ADLECRAFT INVESTMENTS (PRIVATE) LIMITED
versus
ZIMBABWE CONSOLIDATED DIAMOND COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14 & 24 February, 1, 2 & 15 March 2023

Urgent Court Application

T W Nyamakura, with him *M Ndlovu*, for the applicant
J R Tsivama for the respondent

ZHOU J: This is an urgent court application for an order directing the respondent to pay the sum of US$13 824 163.22 to the applicant together with costs of suit on the attorney-client scale. The claim arises from an agreement between the parties in terms of which the applicant rendered contract mining services to the respondent. The application is opposed by the respondent.

Apart from contesting the claim on the merits, the respondent raised the following preliminary objections: (a) that the matter is not urgent; (b) that the claim has prescribed; (c) that there are material disputes of fact, and (d) that the amount claimed offends against the *in duplum* rule. I heard argument on both the preliminary objections and the merits and advised the parties that my determination on the objections *in limine* would have a bearing on whether or not I would consider the merits of the case.

I then dismissed the objections *in limine* and advised that the reasons for the dismissal would be contained in the final judgment. In the interests of ensuring the expeditious disposal of the matter, this court directed that *viva voce* evidence be led to resolve the only issue that was outstanding between the parties, *viz.* the exact amount that is due to the applicant by the respondent for the services rendered. The parties led evidence from one witness each.

The material facts from which the dispute between the parties arose are as follows: In February 2016 the parties entered into a written agreement to which there was a third party that is

not before this court, New Era Diamonds Limited which is a sister company of the applicant. New Era Diamonds Limited is a foreign registered company. In terms of that agreement the applicant were to render contract mining services to the respondent. The services included supplying the respondent with daily ore the tonnage of which is detailed in the agreement, extracting ore, haul and stockpile ore at the designated points. The respondent was enjoined to sell all its Boart Diamonds produced to New Era Diamonds Limited during the subsistence of the agreement. The details of how the applicant was to be paid as well as the applicable rates are specified in the written agreement. Clause 10.1 of the written agreement provided that the initial duration of the contract was twelve months from the date of signature. The agreement was subject to renewal subject to satisfactory performance thereof.

After the period of twelve months the applicant continued to render the services as per the agreement pending negotiations on the contract rate to be applied. Owing to the failure to reach agreement on new contract rates the respondent terminated the agreement in April 2020, according to the letter dated 13 April 2021 which is attached to the applicant's papers, annexure "C". By letter dated 13 April 2021 the respondent acknowledged liability to the applicant in the sum of US$1 979 590.65. In a letter of demand dated 14 December 2022 the applicant through the deponent to the founding affidavit wrote a letter of demand to the respondent in which it acknowledged that a sum of US$1 300 486.67 had been paid, leaving a balance of US$679 103.98 from the admitted US$1 979 590.65. Two days later on 16 December 2022 another letter was addressed to the respondent on behalf of the applicant stating that the outstanding amount as at 31 December 2018 excluding interest was in the sum of US$4 344 965.67. The letter states that when interest is factored in the balance due would be US$13 824 163. 22 as at 31 December 2022. Applicant asked the respondent to deposit the amount into the same account which had been given in the letter of demand of 14 December 2022. The two letters of 14 and 16 December 2022 were delivered to the respondent on the same date, 19 December 2022. The two letters were followed by a series of email correspondence in which the respondent advised that the parties needed to agree on the exact figure or amount that remained outstanding.

Urgency

The respondent's objection is that the debt which forms the subject of this application has been outstanding for many years. For this reason, there is no need for the matter to be heard on an

urgent basis. The applicant, on the other hand, states that it stands on the brink of insolvency if the debt is not urgently paid hence the need for the matter to be heard urgently. It pleads commercial insolvency as a basis for urgency.

A matter is urgent if it cannot wait to be dealt with as an ordinary court application, see *Pickering* v *Zimbabwe Newspapers (1980) (Ltd* 1991 (1) ZLR 71(H). In the case of *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Co (Pvt) Ltd* HH 116 – 98, at p. 1, it was held that:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."

