LITHOTEC (PVT) LTD
t/a Frame Work Media
versus
ENGEN PETROLEUM ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 17 & 27 October 2022

Date of judgment: 1 March 2023

Civil trial

A. Nyamukondiwa, for the plaintiff
R. Matsika, for the defendant

MAFUSIRE J

[a] The suit

[1] The parties to this suit are duly registered private companies. At the relevant time, the defendant, Engen *Petroleum Zimbabwe* (Private) Limited, was one of about six or so "**Engen**" companies registered or domiciled here and/or abroad. The others were Engen *Oil Zimbabwe* (Private) Limited; Engen *Holdings Zimbabwe* (Private) Limited; Engen *Petroleum South Africa* and Engen *Off Shore Holdings (Mauritius)* Limited. The reason for this detail shall soon emerge.

[2] The plaintiff's claim against the defendant is for payment of the sum of US$74 332-58, together with interest thereon at the special rate of 0.5% per day from 12 November 2013, and costs of suit. The claim arises from a contract. In 2012 the plaintiff won a tender to rebrand and de-brand some filling stations owned or belonging to or operated by one or other of the "**Engen**" companies. The amount in the summons is alleged to be the balance of a globular amount of the contract price the payment of which had been spread over five tranches according to the work to be done at the different stages. A certification and authorisation process by the "**Engen**" engineers and independent quantity surveyors engaged

as agents would precede the stage payments. This verification and certification process would end up with the quantity surveyors issuing a payment certificate (PC) for every stage payment. The stage payments were then made against these PCs.

[3] In the course of the contract, five PCs were issued. The first four were paid for without trouble, although Engen *Oil Zimbabwe* subsequently claimed to have made an overpayment. It sued the plaintiff to recover the alleged overpayment. But under judgment no HH416-20, this court dismissed the claim. The defendant rejected the fifth and last PC. It is this PC which contains the summons amount. The defendant completely denies that the contract in question was between itself and the plaintiff. It also denies that the quantity surveyors were appointed by it as its agents or that they had any authority to bind it for the payment of any such amount as might be due to the plaintiff under the contract. The defendant further denies having been issued with any PCs other than this contentious one. It denies liability for the payment of the amount on it, the interest claimed or the costs of suit. In regards to the PC itself, the defendant alleges that the quantity surveyors issued it without authority.

[b] The issues

[4] The matter was referred to trial on two issues, viz:

- whether [the] defendant is liable to make payment to the plaintiff in respect of PC no. 5, and
- whether the debt is a foreign obligation payable in foreign currency.

Unhappily, the issues for trial have not been properly set out. Issue no. 1 does not crisply bring out the real dispute between the parties. It is merely the conclusion to be arrived at after determination of the dispute. The real dispute is whether the defendant was privy to the branding and rebranding contract in question. It is a facet to the dispute whether the quantity surveyors were appointed by the defendant or not, and whether or not they had the authority to bind the defendant. Furthermore, if the defendant is found liable for the disputed amount, is it also liable for the special rate of interest claimed?

[5] As for issue no. 2, plainly it does not arise from the pleadings. Nowhere in the pleadings is the issue of the currency of the debt raised. Pleadings are ever so important.

Among other things, they help mark or identify the boundaries of the dispute or difference between the litigants in any given court case. Once the court has determined such a dispute within the four corners of those boundaries, some important consequences emerge. Among other things, any subsequent dispute between the same parties, or their privies, falling within the four corners of those boundaries becomes issue estoppel or *res judicata*. No other court can determine it again.

[6] However, issue no. 2 seems a question of law that can be raised at any time during the proceedings. The pleadings in this matter closed way back in October 2014. After that there was a lull, with neither party prosecuting their case, nor seeking dismissal for want of prosecution. The issues for trial were only settled in October 2022, exactly seven years later. Meanwhile, the fiscal regime in the country had gone through several changes. These changes were introduced via subsidiary legislation but subsequently incorporated into primary legislation through appropriate amendments. In paraphrase, the situation was this. In 2014 the economy was operating a multi-currency system. The currencies of other countries, among them the British pound, the United States dollar [USD] and the South African rand, had been made legal tender, courtesy of an amendment to the Reserve Bank Act [*Chapter 22:15*][1].

