INTRATREK ZIMBABWE (PRIVATE) LIMITED
versus
ZIMBABWE POWER COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 12, 13 & 14 September, 6 October 2022 & 11 January 2023

Civil Trial – Breach of Contract, Damages and Specific Performance

Mr L Uriri and T W Nyamakura, for the plaintiff
Mr D Tivadar, for the defendant

MUSITHU J:

BACKGROUND TO THE PLAINTIFF'S CLAIM

The plaintiff and the defendant are both legal entities incorporated in terms of the laws of Zimbabwe. On 23 October 2015, the two entities signed a Public Procurement Engineering, Procurement and Construction Contract (the Contract). In terms of that contract, the plaintiff was required to construct a 100MW Solar Photovoltaic Power Station in Gwanda (the Project). A dispute arose during the implementation of the said contract prompting the plaintiff to approach the court for the following relief:

> "**WHEREFORE**, the Plaintiff claims against the Defendant for:
> 1. An order declaring that the procurement contract for the Engineering, Procurement and Construction (EPC) of the 100MW Gwanda Solar Project (*ZPC 304/2015*) between the parties as amended is valid and binding between the Parties.
> 2. Consequent to the declaration of the validity of the EPC Contract, an order for specific performance,
>
> **Alternatively,**
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> Damages in the sum of **US$25 000 000** ***(Twenty Five Million United States Dollars)*** for repudiatory breach of the EPC contract by Defendant.
> 3. Costs of suit at the attorney and client scale."

The plaintiff's claim is amplified in its declaration as follows. The agreed Contract price for the Project was US$172 848 597.60, which amount was exclusive of taxes. The material terms of the contract were summarized as follows:

- The plaintiff was to source and facilitate the funding of the project as well as bear most of the risks associated with the construction of the plant up to the point of commissioning.
- The contractual terms were derived from what is called the FIDIC Silver Book *(General Conditions of Contract for EPC/Turnkey Projects)* 1999, First Edition. The General Conditions of Contract were applicable to the extent that they were amended by Particular Conditions of Contract agreed to by the parties.
- The defendant was to borrow the funds sourced by the plaintiff in its name, superintend over both the construction works and facilitate payments due to the plaintiff. The defendant would only take over the risk and liability in the power infrastructure upon successful commissioning of the solar plant that is at the *"turn of the key"*.
- The commencement of the Contract was subject to certain suspensive conditions which were to be satisfied or achieved by both the plaintiff and the defendant within a period of 24 months from the date the Contract was signed, that is by 23 October 2017.
- The period within which the suspensive conditions were to be satisfied (the "Conditions Precedent Satisfaction Period") could be extended by a period of 6 months through an amendment to the contract. Such extension was to be done before the expiry of the first tenure of the conditions precedent satisfaction period. Beyond the extended conditions precedent satisfaction period, either party became entitled to terminate the contract, provided that the party seeking to terminate the contract was not responsible for the delays to the fulfillment of the conditions precedent.

Before the expiry of the conditions precedent satisfaction period on 23 October 2017, the parties agreed to enter into an addendum to the Contract, the terms of which would allow the defendant to pay some of the plaintiff's subcontractors directly in order to carry out the pre-commencement works at the project site. The arrangement was in anticipation of the commencement of the Contract. The addendum was executed on 21 September 2017, prior to the expiry of the conditions precedent satisfaction period on 23 October 2107. The addendum set different timelines for the conclusion of the pre-commencement works. The defendant undertook to pay for that. The defendant however failed to pay for such works, and resultantly these were either not executed at all or were not executed timeously.

In breach of the Contract, the defendant sought to extend the conditions precedent satisfaction period by a period of six months on 29 November 2017. The extension was to be reckoned from 23 October 2017. The plaintiff objected to that arrangement given the new terms of the addendum to the Contract and the defendant's failure to perform its obligations under the addendum.

According to the plaintiff, the defendant unilaterally demanded that the suspensive conditions be completed on or before 23 April 2018, a requirement that constituted a violation and material breach of the express provisions of the Contract.

By way of notices dated 10 April 2018, 6 July 2018 and 31 July 2018, the defendant informed the plaintiff that the contract had expired by operation of law. The effect of the notification was that all contractual obligations existing between the parties were terminated. Such termination was insisted upon despite an admission by the defendant that it had failed to perform its payment obligations to the plaintiff's subcontractors under the amended contract. The plaintiff further contends that the purported termination of the Contract was also unlawful in consideration of the defendant's direct liability in causing delays in the fulfillment of the conditions precedent within the agreed timeframes.

Following the unlawful termination of the contract, the plaintiff approached this court by way of motion proceedings seeking a declaration of validity of the Contract. The plaintiff also sought an order of specific performance in the same proceedings. On 13 December 2018, this court made a determination in favour of the plaintiff in HC 8159/18 (judgment HH 818/18), and set aside the cancellation of the contract by the defendant. The defendant appealed against that determination to the Supreme Court. In the meantime, the plaintiff approached this court for leave to execute the High Court judgment pending the appeal to the Supreme Court. That relief was granted on 19 June 2019 under HC 2425/19 (judgment HH 440/19).

The plaintiff claims that during the two year period in which the parties were awaiting the outcome of the appeal at the Supreme Court, they implemented the Contract as amended and further engaged in a series of formal negotiations that culminated in the drafting of an Amended and Restated EPC Contract. On 13 May 2021, the Supreme Court upheld the defendant's appeal and set aside the High Court judgment. The court determined that the matter was replete with

material disputes of fact which were unresolvable on the papers. That finding by the Supreme Court prompted the institution of the present action proceedings.

The plaintiff contends that the defendant committed a repudiatory breach of the Contract by purportedly cancelling it when it was responsible for the delays that were cited as the basis for the cancellation. The plaintiff refused to accept the cancellation and opted to hold the defendant to the contract as amended by seeking a decree of specific performance.

In the alternative, the plaintiff sought an award of damages in the sum of US$25 000 000, arising from the repudiatory breach of the Contract by the defendant. The plaintiff maintained that it was required under the Contract to secure funding for the entire project through a debt financing arrangement. The plaintiff was expected to engage in a robust and expensive process of engaging international banks and project financing institutions. It incurred expenses in the sum of US$3 000 000 between 2013 to 2018.

In the process of securing funding, the plaintiff claimed that it had encumbered some of its shares and other corporeal property as security for various loans used to carry out some of the required preliminary works under the Contract. The loans were interest bearing. Plaintiff also claimed to have incurred costs relating to the procurement of various security instruments such as bank guarantees which were demanded and supplied to the defendant. Further, the Contract itself was of a significant value and if it was to be implemented, the plaintiff and its various technical and professional partners expected to realize a return on investment in the sum of US$22 000 000. As a result of the breach, the plaintiff had therefore suffered loss of profit and/or return on the entire investment.

The Defendant's Plea

The plea raised two preliminary points. Firstly it was contended that no cause of action arose from the contract as it never took off. The conditions precedent were not fulfilled such that the contract did not commence. For that reason there was no basis at law to seek a *declaratur* of the validity of a contract that never commenced. Secondly, it was averred that on 10 May 2021, in a matter involving the same parties, the Supreme Court dismissed the plaintiff's case. The present claim was for the same relief and against the same party. The defendant accordingly pleaded *res judicata*.

On the merits, the defendant averred that the Contract was to be read together with other constitutive documents such as the General Conditions of Contract for EPC/Turnkey Projects "First Edition" 1999 published by the *Federation Internationale des Ingenueurs-Conseils* (FIDIC), the Particular Conditions (including the Schedules), Employer's Requirements ER ZPC/H0/10/2012, as amended and its associated clarifications and the Contractor's Proposal.

The defendant asserted that the commencement of the contract was subject to the satisfaction or fulfillment of the agreed suspensive or conditions precedent as set out in Clause 5 of the Contract within 24 months from the date of its signature by both parties. The plaintiff had failed to meet the prescribed conditions precedent under clause 5(a)-(i) of the Contract. The defendant also averred that in the event that all or any of the suspensive or conditions precedent were not satisfied on or before the 24 months, the conditions precedent satisfaction period could be extended by a period of 6 months solely at the discretion of the defendant. According to the defendant, the conditions precedent satisfaction period expired on 23 October 2017 without the same being extended. The failure by the plaintiff to satisfy the conditions precedent resulted in the defendant exercising its sole discretion to extend the satisfaction period by a further 6 months to 23 April 2018.

The defendant denied that the plaintiff objected to the extension of the satisfaction period. It asserts that the plaintiff actually proceeded to utilize the extended period in its quest to fulfill the outstanding conditions precedent. The plaintiff actually derived a benefit from the extension and not from the terms of the addendum to the Contract. The defendant also denied that its insistence on the fulfillment of the conditions precedent on or before 23 April 2018 constituted a violation and a material breach of the express terms of the Contract.

As regards the addendum to the Contract that was signed on 21 September 2017, the correct position according to the defendant was that it dealt with the performance of the pre-commencement activities. The parties had agreed in clause 8 of the Contract that they may, before the contract's commencement date and subject to the availability of funds, agree, undertake or complete all or part of the initial activities. The pre-commencement works were listed in schedule 11 of the Contract, and the purpose of carrying out the pre-commencement works was to allow the plaintiff to carry out activities that would reduce the contract period. The preamble to the addendum further stated that the provisions of the Contract that were not amended by the

Addendum remained in full force. That meant that the requirement to satisfy the outstanding Conditions Precedent within the satisfaction period remained effective.

Clause 8 of the Contract required the plaintiff to carry out pre-commencement works as set out in Schedule 11 of the Contract. The salient features of Schedule 11 were that both parties were to fund the pre-commencement works. The outlay for that phase of the project was US$5 111 224. The defendant was to contribute US$ 4 111 224 against the provision of a bank guarantee. The plaintiff was required to contribute US$1 000 000. The defendant claimed that as at 29 April 2016, it had paid the plaintiff in advance a sum of US$5 664 136.80. The amount was made up of US$2 313 871.30, for the feasibility study, and US$3 310 736. 30 for pre-commencement works. The defendant further claimed that the plaintiff failed to provide the Bank Guarantee for the advance payment and the US$1 000 000 being its share of the pre-commencement works. The defendant asserted that despite receiving the said payment, the plaintiff failed to carry out the pre-commencement works or perform works of equivalent value.

The defendant insisted that the contract had lapsed by operation of law, as a result of the plaintiff's failure to fulfill and satisfy the Conditions Precedent. As at the date of the expiry of the Conditions Precedent satisfaction period, there was no contract to enforce. That position was confirmed by the Supreme Court which also upheld the cancellation of the Contract. The defendant denied that it was in breach of its own obligations to pay the plaintiff's subcontractors under the amended contract. It further denied that the plaintiff's subcontractors performed in terms of their respective mandates. It also challenged the value of the works allegedly performed by the sub-contractors.

While admitting that the parties engaged each other during the two years that they awaited the outcome of the Supreme Court appeal, the defendant averred that their negotiations were confined to the signing of the amended and Restated EPC Contract. The negotiations however never materialized as the parties failed to agree on the terms and conditions of that contract.

The defendant denied any liability for loss of profit or for any direct and consequential loss or damages allegedly suffered by the plaintiff, insisting that the Contract was lawfully terminated. The defendant averred that the plaintiff failed to secure funding for the Contract, and consequently the contract never came into effect. The defendant denied that the plaintiff incurred expenses in the sum of US$3 000 000 from the year 2013-2018, when the contract lapsed by operation of law.

The defendant further denied that the plaintiff performed any financial obligations under the Contract. The defendant also denied that the plaintiff encumbered some of its shares and other corporeal property as security for the various loans used to carry out the required work under the Contract.

The Defendant's Claim in Reconvention

In its counterclaim, the defendant asserted that the Contract was to commence on the date when the agreed Conditions Precedent in clause 5 of the Contract were satisfied. The stipulated conditions were to be fulfilled within 24 months, subject to a 6 months extension at the sole discretion of the defendant. The plaintiff introduced its technical partner, Chint Electric Company Ltd (CHINT), a Chinese Company. Although mentioned in the contract, CHINT did not sign the contract. As the plaintiff's technical partner, CHINT was critical not only in the awarding of the tender to the plaintiff, but also in the financing and implementation of the project.

During the contractual negotiations, the plaintiff and its technical partner made a material pre-contractual representation that they had the ability to perform their contractual obligations. That representation was made with the object of inducing the defendant to enter into a contract with the plaintiff. The defendant claims that at the time the contract was entered into, the plaintiff and its technical partner knew that the representation was false because they did not have such capacity to perform in terms of the Contract. The integrity of the plaintiff's technical partner was questionable. This was because the African Development Bank (AfDB), a multi-lateral financial institution that funds similar projects in Africa, had through its office of Integrity and Anti-Corruption, established that CHINT had in the past misrepresented its experience in similar assignments in order to satisfy the qualification requirements.

The defendant averred that the plaintiff had a duty at law to inform the defendant about its capacity to perform its contractual obligations. Instead, the plaintiff had intentionally misrepresented its capacity to perform. As a result of this misrepresentation, the defendant suffered damages in the sum of US$88 362 500, being loss of revenue and profit, and US$5 000 000 being damages caused by the plaintiff's misrepresentations.

The defendant further claimed that over and above the Conditions Precedent, the parties agreed under Clause 8 of the Contract that the plaintiff would carry out pre-commencement activities as set out in schedule 11 of the Contract. The plaintiff failed to satisfy the prescribed

Conditions Precedent under clause 5(a)-(i) of the Contract. The failure by the plaintiff to satisfy the Conditions Precedent within the stipulated period meant that the contract between the parties never came into effect. As a result, the defendant extended the Conditions Precedent satisfaction period, but despite that extension, the plaintiff still failed to perform its obligations. Consequently, the defendant claimed that it invoked the provisions of clause 5(i), which provide for termination as a contractual remedy available to an aggrieved party. The defendant rejected the termination.

The defendant claimed that as at 29 April 2016, it had advanced US$5 664 136.80 to the plaintiff for pre-commencement works. The amount was made up of US$2 313 871.30, for the feasibility study and US$3 310 736.30 for the pre-commencement works.

The plaintiff failed to provide an advance payment guarantee to securitise the payment for the pre-commencement works to commence. The plaintiff also failed to contribute US$1 000 000, for the execution of the pre-commencement works. Concerning the terms of the addendum, the plaintiff failed to meet its contractual obligations and to complete the works that it was required to perform within the stipulated timeframes. It was on that premise that the defendant claimed damages in the sum of US$3 310 736.30, being the advance payment made to the plaintiff towards the execution of the pre-commencement works. Consequently, the plaintiff's claim in reconvention was for:

> "a) An order declaring that the EPC Contract and the Addendum entered into by the parties did not commence due to the Plaintiff's failure to meet the prescribed Conditions Precedent.
> b) Damages for breach of contract and misrepresentation in the sum of US$96, 673, 236.30 (Ninety-six million Six hundred and seventy-three thousand two hundred and thirty-six United States Dollars Thirty Cents)
> c) Costs of suit on a legal practitioner and client scale."

Plaintiff's Plea to the Claim in Reconvention

The plaintiff denied that the Contract was entered into on the basis of the misrepresentations alleged by the defendant. Instead, the contractual negotiations were the outcome of an arduous bidding process that initially involved more than six prospective contractors. The defendant had, through the State Procurement Board (SPB), flighted a tender in 2012 for the construction of the 100MW photovoltaic solar plant and invited bidders with the financial and technical competence to deliver the required project at an optimum cost but meeting the set technical specifications. In response to the tender, the plaintiff submitted its bid together

with various other competitors such as China Jiangxi, Corporation, Larnlake Power (Pvt) Ltd, Afriven Investments (Pvt) Ltd, Number 17 Meturtiligical and ZTE Corporation.

The plaintiff claimed that its technical submissions were accepted as being compliant with the required specifications and minimum accepted thresholds required by the defendant. It also claimed that the processes preceding the award of the tender were verified independently and objectively decided upon by the SPB, which was satisfied with the plaintiff's compliance levels. The plaintiff denied making any form of misrepresentation leading to the signing of the Contract. The plaintiff averred that the alleged investigation of CHINT by the AfDB bank was of no relevance as the cases were unrelated.

The plaintiff further claimed that as part of the negotiations that led to the consummation of the Contract, a due diligence exercise was carried out on both the plaintiff and its technical partner. The due diligence exercise was intended to verify if the plaintiff and its technical partner had the requisite technical and financial capacity. The defendant allegedly sent a team of engineers, accountants and lawyers to China in January 2016. Their mandate was to conduct an extensive due diligence exercise on the plaintiff's technical partner. The defendant could not turn back at this stage and allege that the plaintiff and the technical partner misrepresented their capacity to perform their contractual obligations, when it had done its due diligence.

The plaintiff further contends that after noting the challenges that beset the defendant in accessing funding for the project as availed by the plaintiff's funding partners, CHINT extended an offer to issue a performance guarantee over the project, valued at US$52 million in an attempt to kick start the project. Such a gesture would not have been made by a party without capacity to perform its contractual obligations. CHINT had extensive experience in the manufacture of PV Solar Modules and construction of solar plants. It was a blue chip company listed on the Shanghai Stock Exchange with an average annual sales revenue in excess of US$12 Billion and a staff compliment in excess of 29 000. CHINT had also successfully carried out other projects for the defendant's sister company, the Zimbabwe Electricity Transmission and Distribution Company (ZETDC).

The plaintiff denied that it had failed to satisfy the conditions precedent as alleged. It averred that the defendant was responsible for the delays in the fulfillment of the conditions

precedent. It rendered itself ineligible from the financing of the project owing to the non-payment of outstanding arrears to China Exim Bank, by the Government of Zimbabwe.

The plaintiff further claimed that the defendant frustrated the fulfillment of the Conditions Precedent in many ways. The defendant allegedly filed fictitious, malicious and unsubstantiated charges of fraud and corruption against the plaintiff and its Managing Director on 12 December 2017. The criminal complaint was filed with the Zimbabwe Anti-Corruption Commission (ZACC), barely two months after the parties signed the addendum to the Contract. The plaintiff lost not only the time to perform its contractual obligations, but its reputation, good name and standing as a corporate citizen. The plaintiff also averred that the defendant chose not to extend the Satisfaction Period prior to the expiry of the 24 months but instead amended the contract on 21 September 2017. The defendant failed to pay the plaintiff's sub-contractors in terms of that addendum. An amount of US$820 317.08 remained owing to the subcontractors.

The plaintiff questioned the basis of the claim for US$3 310 736.30, yet the parties had carried out a joint site visit in August 2020, which confirmed the status of the pre-commencement works executed. A valuation report co-signed by the parties' representatives at the conclusion of that exercise absolved the plaintiff from any financial obligations to the defendant.

THE TRIAL

The agreed trial issues were as follows:

In respect of the main claim:

- Is the procurement contract for the Engineering, Procurement and Construction and Construction (EPC) contract entered into by and between plaintiff and defendant dated 23 October 2015 is valid and binding on the parties?
- Depending on the conclusions reached on the above questions, did the Plaintiff suffer damages, and what is the quantum thereof?

In respect of the claim in reconvention:

- Was the agreement between the parties, namely the Engineering Procurement and Construction (EPC) contract entered into by and between plaintiff and defendant dated 23 October 2015 induced by misrepresentation on the part of the Plaintiff?
- If the Plaintiff breached the agreement, then did the defendant suffer damages as pleaded by it or at all and what is the quantum.

At the commencement of the trial, Mr *Tivadar* for the defendant advised that the defendant was abandoning the claim in paragraph (b) of its prayer. That claim is for payment of damages for breach of contract and misrepresentation in the sum of US$96 673 236.30. The defendant was however persisting with the claim for US$3 310 736.30, being the advance payment made to the plaintiff in respect of the pre-commencement works.

The Plaintiff's Evidence

The plaintiff led evidence from its Managing Director, Wicknell Munodaani Chivhayo who appeared as its sole witness. He told the court that when the tender for the Engineering, Procurement and Construction of the 100MW Gwanda Solar Power Station Project (the Project) was flighted, the defendant had no funds for the Project. The defendant was therefore looking for a contractor that would also assist it in raising funds for the Project. It was for that reason that the plaintiff's technical partner, CHINT, was roped into the Project. The contract price was US$172 848 597.60. The witness told the court that CHINT had the required financial and technical capacity to execute and complete the project.

The witness stated that the commencement of the contract was subject to the satisfaction of the conditions precedent set out in clause 5 of the contract[1]. Some of the key deliverables of that phase included the sourcing of funds for the project and the completion of the feasibility studies. According to the witness, the defendant was responsible for funding the pre-commencement works. On its part, the plaintiff was required to assist with the fundraising, and to that end, it had engaged financial consultants and financial partners such as the China Exim Bank as well as the Ministry of Finance and Economic Development, among many others. These engagements were done before the commencement of the contract. The witness blamed the defendant for the collapse of the engagements that were meant to give birth to the financial agreements.

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[1] See the contract on pages 3-4 of Exhibit 3. The conditions precedent were listed in clause 5 as follows:

(a) the Financing Agreements have been signed, come into full force and effect and all of the conditions to the first drawdown of funds (other than in relation to any conditions which relate solely to the effectiveness of the Contract) have been satisfied;
(b) the Advance Payment Demand Guarantee is provided to the Employer by the Contractor in accordance with Sub-Clause 14.2;
(c) the Contractor receives the amount of the advance payment in accordance with Sub-Clause 14.2;
(d) the Performance Security is provided to the Employer by the Contractor in accordance with Sub-Clause 4.2;
(e) the completion of feasibility studies with bankable findings alignable to the implementation of the project;
(f) due Diligence Exercise by the Employer;
(g) Production of an Environmental Impact Assessment *("EIA")* Certificate;
(h) Acquisition of land for the Project by the Employer as informed the feasibility studies;
(i) Corporate authorisations having been obtained by both Parties.

As an entity owned by the Government of China, China Exim Bank required the provision of guarantees by the Government of Zimbabwe. Out of his desire to see the project move forward, the witness stated that he approached the Ministry of Finance on behalf of the defendant. The Ministry of Finance intimated its preparedness to support the project, and duly accorded it a national project status. The witness averred that he is the one who pushed for the conferment of that status on the project.[2] The Ministry of Finance undertook to provide the government guarantees that were required by China Exim Bank. This was confirmed in a letter from the Ministry of Finance to the Export-Import Bank of China dated 10 March 2016. The ministry undertook to issue a Sovereign Guarantee for the project in the sum of US$147 000 000, for the project.[3]

It however emerged that the Government of Zimbabwe had been blacklisted for defaulting on a loan of about US$400 million that was not repaid. The China Export & Credit Insurance Corporation (China Sinosure) accordingly refused to secure the loan required for the project because of that default. The China Sinosure is a state-funded insurance company established to support China's foreign and trade development and cooperation. The Sinosure Overseas Investment Insurance is available for equity and debt investments made by Chinese enterprises in projects outside China.

After the collapse of the engagements involving China Exim Bank deal, the witness stated that the parties mooted other avenues of raising the required funding. These included the raising of an energy bond through the Commercial Bank of Zimbabwe (CBZ). The proposal had the full support of the SPB. However the defendant was not interested, even after its own Minister directed it to pursue that route. In short, the defendant frustrated the signing of the financial arrangements, contrary to the spirit of clause 5(a) of the Contract.

As regards the advance payment demand guarantee, the witness stated that during their meetings with the defendant's officials, the feasibility studies had been carried out and the defendant owed the plaintiff funds for the work done. There was no need for such guarantee once work had been completed and payment was due to the plaintiff. The advance payment received

[2] Letter from the Ministry of Finance and Economic Development to the defendant dated 8 March 2016, on p 188 of the plaintiff's bundle, volume 1, being exhibit 1.
[3] Letter from the Ministry of Finance and Economic Development to the Export-Import Bank of China on p189 of the plaintiff's bundle, volume 1, exhibit 1.

was therefore in respect of the feasibility that had been performed. As regards the performance security, the witness stated that it was not provided partly because it was never asked for, and partly because the defendant still had some outstanding amounts to be paid on the feasibility study.