In this instance, an extract from the applicant's balance sheet that has been attached shows the financial precariousness of the applicant. Commercial urgency has been regarded as a valid ground for seeking the urgent hearing of a matter, especially where the applicant is threatened with insolvency, see *Silver's Trucks & Anor* v *Director of Customs & Excise* 1999 (1) ZLR 490. Thus, if the application is not dealt with urgently and the applicant is rendered insolvent, whatever relief it will get in the future will be hollow. For this reason, the matter should be dealt with urgently.

In addition, there is an emerging approach in line with the government's "ease of doing business" mantra, to regard commercial matters as deserving urgent attention. The establishment of the Commercial Court as a division of this court is in line with this thrust of seeking to expedite resolution of commercial disputes. The court must take judicial notice of this fact in dealing with commercial disputes and reflect it in its approaches. For this reason, too, the court should look askance at any party that contests the urgent hearing of a commercial matter. The new trajectory essentially makes commercial disputes urgent matters by their very nature.

In light of these reasons, the objection to the urgent hearing of the matter must be and was dismissed.

Prescription

According to the respondent, the fact that the contract from which the claim arose was entered into in 2016 means that the cause of action arose more than three years prior to the service

of the court application. The respondent took the position that even for services rendered after 2016, the claims prescribed if the debts arose more than three years prior to the service of the instant application. The applicant, on the other hand, submitted that the respondent expressly and/or tacitly acknowledged its indebtedness to the applicant, and that that acknowledgment of liability interrupted the running of the period of prescription.

I took the view that there was need for evidence to be heard from witnesses who would give *viva voce* evidence on the question of prescription. The issue of prescription would, therefore, be considered after hearing the evidence of the witness.

Disputes of fact

Most of the facts giving rise to the dispute between the applicant and respondent are common ground. The fact that work was done based on the 2016 contract is common cause. It is not in dispute that even after the date given in the written memorandum for the contract to terminate the applicant continued to do the work while the parties were negotiating new rates to be applied. The only issue to be determined, which the affidavits could not establish with certainty, was the exact amount that remains outstanding to date. This is the main issue which is the subject of a factual dispute.

Where there is a material dispute of fact in application proceedings, the court has a discretion as to the future course of such proceedings. It can refer the matter to trial or direct that evidence be led from witnesses on the facts in dispute or dismiss the application, see *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219(H) at 222F-G; *Adbro Investment Co. Ltd* v *Minister of the Interior* 1956 (3) SA 345(A) at 350A. The latter course of action will normally be deployed where the applicant ought to have realized the existence of the dispute of fact or such dispute was obvious at the time of the launching of the application, see *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232(H); *Magwaza* v *Magwaza & Ors* HH 227-89.

In casu the figures being claimed are based to a very large extent on correspondence authored on behalf of the respondent. What will have to be assessed by reference to the oral evidence is how much, if at all, of the figures in question has been liquidated by the respondent, as well as whether any interest is due and the rate thereof. The currency in which the amount must be paid will also have to be determined. These are very narrow issues. Accordingly, in the exercise

of the court's discretion, this court directed that evidence be led through witnesses to enable the court to resolve those issues.

Applicant's evidence

The applicant led evidence through its Chief Executive Officer and managing director, Ofer Sivan. He stated that the amount that is being claimed now arose from the acknowledged figure of $4 344 965.67. This amount appears in three letters which were written by the respondent's representatives on its behalf. Exh. 1 is a letter dated 16 July 2019. In that letter the respondent acknowledged that as at 31 December 2018 it owed the sum of RTGS4 344 965.67 "for services rendered". There is an acknowledgment that that debt arose in United States dollars, but the respondent then avers that it was affected by legislation which placed United States dollars and the RTGS dollar on a par due to the legislated 1:1 ratio. Respondent explained that it had failed to pay the amount due to cash flow constraints, but would be able to commence the payments in due course because their financial situation was improving as a result of the payments that it was expecting to receive during the week ending 19 July 2019.