[7] In the multi-currency system, the United States dollar was almost exclusively the currency of choice. The local currency had been officially demonetized in 2015 through statutory instrument [SI] 70 of 2015.[2] However, it was brought back in February 2019 through SI 33 of 2019[3] as the Real Time Gross Settlement [RTGS] dollar. In June 2019 the multi-currency system was officially abolished, courtesy of SI 142 of 2019[4]. SI 142 of 2019, together with another SI, namely, SI 212 of 2019[5], made the RTGS dollar the sole legal tender in Zimbabwe. To manage the transition, it was legislated, among other things, that all the assets and liabilities whose values had been expressed in the currency of the USD, would, from 22 February 2019, be deemed to be values in RTGS dollars at par with the USD at a rate

[1] By s 17 of the Finance (No. 2) Act No. 5 of 2009.
[2] Reserve Bank of Zimbabwe (Demonetisation of Notes and Coins) Notice, 2015, SI 70 of 2015.
[3] Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019, SI 33 of 2019.
[4] Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019.
[5] Exchange Control (Exclusive Use of Zimbabwean Dollar for Domestic Transactions) Regulations.

of one-to-one. Thereafter, any variance in parity would be determined by market forces on a willing-seller willing-buyer basis.

[8] So, the genesis of issue no. 2 is understood in terms of the changes in the monetary regime as aforesaid. However, none of the parties in the current proceedings amended their pleadings to reflect the new reality. Nonetheless, in spite of this, the court takes judicial notice of these changes. From this premise, in the event that the liability of the defendant for the payment of the amount in question is determined against it, the currency of the debt will then have to be determined also.

[c] The plaintiff's case

[9] The plaintiff gave evidence through one Martin Jani ("***Jani***"). At the relevant time he was the plaintiff's managing director. Shorn of unnecessary detail, the gist of his evidence relevant to the issues was this. In 2012, the plaintiff won the tender floated by the defendant for the rebranding and de-branding of eleven "**Engen**" service stations in Zimbabwe. A contract was duly executed in writing. The contract documents comprised the tender documents, the letter advising the success of the plaintiff's bid and then the formal contract signed by the parties. There were specific steps and procedures to be taken from the bidding stage, the signing of the contract, the performance of the contract and the manner of claiming payment. The plaintiff scrupulously followed all these steps and complied with all the contractual requirements. In the course of the contract, five PCs were raised. The fifth was a reconciliation of the entire cost of the job. It reflected, among other things, the charges raised to date, the payments received and the balance of the contract price. All the four previous PCs had been paid without question. Only in respect of the fifth PC did the defendant purport to raise an objection.

[10] Some salient details of Jani's evidence were these. The defendant was part of the "**Engen**" group. The plaintiff dealt with both the defendant and Engen *Oil Zimbabwe* which was standing in for the defendant. As far as the plaintiff was concerned, the contract price was being paid by the defendant, or its headquarters in South Africa. The invoices raised by the plaintiff from which the PCs would be made out were all in the name of Engen *Oil Zimbabwe*. It was the quantity surveyors based in South Africa and who were the defendants'

agents who would then issue out the PCs and direct them for payment by, or on behalf of the defendant. Even the invoices that resulted in the compilation of the contentious PC no. 5 had been raised in the same manner as before. It was the quantity surveyors, not the plaintiff, who issued PC no. 5 reflecting the defendant as the one responsible for the payment of the amount reflected on that PC. It did not matter to the plaintiff which of the "**Engen**" companies paid it. To the plaintiff, these "**Engen**" companies were all one and the same. The plaintiff had no knowledge or interest in their internal workings. Apart from the quantity surveyors, the plaintiff also dealt with the defendant's own engineers based here and in South Africa who represented not only the defendant and Engen *Oil Zimbabwe*, but also Engen *Petroleum South Africa*.

[d] Absolution from the instance

[11] After Jani's evidence the plaintiff closed its case. The defendant applied for absolution from the instance. The application was manifestly ill-conceived. So much evidence destructive of the defence had been led. Among other things, and very briefly, irrespective of the particular "**Engen**" entity the plaintiff might have specifically penned the written contract with, Jani's evidence in totality was such that the defendant, which is called Engen *Petroleum Zimbabwe*, and Engen *Oil Zimbabwe*, Engen *Holdings Zimbabwe*, Engen *Petroleum South Africa* were manifestly such an indivisible single economic unit as to make one or other or all of them, particularly the defendant, liable for the debt in question. It had also emerged from Jani's evidence that from the manner the contract had been incepted and executed, the manner it had been discharged, the mode of payment and even the way the **Engen** employees connected to the contract interfaced, especially those in the engineering and finance departments, the defendant was more than merely *prima facie* liable for the amount in question. Therefore, I dismissed the application for absolution from the instance. I directed the defendant to go into its case.