The witness also confirmed that the defendant had carried out its due diligence in terms of clause 5(f) of the contract. Both parties representatives travelled to China as part of the exercise to evaluate the capacity of the plaintiff's technical partner. The parties were also aware that CHINT had successfully carried out some projects in the country.

The witness stated that the production of the Environmental Impact Assessment Certificate (EIA), was the responsibility of the defendant. It was only produced following the intervention of the witness who had to directly engage the responsible ministry officials. The land for the project was also acquired from the Ministry of Lands through the intervention of the witness. The witness also confirmed that both parties had procured the necessary authorisations as required by clause 5(f) of the contract. Only one condition pertaining to financing agreements remained outstanding.

The witness told the court that the amendment of the contract through the addendum was occasioned by the lapse of time. The agreement between the parties as reaffirmed in the addendum was that the total cost of the pre-commencement works was US$5 111 224. Of that amount, the plaintiff was required to contribute US$1 000 000, with the defendant contributing the remainder. The plaintiff did not pay the said amount because it was only required to perform work of an equivalent amount. The witness stated that after the payment for the feasibility study and part of the fee for the pre-commencement works, the defendant still had an outstanding liability in the sum of US$1 232 322.87, for part of the pre-commencement works carried out. The plaintiff's subcontractors were supposed to be paid from that outstanding amount.

The witness stated that the defendant caused his arrest by ZACC officials for non-performance of the contract. The witness wrote to the defendant's Managing Director complaining about the conduct of the defendant's officials in causing his arrest on what he termed unfounded allegations of corruption[4]. His arrest negatively affected the execution of some of the works by the plaintiff and its sub-contractors.

The witness insisted that the conditions precedent satisfaction period was extended by the parties, and yet the defendant went on to raise a criminal complaint for non-performance. The

[4] Letter on p130-141 of Exhibit 3 being the defendant's bundle of documents.

witness made reference to clause 5 (i) of the Contract which stated that if the conditions precedent were not satisfied on or before the date being 24 months after the date of signature of the contract by both parties (the CP Satisfaction Period), then the parties were to meet to review the progress towards satisfaction of such Conditions Precedent and the employer (defendant herein) could in its sole discretion on or at any time prior to that date being 24 months after the date of the signature of the agreement by both parties, elect to extend the CP Satisfaction Period by a further 6 months by giving notice thereof to the contractor.[5]

The witness also referred to a letter of 29 November 2017 from the defendant's Managing Director to the plaintiff's Managing Director in which the condition precedent satisfaction period was extended by a further six months from 23 October 2017 to 23 April 2018.[6]

The witness went on to relate to several communications involving the plaintiff, the defendant and other key stakeholders which tended to show that the defendant was responsible for the failure to sign the financial agreements during the extended period. The witness averred that in terms of clause 5 (i) of the Contract[7], the defendant was estopped from relying on its own breach to cancel the contract.

According to the witness, the plaintiff declared a dispute between the parties in terms of the contract. The declaration of the dispute was done through a letter of 15 January 2018, from the plaintiff to the defendant.[8] In terms of the Contract, the dispute was supposed to be determined by the Dispute Adjudication Board which was duly constituted. The defendant's attitude was that there was no need for the constitution of the adjudication board since the parties could meet and resolve the dispute. The witness stated that at one point, the plaintiff sought to refer the dispute to arbitration, but the defendant objected arguing that it was not an arbitration matter. It was at that point that the plaintiff approached the High Court for an order of specific performance, and alternatively damages and it succeeded in the main relief. The defendant appealed the High Court decision to the Supreme Court. The plaintiff sought leave to execute pending the appeal to the Supreme Court, and the application was granted by this court. Still, the defendant did not comply with the order of this court.

[5] Page 60 of the Plaintiff's bundle of documents being exhibit number 1
[6] Letter on p187 of Vol 1 of the Plaintiff's bundle of documents, being Exhibit 1.
[7] Page 60 of Vol 1 of the Plaintiff's bundle being exhibit 1.
[8] Letter on p205 of Vol 1 of the Plaintiff's bundle of documents, being Exhibit 1.

The Ministry of Energy and Power Development (the Ministry of Energy) directed that the parties further engage in the spirit of giving effect to the contract. The communication was done by way of a letter dated 15 June 2020.[9] The parties prepared an amended contract which they are yet to sign. According to the witness, that dispelled the notion that specific performance was no longer possible.[10]

Further engagements between the parties were initiated at the instance of the Minister of Energy. On 22 May 2020, the defendant was invited to a meeting at the Ministry's offices. The purpose of the meeting was to resolve the issues that were stalling the implementation of the project.[11] Another invitation was to follow this time for a meeting to be held on 22 June 2020 at the Ministry's offices.[12] This was followed by yet another invitation for a meeting at the Ministry's offices on 29 July 2020.[13] In an earlier letter of 6 July 2020, to the Executive Chairman of ZESA Holdings (Pvt) Limited (ZESA Holdings) and copied to the plaintiff, the Minister intimated to the Chairman that "your office is required to urgently conclude the drafting of all the pertinent agreements and financial instruments necessary for the available financier to avail the funds required to implement the project."[14]

The witness averred that the Government of Zimbabwe, as the shareholder in the defendant through the Ministry of Energy wanted the project implemented without delay. It was for that reason that the Ministry had intervened by inviting the parties to meetings at which important milestones were discussed. The defendant remained defiant notwithstanding such interventions at the highest levels.

The witness also told the court that the parties' representatives visited the project site sometime in July 2020. The purpose of the visit was to enable the parties to assess the work that had been done and what was not done since the parties were negotiating a revised contract. After the site visit, the parties prepared a report which comprised of pictures and video evidence demonstrating their findings on the ground. The report was jointly signed by the parties' representatives. The defendant was represented by its Project Manager, a Mr Mugwagwa and two

[9] Letter on p188 of Vol 2 of the Plaintiff's bundle of documents, being Exhibit 2.
[10] The unsigned new contract is on p 131 of Vol 2 of the Plaintiff's bundle of documents, being exhibit 2.
[11] Letter of 20 May 2020 on p178 of Vol 2 of the Plaintiff's Bundle of documents, being Exhibit 2.
[12] Letter of 18 June 2020 on p180 of Vol 2 of the Plaintiff's Bundle of documents, being Exhibit 2.
[13] Letter of 27 July 2020 on p181 of Vol 2 of the Plaintiff's Bundle of documents, being Exhibit 2.
[14] Letter on p193 of Vol 2 of the Plaintiff's Bundle of documents, being Exhibit 2.

officials Fambi and Chinho. The plaintiff was represented by its Project Manager a Mr Magwenzi, the witness himself, and one Mubviri.[15] The parties could not have carried out such an important exercise for a project, whose contract had been terminated. The exercise was undertaken with the parties mindful that the project was temporarily on hold.

As regards the amount of US$3 310 736.30 claimed by the defendant in its counterclaim, the witness averred that such claim was devoid of merit if considered in the context of the joint report. It was made on the premise that the pre-commencement works were not carried out, yet the report showed otherwise. The report actually confirmed that the defendant owed the plaintiff some money for work done, at the conclusion of the pre-commencement works. It also confirmed that the advance payment guarantee was no longer necessary.

The witness was adamant that the objectives of the pre-commencement activities as set out in the Contract were satisfied.[16] It was therefore malicious for the defendant to suggest that the Contract was not implemented at all.

As regards the alternative claim for damages, the witness stated that the plaintiff had incurred expenses from the tendering stage right up to the point the parties had to travel to countries such as China and India as part of the due diligence process. That also included the cost of air travel for the defendant's personnel that had to be covered by the plaintiff. The plaintiff also claimed risk, occupational damages and damages for reputational loss occasioned by the negative publicity that was caused by the defendant. The plaintiff and its security guards were also ordered off the project site. The plaintiff was prepared to carry on with the project.

Under cross examination, the witness insisted that discussions for the preparation of a new contract only started in earnest in 2020 after the new Minister of Energy, who happened to be a lawyer by profession assumed office. The Minister was not at all amused by the delays in implementing the project and particularly the defendant's failure to comply with court orders. He particularly made reference to the order by CHITAPI J, which granted the plaintiff herein leave to execute the High Court judgment pending appeal. After the granting of leave to execute pending appeal, and following the intervention of the Minister of Energy, the parties met but nothing concrete came out of their engagements. The witness also intimated that in as much as no funding

[15] The report is on pages 195-203 of Vol 2 of the plaintiff's bundle of documents, being Exhibit 2.
[16] See Schedule 11 on page 149 of Vol of the plaintiff's bundle of documents, being exhibit 1.

agreements were signed, thanks to the defendant's obstinacy, there were financiers who were ready to bankroll the project. The witness averred that this position was confirmed in the plaintiff's communication with the Ministry of Energy.

The witness submitted that the execution of the Amended and Restated Contract Agreement was in no way an admission that the plaintiff had failed to perform under the Contract. The idea was simply to kick start the project with the plaintiff required to secure funding for the implementation of 10MW, as an initial phase to the execution of the full works as provided for in the Contract. The parties would thereafter move on to implement the 100 megawatts.

Asked to comment on which contract the plaintiff wished to have enforced between the Amended and Restated Contract and the EPC Contract, the witness maintained that it was the EPC Contract. The plaintiff had even offered to reduce the contract price which was a demonstration of how it wished to have the contract implemented.

The witness was also asked to comment on whether a guarantee was provided by the plaintiff as required by the contract. The witness submitted that CHINT wrote to the defendant advising that they had the guarantee in place but the defendant dithered. The offer was not accepted by the defendant because it had no money. Be that as it may, the defendant made payments for feasibility and pre-commencement works without an advance payment guarantee. According to the witness, this was justifiably so because the plaintiff had delivered on those activities.

The witness insisted that the defendant's letters of 2 and 10 April 2018[17], as well as 6 July 2018[18], which confirmed the non-extension of the conditions satisfaction period beyond 23 April 2018 prevented the plaintiff from fulfilling the conditions precedent as set out in clause 5(a). This was because the defendant failed to pay the sub-contractors and as a result the pre-commencement works could not be completed. The witness stated that although the actual project had not yet commenced, save for the pre-commencement works, the plaintiff needed only 6 months to complete the first 10 megawatts once it secured the necessary funding. The witness accepted that the plaintiff had revised the project cost downwards in the Amended and Restated contract because costs of solar projects had generally gone down on the international market.

[17] Pages 245 and 259 of Vol 1 of the Plaintiff's bundle being Exhibit 1
[18] Page 300 of Vol 1 of the Plaintiff's bundle being Exhibit 1.

The witness dismissed the ADB integrity report on the debarment of CHINT on the basis that the plaintiff was not seeking funding from ADB. In any case, the debarment had been lifted. CHINT was never found guilty of any fraudulent conduct.

Asked to comment on how the project could be implemented since the defendant did not have the financial resources, the witness submitted that the plaintiff had presented to the defendant the Export and Import Bank of China (China Exim Bank) as a willing financier for the project around 2015. The defendant could however not access the funding set aside by China Exim Bank for the project owing to the arrears that the defendant's shareholder owed the Bank's export credit insurance provider, Sinosure. The bank however indicated that it could still support the project without involving Sinosure, since they were other insurance companies that could be roped in.

There were alternative funders that did not even require underwriters. The plaintiff presented other local financing institutions such as the Commercial Bank of Zimbabwe (CBZ) and the African Transmission Corporation Holdings Limited (ATC) as prospective funders. The Ministry of Energy even approved the funding proposal by ATC in June 2020. The defendant was mandated to amend and restate the terms of the Contract to give effect to the new funding model, but it failed to do so. The witness further stated that the plaintiff also approached NSSA, on behalf of the defendant, requesting assistance in raising US$25 927 289.[19] That offer was also not taken up by the defendant.

The witness insisted that the annexure to the joint report prepared following the joint visit to the site dated 13 July 2020, was part of the main report prepared by the parties representatives.[20] The witness averred that the report, together with the annexure was actually sent to the plaintiff by the defendants after the joint visit.

The Defendant's Case

The defendant called one witness, Cleopas Fambi. He is employed by the defendant as the Assistant Project Manager. During the period 2015-2017, he was employed as the Project Manager for renewables. That included the project between the plaintiff and the defendant. He was involved in the project during the tendering phase, contract negotiations and the pre-commencement works. His evidence was as follows. Sometime in 2013, the defendant through

[19] Letter from NSSA dated 19 January 2016, Vol 1 p478
[20] Annexure to the report on p 195 being pages 204-206 in Vol 2 being Exhibit of the plaintiff's bundle of documents.

the then State Procurement Board floated a tender for the construction of 3 x 100MW Photovoltaic solar plants at Gwanda, Insukamini and Munyati. The plaintiff was one of the bidders who participated in the tender. It was awarded the tender to construct the solar power station at Gwanda.

Following the awarding of the tender to the plaintiff, the parties concluded the Contract on 23 October 2015. The Contract was to commence in full force and effect after the satisfaction of the conditions precedent as stipulated in the Contract. The plaintiff failed to fulfill the prescribed conditions precedent under clause 5 of the Contract and the conditions remain unfulfilled to this date. The Contract did not commence as a result of the plaintiff's non-fulfillment of the conditions precedent. According to the witness, the addendum to the Contract dealt with the performance of the pre-commencement works listed in Schedule 11 of the Contract.

The witness also stated that the defendant paid for the pre-commencement works in advance. The plaintiff however failed to provide the bank guarantee for the advance payment as well as to provide its payment portion that it was meant to contribute towards the pre-commencement works. The witness also averred that the plaintiff misrepresented its capacity to perform its contractual obligations.

The witness told the court that the site visit of 13 July 2020, took place in the context of a proposal to implement the project in phases, starting with 10 megawatts. He was part of the team that carried out the site visit. The works had been partially completed on the ground. To his knowledge, no maintenance or repairs had been carried out since July 2020.

In respect of the document attached to the joint report showing the various activities of the pre-commencement works undertaken at the site and the Bill of Quantity amounts, the witness stated that he had only seen the attached document for the first time in court.[21] The witness submitted that the amount of US$2 031 230, representing the value of the Groundsite Clearing was overstated since there was still need to carry out ripping of the top soil, clearing and site levelling.

The witness dismissed the accusation that the defendant did not wish to implement the project, asserting that the defendant's conduct was consistent with a desire to see the project completed. It was for that reason that the defendant had paid for the pre-commencement works.

Under cross examination by plaintiff's counsel, the witness admitted that the defendant was a State commercial entity and therefore subject to the law governing procurement by State

[21] See the breakdown on pre-commencement works attached to the report of the site visit p204-206 Vol 2, being Exhibit 2.

commercial entities. He also confirmed that in terms of the law, the defendant's Accounting Officer was its Managing Director who was wholly responsible for the administration of the project. The witness conceded that he could not account for the project within the contemplation of the law since he was not the defendant's Accounting Officer. The Accounting Officer was the one with the complete record of all the transactions.

The witness was asked if he could provide some insight on the issue of the financing agreements, but he admitted that his understanding was limited. He stated that he could not comment on why there was no financial closure because he did not have the required information. He could also not comment on whether the defendant deliberately frustrated the financial closure as alleged by the plaintiff. He could not deny that CHINT had procured funding from China, since he was not the accounting officer. The witness could also not deny that the plaintiff had, as an alternative engaged domestic funders to finance the project, and that its efforts had been frustrated by the defendant's ambivalence.

The witness could also not deny that CHINT had offered a US$52 million guarantee, but the defendant did not embrace it because it did not have the required funds. He opined that the best person to comment would the Accounting Officer since all correspondence was directed at him.

The witness admitted that the parties did not refer their dispute to a Consultant or Engineer because there was no disagreement on the value of the pre-commencement works carried out. The witness was also part of the team that carried out a site visit at the project site in July 2020. The parties agreed that the fence was erected and completed 100%. The witness agreed that the defendant therefore received value at the conclusion of that part of the project. The witness also admitted that the feasibility study had been done and completed. Repairs and maintenance work had also been carried out.

Although the witness denied the value delivered ascribed to the pre-commencement works in the sum of US$3 382 697 as recorded in the Bill of Quantities report[22], he conceded that he could not tell the value that had been delivered to date. The witness could not comment on how the sum of US$3 310 736.30 representing the defendant's counterclaim was arrived at. According to the witness, that required the Accounting Officer, his team and the contractor to confirm how the figure was arrived at.

[22] See p 206 of the report in Vol 2 of the Plaintiff's Bundle being Exhibit 2

The witness admitted that at some point the defendant ordered the plaintiff's workmen off the site. He further admitted that the plaintiff could not be expected to carry out repairs and maintenance work when they were offsite.

The witness could not comment on the Ministry's directive that the project be completed. It was further put to him that as late as 6 July 2020, the Minister of Energy had written to the Chairperson of ZESA Holdings expressing Government's position on the project.[23] The witness' attention was also drawn to the letter of 15 June 2020 from the Minister to the Chairperson of ZESA Holdings, where the Minister reiterated the government's desire for the parties to move with speed to implement and execute the project without further delay.[24] The witness could not deny that the contract was still capable of performance and that the plaintiff could still secure funding in order to achieve financial closure. He also admitted that the defendant was desirous of addressing power shortages which is what had given the impetus for the project.

The Closing Submissions

Plaintiff's Submissions

At the conclusion of the oral testimonies, counsel opted to file written closing submissions. In its closing submissions, the plaintiff noted that the only issue that remained for determination was whether or not the Contract remains valid, binding and capable of performance. In respect of the counterclaim, the issue was whether the plaintiff was liable to the defendant for the advance payment made in respect of pre-commencement works. The plaintiff contended that no meaningful evidence was advanced in order to sustain the counterclaim. Citing the case of *His Holiness Acharya Swami Ganesh Dassji* v *Sita Ram Thapar*[25], the plaintiff argued that it was ready to perform the contract. In that case it was held that readiness to perform a contract meant the capacity to perform the contract, which included the financial capacity to pay the contract price. The plaintiff submitted that the onus was on the defendant to show that performance was impossible. The plaintiff further submitted that at law where one party to an agreement repudiated that agreement, the innocent party could at its election claim specific performance of that

[23] Para 2 of the letter of 6 July 2020, in Vol 2, Exhibit 2 reads:
"Cabinet's decision to approve the project was based on the technical and financial proposal by the EPC Contractor to commence the project with a 10MW plant which is expected to be commissioned within a period 6 months from financial closure and the drawdown of funds for that phase. In the circumstances I reiterate the need to expedite the current discussions between ZESA and the contractor to completion."

[24] Letter of 15 June 2020 on p188 of Vol 2 Exhibit 2

[25] (1996) 4 SCC 526

agreement or damages in lieu of specific performance. Specific performance was of course in the court's discretion. Each case had to be determined on its own merits. The plaintiff referred to the case of *Benson* v *SA Mutual Life Assurance Society*[26], where the court held that the plaintiff had the right to elect whether to hold a defendant to his contract and claim performance by him of what he bound himself to do or claim damages for the alleged breach. The defendant did not enjoy that right of election.

The plaintiff argued that the defendant did not lead any evidence to show that specific performance was impossible. Neither had it incorporated its evidence in the prior litigation in the present matter. Although the court could have regard to its records, it did not necessarily mean that the previous evidence could be taken as having been led in the present proceedings. A party that intended to rely on evidence in past litigation had to lead that evidence in the litigation in which it was intended to rely on such evidence.

The plaintiff argued that it had done enough on its part to achieve financial closure. It introduced its technical partner, CHINT who was willing and able to provide the necessary performance guarantee in the sum of US$52 000 000. The defendant however failed to provide a counter-payment contemplated by the guarantee. Alternative efforts were made to raise funding locally. The plaintiff submitted that it found the funders and brought them to the table but the defendant frustrated such efforts. The plaintiff argued that there was nothing on record to show that the defendant took any positive steps in connection with the issue of financial closure. The defendant even caused the arrest of the plaintiff's Managing Director. The plaintiff also averred that the defendant had all but admitted that the conduct of its shareholder was partly to blame for its failure to perform. As such the defendant was bound by the actions of its shareholder.[27] According to the plaintiff, this was because the shareholder, in this case the Government of Zimbabwe exercised positive control over the defendant in that it could allow for a decision to be made and implemented by moving or sponsoring a resolution. It could equally exercise negative control by preventing a decision from being made by blocking a proposed resolution. The conduct of the State was therefore the conduct of its economic unit.[28]

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[26] 1986 (1) SA 776 (A)
[27] Para 24 of the plaintiff's submissions.
[28] Per the findings of MAFUSIRE J in *Grandwell Holdings Limited & Ors v Minister of Mines & Ors* HH 193/16

Commenting on the evidence of the defendant's sole witness, the plaintiff submitted that the witness did not add much value to the defendant's case. The witness was not involved much in the work relating to financial closure. He confirmed that it was the prerogative of the accounting officer. Further, while disputing the value of the pre-commencement works, neither the witness nor the defendant placed before the court evidence of the value of the works that were undertaken. The witness conceded that there were works that were completed 100%. The witness could also not dispute that it was the defendant that actually owed the plaintiff.

The plaintiff dismissed the defendant's attempts to argue that the addendum to the Contract was a separate document whose rights, duties and obligations were parallel to the main agreement, insisting that the court was enjoined to interpret and enforce the main agreement as read with the addendum. The new draft agreement was never signed and did not come into operation.

The plaintiff maintained its position that the defendant frustrated condition precedent 5(a) of the Contract which pertains to the financing agreements, and the court should deem the condition to have been fulfilled in line with the doctrine of fictional fulfillment. The plaintiff cited the case of *Scott and Another* v *Poupard and Anor*[29], which set out the factors to be established for one to invoke the doctrine. The factors were summarized as follows: non-fulfillment of the condition; the defendant's breach of his duty with an intention to frustrate the fulfillment, and a causal link between the non-fulfillment and the defendant's intentional frustration of the fulfillment of the condition.

The plaintiff averred that generally a court does not have a discretion to refuse to enforce a term contained in a lawfully concluded agreement. In determining whether or not to enforce a term breached by one of the parties, the court will be concerned with the effect of enforcing such term in view of the dictates of public policy. The plaintiff had placed before the court evidence which showed that the defendant had frustrated the conclusion of the financial agreements. Relying on the dicta in the cases of *Standard Chartered Bank Zimbabwe Limited* v *Matsika*[30]*; Wimbledon Lodge (Pty)* v *Gore No & Ors*[31] and *Brooks* v *Minister of Safety &*

[29] 1971 (2) SA 373 (A) at p378
[30] 1997 (2) ZLR 389 (SC) at p 389H
[31] 2003 (5) SA 315 (SCA) at p 321F-I

Security[32], the plaintiff argued that the defendant could not be allowed to benefit from its own wrongdoing.

The plaintiff also averred that while the defendant asserted in its plea that the EPC Contract could not be understood fully without considering the FIDIC *(Federation Internationale des Ingenicurs-Conseils)*, it did not place that document before the court. A party who made an assertion bore the onus of proving such assertion. Reference was made to the case of *Pillay* v *Krishna*[33].

The Defendant's Closing Submissions

While conceding that the Supreme Court judgment that set aside CHITAPI J's judgment did not render the entirety of the plaintiff's present claim *res judicata*, the defendant averred that the judgment was still material as it was rendered after full ventilation of the Contract. The defendant submitted that the Supreme Court made a finding that the plaintiff failed to meet the prescribed Conditions Precedent as set out in clause 5 of the Contract. The court had also established that the plaintiff conveniently avoided the action procedure in a bid to shy away from the truth as well as hoodwink the court. The defendant contended that these observations by the Supreme Court were apt as they were confirmed by the demeanor of the plaintiff's witness who was unreliable and evasive. The witness was accused of not giving straight answers to simple questions, as well as changing his evidence when it suited him. He was also accused of giving evidence that was inconsistent with contemporaneous documentation, as well as referring to documentary evidence that was not in existence. For those reasons, Mr Chivhayo's evidence was dismissed as inherently unreliable. It also meant that the plaintiff had failed to discharge the onus on it in relation to its claim.

The defendant argued that in its evidence, the plaintiff's based its claim on contentions made in the replication to the defendant's plea instead of its declaration. The defendant pointed to the following key areas of the evidence to support its position. The China Exim Bank financing issue; the CBZ and ATC funding; and the allegation that the defendant filed fictitious and malicious charges of fraud and corruption against the Mr Chivhayo. The defendant further averred that the plaintiff's opening submissions and evidence in chief focused on the case set out in the

[32] 2009 (2) SA 94 (SCA) at p 100E-F
[33] 1946 AD 946 at p952

replication and not the declaration. The defendant argued that the plaintiff ought to have sought to amend its declaration to incorporate the claims that were never pleaded in the declaration. The defendant also averred that the letters of 10 April, 6 July and 31 July 2018 that were pleaded to constitute a material breach of the contract in the declaration were never referred to in the examination in chief of the plaintiff's witness.

I must hasten to note that the matters alluded to by the defendant are matters of evidence that ordinarily should not be pleaded in the pleadings, but set out in evidence.

The defendant averred that the purported extension of the CP satisfaction period by six months prior to 23 October 2017, though not in accordance with the contract was not a nullity, as the plaintiff could have accepted it. The plaintiff objected the validity of the extension only to make an about turn in the hearing. According to the defendant, what was common cause was that the CP satisfaction period expired on 23 October 2017.

The defendant submitted that the defendant communicated its election to terminate the contract to the plaintiff. While accepting that it did not draft a letter speaking to "Notice of Termination", the defendant argued that it did not mean that no notice was given as that would be an elevation of substance over form. The defendant made reference to paragraphs 13 and 14 of the declaration in which the plaintiff made reference to the alleged termination of the contract. The issue therefore was not about the absence of a notice of termination, but whether the defendant had a right to terminate the contract it being guilty of delaying the satisfaction of the Condition Precedents.

The defendant averred that the plaintiff alleged a breach of the Addendum 1, which was not a breach of the Contract. A breach of addendum 1 only affected Schedule 11 of the Contract and had no impact on clause 5 of the Contract. The defendant further averred that the defendant failed to allege when these breaches took place. Addendum 1 was executed only 1 month before the expiry of the CP satisfaction period, or 23 months after the execution of the Contract. For that reason an alleged breach of Addendum 1 was incapable of explaining the failure to complete the Conditions Precedent in the preceding 23 months.

The defendant argued that the court should not exercise its discretion in granting specific performance for the reason that the present position was at odds with the parties' original position. The original intention was that the project would take 4 years. This is so because the Conditions

Precedent satisfaction period was to take a maximum of 2.5 years and construction was to take 1.5 years. In essence, the solar plant was to be constructed, commissioned and handed over by October 2019 latest. If specific performance were to be granted as per the plaintiff's testimony, then the project would take between March 2029-2034. This would be 10-15 years later than what the parties had initially projected.

The other reason why the court was urged not to grant specific performance was that the project was no longer viable. The cost of constructing the plant had significantly decreased as a result of improvements in solar technology. Were the contract to be enforced, the plaintiff would stand to make an additional profit of US$33 million.

According to the defendant, the fact that the parties negotiated a new contract after the judgment by CHITAPI J, was enough testimony that the parties were in agreement that the project was no longer viable. It was also for that reason that the parties carried a site visit on 13 July 2020, and that the Minister of Energy urged the parties to implement the amended contract. The defendant averred that the Ministerial report related to the amended contract and not the original contract. Another reason was that the African Development Bank (AfDB) had debarred CHINT for fraudulent practices for three years.

The defendant also contended that the introduction of a new currency regime in February 2019 had some implications on the funding of the project. The RTGS values in terms of which the country was transacting were significantly less valuable than the USD values. Some banks may not be willing to fund a major infrastructure project in the USD currency. It was submitted further that at any rate, going by the wording of s 22(4)(a) of the Finance (No.2) Act, the obligation to pay US$172 million in line with the Contract had transmuted to RTGS$172 million in February 2019. All that made the project nonviable.

As regards the argument based on fictional fulfillment, the defendant argued that the court could not declare fictional fulfillment in the present case for reasons that: the plaintiff had failed to plead relief relating to fictional fulfillment; the plaintiff failed to plead the relevant factual assertions, which if established by the court, would entitle the plaintiff to relief of fictional fulfillment. It was further argued that fictional fulfillment would make no practical sense in the present circumstances for reasons that: the project had to be funded. Without the required funding,

the defendant would not be in a position to pay the contractual amount. It followed therefore that if the project received fictional funding, still the defendant would not be able to pay the plaintiff.

It was further averred that the plaintiff was arguing for the fictional fulfillment of only one of the CPs, which was the funding condition. Even if this was granted, there would still be other CPs to satisfy, which included the Advance Payment Guarantee. It was further argued that the defendant would still need to obtain corporate authorisations. These authorisations related to the CPs, and not to the contract itself. The defendant asserts that the contract had been authorized under clause 10. The defendant's board could not authorize the commencement of the contract knowing fully well that it was not going to be funded.

It was also submitted that fictional fulfillment would have implications for third parties in line with the definition of "financial agreements". It was a requirement that the Government of Zimbabwe be a co-signatory to the Financing Agreement. It meant that the government would also be a fictional party to the fictional Financing Agreement. There was no basis on which the court could exercise jurisdiction over the Government when it was not cited as a party to the proceedings.

The defendant denied that it intended to frustrate the project. It averred so for the following reasons. It had paid the sum of US$5.6 million to the plaintiff. By contrast, the plaintiff failed to pay the US$1 million it had undertaken to pay in both the main Contract and Addendum 1. It was the defendant that sought to extend the CP satisfaction period by way of its letter of 29 November 2017. The plaintiff on its part never sought an extension of the time. The defendant also argued that it was the one that took steps to secure funding for the project. It referred to its communication with the various key stakeholders such as the Ministry of Finance, the SPB and NSSA.[34]

The defendant also argued that it carried out all the CPs which were dependent on it alone. It pointed to the following: the feasibility studies were completed and paid for; due diligence was carried out by the defendant; the EIA certificate was granted on 10 May 2017; it acquired the land. The defendant averred that the only CP that it did not satisfy was with respect to corporate authorisations. It averred that this CP would only become relevant once the other CPs were satisfied. The defendant accused the plaintiff of failing to satisfy its own contractual terms, that is, the provision of an Advance Payment Guarantee and the performance security.

[34] Pages 192, 194 and 478 of the Vol 1 of the Plaintiff's Bundle being Exh 1

The defendant also accused the plaintiff for being responsible for the collapse of the China Exim Bank funding. It argued that though its shareholder, the Government of Zimbabwe was responsible for Sinosure's refusal to insure the funding owing to the government's arrears with China Exim Bank, still the argument did not have merit. It averred so for the following reasons: the defendant was a different legal entity from its shareholders; China Exim Bank was not a willing financier because the condition it imposed on lending concerned payment of an unrelated debt by a third party. Had the plaintiff done proper due diligence, it ought to have known from the outset that China Exim Bank was not a viable financier.

Concerning the plaintiff's claim for repudiatory breach, the defendant commented as follows. The claim for expenses incurred in the sum of US$3 000 000 was neither established as having been caused by the defendant, let alone quantified. The plaintiff was failing to appreciate that it took commercial risk when it incurred expenses during the tendering process. It did so in order to reap the benefits of the contract. The defendant also argued that the plaintiff could not claim its expenses in servicing the contract and loss of profit at the same time. It further argued that the purpose of damages was to place the aggrieved part in the position they would have been had the contract been performed. If the contract had been performed, then the expenses would have been absorbed in the contract sum. At any rate, that figure was thumb sucked. It was unrealistic that the expenses would add up to a round figure. No evidence was also placed before the court to prove the alleged losses.

As regards the claim for damages for loss of profit, the defendant argued that in terms of clauses 16.4 and 17.6 of the FIDIC Silver Book, loss of profit was only recoverable in circumstances where the defendant terminated the contract. However, since it was the plaintiff's case that the contract was not terminated, the plaintiff could not pursue loss of profit on its own case. It was further averred that the plaintiff's witness did not even support this head of loss. His evidence focused rather on reputational loss resulting from the plaintiff's inability to obtain further contracts in other countries. That alternative claim was not supported by any evidence as well.

Coming to its claim in reconvention, the defendant submitted as follows. It provided the plaintiff with an advance of US$5.6 million. The sum of US$2.3 million went towards the feasibility study. Its claim was therefore limited to the balance of the total figure paid, namely US$3 310 736.30. The plaintiff was required to contribute the sum of US$1million towards pre-

commencement works. The contribution was to be done through the carrying out of works, rather than payment. The pre-commencement works were not completed as shown in the joint site visit report. It was on that basis that the claim for repayment of US$3 310 736.30 was being made. Alternatively, the defendant averred that even going by the plaintiff's own computations the defendant was owed US$2 299 563.13 by the plaintiff. The court was urged to dismiss the plaintiff's claim and allow the claim in reconvention with costs.

The Analysis in respect of the Main Claim

I will now proceed to deal with the trial issues as recorded by the parties in the context of the witness' testimony. Before delving into the parties respective submissions in detail, it perhaps behoves the court to briefly evaluate the significance of the High Court judgment by CHITAPI J and the Supreme Court judgment which overturned the High Court judgment on appeal. The parties hold conflicting views regarding the implication of the Supreme Court judgment.

The High Court Judgment: *Intratek Zimbabwe (Pvt) Ltd* v *Zimbabwe Power Co (Ltd)*[35]

The plaintiff herein instituted proceedings by way of the motion procedure. The relief sought was similar as *in casu*. The respondent therein, being the defendant herein, raised a point *in limine* that the applicant (the plaintiff *in casu*) had used the wrong procedure in launching its claim. It argued that there were material disputes of fact which could not be resolved on the papers without the benefit of oral evidence. In disposing of the preliminary point, the court per CHITAPI J extensively traversed the factors that a court must have regard to in determining whether the alleged disputes of fact were such that the court could not take a robust approach and either endevour to determine the matter on the papers or refer it to trial. He cautioned against overly invoking the more drastic remedy of dismissing the case altogether mindful of the need to uphold the court's constitutional role of dispensing justice as prescribed by the supreme law. The learned judge concluded thus:

> "After a consideration of all the circumstances of this case and the parties' depositions, the voluminous nature of the application is deceiving inasmuch as it would point out to a case replete with irreconcilable disputes of fact. There are none such irreconcilable facts of a fundamental nature."[36]

[35] The judgment has since been reported as 2018 (2) ZLR 854
[36] At p 862 para D-E of the reported judgment

As regards the merits of the case, the learned judge determined that the defendant tacitly waived its rights for the provision of an advance payment guarantee amongst other things. The court found that the defendant allowed the *"applicant to commence work and paying for it and entering into an amendment to the main contract whose effect was that the contract commenced before the fulfillment of suspensive conditions, the conditions must be adjudged to have been waived. In a waiver, it must be shown that the respondent with full knowledge of its right decided to abandon it whether expressly or by conduct……Following on the waiver, the respondent cannot successfully claim that the contract was properly terminated. The contract must be held to be still extant and susceptible to amendment regarding satisfaction of any conditions as the parties may mutually agree or <u>if either party desires termination, then it must do so strictly in accordance with its terms</u>."*[37]

Further down in the same judgment, the court concluded its analysis as follows:

> "It follows that in the circumstances of this case, there was no breach by the applicant based on failure to timeously perform on time. Following the amendment of the contract, there was no legal basis for the respondent to allege a failure to perform and to file criminal charges against the applicant. …….
> The parties in executing the addendum on 21 September 2017 must be held to have evinced a clear intention to be further bound by the EPC contract. The addendum was not a stand-alone contract in as much as it stipulates that it is to be read as and treated as part of the original contract. It extended the period for performance beyond 23 October 2017. It provided for the commencement of the main works after completion of the pre-commencement works. There was therefore a tacit manner of the conditions precedent being a factor putting on hold the operationalization or commencement of the main contract."[38]

The court went on to determine that the main works could not commence before the pre-commencement works, if the pre-commencement works were to be completed at a date beyond 23 October 2017 in order to pave way for the commencement of the main works. For that reason, the court concluded that the defendant must be taken to have waived the 24 month period which ended on 24 October 2017. The court further determined that the addendum signed by the parties thus compromised and extended the 24 month period ending on 23 October 2017. The court also determined that the defendant frustrated the implementation of the contract as extended by the addendum by causing the arrest of the plaintiff and its managing director. For that reason, it concluded that the doctrine of fictional fulfillment applied in favour of the aggrieved party. The

[37] At p862 paragraphs G-H and A-B of the reported judgment
[38] At p863 paragraphs F-H

defendant was accordingly estopped from terminating the contract as it was responsible for the delays in satisfying the conditions precedent.

The Supreme Court judgment: *Zimbabwe Power Company (Private) Limited* v *Intratrek Zimbabwe (Private) Limited*[39]

The defendant herein appealed the High Court judgment to the Supreme Court. The appeal raised nine grounds of appeal. The first ground of appeal reads as follows:

> "1. The Court a quo erred by holding that there were no material disputes of fact between the parties and that it could appropriately proceed under the court application procedure."

From my reading of the judgment, the court confined itself to this ground of appeal. After summarizing the factual background as well as the proceedings in the court *a quo,* the court zeroed in on the preliminary point raised in that court pertaining to the applicant's use of the wrong procedure in approaching the court. The court proceeded to make a detailed analysis of the law pertaining to the purpose and object of motion proceedings and the circumstances under which such procedure should be relied upon. The court also dealt with the options open to a court seized with a matter where material disputes of fact manifested themselves. The court then remarked that the appellant's grounds of appeal raised pertinent material disputes of fact which were placed before the court *a quo* for determination, and proceeded to restate the grounds of appeal.

The court observed that the lower court had made factual findings complained of in the grounds of appeal without the benefit of oral evidence, despite clear evidence that the matter was riddled with material disputes of fact. The court pointed to the areas of dispute as follows: there were allegations and counter allegations as to who was to blame for the alleged breach of the contract; whether or not the EPC Contract had expired due to effluxion of time; the issues of waiver and non-disclosures were also contested. The court also noted that the plaintiff herein had also made a claim for damages which rendered the dispute unsuited for disposal through motion proceedings. I pause here to note that at the commencement of the proceedings *a quo,* the applicant abandoned the damages claim after its application to amend the draft order was granted by consent.

The Court concluded that the matter was incapable of resolution on the papers, and that the applicant was determined to avoid trial in the face of the glaring disputes of fact apparently because it had something to hide. The court made the following concluding remarks:

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[39] SC 39/21

> "We therefore come to the unanimous conclusion that the respondent deliberately chose the wrong procedure to shield itself from the glare of a full-fledged trial to wood wink the court a quo and succeeded. The court accordingly sustains the appellant's objection in limine…."

The court did not determine the rest of the grounds of appeal which bore upon the merits of the matter. In my respectful view, the rationale for the decision of the court had not so much to do with the dispute on the merits. I hold that view because the court did not interrogate the rest of the grounds of appeal which touched on the merits of the dispute. The sentiments expressed in relation to the conduct of the applicant to approach the court in the face of material dispute would have been obiter. Those comments cannot be interpreted as having sealed the fate of the applicant's case on the merits.

Having expressed my views on the two judgments above, I now turn to consider the issues before the court.

Whether the EPC Contract remains valid and binding on the parties.

I must at the very outset make an observation that this issue was not substantially different from the first issue in the defendant's claim in reconvention. That issue was whether or not the Contract was induced by misrepresentation on the part of the defendant. At the commencement of the hearing the defendant abandoned that part of its claim for damages which was based on the alleged misrepresentation by the plaintiff. Mr *Uriri* for the plaintiff submitted that the abandonment of that part of the claim which sought to impugn the validity of the contract, effectively meant that the contract was valid. The court accepts that the abandonment of that crucial component of the defendant's claim essentially means that the validity of the Contract is beyond reproach. It is no longer an issue as far as the defendant is concerned. The central issue that remains lingering is the status of that contract.

I must pause to observe that having abandoned the question of the validity of the contract on account of the alleged misrepresentation, that is clause 1.2.1 of the issues in the claim in reconvention, the only issue that remains for determination in the claim in reconvention is whether or not the defendant suffered any damages at all and if so the quantum thereof. The immediate difficulty that arises for the defendant is that the manner in which the second issue was couched (that is issue 1.2.2), was such that it was dependent on the finding the court made in respect of the first issue (issue 1.2.1). In other words, on the first issue, the court was required to determine if the EPC Contract was induced by misrepresentation on the part of the plaintiff. If the court found that

the contract was indeed induced by a misrepresentation, then the court was then required to determine the defendant's claim for damages with the plaintiff's breach in mind. After abandoning the claim for damages for breach of contract and misrepresentation in the sum of US$96 673 236.30, being para (b) of its prayer in the claim in reconvention, the defendant substituted para (b) of its prayer with para17 of the claim in reconvention, which relates to the claim for damages in the sum of US$3, 310, 736.30, being the refund for the advance payment made towards the pre-commencement works.

It therefore follows that in determining the defendant's claim for damages in the sum of US$3 310 736. 30, this court is not considering the claim on the basis of a breach by the plaintiff (as initially set out by issue 1.2.1), but on the basis of a finding that the EPC Contract and the Addendum entered into by the parties did not commence owing to the plaintiff's failure to meet the prescribed conditions precedent (para (a) of the defendant's prayer in its claim in reconvention). If the court determines that the Contract indeed commenced and remains valid, then the defendant's claims as set out in the claim in reconvention fall away.

The central issue upon which the consequential reliefs sought by the parties in their respective claims therefore whittles down to the status of the contract between the parties. The plaintiff on one hand contends that the contract as amended remained valid and binding, thus justifying the consequential relief of specific performance. In its claim in reconvention, the defendant sought a *declaratur* to the effect that the contract never commenced as a result of the plaintiff's failure to meet the prescribed CPs. The defendant also averred that it cancelled the Contract as a result of the plaintiff's breach. It further averred that the cancellation of the contract was confirmed by the Supreme Court which found in its favour. This submission is without merit for reasons that I have already expressed. The Supreme Court judgment did not confirm the cancellation of the contract. The judgment simply upheld the defendant's preliminary point that had been dismissed in the court *a quo*.

The question of the status of the contract calls for a consideration of the critical clauses that were ostensibly breached leading to the termination of the contract as alleged by the defendant. Clause 5 of the Contract provided that the contract would commence in full force and effect when the conditions listed in paragraphs (a) to (i) were satisfied.[40] The conditions precedent were to be

[40] In terms of clause 5, the conditions precedent to be satisfied were as follows:

satisfied within a period of twenty four (24) months after the date of the signature of the contract by both Parties (the CP Satisfaction Period). It is common cause that the 24 months period would expire on 23 October 2017. The parties were required to meet to review progress towards the satisfaction of the conditions precedent. The defendant could, at its sole discretion on or at any time prior to that date being 24 months after the date of signature of the agreement, elect to extend the CP Satisfaction Period by a further 6 months by giving notice to the plaintiff. Further in terms of clause 5:

> "If the Conditions Precedent are not satisfied on or before the expiry of the CP Satisfaction Period (as may have been extended), either Party may elect to terminate the Contract by notice to the other provided that if a Party is causing a delay to the satisfaction of any of the Conditions Precedents as at the date on which it seeks to terminate, such Party shall not be entitled to exercise such right of termination while such cause of delay subsists." (Underlining for emphasis).

The significance of the above clause was that in the event of a failure to accomplish the conditions precedent within the 24 months Conditions Precedent Satisfaction Period, then either party could elect to terminate the contract on notice to the other. That was of course subject to the caveat that the party responsible for the delay in the satisfaction of the Conditions Precedent was estopped from invoking this termination clause for as long as the cause of the delay persisted.

Clause 5 also dealt with the satisfaction or waiver of Conditions Precedent. The relevant part states as follows:

> "Each Party shall use its reasonable endeavours to ensure the satisfaction of the conditions precedent set out above, provided that:
> a) the Employer may waive the Contractor Conditions Precedent and such waived Contractor Condition(s) Precedent will be deemed satisfied for the purposes of this Agreement;
> b) the Contractor may waive the Employer Conditions Precedent and such waived Employer Condition(s) Precedent will be deemed satisfied for the purposes of this Agreement; and

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(a) the Financing Agreements have been signed, come into full force and effect and all of the conditions to the first drawdown of funds (other than in relation to any conditions which relate solely to the effectiveness of the contract) have been satisfied;
(b) the Advance Payment Demand Guarantee is provided to the employer by the contractor in accordance with Sub-Clause 14.2;
(c) the Contractor receives the amount of the advance payment in accordance with Sub-Clause 14.2;
(d) the Performance Security is provided to the Employer by the Contractor in accordance with Sub-Clause 4.2;
(e) the completion of the feasibility studies with bankable findings alignable to the implementation of the project.
(f) Due Diligence Exercise by the Employer;
(g) Production of an Environmental Impact Assessment (*EIA)* Certificate;
(h) Acquisition of land for the Project by the Employer as informed the feasibility studies;
(i) Corporate authorisations having been obtained by both Parties."

c) and, except where a Party has failed to use its Reasonable Endeavours to ensure the satisfaction of such conditions precedent, neither Party shall be liable in any damages to the other in respect of any failure to satisfy any of its Conditions Precedent."

Therefore once a party chose to waive a condition precedent, then the condition precedent so waived was deemed to have been satisfied for purposes of the Contract. Further neither party was liable to the other for any failure to satisfy any of its conditions precedent unless it was proven that the party had failed to use its Reasonable Endeavours to ensure the satisfaction of such conditions precedent.

In terms of clauses 9 and 10 of the contract, both parties made certain representations and warranties concerning their capacity to enter into the contract.[41]

On 21 September 2017, the parties signed addendum number 1 to the Contract. That date was the effective of the addendum. So much was said about the addendum and its effect on the main contract, as the parties expressed shared divergent views on the import of the addendum and its scope. It is pertinent to dissect the provisions of the addendum as it has a huge bearing on the status of the Contract. In para 2 of its preamble, the parties express their wish to *"amend the contract through this addendum"*. Clause 4 provided in the material part that "*the Parties agree and acknowledge that with effect from the Effective Date of this Addendum that the Contract shall be amended in accordance with this Addendum and that the provisions of the Contract except as amended by this Addendum will remain in full force and effect."* It is therefore clear that the addendum amended the Contract and the two documents must be read and understood together.

In clause 5 of the addendum, the parties observed that they agreed in clause 2 of the Contract that the plaintiff was to undertake pre-commencement works listed in schedule 11 of the Contract at a total cost of US$5 111 224.00, excluding tax and feasibility study costs. Of that amount the defendant was required to pay US$4 111 224.00, with the defendant contributing

[41] Clause of the contract states as follows:

"The Employer hereby represents and warrants, at the date of the signature of the Contract by both Parties, to and for the benefit of the Contractor as follows:

(a) it is a body corporate duly incorporated and validly existing under the laws of the Republic of Zimbabwe;
(b) it has full power, authority and legal right to execute the Contract, to assume the obligations contained in this Agreement, and to perform and observe the terms and provisions hereof; and
(c) the obligations assumed by it under the Contract constitute legal, valid, binding and enforceable obligations in accordance with the terms hereof; and
(d) ……"

US$1 000 000.00, which amount was still to mobilized and paid. Clause 7 provided that an advance payment guarantee was to be provided against this payment within a period of 30 days from the effective date to secure payments that had already been made and such future payments that were still to be made.

Clause 8 recorded that the defendant had as at the effective date paid the plaintiff a sum of US$5 624 607.60, inclusive of tax in respect of the pre-commencement works, as set out in schedule 11 of the main contract. Those works for which payment was made comprised feasibility study for which a payment of US$2 313 871.30 was made, and a sum of US$3 310 736.30 for pre-commencement works.

Clause 9 acknowledged that the plaintiff was still to furnish the defendant with an Advance Payment Guarantee for the funds already released. Clause 10 observed that a payment of US$1 232 322.87 for pre-commencement works was still to be paid to the plaintiff, and that the amount was to be utilized to pay some of the sub-contractors engaged for the pre-commencement works. Clause 11 reaffirmed the parties desire to ensure progress at the site in order to kick start the project.

The provisions of clause 4.4 of the Contract (which relate to subcontractors in the main contract), were to apply with equal force to the amended provisions of schedule 11. The amendment specifically amended schedule 11 of the Contract through the insertion clause 3. That new clause specified that the plaintiff was to meet the cost of site establishment and sand quarry development, utilizing funds that had already been disbursed and at no extra cost to the defendant. In short, the addendum dealt with the completion of pre-commencement works and the payment of subcontractors employed for that purpose.

What is clear from the above analysis is that the plaintiff carried out some pre-commencement works before the satisfaction of certain Condition Precedents stipulated in clause 5 of the Contract. A condition precedent also known as a suspensive condition is an agreement to suspend the operation of the contract until the fulfillment of the condition.[42] Non fulfillment of the condition precedent renders the contract void, unless the contract provides otherwise.[43] *In casu*, the parties intention as expressed in the contract was to allow a waiver of the conditions precedent,

[42] See *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G
[43] See also *Laskey v Steadmet (Edms) Bpk* 1976 (3) SA 73 (D) 80-81

and once that waiver was exercised, such waived condition precedent was deemed to have been satisfied for purposes of the agreement. The Contract did not express the manner in which such waiver could be exercised, and for that reason any waiver by conduct would be effective under the circumstances.

Having determined that the defendant effectively waived the fulfilment of the condition precedents by allowing some pre-commencement works to be carried out before the fulfillment of the condition precedents, the issue is whether the defendant's argument that the contract lapsed by operation of law as a result of the plaintiff's failure to fulfill the conditions precedent is tenable. Also related to this issue is the defendant's contention that it exercised its right to terminate the contract in terms of clause 5(1) of the contract. The waiver of the conditions precedent must also be considered in the context of the execution of the addendum to the contract. What was the effect of the addendum on the main contract?

The main Contract had two very important dates which are pertinent to this dispute. Clause 5 of the Contract stated that the agreement and such clauses of the Conditions of Contract referred to or otherwise required to give effect to "this Agreement" shall come into force and effect on the date of the signature of "this Contract Agreement by both Parties (the Effective Date)". The same clause also referred to the Commencement Date of the contract as the date when the aforementioned conditions precedent would have been satisfied. Clause 11 of the Contract provided that after the Contract Effective date, the parties would mutually agree on the scope, plan, programme and terms of the initial activities and the feasibility study to allow the Pre-Commencement Activities and the feasibility study to commence. The activities were to be undertaken before the Commencement Date.

It will be recalled that the main Contract was signed on 23 October 2015, with the parties anticipating that the Conditions Precedent would have been satisfied within 24 months after the date of signature of the Contract. That 24 month period would lapse on 23 October 2017. In the meantime, on 21 September 2017, the parties signed the addendum to the main Contract. That addendum was consummated a month before the anticipated date of the satisfaction of the Conditions Precedent.

As already stated, the addendum introduced clause 3 to Schedule 11 of the Contract which dealt with pre-commencement works. Clause 3 dealt with two key activities, which are site

establishment and sand quarry development. The key result areas for those activities were highlighted in tabular form.[44] For site establishment activity, the activities to be undertaken were: ablution facilities; 3 phase power; hydrological study, borehole siting; borehole drilling and installation; water storage; temporary fuel storage tanks; temporary housing and offices; radio communication and VSAT. For the quarry development, the plaintiff was responsible for the testing the quality of the quarry before using reputable laboratories, design, construct and maintain the construction of roads as were necessary, from the existing roads and tracks to the various work areas and other areas such as camps, stores, quarry sites plants disposal areas and any other areas related to the works.

The parties also agreed on the sub-contractors to be engaged by the plaintiff for the pre-commencement works. Tailjet was responsible for the geotechnical survey, with a lead time of one month. Salwire was responsible for the supply and erection of high security fence with a lead time of fifty working days. Buxton and Carter were responsible for billboards and signage with a lead time of two weeks. MEPH was responsible for ground clearance. It had a lead time of sixty days. In terms of clause 3.7.1, the sub-contractors were to be paid from the outstanding amounts for the pre-commencement works still being held by the defendant.

It follows that at the time the parties signed the addendum they were well aware of the 23rd October 2017, being the date by which the Conditions Precedent Satisfaction period were to lapse. That date would also mark the commencement date of the Contract. At the time that the addendum was signed, the parties had only one month before that date lapsed. Yet the addendum gave lead times that were well beyond the date on which the Condition Satisfaction Period would lapse. In my view, it can only be concluded that by their conduct, the parties waived not only the commencement date of the contract, but also the accomplishment of the Condition Precedents upon which the commencement date was predicated.

It would not only defy logic, but would be highly absurd for the defendant to insist on the termination of the contract on the basis of an alleged failure by the plaintiff to satisfy the conditions precedents, yet a month before the expiry date the parties had agreed on certain deliverables that further tied the parties to certain contractual obligations that also involved third parties. Those activities involving third party contractors would certainly outlive the Contract if the Contract was

[44] Pages 121-123 of Exhibit 2, being Vol 2 of the Plaintiff's Bundle

going to be deemed to have lapsed on 23 October 2017. What then would have been the point of signing the addendum if a month letter, the defendant could opt out of the contract on the basis that the plaintiff breached the contract because of its failure to satisfy the conditions precedent? Why were the parties in a rush to sign the addendum when they could as well wait for one month to review progress on the satisfaction of the conditions precedent? The only logical conclusion to be drawn is that the parties had their sights set on events post 23 October 2017. That date was no longer material to them. In view of the foregoing observations, the court therefore determines that the Condition Precedent satisfaction period did not lapse on 23 October 2017 as submitted by the defendant. The parties must be regarded as having waived the satisfaction of the conditions precedent by the said date in terms of clause 5 of the Contract.

Perhaps as a veiled admission that the Condition Precedent Satisfaction period did not lapse on 23 October 2017, on 29 November 2017, the defendant wrote to the plaintiff extending the Condition Precedent Satisfaction period by a further six months in terms of clause 5 of the contract. That letter was followed up by another dated 4 April 2018. The material part of the letter reads:

> "RE: NOTICE OF NON-EXTENSION OF THE CONDITIONS PRECEDENT SATISFACTION PERIOD – 100MW GWANDA SOLAR PROJECT (ZPC 204/2015)
>
> We refer to the above matter and to our letter dated 29 November 2017……
>
> In our letter as aforementioned above, ZPC exercised its sole discretion to extend the Conditions Precedent Satisfaction Date by 6 months from 23 October 2017 to 23 April 2018. In terms of Clause 5 of the EPC Contract Agreement, all the Conditions Precedent set out in Clause 5(a)-(i) should have been satisfied on or before the expiry of the CP Satisfaction Period (as may have been extended) i.e. by 23 April 2018.
>
> We note that to date, certain Conditions Precedent to the Commencement of the Contract have not yet been satisfied. The EPC Contract Agreement does not allow the Employer to further extend the CP Satisfaction Period should these remain unsatisfied by the extended date of 23 April 2018. By copy of this letter therefore, you are hereby notified that ZPC shall not extend the CP Satisfaction date beyond 23 April 2018…."

The plaintiff responded to that letter through its own letter of 9 April 2018. The plaintiff dismissed the defendant's interpretation of the contract as flawed and consequently the purported extension of the Conditions Precedent Satisfaction period a non-event for the following reasons: The plaintiff had on 22 March 2018, referred the parties' dispute to arbitration. It had declared a dispute on 8 January 2018. The issues to be determined had a bearing on the period that the plaintiff was entitled to in order to satisfy the Conditions Precedent to the commencement of the Contract.

The parties obligations arising from the contract were therefore suspended pending the determination of the dispute at arbitration. The plaintiff also contended that the extension of the Conditions Precedent satisfaction period was not done in accordance with the terms of the Contract, thus invalidating 23 April 2018 as the extended Conditions Precedent Satisfaction Date. The plaintiff referred to clause 6 of the Contract which states that *"the contract may only be amended by a written document duly executed by the Parties"*. In *casu*, the defendant had acted unilaterally. The plaintiff also noted that the defendant had elected to waive the right to terminate the Contract on 23 October 2017, being the date by which the Conditions Precedents ought to have been achieved.

There is merit in the plaintiff's submission that the extension of the Condition Precedent Satisfaction period was not done in terms of the law. Clause 5(i) of the Contract provided that if the Conditions Period were not satisfied within 24 months of the effective date of the contract, then the parties were to meet and review progress towards the satisfaction of those conditions. In my view, the election to extend the satisfaction period by another 6 months could only be exercised after the parties had reviewed their progress on the satisfaction of the Conditions Precedent. Nothing was placed before the court to show that the parties met and reviewed the progress made towards the satisfaction of the Conditions Precedent as required by the Contract.

Further, even though the defendant had the sole discretion to extend the period that election could only be exercised through an amendment to the Contract, consistent with Clause 6. The court therefore determines that the purported extension of the Conditions Precedent satisfaction period was inconsistent with the provisions of the Contract and consequently a nullity. It follows that the contract could not have been terminated on 23 April 2018, being the new extended Conditions Precedent Satisfaction Date as insisted upon by the defendant. Any communication therefore imputing the termination of the contract to that date, on account of the failure to satisfy the Conditions Precedent would be of no legal force. The contract remained valid and extant.

Fictional Fulfillment and Specific Performance

Having determined that that the contract was not terminated and therefore remains extant, the next question that arises is whether the defendant frustrated the satisfaction of condition precedent 5(a) for purposes of the relief sought by the plaintiff. The doctrine of fictional fulfilment

was explained in *MacDuff & Co Ltd* v *Johannesburg Consolidated Investment Co Ltd*[45], where the court, per INNES CJ said:

> "I am therefore of the opinion that in our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfillment, be bound by an obligation, and who had designedly prevented its fulfillment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part."[46]

Author R.H. Christie posits that *dolus* in this context does not allude to fraud or dishonesty, but a deliberate intention to prevent the fulfillment of the condition, no matter how laudable the motive.[47]

I have already determined that the conduct of the parties clearly evinced an intention to proceed with the implementation of the contract even before the satisfaction of all the Conditions Precedent as stated in clause 5 of the Contract. The plaintiff engaged sub-contractors and proceeded to execute the pre-commencement activities and received payment for those pre-commencement activities without the provision of an advance payment guarantee. The parties executed an addendum to the Contract a month before the expiry of the 24 months period within which the conditions precedent ought to have been accomplished. Clause 10 of the addendum recorded the defendant's outstanding financial obligations to the contractor and sub-contractors in respect of the pre-commencement works.

As late as 14 June 2018, the plaintiff submitted its report giving an update on the project milestones undertaken in terms of Addendum No.1. The report covered the following: completion of the geo-technical survey and the submission of a final report; completion of phase 1 of fencing at project site and completion of phase 1 of ground clearance at the project site.[48] This was notwithstanding the declaration of a dispute and the reference of the matter to arbitration between January and March 2018. In its response, while noting the contents of the report, the defendant

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[45] 1924 AD 573 at 592

[46] See also *Koenig v Johnson & Co Ltd* 1935 AD 262 AT 272 where WESSELS CJ held as follows:

> "The nature of the contract is always an important element. In some cases the person benefitted by the non-performance of the condition can sit still and do nothing to assist in its fulfillment; in other cases it is his legal duty to assist in the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfillment of the condition in order to escape the consequence of the contract the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith."

[47] Business Law in Zimbabwe p56.

[48] Page 297 of Vol 1 being Exhibit 1

declined liability to honour payments for the claims on the basis that the plaintiff was in breach of its contractual obligations.

Of the conditions precedent the one which ultimately has a bearing on the performance of the Contract is the one relating to Financing Agreements. The success of the project hinges on the unlocking of the required funding. The record of proceedings is replete with correspondence confirming the extent of involvement and the expression of interest by key stakeholders who were all keen on making the project a success. The National Security Authority (NSSA) was approached as early as January 2016, and it had asked the defendant to submit a detailed business plan on the funding requirements.