By another letter dated 6 August 2019, exh. 2, the respondent acknowledged the same figure, this time explicitly stating it in United States dollars as US$4 344 965.67. This letter also admits that the amount excludes interest. It repeated its understanding that Statutory Instrument 33 of 2019 had converted the amount to RTGS dollars. The letter repeats the explanation that the respondent had failed to pay the money due to cash flow challenges. There is repetition of the undertaking to start the payments.

On 8 October 2019 yet another letter, exh. 3, was written by the respondent acknowledging the amount of $4 344 965.67, and repeating the assertion that it would be paid in the local currency at the rate of 1:1 against the United States dollar. The letter implored the applicant to seek Exchange Control approval in order to facilitate the payment of the debt in United States dollars.

A letter addressed to the FBC Bank Limited, exh 4, by the respondent acknowledged that it owed the applicant "amounts in excess of ZWL5 000 000 for contract mining services rendered". The letter is dated 14 November 2019. The letter stated that the respondent would process payments due to the applicant in the next fourteen days.

The evidence of Ofer Sivan was that the acknowledged amounts were never paid. He stated that the payments by the respondent made in August 2019 (per exh. 5 and 6) in the local currency

were not meant to liquidate the debt of $4 344 965.67. His evidence was that the payments were for current expenses unconnected to the above figure.

Attached to the applicant's founding affidavit is a letter (annexure "C") written by the respondent on 13 April 2021. The letter refers to a meeting of 12 April 2021 and suggests that an agreement was reached thereat. The alleged agreement entailed the payment by the respondent to the applicant of a sum of USD1 979 590.65. The figure is stated by the respondent to be the outstanding debt as at 31 December 2020. In December 2022 Ofer Sivan wrote two letters of demand to the respondent. The first letter dated 14 December 2022, annexure "D" to the founding affidavit, acknowledged that pursuant to the letter of 13 April 2021 the respondent had paid a sum of USD1 300 486.67 leaving a balance of USD679 103.98. The letter demanded payment of the balance within 72 hours of the letter of demand. The second letter is dated 16 December 2022, annexure "E" to the founding affidavit. It demanded payment of the sum of US$13 824 163.22, being the total made up of the sum of US$4 344 965.67 referred to in the previous letters and the interest thereon. Ofer Sivan testified that the two letters of demand were delivered to the respondent on the same date, 19 December 2022. His evidence is supported by the respondent's stamp acknowledging receipt of the two letters. Ofer Sivan's evidence was that the US$1 979 590.65 that is referred to in the letter of 13 April 2021 is part of the US$4 344 965.67. He only demanded it separately because the respondent had undertaken to pay the amount. It was expected to be paid without any further negotiation.

The applicant's witness gave evidence on the statements attached to the answering affidavit as annexure "A" thereto. His evidence was that the statement showed the financial transactions between the parties and explained how the amount being claimed is arrived at with reference to the schedule. According to this witness, the respondent owes the sum of US$13 824 163.22 as well as the sum of US$679 103.98 which is the balance from the US$1 979 590.65 that was separately admitted, as at 31 December 2022.

Respondent's evidence

The respondent's Finance Manager, Charles Gobvu, gave evidence on its behalf. He has also acted as the respondent's Chief Finance Officer. His evidence was that indeed the respondent owed the sum of US$4 344 965.67 as at 31 December 2018. He stated that the coming in of Statutory Instrument 33 of 2019 converted the balance to RTGS dollars, hence the contents of the