[e] The defendant's case

[12] The defendant called one witness, one Farai Nyamukapa ("***Nyamukapa***"). The gist of Nyamukapa's evidence relevant to the issues was this. At all relevant times he was the finance director for both the defendant and Engen *Oil Zimbabwe*. The managing director for

the defendant, one Cremio Mapfumba ("***Mapfumba***"), now deceased, was also the managing director for Engen *Oil Zimbabwe*. Nyamukapa became managing director for both the defendant and Engen *Oil Zimbabwe*. Both these companies operated service stations in Zimbabwe. Engen *Oil Zimbabwe* operated the bulk of them. The defendant operated only four. The defendant was responsible for the procurement of all the fuels and the lubricants for the service stations. It would sell to Engen *Oil Zimbabwe*. The operations of these companies was such that without the one, the other would not operate. Both of them were subsidiaries of Engen *Holdings Zimbabwe* the shareholding of which was held by, among others, Engen *Offshore Holdings (Mauritius)*. Engen *Petroleum South Africa* belonged to the same group. The engineer was one Clarence Gilbert ("***Gilbert***"). He was employed by Engen *Petroleum South Africa*.

[13] Nyamukapa further testified that during the course of the contract, the quantity surveyors would issue out the PCs and forward them to Gilbert, representing the defendant. Once Gilbert was satisfied, he would pass them on to Nyamukapa for payment. Nyamukapa alleged that the plaintiff has confused and has mixed up the defendant with Engen *Oil Zimbabwe*. These companies are separate and standalone entities, each responsible for its own operations. Although it was the defendant that floated the tender in question and arranged the execution of the contract, the plaintiff's contract was with Engen *Oil Zimbabwe*, not the defendant. All the previous PCs had been made out in the name of Engen *Oil Zimbabwe*, not the defendant. They were paid out from Engen *Oil Zimbabwe's* own bank account here in Zimbabwe. For support, he referred to the various electronic transfer and settlement forms in respect of the uncontested four PCs. They all showed that indeed they had been raised against, and paid for on behalf of Engen *Oil Zimbabwe* from its local bank account.

[14] Nyamukapa stressed that it was only the fifth and last PC that was made out in the name of the defendant. That was wrong. The defendant is not liable for the amount. The defendant is not headquartered in South Africa. Engen *Petroleum South Africa* had been roped in for the project only in a supervisory capacity given its experience in running and branding service stations. Regarding the special rate of interest claimed by the plaintiff at 0.5% per day, Nyamukapa argued that this was the rate the plaintiff itself would be liable for

in respect of any breach of the contract by it. It was never agreed that the defendant or any "**Engen**" entity would be equally liable for this rate.

[f] Analysis of the evidence

[15] Both parties submitted separate bundles of documents which were admitted into evidence. The bulk of the documents were the same. From both the documentary evidence and the *viva voce* testimonies of the witnesses, very few facts are in contention. It is largely the interpretation of the evidence and the legal conclusions reached by the parties which form the basis of the dispute between them. From the documents, the scope of the work was described as the rebranding of existing service stations and the installation of corporate signage for Engen *Petroleum Zimbabwe*, i.e. the defendant. The quantity surveyors were iQS (International Quantity Surveyors) CC, of an address in South Africa. The tender and contract conditions relevant to the dispute directed that the tender documents would be endorsed with: "FOR INSTALLATION OF CORPORATE (*sic*) AT VARIOUS SERVICE STATIONS IN ZIMBABWE FOR ENGEN PETROLEUM ZIMBABWE (PVT) LTD". The tender documents could be emailed to one Fernando Serra. An email address, telephone number and physical address were supplied. The telephone code was South Africa. The physical address was Engen Petroleum Ltd, Procurement Department, Engen Court, Cape Town, South Africa.

[16] The tender conditions also provided that a binding contract, in accordance with the conditions embodied in the tender document, would come into existence immediately between the successful tenderer and the "***client***" upon the posting of a letter addressed to the tenderer, notifying of the acceptance of the tender (*underlining and highlighting for emphasis*). That letter would form part of the contract. "**Client**" was not defined. Jani said the plaintiff assumed "**client**" was a reference to the defendant. Nyamukapa argued that "**client**" was a reference to Engen *Oil Zimbabwe*. The basis of his argument was that when the formal contract was eventually signed, it was clearly stated that it was between the plaintiff and Engen *Oil Zimbabwe*, not the defendant. I will come back to this point later on.

[17] Regarding the process of applying for stage payments, the tender conditions stipulated that the application would be submitted to the "**client's**" local representative and/or the project quantity surveyor once 50% or complete works had been completed. After the

"**client's**" local representative or project quantity surveyor had "… **settle on an agreed, …**" (*sic*), payment certificates would be issued. The printed standard term tender form which the plaintiff completed and submitted repeated the information that the installation of the corporate signage was for the defendant. It was addressed to the defendant at its property in Harare. It was underlined that the "**employer**" reserved the right to accept the tender in full or in part. "**Employer**" was not defined. It was also repeated that the completed tender documents could be sent by email to Fernando Serra of the same email address, telephone number and physical address in South Africa.

[18] The plaintiff won the tender. The letter advising it of this was now from Engen *Oil Zimbabwe*. The material portion read, "**On behalf of Engen Oil Zimbabwe you are herewith appointed as contractor for installation of signage at the following sites: …**" Eleven sites were listed. On payment, the letter required that claims would be submitted to the local project manager and copied to iQS. It advised that once iQS had approved the claim with the local project manager, a payment certificate would be issued. Thereafter, an invoice would be requested from the contractor to match the payment certificate (*underlining for emphasis*). Invoices were required to be made out to Engen *Oil Zimbabwe*. The currency was USD. One of the clauses provided that the "**client**" had the right to terminate ***any*** contract if not satisfied with the performance of the contractor. But once again, "**client**" was not defined. And the right of termination was in regards to ***any*** contract.

[19] A further salient detail of the contract was that the signed contract was copied to Gilbert at Engen **Head Office**, Cape Town, South Africa. Furthermore, the letter by iQS on 6 November 2012 in regards to the first PC was addressed to Engen *Oil Zimbabwe*. However, the postal address for the "**Engen"** company was Cape Town, South Africa. Nyamukapa claimed that the address was a mistake. But given all the other details highlighted above, such a "mistake" was manifestly consonant with the general drift of the plaintiff's narrative that, among other things, its contract was with the defendant or its associates, and that payment for the project was coming from the defendant's headquarters in South Africa. At any rate, such a mistake was repeated on all subsequent occasions whenever iQS sent covering letters accompanying PCs. They were all addressed to Engen *Oil Zimbabwe* in Cape Town, South Africa. It does not end there.

[20] When PC no. 5 remained outstanding and the plaintiff was chasing up payment, among other things, there was some internal correspondence within "**Engen**" with the engineers urging the defendant to pay. One such correspondence was an email dated 24 February 2014 from Gilbert to Mapfumba and copied to, among others, Nyamukapa. It read:

> "Crem,
>
> Please can I have a response in this regard. I am now being bombarded by calls from this contractor for something I have little control over. I have on numerous occasions wrote (*sic*) to your office with simply no response. This is a certified payment, and as such should be honoured. The QS Certificate is a liquid document and this contractor has legal recourse here.
>
> Can I understand what the holdup is here?"

An earlier email dated 6 February 2014 by the same Gilbert to the same Mapfumba and copied to, among others, the same Nyamukapa, is also worth highlighting. It read:

> "Hi Crem,
>
> After getting some more background on this claim I can confirm that this is a legitimate claim for payment. This contractor has gone out of his way in order to get the job done. Please can we process for payment. I would hate to lose a guy like this on the future to payment delays by our office."

An even earlier email on 5 February 2014 between the same people read:

> "Hi Crem,
>
> I am not quite sure what the apparent hold up is on payment. This is a certified payment for works done by Lithotec and the rebranding exercise. Stan can you shed some light."

There was no response to all this communication. During cross-examination, Nyamukapa was quizzed on the defendant's apparent intransigence in the face of its own engineers urging payment. He could only shrug and assert that Mapfumba, as the managing director at the time, had his reasons for refusing payment.

[g] Determination of the issues

[21] Nyamukapa conceded during cross-examination that the only reason why the defendant refused payment was because the contentious PC no. 5 was in the name of the defendant, instead of Engen *Oil Zimbabwe* as per the contract stipulation and as had been the case with the other four PCs. However, it is disconcerting that the defendant should mount such a bogus defence. It is manifestly ill-advised. During trial both parties meticulously went

over the payment modalities. It emerged that whilst the method stipulated in the contract in regards to the raising of invoices and the process of effecting payment might not have been scrupulously observed by both sides, what was beyond question was that the plaintiff did nothing contrary to the contract in regards to the raising of invoices. Among other things, it raised its invoices in the name of Engen *Oil Zimbabwe*, including in respect of those pertaining to PC no. 5. It was the defendant's own engineers and quantity surveyors as agents who would verify the work done and certify the job for payment. In particular, it was the quantity surveyors that prepared the PCs for payment. That PC no. 5 reflected the name of the defendant was not, and is not, for the plaintiff to answer. As Jani said, the plaintiff had no knowledge of the internal workings of the defendant and/or its sister companies. That iQS International Quantity Surveyors were the defendant's own agents was printed on the bottom of PC no. 5 which, among other things, stipulated the defendant as the "**employer**". At any rate, this was common cause. That is not all.

[22] Mrs *Matsika*, for the defendant, argues that, among other things, the actual contract was between the plaintiff and Engen *Oil Zimbabwe* and that therefore, it is to Engen *Oil Zimbabwe* that the plaintiff must look to for payment. With all due respect, the whole stance by the defendant is a smokescreen. For example, the only reason for the claim that the parties to the contract were the plaintiff and Engen *Oil Zimbabwe* is apparently that single phrase in the letter of 24 August 2012 awarding plaintiff the tender, which read, "**On behalf of Engen Oil Zimbabwe you are herewith appointed as contractor** …" Quite why the consideration whether the plaintiff's contract was exclusively with the defendant should start end with this phrase only, ignoring all the other provisions, and the rest of the other documents analysed above, including the invitation to tender, the tender application form and the contract itself, which clearly specified that they all had to be read and construed together as part of the contract, has not been explained.

[23] Quite clearly, the documents themselves, especially the portions highlighted above, the manner the contract was executed on the ground, particularly the payment process, and manner of operations of the **Engen** cluster of companies, were all such that the defendant was very much privy to the contract. It was very much a part of it in its own right. That phrase, "**On behalf of Engen Oil Zimbabwe …**", given what preceded that letter and how the

contract was executed, cannot, on its own, be construed as suggesting that Engen *Oil Zimbabwe* was the sole party to the contract to the exclusion of the defendant and/or other entities in the "**Engen**" family. Demonstrably, the contract was not very tight in its wording. Read in context, the reference to "**client**" and "**employer**" was plainly a reference to the defendant. The defendant is nit picking. That is not all.

[24] Given the manner this contract was concluded and executed, the defendant, Engen *Oil Zimbabwe*, Engen *Holdings Zimbabwe* and Engen *Petroleum South Africa*, at the very least, were unquestionably a single economic unit. The defendant was an integral part of the cluster of companies constituting the Engen group. The concept of holding a cluster or group of companies as forming a single economic entity is a variant or extension of the concept of piercing the corporate veil: *Deputy Sheriff Harare v Trinpack Investments (Pvt) Ltd & Anor* HH 121-11 at p 3 of the cyclostyled judgment. If an entity in a cluster is, among other things, used as a tool to cause harm or to evade responsibilities just because of its corporate status, the corporate veil will be uplifted to get to the members or bodies manipulating it behind the scenes: *Littlewoods Stores* v *I.R.C* [1969] 1 WLD 1241 CA, 1254. If there has been a misuse of the corporate personality, the court can disregard it and attribute liability where it should lie: *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd & Ors* 1995 (4) SA 790 (A), 804 and *Eagle Liner Coaches (Pvt) Ltd v Paratema* HH 655-16.

[25] In *casu*, the defendant wants to hide behind the "**Engen**" cluster to evade liability. That is futile. It was an integral part of the cluster. Among other things, the shareholding was intermingled. Key personnel, especially in engineering, finance, and the managing director, all fronted the cluster. These are pertinent consideration: *Eagle Liner Coaches*, *supra*. But in this case, it is crucial that the tender process and its execution thrust the defendant at the very front of the contract. That the final PC was in the name of the defendant, far from exonerating it, actually makes it liable to the hilt. It was its own personnel or agents that made it out in that way. There is one more point.

[26] In his email urging payment, Gilbert reminded the defendant that the claim was predicated on a PC and that this was a liquid document. Indeed, a PC is a liquid document. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), the Supreme Court of South Africa accepted that, at para 27:

> "… … a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgement of debt in favour of the contractor. … … The certificate … embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash" *(my emphasis*).

There can be no question that the defendant is liable to the plaintiff for the amount on PC no. 5.

[h] The currency of the debt

[27] The currency of the contract was USD. All previous PCs were paid for in USD. But that was because the USD was practically the sole legal tender at the time. The country was in the multi-currency dispensation in terms of which the USD was predominate. The law subsequently intervened. The multi-currency system was abolished. The RTGS dollar was made the sole legal tender. All the assets and liabilities previously valued in USD immediately before 22 February 2019 became values in RTGS for accounting and other purposes on a ratio of one-to-one. The plaintiff's claim pre-dates the above intervention. Contrary to its argument herein, its claim was undoubtedly affected. Going forward, the exchange rate would be determined by market forces when all foreign currency would be dispensed via an auction system on the basis of a willing-buyer willing seller.

[28] The law was subsequently changed again. Among other things, the USD was once again effectively restored as legal tender, courtesy of SI 85 of 2020.[6] In terms of this change, any one could use their "free funds", as defined, to pay for goods and services chargeable in Zimbabwe dollars. There has been a further complication. On 15 February 2023 this court declared as unconstitutional the previous change in the law that had brought in the parity ratio of one-to-one between the USD and the RTGS. This was in the case of *Stone & Anor v CABS & Ors* HH 118-23. But by operation of the law, such declaration of unconstitutionality has no force until confirmed by the Constitutional Court. At the time of this judgment, it was still to be confirmed (or discharged). What all this analysis boils down to is that the defendant's liability to the plaintiff is in USD. It has not been shown that the defendant is not the holder of such free funds as would disentitle it to pay its debt in foreign currency. Whilst the

[6] Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2).

payment vouchers produced by the defendant in respect of the previous four PCs show that the payer was Engen *Oil Zimbabwe* , this does not detract from the following facts:

- that the currency of the contract was USD;
- that all the payments have been in USD;
- that right at the outset, the tender document on payment arrangements, stipulated that the plaintiff's applications for payment, and the original tax invoice, would be submitted to the "**client's**" local representative, suggesting that the "**client**" was based abroad, and crucially,
- that the formal contract itself stipulated, in clause 3 under "**Payment Issues**", that after receiving the contractor's invoice, the PC would be issued to Engen Petroleum Head Office in Cape Town , South Africa for approval and payment (*underlining for emphasis*).

[29] The defendant is trying to hide behind a finger. The plaintiff is eminently entitled to payment in USD. Among other things, it was made to believe, and objectively, the contract documents support this belief, that the contract price would come from the defendant's headquarters in South Africa. Whatever other arrangements the defendant and/or its "sister" companies in the "**Engen**" group might have made to effect the payments would not be of concern to the plaintiff so long as the contractual rights and obligations of the parties were observed.

[i] Whether the defendant is liable for the special rate of interest of 0.5% per day

[30] The defendant is clearly not liable to the plaintiff at the special rate of interest of 0.5% per day. That rate was stipulated in the tender as a penalty for the late completion of the job by the plaintiff. The plaintiff's argument herein is basically that what is good for the goose is good for the gander. If the contract made the plaintiff liable for that penalty in the event of a breach by it, then the defendant should, in equity, equally be liable for the same penalty in the event of a breach by it. But the law does not operate that way. Courts do not make or re-write contracts for the parties. Where the contract is not illegal or contrary to public policy or morals, the courts will enforce the terms as agreed upon by the parties. There is nothing in the present case that warrants a departure from this cardinal rule. The defendant's liability in interest is at the prescribed rate of 5% per annum from the date the amount on PC no. 5 was

due and payable, namely 12 December 2013, being thirty (30) days after the invoice in accordance with the contract stipulation.

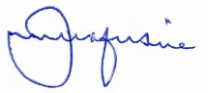
[31] In the premises, the following order is hereby made:

i/ The defendant shall pay the plaintiff the sum of US$74 332-58 [seventy-four thousand three hundred and thirty-wo United States dollars and fifty-eight].

ii/ The defendant shall pay interest on the amount aforesaid at the rate of 5% per annum from 12 December 2013 to the date of payment in full.

iii/ The defendant shall pay the costs of suit.

1 March 2023



Chigwanda Legal Practitioners, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners