CMED (PRIVATE) LIMITED
versus
FIRST OIL COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 22 October 2021 & 24 January 2023

Opposed Application – Leave to Execute Pending Appeal

Mr *C Kwirira*, for the applicant
Mr *S M Guwuriro*, for the respondent

MUSITHU J: The applicant seeks leave to execute the judgment of this court per TAGU J delivered on 13 January 2021 under HC 1897/16 (judgment No. HH 26/21). The relief sought is aptly set out in the draft order as follows:

> "WHEREUPON after reading documents filed of record and hearing counsel it is ordered that:
> 1. That the Applicant be and is hereby granted leave to execute judgment No. HH 26/21 granted by this court under case HC 1897/16 on 13th January 2021.
> 2. That the Applicant furnish security to the satisfaction of the Registrar.
> 3. That in the event of an appeal being noted against this order, notwithstanding such noting of appeal, this order be and is hereby declared operative and in effect and shall not be suspended.
> 4. That the costs will be costs in the cause."

BACKGROUND TO THE JUDGMENT BY TAGU J IN HC 1897/16

In order to place the application into its proper perspective, it is critical to briefly deal with the background circumstances that led to the judgment by TAGU J. The trial before TAGU J proceeded as a special case in terms of Order 29 r 199 of the then High Court Rules, 1971. In that case, the applicant herein was the plaintiff, while the respondent herein was the defendant. The agreed facts were as follows. The applicant and respondent are legal entities duly incorporated in terms of the laws of Zimbabwe. The applicant and the respondent (referred to collectively as the parties hereafter) entered into an agreement for the supply and delivery of diesel. In terms of that agreement, the respondent was to supply the applicant 3 million litres of diesel upon payment of

the agreed price. Before the agreement was signed, the applicant paid US$ 2 700 000.00 towards the purchase of the 3 million litres of diesel. In terms of the agreement, the applicant was required to pay US$720 000.00 directly to the Zimbabwe Revenue Authority (ZIMRA) to cover the requisite duties and levies. That amount was apparently not paid. The sum of US$ 2 700 00.00 was paid into the respondent's ZB Bank account held at Avondale. The parties subsequently signed the agreement after the payment of the US$2 700 000.00. After the payment was received, the applicant demanded delivery of the diesel but the respondent failed to deliver. That breach prompted the applicant to institute the action proceedings under HC 1897/16.

In its summons, the applicant therefore sought the following relief:

"(i) An order of specific performance, that the defendant be and is hereby ordered to deliver to the plaintiff, three million litres of diesel within 14 days from the date of judgment or Alternatively; failing delivery;
(ii) That the defendant pays to the plaintiff the market value of three million litres of diesel at the date of judgment;
(iii) Interest thereon calculated from date of judgment to date of payment;
(iv) Costs of suit."

In its defence, the respondent admitted receiving the full payment (less duties and levies due to ZIMRA). It however averred that specific performance was not competent because the applicant breached the agreement by not paying what was due to ZIMRA in *lieu* of duty for the 3 million litres of diesel. Any order for specific performance would therefore result in unjust enrichment. As regards the alternative relief, the respondent's contention was that the alternative relief of payment of the market value of the fuel was not sustainable as the applicant had breached the contract. The alleged breach was the failure to pay the full purchase price which ought to have included the duty that was to be paid to ZIMRA. The respondent's further contention was that the remedy of specific performance was not available to a party that had committed a breach of the contract.

In his analysis of the submissions and the evidence before him, the learned judge found that the agreement between the parties was valid, even though it was only signed after the applicant had paid the US$2 700 000.00. The court also established that through its conduct of signing the agreement after payment of the said amount, the respondent had effectively ratified the contract.

The court also established that the applicant was required to pay US$2 700 000.00 to the defendant and US$720 000.00 to ZIMRA before the delivery of the diesel.

The court determined that the applicant breached the agreement by failing to make the payment to ZIMRA before the fuel was delivered. The court cited clause 2.2 of the agreement which provided that the purchase price to be paid was US$3 630 000.00, which amount included duties and levies, with the applicant expected to pay US$720 000.00 as duty directly to ZIMRA. Clause 5.1 of the agreement provided that the diesel was to be delivered immediately after payment. Clause 6 provided that payment would be upfront upon confirmation of product at the National Oil Infrastructure Company (NOIC) Msasa. The court further established that going by the correspondence between the parties, the diesel was available and reserved at the NOIC Msasa depot. It was only awaiting delivery after the full payment, which entailed payment to the respondent and to ZIMRA. It was on that basis that the court concluded that specific performance was not sustainable in view of the applicant's breach. The court also concluded that the respondent would be unjustly enriched if it was not ordered to refund the amount paid but for which no diesel was supplied.