letters written on behalf of the respondent, exh. 1, 2, 3 and 4. Exhibits 1, 2 and 4 were authored by him. He stated that the respondent never paid interest, hence his belief that the applicant was not entitled to recover interest from it. According to this witness, the respondent settled the debt of $4 344 965.67 through the two payments shown in exh. 5 and 6. Exh 5 shows a total payment of RTGS$2 517 943.60, inclusive of Value Added Tax (VAT). Out of that amount, RTGS$218 951.62 was withheld by the respondent and paid directly to the Zimbabwe Revenue Authority (ZIMRA). The sum of RTGS$2 298 991.98 is what was credited directly into the account of the applicant. Exhibit 6 is a payment of RTGS$1 952 021.73. Of this amount, the sum of RTGS$1 867 151.22 went directly into the account of the applicant while the difference of RTGS$84 870.51 was withheld and paid to ZIMRA. He stated that the payments were made to the applicant on 7 and 20 August 2019. The two exhibits show a total payment of RTGS$4 469 965.33. This amount exceeds the admitted sum of $4 344 965.67 by a sum of $124 999.66. His explanation was that this was an overpayment which was subsequently credited towards obligations which were incurred subsequent to the payment. He stated that the US$1 979 590.65 which is contained in the letter of 13 April 2021 related to the additional work that the applicant had continued to do and was also meant to cushion the applicant against the loss in value occasioned by the currency reforms ushered in by the new law in 2019. He stated that the only amount that the respondent owes to the applicant is the US$679 103.98. According to him the US$1 300 486.67 was paid in United States dollars. The US$679 103 98 would also be paid in United States dollars but the respondent was entitled to pay in any of the currencies in the bracket of the multicurrency system. He stated that the US$13 824 163.22 that is being claimed by the applicant includes the interest at the rate of two percent (2%) per month as per the 2016 agreement. He stated that if the United States currency was applied then the sum of US$13 824 163.22 was accurate, but stated that the respondent's position was that the local currency must be used. He stated that he disagreed with the principal of US$6 million which he alleged had been used to calculate the amount due. He stated that the respondent had never paid any interest to the applicant on outstanding debts, and previously the applicant had also never claimed such interest.

During cross-examination the witness stated that the US$1 979 590.65 was not part of the old debt of $4 344 965.67, but arose because the parties continued to engage and the applicant continued to do the contracted work even as they were discussing the issue of the rate. He admitted

that the payment of US$1 300 486.67 did not appear in the respondent's reconciliation statement. According to him the reconciliation related to the "old debt". It was a payment for "current work". Upon being challenged about a payment reflected in the applicant's statement for 28 August 2019 the witness stated that this was a payment for current works and not for the "old debt". He did not produce any evidence to show that the transaction was for a purpose different from the other payments made during the same month.

Analysis of the evidence

From the evidence led, on behalf of both parties, the sum of US$4 344 965.67 was due as at 31 December 2018. The applicant's position is that that amount was not paid. On the other hand, the respondent's position is that it was paid by the two amounts which appear in the statement prepared by the applicant's accounting department as payments made on 7 and 21 August 2019 as read together with exh. 5 and 6 produced by the respondent through its witness. The applicant's statement shows that even after the amounts in question were appropriated the balance remained staggering above four million dollars throughout, with a closing balance of $6 259 127.55 as at 28 April 2020. That figure became the balance brought forward in the statement of 31 March 2021.

If, as the respondent's witness suggests, the sum of $4 344 965.67 had been paid off by 20 or even 21 August 2019 then the respondent would not have been acknowledging indebtedness in that amount after those dates. However, the letter of 8 October 2019, exh. 3, was written nearly two months after the alleged payment, yet it acknowledges that it still owed the applicant, and explicitly refers to the amount of $4 344 965.67. The respondent even accepts liability to compensate the applicant for loss of value from 2016 by payment of interest on the outstanding amount, with such interest having to be calculated from 2016. The respondent's letter of 14 November 2019 which was written by the witness who testified on its behalf, acknowledges that the respondent owes the applicant more than $5 000 000.00 for contract mining services rendered. That letter while addressed to the FBC Bank Limited, is copied to the applicant and specifically to the attention of O. Sivan. The respondent would not have been acknowledging owing more than five million dollars in November 2019 if it had paid off the debt by 21 August 2019. The lack of specificity in relation to the exact amount owed in November 2019 means that the evidence of the applicant remains intact. That evidence shows that as at 28 April 2020 the amount outstanding

was $6 259 127.55, as appears from the statement which is annexure "A" to the answering affidavit. The evidence is consistent with the acknowledged indebtedness of the respondent.

The sum of US$679 103.98 which was admitted to be due to the applicant by the respondent is part of the $13 824 163.22 which forms the claim *in casu*.

The applicant's "ZCDC Statement as at 31 March 2021" shows that as at 31 March 2021 the amount due by the respondent to the applicant was in the sum of $6 009 430.09. There was no evidence led by the respondent to rebut this evidence. This amount does not include interest. When interest is factored in, as appears from the last page of annexure "A" to the answering affidavit, the total amount due becomes $13 824 163.22. This means that the sum of $7 814 733.13 represents interest, as shown in the applicant's document.

The interest has exceeded the capital sum. Allowing payment of the interest portion that is more than the principal sum would offend against the *in duplum* rule. See *Commercial Bank of Zimbabwe Ltd* v *MM Builders & Suppliers (Pvt) Ltd & Others* 1996 (2) ZLR 420(H); *ZB Bank Ltd* v *Eric Rosen (Pvt) Ltd & Others* 2015 (1) ZLR 314(H).

This would mean that interest ceased to run upon reaching the sum of $6 009 430.09. The amount which the plaintiff would be entitled to is therefore in the sum of $12 018 860.18. During the closing submissions Mr *Ndlovu* for the applicant moved an amendment to the draft order, and advised that the applicant was abandoning part of its claim so that it now claims a sum of $10 712 860.18. The reason given was that this would ensure that the *in duplum* rule was not violated. The correct amount is $10 718 373.51, which is arrived at after subtracting $1 300 486.67 from $ 120 18860.18. Both parties agreed that US$1300 486.67 was paid.

Prescription

The objection based on prescription is made half-heartedly by the respondent. The objection reflects a worrying ethical trend in the business community where businessmen and businesswomen stop at nothing to avoid contractual obligations voluntarily assumed. This court has previously commented on this unacceptable approach to business in the case of *African Banking Corporation of Zimbabwe Limited t/a BancABC* v *PWC Motors (Pvt) Ltd and Others* HH 123 – 13, at p. 1, as follows:

> "This summary judgment application graphically illustrates that a trend is fast developing among business people in this country to borrow huge sums of money from financial

> institutions and when the time to pay comes, to pay as little as possible or better still, not to pay at all. A pattern is manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc to investor confidence."

The frustration expressed above applies with equal force to the legal profession. The legal profession is not entirely innocent. There is need to add that there are those in the legal profession who think that it is their responsibility to excuse their clients from performing obligations arising out of contracts that they have entered into by raising frivolous objections. This is a very serious ethical issue that must dominate legal training in this country. It exposes the entire profession to resentment as a group of professionals who are there to manipulate the legal process to frustrate performance of contracts. This ethical issue is also a serious threat to investor confidence and undermines the "ease of doing business" policy. The time has come for the courts to reflect disapproval of that conduct on the part of lawyers by depriving them of legal costs where they abuse court procedures to frustrate due performance of contractual obligations by their clients. It is unfair to a client who approaches a legal practitioner for legal advice to be made to pay a fee to that lawyer where the lawyer deliberately prolonged a dispute or litigation by not giving the correct advice to the client.

In this case, the letter dated 13 April 2021 is a clear and unequivocal admission of liability by the respondent. The debt is explicitly admitted. The emails which follow after that letter also show that the respondent admits that it owes money to the applicant. As recently as 27 January 2023, the respondent sent emails in which it stated that its accounts department had agreed to pay the amounts reflected in a statement sent in 2021. The only issue which had to be resolved was of the amount due. Given that the debt was long overdue, the respondent could not genuinely believe that the amount outstanding would remain static in light of its agreement or obligation to pay interest. To then turn around and raise the defence that the debt has prescribed in the face of the documented acknowledgment of indebtedness is clearly an abuse of court procedures which must be frowned upon.

The Prescription Act [*Chapter 8:11*], provides, in s 18 (1), that the "running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor." The exact amount due is a question of detail. Liability to pay for the services rendered is admitted by the

respondent. In all its emails, including those written in 2023, the respondent has consistently admitted that there is a sum of money outstanding in respect of the work done by the applicant. Accordingly, the objection that the debt has prescribed is without merit and is dismissed.

The currency of the debt

There is a dispute as to the currency in which the debt must be paid. The applicant insists that it must be paid in the currency of the contract which is the United States dollar. The respondent, per contra, contends that by operation of Statutory Instrument 33 of 2019, it is entitled to settle the debt in the local currency.

The effect of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations (Statutory Instrument 33 of 2019) on debts that were denominated in United States dollars immediately before the effective date of 22 February 2019 has been authoritatively settled. See *Zambezi Gas Zimbabwe (Private) Limited* v *N. R. Barber (Private) Limited & Another* SC 3/20. On or after the effective date, the debt shall be valued in RTGS dollars using the rate of one-to-one to the United States dollars.

However, this is a contractual matter. The court must therefore look at what the agreement between the contractants says about the currency in which the debt must be paid. In this instance the rates are expressed in United States dollars, as per clause 3.1 of the written contract. The prices are given in United States dollars, according to clause 4.4. The contract in clause 17.1 provides that the written memorandum "constitutes the whole agreement and sole record of the agreement between the parties with regard to the subject matter hereof". The "whole agreement" clause is also contained in clause 20 of the written contract.

The contract also provides in clause 19 that it "shall in all respects be governed and construed in accordance with the laws of Zimbabwe". Statutory Instrument 33 of 2019 does not outlaw the performance of the contractual term relating to payment in United States dollars. It merely introduced the RTGS dollar which was equal in value to the United States dollars as at the effective date. The multi-currency system continued to subsist post the enactment of those

regulations. The parties continued to denominate all their obligations in United States dollars and where any payment was made in a different currency such payment would be rated to the United States dollar. This is evident even from the respondent's statement that is part of exh. 5. The respondent was prepared to and did make payments in United States dollars after 22 February 2019. The evidence of the parties is that the sum of US$1 300 486.67 that was made pursuant to the letter of 13 April 2021 was in United States dollars. There is therefore no legal impediment to the making of an order that performance of the contract be in the agreed currency. Payment in United States dollars was proved by the parties' previous consistent course of dealings even after SI 33 of 2019 had come into operation.

Interest

The debt that is being claimed *in casu* arose from the written contract of 2016. Clause 3.4 of the contract has provision for the payment of interest at the rate stated therein. That term of the contract was not varied in writing as required by clause 17.2 of the contract. Clause 17.3 of the agreement provides that no relaxation or indulgence, which either party may grant to the other shall constitute a waiver of the rights conferred by the contract. Thus, the mere fact that the applicant never stated that the payments to be made included the interest does not excuse the respondent from its expressed obligations under the contract. In the absence of any agreement on the allocation of payments made by a debtor, the apportionment of the payment made is determined by operation of law. The position of the law is that liability for interest on a debt is extinguished before liability for the capital. *Standard Bank of South Africa Limited* v *Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811(SCA); Pfeiffer v *First National Bank of SA Ltd* 1998 (3) SA 1018 (SCA). The respondent must therefore understand that its part-payments do not extinguish the whole debt in light of that principle.

In any event, in its letter dated 8 October 2019, exh 3, the respondent undertook that it would pay interest on the outstanding amounts.

Costs

Clause 15.2 entitles a party that has approached a court to enforce its rights in terms of the agreement to recover costs on the attorney-client scale. The applicant is therefore entitled to recover the costs based on that scale. Further, the refusal by the respondent to meet its contractual

obligations is in itself so reprehensible as to justify a special order of costs. The respondent insisted that it had paid off the debt even in the face of its own letters of 8 October 2019 and 14 November 2019, in which the debt is acknowledged.

Disposition

In the result, IT IS ORDERED THAT:

1. Judgment be and is hereby granted in favour of the applicant against the respondent for payment of:
   (a) the sum of US$10 718 373.51
   (b) interest on the above sum of money at the rate of 2% per month from the date of this judgment up to the date of full payment; and
   (c) costs of suit on the attorney-client scale.

Tarugarira Sande Attorneys, applicant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners