

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**
(Civil Jurisdiction)

2007/HP/0504

BETWEEN:

STANCOM TOBACCO SERVICES LIMITED

PLAINTIFF

AND

PAG SHERIFF LIMITED

1ST DEFENDANT

**MAHESHKUMAR PATEL (sued as joint
Liquidator of Sherdown Cropping Limited)**

2ND DEFENDANT

**NEWTON LUNGU (sued as joint Liquidator
Sherdown Cropping Limited)**

3RD DEFENDANT

SHERDOWN CROPPING LIMITED

4TH DEFENDANT

(IN LIQUIDATION)

Before: E. M. Hamaundu, J.

For the Plaintiff : Mr E. Mwitwa, Messrs Musa Mwenye
Advocates

For the 1st Defendant: Mr M. Z. Mwandenga, Messrs M. Z
Mwandenga & Co

For the 3rd Defendant: Mr N. Sampa, Messrs Mumba Malila & Co

JUDGMENT

The plaintiff claims the sum of US\$248,534.68 from the 1st and 4th defendants, together with interest at 10% per annum from the

date the sum fell due. The plaintiff also seeks a declaration that it is the legal holder of a charge over all farm, plant and machinery, vehicles, livestock and crops on farm 9235 belonging to the 1st defendant and that the 2nd and 3rd defendants have no right to remove that security. The plaintiff, alternatively, seeks to take possession of the farm and sell it together with movable and immovable property thereon in order to recover the sum owed. The plaintiff seeks an injunction restraining all the defendants from removing any plant and machinery from the farm. As against the 2nd and 3rd defendants, the plaintiff seeks a mareva injunction compelling them to return the machinery, livestock and crops they removed from the farm.

According to the statement of claim, the plaintiff, which has since changed its name to Alliance One Zambia Limited, is in the business of buying and selling tobacco as well as providing agricultural finance. In June, 2004, the plaintiff lent the 1st defendant a sum of US\$37,500.00. Again, in December, 2004, the plaintiff lent the 1st defendant a sum of US\$165,000.00. The 1st defendant provided some security for these sums of money. In April, 2005, the plaintiff had started advancing funds to the 4th defendant

for the purpose of funding its production of tobacco. These advances were to be secured by the same security that the 1st defendant had pledged for the sums of money it borrowed. The security was a charge on plant, machinery, motor vehicles, livestock and crops on farm 9235 Serenje, belonging to the 1st defendant. The funds advanced to the 4th defendant amounted to US\$248,534.68. The 4th defendant was subsequently placed under liquidation and the 2nd and 3rd defendants were appointed joint liquidators. Neither the shareholders nor the liquidators have been willing to settle the debt owed by the 4th defendant. Hence this claim.

The 1st defendant filed a defence.

According to that defence, the 1st defendant and some business partners decided to engage into tobacco farming, to be carried out first on the 1st defendant's farm and then spread to the farms belonging to other business partners.

In furtherance of that objective, the 1st defendant borrowed the sums of money alleged in the statement of claim. The sum of US\$37,500 was paid while the sum of US\$165,000 was not fully paid. The 4th defendant was incorporated in furtherance of the objective in July, 2004. Owing to irreconcilable differences between the

shareholders, the 4th defendant was wound up. The 2nd and 3rd defendants were then appointed joint liquidators.

The 2nd defendant filed a defence.

According to that defence, the 2nd defendant as liquidator has no record of the money allegedly advanced to the 4th defendant. The property on the farm was removed in the 1st defendant's ordinary course of business; and after the 1st defendant and a panel of auditors confirmed that the property belonged to the 4th defendant.

The 3rd defendant also filed a defence. The defence, however, consisted of bare denials of the plaintiff's averments.

No defence was filed for the 4th defendant.

The plaintiff called one witness, Mr Phillip Studgess, the Administration Manager. His testimony was thus: The plaintiff was in the business of providing crop finance to farmers of all types; that is small scale, medium scale and commercial farmers. The financing could take the form of either cash or inputs. Regarding this particular case, the plaintiff had an ongoing financing arrangement with the 1st defendant. In 2004, the plaintiff disbursed one sum of US\$37,500.00 and two sums of US\$165,000.00 respectively to the 1st defendant. The sums lent were secured by agricultural charges on farms 9235

and 10134, both situated in Serenje. The arrangement was also supported by a grower's contract. The sum of US\$37,500.00 was repaid; and so was the sum of US\$165,000.00 which was secured by a charge on farm 10134. The sum of US\$165,000.00 secured by a charge on farm 9235, however, was only partially paid.

In 2005, instructions were issued by the shareholders of the 1st defendant that funding should now be disbursed to the account of Sherdown Cropping Limited, the fourth defendant. Pursuant to those instructions, the plaintiff made eleven monthly transfers to the account of Sherdown cropping limited. The transfers went on up to March, 2006. These funds were still secured by the charge created in 2004 on Farm 9235. The funds should have been repaid by September, 2006. But, instead, the money was only partially paid. As at March, 2006 the debt stood at US\$209,112.00. As time went by, it became apparent to the plaintiff that the shareholders of Sherdown Cropping Limited were having differences among themselves. As at 31st March, 2009, the debt stood at US\$248,000.00 Later the plaintiff heard that Sherdown Cropping Limited had gone into liquidation and that the liquidators were removing the assets from the farm. The plaintiff then instructed its advocates to commence this action and

obtain an injunction, restraining the liquidators from removing the assets. The plaintiff now wanted both PAG Sheriff Limited and Sherdown Cropping Limited to pay the outstanding debt of US\$248,000.00 with interest at the agreed 10% per annum until date of judgment. The plaintiff also wanted the liquidators to be ordered to return the assets which they had removed from the farm.

Cross-examined by counsel for the 1st defendant, the witness replied as follows: The loans to the 1st defendant company and the 4th defendant company were given to them separately. The plaintiff was aware that Sherdown Cropping Limited was a joint venture between John Downie's family and the Sheriffs.

Cross-examined by counsel for the 2nd and 4th defendants, the witness replied thus: There was no agricultural charge or grower's account in respect of Sherdown Cropping Limited but there was one with PAG Sheriff Limited on whose farm the crop was being grown. The disbursement of funds to Sherdown Cropping was at the request of PAG Sheriff Limited. The borrower had discretion to nominate an account to which funds were to be disbursed. Otherwise the parties to the agricultural contract were the plaintiff and the 1st defendant.

Cross-examined by counsel for the 3rd defendant, the witness agreed that the 4th defendant was in liquidation.

That was the case of the plaintiff.

The 1st defendant called Roger Anthony Sheriff as its witness. His testimony was as follows: He was a director in the 1st Defendant Company. His company had over a number of years been a contract grower of tobacco for the plaintiff. The witness was also a shareholder and director of Sherdown Cropping Limited. There were other shareholders as well namely, Katrina Downie, the 1st defendant company and a company known as Arcadia Investments. The Downie's, that is John and Katrina had expressed interest in farming in Zambia. At that time the 1st defendant company had been farming in Zambia for eight years. The company was already well developed, with infrastructure and land. The Downies had struck a relationship with Peter and Jean, shareholders in the 1st defendant company. To assist the Downies, it was agreed that a joint venture be formed to do farming on the land belonging to the 1st defendant company. In this case, it was farm 9235. The venture started under the umbrella of the 1st defendant company pending the registration of the 4th defendant company. The initial loan of US\$37,500.00 was obtained

from the plaintiff under the umbrella of the 1st defendant company. The loan was secured by an agricultural charge in the name of the 1st defendant company. The 1st defendant also signed a grower's contract with the plaintiff. The money was used for the production of tobacco under the joint venture. This money was paid back from the tobacco produced. Another sum was borrowed. This time in the sum of US\$165,000.00. This too was utilized for the production of tobacco under the joint venture. It was secured by an agricultural charge created by the 1st defendant company. The money was repaid but there was a little shortfall which was only cleared the following season. In the meantime, another sum of US\$165,000.00 was obtained. Because of the shortfall from the previous loan, the agricultural charge continued. All the money borrowed was used by Sherdown Cropping Limited on the joint venture. The 1st defendant company did not owe the plaintiff any money.

In cross-examination by counsel for the plaintiff, the witness conceded that, indeed, the sum claimed was owed to the plaintiff, but that it was the 4th defendant company that owed the money and not the 1st defendant.

Cross-examined by counsel for the 2nd and 4th defendants the witness replied that the Downies used to put money in the joint venture but that they were always behind schedule. They also put in some equipment. It was not true that the money borrowed from the plaintiff was the 1st defendant's contribution to the joint venture.

That was the case for the 1st defendant.

The 2nd defendant testified on his own behalf. His evidence was thus. He was a joint liquidator of the 4th defendant. Upon his appointment, he, together with his fellow liquidator, took over the assets and records of the 4th defendant from the company secretaries. There was an asset register which showed the assets belonging to the 4th defendant and those belonging to the 1st defendant. The company secretaries were a firm named K.J.K Tembo & Associates. At a later stage the list of assets was verified. After verification, the liquidators took a decision to move the moveable assets to Kabwe for safe-keeping. They made an inventory of what they had removed from the farm. Not all the assets were collected as they were subsequently served with an injunction. Later the auditors of the plaintiff asked the liquidators to verify the amount that the 4th defendant owed the plaintiff. The liquidators responded that they could not verify the

amount because the records were insufficient; for example, there was no growers contract, there was no resolution from the shareholders for the company to borrow money and there was no document showing that money was borrowed and secured.

When the witness was shown, during cross-examination by counsel for the 1st defendant, ledgers and documents showing payments made to the 4th defendant he replied that he was seeing the documents for the first time.

Cross-examined by counsel for the 3rd defendant, the witness said that he was not aware of any claim that the plaintiff had against him in his individual capacity; but that he was aware about the claim that the plaintiff had against the 4th defendant.

Cross-examined by counsel for the plaintiff, the 2nd defendant replied as follows: The property which they took, as liquidators, belongs to Sherdown Cropping Limited. That equipment was at farm 9235 Serenje which belonged to PAG Sheriff Estates. At the farm, they found equipment belonging to PAG Sheriff Estates as well.

John Downie testified on behalf of the 4th defendant. The following was his testimony: He had come to Zambia at the end of 1999, upon being employed by the Tobacco Association of Zambia.

In the course of his duties he moved around the country extensively, meeting farmers. It was through his duties that he met Mr Peter Sheriff. The latter bought a farm. The witness and his wife also bought a farm which was adjacent to that of Mr Peter Sheriff. The witness and his wife Katrina Downie formed a company known as Arcadian Investments Limited. Subsequently, the witness, his wife and their company Arcadian Investments Limited, on one hand and the Sheriffs and their company PAG Sheriff Limited, on the other, agreed to form a company known as Sherdown Cropping Limited. Together the parties drew up a development plan whereby in the first five years the infrastructure for farming would be developed on the farm belonging to PAG Sheriff Limited. Subsequently, a similar investment would be made on the farm belonging to Sherdown Cropping Limited. The witness's side invested US\$300,000.00 in the venture. The investment by the Sheriffs was to be through the farming. To that end, the Sheriffs borrowed money from the plaintiff, Stancom Tobacco Services Limited, to boost the production of the crop. However, for about two seasons, the crop was a failure; resulting in a very poor yield. Therefore, the Sheriffs failed to clear their loan. At that point, the Sheriffs announced that they would stop

growing tobacco and, instead, start growing sunflower and cassava. The witness was of the view that neither of the two crops was suitable to generate funds. It was, therefore, agreed by all that Sherdown Cropping Limited should be closed.

In cross-examination by counsel for the 1st defendant, the witness replied as follows: Sherdown Cropping Limited did not own land. The company was formed for the purpose of developing infrastructure on the two farms. Sherdown Cropping did carry out some farming operations on the Sheriffs' farm. When shown documents in the defendant's bundles by counsel for the 3rd defendant, in cross-examination, the witness replied that he was not party to any of the documents.

In cross-examination by counsel for the plaintiff, the witness replied as follows: The company Sherdown Cropping Limited was formed in July, 2004. The infrastructure for growing tobacco was developed by Sherdown Cropping while Stancom Tobacco Services Limited advanced the funds for growing the tobacco. Sherdown Cropping was formed in order to develop infrastructure on the two farms. The first farm to be developed was the one on PAG Sheriff Estates.

That was the case for the 2nd and 4th defendants.

The 3rd defendant testified on his own behalf. The following was his testimony: He was a liquidator of Sherdown Cropping Limited. Upon being so appointed, he, together with his co-liquidator and the company secretary, a Mr J. K. Tembo, held some meetings and agreed to transfer the company's assets to a more central place for easy disposal thereof. In this case they chose Kabwe. They managed to move some of the assets from Serenje to Kabwe. As they were planning to hold a creditors meeting, the plaintiff issued an injunction restraining them from collecting the company's assets on the ground that they constituted collateral for some loans.

Cross-examined by counsel for the 1st defendant, the 3rd defendant replied as follows: He did not find out that the main activities for Sherdown Cropping Limited was tobacco farming. He did not find out where Sherdown Cropping Limited was carrying out its activities. At one of the meetings that the liquidators held, it was said that Stancom Tobacco Services Limited was the biggest creditor.

Cross-examined by counsel for the plaintiff, the 3rd defendant replied as follows: After the injunction was issued, the assets that had been removed from the farm were never returned.

That was the case for the 3rd defendant.

The following facts are not in dispute: On 1st June, 2004, the 1st defendant, PAG Sheriff Estates Limited executed a Grower's contract numbered 12164 with the plaintiff Stancom Tobacco Services Limited. By this contract, the plaintiff contracted the 1st defendant to cultivate 15 hectares of Virginia tobacco exclusively for sale to the plaintiff. For its part the plaintiff agreed to provide pre-finance in the sum of US\$37,500.00. As security for that sum of money, the 1st defendant created and executed a charge over all farm, plant and machinery, vehicles and livestock, and all crops growing and otherwise, on farm 9235 in Serenje. Again, on or about 31st December, 2004, the plaintiff, under Growers contract numbered 12162 contracted the 1st defendant to cultivate 60 hectares of Virginia tobacco. For that, the plaintiff agreed to provide pre-finance in the sum of US\$165,000.00. As security for that money the 1st defendant again charged all farm plant and machinery, vehicles and livestock, and all crops, growing and otherwise, on the same farm 9235 Serenje.

It is not in dispute that from April, 2005, the 1st defendant directed the plaintiff to be paying the disbursements on the funds directly to the account of the 4th defendant.

Both sides are agreed that the loan of US\$37,500.00 was paid back. There is also no dispute by the plaintiff to the 1st defendant's contention that the sum of US\$165,000.00 was eventually paid back, although only in the season that followed. Again, the plaintiff does not dispute the 1st defendant's contention that whilst the loan of US\$165,000.00 was subsisting, the 1st defendant obtained further finance of US\$165,000.00; and that this was secured by the same floating charge that had been executed on farm 9235 as security for the earlier finance which had not yet fully been repaid. It is agreed that it is the latter finance of US\$165,000.00 which has not been repaid and has escalated to what the plaintiff is claiming now.

It is further not in dispute that the above loans were obtained by the 1st defendant in order to finance a joint farming venture between it and the 4th defendant. It is not in dispute that the growing of tobacco through this joint venture was a failure, leading to the winding up of the 4th defendant company and the appointment of the 2nd and 3rd defendants as liquidators thereof.

I find all the foregoing as facts.

What the plaintiff is claiming as being owed is not disputed. What is in dispute is with regard to who is liable to pay the money. According to the plaintiff, both the 1st and 4th defendants should bear equal responsibility to pay it. However, as between the 1st and 4th defendants, the former contends that it is the latter who should pay it back, while the latter argues *vice versa*.

The answer to the above question lies in the principles of contract. In this regard, the Growers contracts that were produced, in particular, the Growers contract of December, 2004, for US\$165,000.00 is of particular significance. This is so in the light of the 1st defendant's evidence that, while that loan was still subsisting, it obtained another of US\$165,000.00 on the same documents. While it is accepted that the 1st defendant did direct that disbursements under that funding should be paid directly to the 4th defendant's account, it is the 1st defendant that contracted under that Grower's contract to cultivate tobacco for sale exclusively to the plaintiff in return for the finance. Clearly, whatever arrangement may have existed between the 1st defendant and the 4th defendant as regards the joint venture, the latter was a stranger to that Growers contract.

That contract spells out the obligations of the 1st defendant, the prime one being to pay back the finance. Therefore, in so far as what the plaintiff is claiming now arises solely from what was lent under that Growers Contract, the responsibility to pay it back rests solely on the 1st defendant; and not on the 4th defendant.

With regard to the property charged, I have found that the sum of money which has escalated to what is being claimed now was not the subject of a charge created specifically for it. As explained by the 1st defendant, the money was advanced by the plaintiff before the 1st defendant had fully paid back the previous sum of US\$165,000.00 and, therefore, the second sum of US\$165,000.00 was treated as additional funding on the same security created for the first sum of US\$165,000.00 in December, 2004.

The **Agricultural Credits Act, Chapter 224** of the **Laws of Zambia** which was in force at that time made provision for such an arrangement. Hence in **Section 3(6)** it provided as follows:

- “The principal sum secured by an agricultural charge may be—**
- (a) a specific amount advanced in one sum or in instalments;**
 - or**
 - (b) a fluctuating amount advanced on a current account not exceeding at any one time such amount, if any, as may be specified in the charge.**

Provided that any charge for securing a current account or any further advances shall continue to be effective against the farmer, trader or related business and against the holder or any subsequent interest in the agricultural commodities charged, notwithstanding the fluctuation or temporary extinction of the indebtedness and notwithstanding that the lender may have had notice of the subsequent interest.”

Clause 2 of the agricultural charge that was created in December, 2004 for the first sum of US\$165,000.00 provided:

“The Borrower hereby covenant with Stancom that the Borrower will on demand (or, upon the death or liquidation as the case may be of the Borrower, without demand) pay to Stancom and discharge the balance of all moneys now or hereafter owning by the Borrower to Stancom upon any current or other account with Stancom and all other moneys and liabilities now or hereafter due or to become due from the Borrower to Stancom in respect of any sums advanced or to be advanced by Stancom to the Borrower...”

Clearly, in that charge the parties did envisage further advances of money to the 1st defendant on the same charge. Therefore, the second sum of US\$165,000.00 was properly secured by the charge of December, 2004.

As for the dispute between the plaintiff and the liquidators of the 4th defendant (i.e the 2nd and 3rd defendants) the issue is whether

or not the property which the liquidators collected belongs to the 4th defendant.

It was common cause from the testimony of the witnesses for the 1st defendant and the 4th defendant that the purpose of the joint venture was to develop the respective farms of the two families, the Sheriffs and the Downies; and that according to the joint venture program the farm belonging to the Sheriffs was to be developed first. That position is confirmed by the contents of a letter which Mr John Downie wrote to the liquidators of the 4th defendant. The letter read in part:

“Sherdown Cropping Limited was created to develop two farms, one owned by the Sheriff family and one owned by the Downies. The agreement was that over a 5 year period the total investment on the Sheriff farm, which would be developed first, would be repeated on the farm owned by the Downies. After three seasons the infrastructural development on the farm owned by the PAG Sheriff Estates was substantial yet nothing had been developed on the farm belonging to the Downies except what they had financed themselves....”

It is clear then that the machinery which the liquidators went to collect from farm 9235, belonging to the Sheriffs, was part of the development that had been undertaken on that farm by the joint venture. The spirit of the joint venture was that that development

would remain as belonging to the Sheriffs when the development phase switched to the farm owned by the Downies. It follows that all the equipment that was on farm 9235 was the subject of the charge. It was immaterial that some of it appeared on the 4th defendant's inventory as having been acquired by the 4th defendant. Therefore, between the plaintiff and the liquidators, it is the plaintiff who is entitled to the plant and machinery on farm 9235.

To sum up, the plaintiff has proved its claim for US\$248,534.68 but against the 1st defendant only. I enter judgment accordingly. The plaintiff has also proved its charge over the plant, machinery, crops and livestock on farm 9235. I therefore order the 2nd and 3rd defendants to return to farm 9235 the equipment that they removed therefrom. The plaintiff's claim for possession and sale of the entire farm 9235 fails because the charge under the **Agricultural Credits Act** then did not extend to land.

The judgment against the 1st defendant shall carry interest at 1% per annum from the date of the issue of writ up to the date of judgment. Thereafter, interest shall be at 2% per annum until payment.

The plaintiff shall have costs of this action.

Dated *5th* Day of *February* 2018

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E. M. Hamaundu
JUDGE