As early as 8 March 2016, the Ministry of Finance and Economic Development had accorded the project a National Project Status.[49] On 10 March 2016, the same Ministry had written a letter of intent for the issuance of a sovereign guarantee for the project to the Export Import Bank of China. The letter expressed the Government's support for the project as it would *"reduce electricity deficit and contribute towards the socio economic development of our country as enshrined in our economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset)"*. The Ministry further expressed Government's readiness to issue a Sovereign Guarantee for the project in the sum of US$147 000 000 (one hundred and forty seven million United States dollars).[50]

By way of a letter dated 23 April 2018, CHINT in response to an invitation for a meeting by the defendant indicated that *"our drive to expedite all outstanding issues under this contract is compelled and complemented by His Excellency, your President of the republic of Zimbabwe Cde E.D Mnangagwa's recent visit to the People's Republic of China and clarion call to accelerate the progress of the project"*. CHINT also expressed its readiness to process the Advance Payment Guarantees and accomplish the swift closure of all outstanding obligations to ensure the timely commencement of the technical works.[51]As late as June 2020, CHINT wrote to the Minister of Energy and Power Development restating its role as the plaintiff's technical partner in the project

[49] Page 188 of Vol 1 being Exhibit 1
[50] Page 189 of Vol 1 being Exhibit 1
[51] Letter on pages 291-293, being the Plaintiff's Bundle Exhibit 3

and further expressing its preparedness to implement the first phase of the project within a period of six months.[52]

In April 2018, the plaintiff wrote to the Minister of Energy and Power Development complaining about the defendant's delays to sign a bank guarantee issued in its favour by Metbank. The defendant had also failed to meet certain requirements of the guarantee.[53] In July 2018, the plaintiff also wrote to the Minister of Energy and Power Development giving an update on the project. The letter also expressed concern that whilst on one hand the defendant was alleging that the Contract had lapsed, the defendant was also inviting CHINT for a discussion of the same Contract. The same letter referred to the Sinosure arrears which were hindering access to funding from China Exim Bank. The plaintiff also expressed its commitment to complete the project in the shortest possible time while utilising minimum resources in order to guarantee the availability of electricity to the country.[54]

After the defendant's appeal to the Supreme Court against the High Court judgment by CHITAPI J, and following the granting of leave to execute the same judgment, there were several interventions by the Ministry of Energy and Power Development nudging the parties towards finding common ground in order to fully implement the project. Perhaps more telling is the Minister's letter to the Executive Chairman of ZESA Holdings of 15 June 2020.[55] The letter expressed reservations with the entity's resolutions which were at variance with Government's policy direction on the matter concerning the project. The letter noted that the Government had recommended that the contracting parties reconcile their differences and implement the project as directed by the High Court judgment. In fact the Minister construed the ZESA Holding's intransigency as a clear objection to the government's directive on the matter. As a way forward, the letter directed the Executive Chairman as the Accounting Officer of ZESA Holdings to comply with the government's position with immediate effect, subject to the provisions of s 14 of the Public Finance Management Act.[56]

While the letters were directed to ZESA Holdings, which is not a party to the Contract, it is of course common cause that the defendant is a subsidiary of ZESA Holdings. The government

[52] Page 186 Vol 2 being Exhibit 2
[53] letter on pages 260-273 of Vol 1 Exhibit 1
[54] Letter on page 316-320 of Vol being Exhibit 1
[55] Page 188-192 of Vol 2 being Exhibit 2 of the plaintiff's bundle.
[56] [*Chapter 22:19*]

of Zimbabwe is the principal shareholder through the Ministry of Energy. What is clear is that even the Ministry was frustrated with the manner in which the defendant was conducting itself in the implementation of the project. The record of proceedings is also teeming with correspondence from the Ministry of Energy inviting the contracting parties to meetings whose main agenda was the project. All these efforts were intended to find common ground to ensure the implementation of the project.

The various communication by the Ministry of Energy to ZESA Holdings and the plaintiff, and the meetings involving the Ministry officials and the parties herein, were coming on the back of complaints by the plaintiff to both the Ministry and the defendant concerning the defendant's diffidence and lackadaisical approach to the implementation of the project and the funding arrangement. That the Minister of Energy had to write such a strongly worded letter to the defendant's holding company speaks volumes about the insincerity of both the defendant and its holding company. The defendant did not place before the court any evidence to show the measures it took in response to the plaintiff's complaints or to comply with its own Ministry's directive on the matter given the government's interest in the project.

Clause 5(i) of the contract obliged each party to use its reasonable endeavours to ensure the satisfaction of the conditions precedent. The same clause estopped a party causing delays from terminating the contract while such cause of delay subsisted. Based on the evidence placed before the court, the court is satisfied that the defendant frustrated the satisfaction of the conditions precedent pertaining conclusion of the financial agreements. As such, the defendant is precluded from seeking termination of the Contract on the basis of the alleged failure to attain financial closure.

Also worth noting is that while engagements were ongoing with a view to achieve financial closure so as to kick start the project, the defendant filed a criminal complaint against the plaintiff and its managing director. The arrest was made in December 2017, hardly four months after the parties signed the addendum to the Contract. The arrest was also made at a time that the parties were exchanging correspondence, and the defendant was itself engaging with the plaintiff's technical partner. The enthusiasm with which the plaintiff engaged the defendant and the Minister of Energy and Power Development as manifested by the various communication shows a party who was determined to see the project through to completion. It is also worth noting that the

meetings between the Minister and the contracting parties were held after the arrest of the plaintiff's managing director on allegations relating to the same project.

If the plaintiff was so culpable as to justify the arrest of its managing director, then there is no reason why the Government through the Ministry of Energy would have urged the parties to find ways of expediting the implementation of the project. In view of the foregoing observations there is clearly a case for finding in favour of the plaintiff on the basis of the doctrine of fictional fulfillment. The defendant purposefully prevented or frustrated the fulfillment of the condition precedent pertaining to the signing of the financing agreements. In terms of clause 5 of the Contract, the right to terminate the Contract by either party is not absolute. The party responsible for frustrating the fulfillment of any of the conditions precedent is estopped from seeking the termination of the contract. The defendant is therefore precluded from exercising the right to terminate the contract for as long as the cause of the complaint subsists.

I must also comment on the evidence of the defendant's witness herein. The witness conceded that he was hamstrung from answering critical questions pertaining to the project as he constantly deferred most questions on key issues of a strategic nature to the accounting officer. The witness was at most an operative whose participation in the project was very minimal and limited to his area of expertise. The very strategic issues which pertained to the funding of the project and decision making fell outside his domain. In fact the issues at stake were by and large of an executive nature that required representation at a very strategic level of the organization. His evidence was therefore not helpful at all.

What remains is whether the court can grant the relief of specific performance sought by the plaintiff or the alternative relief of damages. In *Grandwell Holdings (Pvt) Ltd* v *Zimbabwe Mining Development Corporation and Three Ors*[57], the court had this to say of the remedy of specific performance:

> "However, the right to claim specific performance is predicated on the concept that the party claiming it must first show that he or she has performed all his or her obligations under the contract or is ready, willing and able to perform his or her side of the bargain. Even then, the court has a discretion, which should be exercised judicially, to grant or refuse a decree of specific performance. It follows therefore that the court's discretion should not be exercised arbitrarily or capriciously. See *Minister of Public Construction & National Housing* v *Zescon (Pvt) Ltd* 1989 (2) ZLR 311 (S), where at 318 G, this Court stated:

[57] SC 5/20

> "The law is clear. This is a remedy to which a party is entitled as of right. It cannot be withheld arbitrarily or capriciously.""

An order of specific performance is not by any means arbitrary or cast in stone. The court has a discretion which must be exercised judiciously. In so doing the court must carefully consider the circumstances of each case mindful not to appear to be making a contract for the parties. As already stated, the defendant has not placed any evidence before the court to show the measures it took in its attempt to achieve financial closure. In short, there is nothing to show that specific performance is unachievable, with the parties having accepted that the procurement of funding is central to the implementation of the project.

The submission by the defendant that the project is no longer viable and that it will take years to be completed is in the court's view without merit. In terms of clause 1.1.3.3., the time for completion of the project was stated as 540 calendar days from the Commencement Date. The court has determined that the plaintiff did not breach the Contract. The court has also determined that the Contract was never terminated contrary to the defendant's submission. That Contract remains extant and binding between the parties. Any proposed termination must follow the letter and spirit of the Contract. At least the parties have a starting point. Clause 5(i) obliges the parties to meet and review progress on the satisfaction of the Conditions Precedent, and thereafter decide on the proper cause of action. The court has also determined that the parties in their wisdom, and by their own conduct waived the satisfaction of the conditions precedent in terms of clause 5 of their Contract. Any issues pertaining to the viability of the project and the effect of the changes in the currency regime must be left to the parties to take care of in terms of clause 5(i) of the contract. These are matters that parties to an extant contract must grapple with. At any rate, clause 6 of the Contract allow the parties to amend the Contract should they be so minded. This court cannot prescribe a solution for the parties in keeping with time honoured principles of freedom of contract and sanctity of contracts.

The court notes that at some point, the parties had agreed to execute an Amended and Restated Contract, notwithstanding their legal contests.[58] That Amended and Restated Contract would have seen the project being implemented in phases. The plaintiff indicated that it had obtained funding for the implementation of 10MW as an initial phase. That Contract was however

[58] Page 131 Vol 2 of the Plaintiff's bundle being Exhibit 2.

never signed for reasons which are not of concern to the court at this stage. The point is that the question of the unavailability of funding is clearly not an excuse going by the evidence that was placed before the court.

The Plaintiff's Alternative Claim for Damages

Having determined that the contract between the parties was never terminated, and is, in the eyes of the court still capable of performance, it therefore becomes unnecessary to go into detail on the alternative claim.

The Claim in Reconvention

In its claim in reconvention, the defendant's remaining prayer was that the court must make a finding that the Contract and the addendum entered into by the parties did not commence due to the plaintiff's failure to fulfill the prescribed conditions precedent. The claim for damages based on a misrepresentation by the plaintiff was abandoned at the commencement of the trial. The only issue remaining was whether the plaintiff breached the agreement, and consequently the quantum of damages occasioned by such breach. That claim was further qualified to limit it to a refund of the advance payment that was made to the plaintiff towards the execution of the pre-commencement works. Still that claim would only be sustainable in the event that the court determined that the Contract did not commence as a result of the plaintiff's failure to fulfill the prescribed conditions precedent. The court has already established that the contract was not terminated either by effluxion of time or by way of notice as submitted by the defendant.

In view of the court's finding on the status of the Contract, the court determines that the claim in reconvention is therefore not sustainable. The amounts paid towards the pre-commencement were not entirely wasted or made for no value. These are some of the issues that the parties would need to deal with as they review the progress made in terms of clause 5(i) of the Contract.

COSTS

The plaintiff sought costs of suit on the legal practitioner and client scale in the event of the court finding in its favour. It also urged the court to dismiss the claim in reconvention with costs on the ordinary scale. On its part, the defendant had, in its plea prayed for the dismissal of

the plaintiff's claim with costs on the legal practitioner and client scale, and that its claim in reconvention be granted with costs on the same scale.

The claims for costs on the punitive scale were not motivated by either party in their closing submissions. The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. The dispute before the court involved very complex principles of the law of contract which required careful analysis. An order of costs on the punitive scale is therefore not called for.

Disposition

Resultantly it is ordered that:

1. The procurement contract for the Engineering, Procurement and Construction (EPC Contract) of the 100MW Gwanda Solar Project (*ZPC 304/2015*) between the plaintiff and the defendant as amended is valid and binding between them.
2. Consequent to the declaration of the validity of the EPC Contract, an order for specific performance of the said contract is hereby granted.
3. The defendant's claim in reconvention is hereby dismissed with costs.
4. The defendant shall pay the plaintiff's costs of suit in the claim in convention.

Manase & Manase, plaintiff's legal practitioners
Muvingi & Mugadza, defendant's legal practitioners