *Standard Chartered Finance Zimbabwe* v *Georgias & Anor* 1998 (2) ZLR 547 (H) SMITH J at p 552 F – 553 D had this to say

> "After the close of *Trinity's* case Mr *de Bourbon* moved for absolution from the instance. In doing so he referred to *Supreme Service Station* (1969) *(Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 ZLR at 5D where 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 reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make a definition which helps not at all."

Further on, at 5 – 6, the learned Chief Justice went on to say:

> "Before concluding my remarks of the law on this subject I must stress that rules of procedure are made to ensure that justice is done between the parties, and, so far as is possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. I might usefully quote here what was said by SUTTON J in *Erasmus* v *Boss* 1930 CPD 204 at 207.
>
> "In *Theron* v *Behr* 1918 CPD 443, JUTA J at p 451 states that according to the practice in this court in later years judges have become very loath to decide upon question of fact without hearing all the evidence on both sides."
>
> We in this territory had always followed the practice of the Cape courts. In case of doubt at what a reasonable court "might" do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed…"
>
> In *Quintessence Co-ordinators (Pty) Ltd* v *Government of the Republic of Transkei* 1993 (3) SA 184 (TK) at 185 B – D HANCKE J said:
> "The legal test to be applied at this stage appears to be common cause namely whether there is evidence upon which a reasonable man might find for the plaintiff: *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A) at 409."

Mr *Findlay,* counsel for the defendant, accepted that at this stage of the trial neither the weight of any of the evidence tendered, nor any evaluation of the probabilities are relevant to the enquiry, save where such findings are clearly manifest from the evidence. I also agree with his submission that where the question is exclusively one of law or involves the application of a legal principle in the light of the onus-bearing party being required to establish certain material facts essential to its cause of action, if I uphold the legal contention in favour of the defendant or find that essential material facts have not been established at all in order that there be a finding favourable to the plaintiff, then can properly, in the exercise of my discretion, grant the application for absolution.

At p 554 A the learned judge concluded:

> "a judicial officer should always lean on the side of allowing the case to proceed."

The evidence produced by the plaintiff more particularly exhs 1 and 2, in my view is reasonable evidence on which the court might find for the plaintiff, hence I ordered that the case should continue, and it did.

Analysis of plaintiff's exhibits

Exhibit 1

Exh 1 is the first acknowledgment of debt dated 12 May 2016.the exhibit reads as follows

"AGREEMENT OF INDEBTEDNESS

We acknowledge our indebtedness to your company N R Barber (Pvt) Ltd in regards to the contract mining work, your company carried out for us at Zambezi Gas's Entuba Coal Concession in Hwange, Zimbabwe. We acknowledge the capital amount of USD3 012 493.46 (USD Three million and twelve thousand four hundred and ninety three dollars and forty six cent) subject to the reconciliation of the total amount of fuel issued out to NR Barber (Pvt) Ltd mining team during the period between 16 May 2014 to 4 June 2014.

This amount excluding interest. This interest will be added after reconciliation of total capital amount owing as per the contract.

We are also agreeable to your proposal that as soon as inflows of income from our mining operations start to come in the proceeds will be shared amongst us at the agreed percentages that shall be agreed between Zambezi Gas and NR Barber (Pvt) Ltd at that time.

We are also agreeable to giving you full access to our books of accounts so as to have full transparency between us. This agreement is without prejudice to prior contracts made between our two parties. (my emphasis)

The letter was written by the defendant company and signed by Mr Thomas Nherera its Chief Executive Officer, defendant's second witness in this trial. It originates from defendant company written on the defendant's letter head. The defendant's witnesses acknowledge same. Exhibit 2

This letter was written and signed by Mr E Raradza (the managing director of defendant) and Mr Thomas Nherera (Executive Director Finance and Administration) dated 15 February 2017 on behalf of the defendant. It is equally central to this matter and it needs extensive quotation and analysis.it is necessary to quote it as is:

> "Zambezi Gas Zimbabwe Private Limited
>
> 15 February 2017
>
> Mr J.M Kurauone
>
> Harare
>
> Attn: Mr Kurauone
>
> Dear Sir
>
> REPAYMENT PROPOSAL FOR THE PAYMENT OF N.R BARBER (PVT) LTD
>
> We as Zambezi Gas Zimbabwe (Pvt) Ltd are committed to the repayment of the principle debt of USD2 715 00 (two million seven hundred and fifteen thousand dollars) and an interest amounting USD 1. 170 000 (one million one hundred seventy thousand dollars) to the work done at Entuba Coal Mine in Hwange between 2014 and 2015.

We are proposing the following repayments starting from February 2017 onwards to February 2020.

MONTH	AMOUNT (USD)
February 2017	10 000
March 2017	10 000
April 2017	15 000
May 2017	15 000
June 2017	20 000
July 2017	20 000
August 2017	30 000
September 2017	30 000
October 2017	40 000
November 2017	40 000
December 2017	40 000
Total	265 000
January 2018	50 000
February 2018	50 000
March 2018	70 000
April 2018	70 000
May 2018	90 000
June 2018	90 000
July 2018	100.000
August 2018	100 000
September 2018	100 000
October 2018	100 000
November 2018	100 000
December 2018	100 000
Total	1 020 000
January 2019	150 000
February 2019	150 000
March 2019	200 000

April 2019	200 000
May 2019	200 000
June 2019	200 000
July 2019	200 000
August 2019	200 000
September 2019	200 000
October 2019	200 000
November 2019	200 000
December 2019	200 000
Total	2 300 000

January 2020	150 000
February 2020	150 000
Total	300 000

Total all arrears $3 885 000

We are hopeful that you will find this a fair way of settling this outstanding debt

Yours faithfully

E RARADZA (ER)	T NHERERA (TN)
MANAGING DIRECTOR	EXECUTIVE DIRECTOR
	FINANCE & ADMINISTRATION

Exh 1 and 2 gave rise to the action taken by the plaintiff.

The following aspects seem not to be controverted by the parties.

(a) defendant and the plaintiff are known to each other in business.

(b) the defendant's own agents/directors Mr E Raradza (the managing director) and Mr T Nherera (Executive Director: Finance & Administration) wrote exh 2 above proposing to settle the debt of the exact amount owed by the defendant to the plaintiff in the sum of $3 885 000.00.

(c) the defendant unconditionally, undertook and promised to pay specified amounts of money per month from 2017 to the month of February 2020.

(d) the acknowledgment of debt are of a specific sum of money and made in writing by the defendant's authorised agents and accepted by the plaintiff.

(e) the defendant is bound by the actions of its agents, Mr E Raradza and Mr T Nherera resultantly; the defendant through, the actions of its agents rendered itself liable as the principal.

(f) Exh 2 written by the defendant acknowledging indebtedness to the plaintiff is not denied by defendant in its pleadings, hence it is deemed authentic and accepted by the defendant.

Contrary to what is contained in the defendants plea more particularly para 3 thereto, the defendant in its letter of 15 February 2017 unreservedly acknowledge that the US$3 885 000 was due "to the work done at Entuba Coal Mine in Hwange between 2014 and 2015."

The opening of the letter/acknowledgment of debt dated 15 February 2015 reads as follows:

"We as Zambezi Gas Zimbabwe (Pvt) Ltd are committed to the repayment of the principle (*sic*) debt of ……" this in this court's view is not disputed by the defendant if the foregoing are issues of common cause then what is the reason proferred by defendant to impugn or perjure the acknowledgment of debts duly signed by it? Exh 2 is self-explanatory to the aspect of legal cause raised in defendant's plea. Defendant in its own letter to the plaintiff admits that the amount due to plaintiff was for work done at Entuba Coal Mine in Hwange and that it was committed to the repayment in full, albeit, in staggered figures. The acknowledgment did not question the motive or otherwise by the defendant to pay or not to pay. The plea by the defendant was not sustainable. If it had denied authorising the 15 February 2017 letter maybe one would have understood that.

When the defendant on its own letter head signed by its own directors acknowledging the amount due and proposing sums of payments per month, then disown such evidence, defies all logic.

The acknowledgments of debt authored by the defendant contained the legal *causa* of the debt. They had written confirmations of the matter in dispute and acknowledged the exact amount due to the plaintiff:

Entuba Coal Mine was created by the defendant's directors. The registered office of Entuba was the same with that of the defendant, 28 Transtobac Complex, Hillside Road

Extension, Msasa Harare. Mr Thomas Nherera was Entuba Coal Mine's Chief Executive and defendant's managing director Mr E Raradza was a co-director of Entuba. Entuba was formed to operate defendant's mining concession in Hwange and all the invoices for Entuba were send to defendant's address for the attention of Mr T Nherera. Entuba Cola Mine was hence purely an *alter ego* of Mr Raradza and Mr Nherera. One cannot differentiate defendant from Mr Raradza and Mr Nherera and from Entuba. This court has found that the work done at Entuba by plaintiff at Hwange mine was at the instance of the defendant. This is clearly accepted by the defendants in exh 1 and 2 and Mr E Raradza ungrudgingly accepted this during trial. It is therefore found that there is a legal causa to the acknowledgment of debt as admitted by the defendant's directors.

Exhibit 1 and 2 captures the previous transactions and embodies such to show how the amounts arose from work done on behalf of the defendants. Defendant voluntarily wrote to the plaintiff confirming its indebtedness and in terms of exh 2, defendant outlines the estimated period of settlement of the debt until the whole sum is liquidated. Hence not only an amount is acknowledged but also a promise to pay and specific dates provided by the defendant in writing. Assuming that the defendants are stating the truth that the court should treat Entuba and defendant as separate legal entities which I do not accept, from the day exhs 1 and 2 were written by the defendant such acknowledgments bound the defendant and exh 2 became the cause of action at the instance of the plaintiff.

The defendant in its plea presents a bare denial based on law. It persisted that there was never any contractual relationship between it and the plaintiff and during trial, it tried to point a picture that exhs 1 and 2 were prepared out of compassionate grounds with the intention to maintain good business relationships with Mr NR Barber, the managing director for plaintiff. The reading of exhs 1 and 2 shows a totally different picture. Exhibits 1 and 2 show that defendant adopted the liability and undertook to settle the amounts due. The figure of $3 012 493.46 was revised as the capital figure and on exh 2 the capital principal debt became $2 715 000. Such a reconciliation is consistent with the undertaking of the defendant in its letter of 12 May 2016, exh 1. The managing director Mr E Raradza and the Chief Executive Officer, Mr T Nherera wanted to convince the court that they had no knowledge of mining concepts of invoicing but defendant's board chairman is a legal practitioner of long outstanding and experience, surely he would have explained to the defendant the legal effect of exh 1 and 2 and it is assumed in the circumstances that such advise was given to the defendant and it proceeded to prepare them. Mr Masimura came to join the defendant well after exhs 1 and 2 had been

prepared. The alleged reconciliation was post *facto* and could not affect exhs 1 and 2. Mr T Nherera is in charge of defendant's finance and he is the one who initiated both exhs 1 and 2, the only reasonable inference relating to exhs 1 and 2 in this court's view is that they reflect the actual amount owed to the plaintiff. The amount of $896 884 does not appear in defendant's plea. It only emerges in exh No. 4; defendant's legal practitioner's letter dated 24 August 2017 written in reply to plaintiff's letter. It was never tendered to the plaintiff as being the amount due to the plaintiff. It was not even admitted by the defendant in its papers. There is no evidence to show that the figure came as a result of conciliating $3 012 493.46 contained in exh 1. The court concludes that the amount of $3 885 000 acknowledged by the defendant on 15 February 2017 is the capital debt inclusive of interest due to the plaintiff.

The law

In the matter of *Bared van Wyk* v *Tarcon (Pvt) Ltd* SC 49/2014, PATEL JA on p 3 of the ecyclostyled judgment stated the law as follows:

> "In the circumstances, I am inclined to take the view, in the absence of evidence to the contrary, adduced before the court *a quo*, that the claim *in casu* was based on a stated account. There was an agreed acknowledgment of liability signed on behalf of the respondent. All that appears to have been required thereafter is its chairman's approval of the payment plan or method of discharging that agreed liability. As was recognized by the learned judge, it is competent to sue a debtor on his admission of liability as set out in an acknowledgment of debt without founding the action on the original transaction giving rise to that acknowledgment.
>
> See *Mahomed Adam (Edms) Beperk* v *Raubenhumer* 1966 (3) SA 646 TRD and the authorities there cited."

The above legal position is very apposite to the matter before me. I do not agree with the defendant's argument to the effect that the court should go beyond the acknowledgment of debt to see the motive or basis behind its birth or existence.

The plaintiff has managed to prove its case on a balance of probabilities and in effect the defendant to a large extent agrees with plaintiff's evidence on material aspects.

Disposition

Plaintiff's claim succeeds and it is ordered as follows

1. Judgment be and is hereby entered for plaintiff in the sum of USD3 885 000.00 (three million eight hundred and eighty five thousand United States dollars).
2. Interest on the amount of US$3 885 000 at the rate of 5% per annum calculated from the date of summons to the date of payment in ful; and
3. Costs of suit on an attorney client scale.

Dondo and Partners, plaintiff's legal practitioner
Chirimuuta and Associates, defendant's legal practitioners