FYNATEX DISTRIBUTORS (PVT) LTD
versus
TASMINE ENTERPRISES (PVT) LTD
and
YE YOU-JING

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 14 July 2015 and 21 July 2015

Opposed Application

Ms *M Kenende*, for the applicant
The 1st and 2nd respondent's indefault

MATHONSI J: The applicant leased certain business premises to the first respondent which failed to pay rentals thereby accumulating rent arrears of $82 740-00 which now form the subject of the present litigation. The second respondent is a director of the first respondent.
On 6 November 2014 the second respondent signed an acknowledgment of debt which reads in relevant part:

> "I the undersigned YE YOU – JING (Passport No. G52679001) representing TASMINIE ENTERPRISES of 17 George Drive, Msasa (hereinafter called 'the debtor') do hereby acknowledge myself to be truly and lawfully indebted to FYNATEX DISTRIBUTORS (hereinafter called 'the creditor') in the sum of US$82 740-00"

Thereafter the second respondent agreed to pay the total amount due on 31 January 2015, to pay collection commission and any costs to be incurred in pursuit of the debt on a legal practitioner and client scale. He also renounced any benefits of the legal exceptions *non causa debiti, non numerate pecuniae de error calcnli,* revision of accounts, no value received and any other exceptions available to a debtor at law.

The applicant has made this application seeking an order for payment of the amount acknowledged in that document, together with interest, collection commission and costs of suit

on a legal practitioner and client scale against the first and the second respondents jointly and severally. Both the respondents have opposed the application and in the opposing affidavit of the second respondent they state that the acknowledgment of debt does not specify who between them is indebted to the applicant. He goes on to say that when he signed the document he understood it to mean that he was negotiating a settlement on behalf of the second respondent and not in his personal capacity. His signature was intended to bind the first respondent and not himself.

The second respondent states that he has "scant understanding and knowledge of the English language" and therefore did not understand the meaning of the legal exceptions he was renouncing. As he is disputing the amount claimed, he should be allowed to rely on the legal exceptions which he has renounced. He then surprisingly says that he has been busy trying to settle the issue of the outstanding rent arrears and is "convinced that we are close to settling this debt".

Therein lies the truth of the matter. A person does not generally negotiate and then settle a debt that is not due. Could it be that opposition to the application is being mounted as a ruse to gain time? It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other and not both : *S* v *Marutsi* 1990 (2) ZLR 370(S). When you are negotiating to settle a debt, it means that it is owing. You cannot do that while at the same time contesting the claim in court.

Looking at the part of the acknowledgment of debt relied upon by the applicant in holding the second respondent liable, one has to employ the rules of interpretation in order to determine whether liability attaches to the second respondent or not and in doing so, it is trite that the court must endeavor at all times to give effect to the agreement of the parties. It is undesirable to nullify what the parties agreed upon because one experiences difficulties in interpretation.

As stated in *S* v *Nottingham Estate (Pvt) Ltd* 1995(1) ZLR 253(S) 256 E:

> "The primary rule on interpretation is, of course, to endeavor to ascertain the intention of the law maker from an examination of the provision under consideration placed in proper context. A court will commence its enquiry by giving the word its grammatical signification, unless it is clear that the literal sense, when so applied, defeats the legislative intendment. In such event, a deviation from the ordinary meaning is justified, provided always that the word is sufficiently flexible to admit of another meaning by which such intention can be better effected."

It is also trite that in interpreting contracts between parties the same rules of interpretation

as apply to statutory interpretation apply to contracts. The second respondent clearly stated that he was "the debtor" and acknowledged himself ("myself") to be truly and lawfully indebted to the applicant. The simple and grammatical meaning of that passage is that he was personally liable to the applicant. There is no need to go beyond the grammatical meaning because it clearly makes sense and the intention of the parties was to make the second respondent liable. Otherwise there would have been no need for him to sign the document in that form.

I conclude therefore that the applicant has made out a case for the relief that it seeks. I however have to comment on the claim for what is clearly 10% of the outstanding sum of $82 740-00 as collection commission, yet the applicant is claiming collection commission in terms of the Law Society of Zimbabwe Bye Laws dealing with it. In fact Ms *Kenende* for the applicant insisted that in term of that bye law, the applicant is entitled to 10% as collection commission.

It is strange that so many legal practitioners continue to systematically claim collection commission as 10% of whatever amount is being recovered ostensibly in terms of the Law Society Bye Laws. Just how possible is it to make the same mistake so repeatedly and by so many? The Law Society Bye Laws do not provide for 10% collection commission. They provide that commission is calculated at the rate of 10% for the first $5 000-00 of what is being collected, 5% of the next $5 000-00 and then 2½% of the rest.

Quite a lot of time is spent by the Law Society and its partners embarking on continuing legal education for legal practitioners which is commendable indeed. However it is such small issues like collection commission which are being overlooked and yet they expose members of the Law Society as being very wanting indeed.

Allied to that is the claim for both collection commission and legal practitioner and client costs. This issue was settled by Smith J in *Sedco* v *Guvheya* 1994 (2) ZLR 311 (H) 315 C – N, when he pronounced;

> "Collection commission is essentially a charge made by an attorney or a commission agent when payments have been obtained through his services prior to judgment. If the matter has to proceed to judgment, then what is recovered is not recovered as a result of a collection by the attorney, but as a result of the judgment of the court and the process that follows thereafter."

He went on at 316C to state:

> "To sum up, therefore, once summons has been issued for any debt, the legal practitioner is

> entitled to claim his costs but not collection commission unless subsequent to the service of the summons the debtor has agreed to pay Collection Commission. Collection Commission can only be charged on moneys actually collected by the legal practitioner."

See also *UDC Rhodesia Ltd* v *Ushewokunze* 1972 (2)RLR 97 (G) at 100 – 1; *Kingdom Bank Africa Ltd* v *Notraught Trading (Pvt) Ltd & Ors* HH 437/12.

In that regard, I can only award the applicant attorney and client costs but not collection commission.

In the result, it is ordered that;

1. The 1st and 2nd respondents shall pay the applicant the sum of $82 740 - 00 in arrear rentals jointly and severally the one paying the other to be absolved.
2. Interest on that amount at the rate of 5% per annum from 6 November 2014 to date of payment.
3. Costs of suit on the scale of legal practitioner and client.

Tavenhave & Machingauta, applicant's legal practitioners
Messers T.A Toto Attorneys, respondent's legal practitioners