In the final result, the court made the following order:

"IT IS ORDERED THAT
1. The claim for specific performance is dismissed.
2. The alternative claim is granted.
3. The Defendant is to pay the Plaintiff any amount of US$2 700 000.00 at the current bank rate, being a refund of the value of diesel that the Plaintiff had paid for, but was not delivered by the Defendant.
4. Interest on the said sum at the prescribed rate.
5. Costs of suit."

THE APPEAL TO THE SUPREME COURT

The respondent appealed the High Court decision to the Supreme Court on 2 March 2021 under SC 13/21. The appeal raised two grounds of appeal which are as follows:

"1. The learned Judge erred at law by granting the alternative relief in favour of the respondent when to the contrary the learned Judge made a finding at law that indeed the respondent breached the agreement for the supply and delivery of diesel which breach went to the root of the agreement.
2. The learned Judge erred at law by making a finding that the agreement of supply and delivery of diesel entered by the parties was enforceable notwithstanding the established

> evidence that the respondent had breached the agreement thereby rendering the agreement unenforceable."

THE PRESENT APPLICATION FOR LEAVE TO EXECUTE PENDING APPEAL

The applicant contends that the appeal to the Supreme Court lacks merit, it is frivolous and only filed with the intention of frustrating the applicant. The applicant further averred that the respondent merely wanted to derive pecuniary benefit from a failed transaction in circumstances that would lead to unjust enrichment to the respondent, and prejudice to the applicant. The applicant parted with US$2 700 000.00 in anticipation of receiving diesel for resale at a profit. The respondent admitted to receiving the said amount but did not deliver any diesel. The fact that the applicant had effectively lost on the anticipated profit it would have earned had the respondent performed, constituted irreparable harm on its own. While the judgment by TAGU J attempted to mitigate the applicant's loss, the applicant could never be placed in the position it was in prior to the transaction. Further, the applicant contended that it made payment in the United States dollar currency. The money had already been expended by the respondent, and the applicant was never going to get a refund in the currency it had paid the respondent. That again constituted irreparable harm.

The applicant further averred that the respondent appeared to be a briefcase company that had no known immovable assets. It had failed to provide security to secure the judgment pending appeal. The applicant held a genuine fear of irreparable harm and prejudice as chances were that it was never going to recover the refund which the judgment debt had conferred to the applicant.

The applicant averred that the respondent would not suffer any harm or prejudice if leave to execute was granted. The applicant would only execute to recover what it lost and nothing more. Even assuming the appeal were to succeed, the applicant was a corporate of high repute with immovable properties, vehicles, workshops and fuel stocks throughout the country. It was therefore well positioned to deal with any adverse ruling that would be made against it. There was therefore no risk of irreparable harm or prejudice to the respondent. Further, the applicant was able to pay security to the satisfaction of the registrar pending the determination of the appeal.

The applicant contended that the respondent held no prospects of success on appeal. It acknowledged receiving payment. It had not explained why it should be allowed to withhold payment of the funds received in anticipation of supplying diesel to the applicant. There was no *bona fide* intention to seek a reversal of the judgment appealed against. The respondent did not point to any misdirection by the court in ordering a refund of the amount paid.

In his oral submissions, Mr *Kwirira* for the applicant averred that the respondent even attempted to smuggle a ground of appeal by alleging that it sought to have the appeal court test the correctness of the court's decision to *mero motu* raise the issue of unjust enrichment. The issue was not raised in the respondent's grounds of appeal. Counsel further submitted that the submission was devoid of merit since the respondent never denied receiving the amount in issue.

Mr *Kwirira* impugned the respondent's grounds of appeal on the basis that they merely sought to attack the court's factual findings. An appeal court could only interfere with factual findings if they were grossly unreasonable. Counsel further submitted that it was common cause that once a court made a finding that specific performance was not sustainable, then the alternative remedy available to the injured party was cancellation of the contract and a refund of the purchase price. The court was referred to the case of *Manengureni* v *Kakomo & Others*[1] where the court held that a party in breach of the contract would always remain breach.

Mr *Kwirira* further submitted that the failure by the respondent to pay the security costs showed that it did not have a genuine desire to pursue the appeal.

The applicant also averred that the balance of convenience favoured the granting of leave to execute. It was the applicant who would suffer hardship, while no hardship would visit upon the respondent if leave to execute was granted. The respondent had not given any explanation as to why it should not refund the sum of US$2 700 000.00. Counsel for the applicant also pointed to the continuous price hikes of fuel as justification for leave to execute pending appeal. The applicant was not going to purchase the same quantity of fuel with the amount it was going to recover.

In its response, the respondent did not deny that it received the sum of US$2 700 000.00. It however argued that the court unnecessarily exercised its discretion by making an order for

[1] HCH 489/20

refund based on unjust enrichment which the applicant never asked for. The applicant had prayed for specific performance, and in the alternative, an order for the payment of the current market value of the three million litres of diesel. The court dismissed both claims by the applicant. It was the correctness of the court's exercise of discretion in ordering a refund of the sum of US$2 700 000.00 that the respondent wanted tested on appeal. It followed that the applicant would suffer no prejudice at all as its claims were dismissed. The appeal would therefore set the record straight as to whether the court was correct in making the order of restitution *mero motu*. The respondent denied that the appeal was devoid of merit and that it was seeking to frustrate the applicant. It insisted that it was within its rights to test the correctness of the court's decision. Any order of execution pending appeal would negate the respondent's absolute right of appeal.

The respondent averred that the applicant was not being sincere in alleging that it would not receive the sum of US$2 700 000.00 in foreign currency since the Reserve Bank of Zimbabwe had a facility whereby entities involved in the procurement of fuel were allowed to participate on the foreign currency auction market. The applicant was therefore not going to suffer any prejudice. The respondent also argued that even if its appeal was subsequently dismissed, it would still satisfy the judgment. It claimed that it was a limited liability company and it had defended the matter for the past nine years. The respondent further averred that it would suffer irreparable harm if the judgment was executed before the appeal was determined since it had a strong case on appeal. The respondent asserted so on the basis that the applicant breached the agreement between the parties.

The respondent also averred that the balance of convenience favoured the dismissal of the application for leave to execute since the appeal was already pending. Further it claimed to have tendered an amount of ZW$300 000.00 as security for costs.

In his oral submissions, Mr *Guwuriro* submitted that a party in breach remained in breach until such time that the breach was remedied. The applicant could therefore not seek to enforce the contract for as long as it remained in breach. Counsel submitted that the issue of harm was not just confined to the funds advanced to the respondent. It was also about the consequences of the breach by the applicant. The respondent had also lost business in the process.

THE ANALYSIS

The legal principles that are considered in applications of this nature have been traversed in numerous decisions of the superior courts. In *Trustco Mobile (Pty) Ltd & Ano* v *Econt Wireless (Pvt) Ltd & Ano*[2], MAVANGIRA J (as she then was) set them out as follows:

> "In *Whata* v *Whata* 1994 (2) ZLR 277 (S) at 281 B-C GUBBAY CJ stated:
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> 'The principle to be applied by the court considering the grant of an application for leave to execute on a judgment under appeal is what is just and equitable in all circumstances. The enquiry normally involves assessing such factors as: the potentiality of irreparable harm or prejudice being sustained by either the successful or the losing party, and, if by both, the balance of hardship or convenience; and the prospects of success on appeal, including whether the appeal is frivolous or vexations or has been noted for some indirect purpose, such as to gain time or harass the other party. See the *South Cape Corporation* case supra at 545 E-G.' (*South Cape Corporation (Pty) Ltd Eng Mgmt Svcs (Pty) Ltd* 1997 (3) SA 534 (A)'."

The court further stated as follows:

> "In *Econet* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) SMITH J articulated the same principle at 154F-9 as follows:
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> "In determining an application for leave to execute pending an appeal, the court must have regard to the "preponderance of equities", the prospects of success on the part of the appellant and whether the appeal has been noted without "the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party": see *Fox and Carney (Pvt) Ltd* v *Carthew-Gabriel (2*) 1997 (4) SA 970 (R) and *ZDECO (Pvt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H)."[3]

In determining an application of this nature, the court must consider the entirety of the circumstances of this matter. That includes the potentiality of irreparable harm or prejudice to either the applicant or the respondent in the event that leave to execute is denied or granted. In the event that there is a likelihood of prejudice to both parties, then the court must consider whether the balance of convenience favours the granting of the relief or its denial. In so doing, the court must also relate to the prospects of success of the appeal. There is no point in denying execution pending appeal where the appeal is clearly devoid of merit, and it has simply been filed in order to delay the day of reckoning.

It is common cause that the gravamen of the applicant's complaint is the sum of US$2 700 000.00, that the applicant paid to the respondent towards the purchase of the diesel. The respondent accepts that it received the money but it did not supply the diesel and neither does it

[2] HH 211/11 at pages 4-5 of the judgment
[3] See also per MAFUSIRE J in *Zimbabwe Commercial Farmers Union* v *Peter Gambara* HH 375/15 and per MATANDA-MOYO J in *Ladrax Investments (Pvt) Ltd* v *Ignatius Chirenje & Ano* HH 776/15

say it intends to supply that diesel. In the main matter, the court determined that the relief of specific performance was not sustainable because the applicant had breached the contract by the failure to make the direct payment to ZIMRA. The court also determined that having failed to deliver the diesel, the respondent had no reason to hold on to the funds that had been paid for the purchase of the diesel.

The respondent does not assert that it has any claim against the applicant. It did not file any counterclaim for damages, assuming that it holds the view that it is entitled to claim damages as a result of the applicant's breach. While in his submissions Mr *Guwuriro* urged the court to consider the consequences of the applicant's breach, he did not allude to those consequences. One would have expected him to point out to the prejudice that the respondent would suffer in the event that execution pending appeal was granted. In short, the respondent has not laid a justification for holding on to the funds that it received from the applicant. As I have already stated, there is no counterclaim pending, and neither has the respondent indicated that it intends to make a claim for damages against the applicant.

The respondent's grounds of appeal warrant some attention. In the first ground of appeal, the respondent attacks the court's decision to grant the alternative relief in favour of the applicant despite having determined that the applicant committed a material breach of the agreement. I agree with Mr *Kwirira's* submission that there is clearly no merit in this ground of appeal. The court declined to grant the main relief of specific performance after determining that the applicant breached the agreement for the supply and delivery of diesel. A finding by the court that a party to a contract committed a breach does not preclude the court from granting an alternative remedy if one is sought, and depending on the circumstances of the case. In the instant case, the court ordered the respondent to refund the amount already paid to the respondent towards the procurement of the diesel. As already stated, the respondent has not justified why it should hold on to that money.

In the second ground of appeal, the court's decision is impugned on the basis that it made a finding that the agreement was enforceable notwithstanding the availability of evidence that the applicant had breached the agreement. From my reading of the judgment, the finding by the court that the agreement was enforceable was made in the context of the defendant's preliminary position

that the sum of US$2 700 000.00 was paid before the agreement was signed. On p 7 of the judgment, the court said:

> "The defendant cannot claim that the agreement is unenforceable because it signed the agreement with eyes wide open well after the amount of US$2 700 000.00 was deposited into its account. The defendant does not allege that when it signed the agreement it did not know that money had been deposited into its account. By signing the defendant rectified the contract hence the agreement is valid and binding. If the defendant's position is correct that the signed agreement is unenforceable because the plaintiff paid before the agreement was signed, then in my view it follows that the defendant has no right to hold on to the US$2 700 000.00 because by doing so it would be unjustly enriched. The defendant would have also breached the contract by signing the agreement when money had already been deposited into its account. It should have refused to sign the agreement."

Having expressed the above sentiments, the court went on to determine that the applicant had breached the agreement and denied it the main relief of specific performance. The second ground of appeal is therefore equally devoid of merit.

It is common cause that the court ordered the respondent to refund the applicant the sum of US$2 700 000.00. In its notice of opposition, the respondent sought to impugn the correctness of the judgment on the basis that the court *mero motu* granted the applicant relief for refund of the amount paid based on unjust enrichment.[4] That point is not raised in the respondent's grounds of appeal. At the time this matter was argued before me, the respondent had not amended its grounds of appeal to raise this issue as an additional ground of appeal. The merits of the respondent's appeal cannot therefore be determined on the basis of non-existent grounds of appeal.

In conclusion, the court determines that the respondent will suffer absolutely no prejudice if the court grants an order for the execution of TAGU J'S judgment pending appeal. The respondent failed to point to any prejudice or harm that it will suffer if the said relief is granted. It merely averred that it will suffer prejudice without pointing out to any such prejudice. Further, the mere fact that the court found the applicant to be in breach did not preclude the court from granting any alternative remedy available.

The court determines that on the evidence available, it is the applicant that stands to suffer irreparable harm if execution pending appeal is not granted. The applicant parted with a huge amount of money, but it has received nothing in return. It is common cause that the applicant is in

[4] Paragraph 20 of the opposing affidavit on p 29 of the record

the business of procuring and dispensing fuel. Because of the instability in the pricing of fuel globally, it is also common cause that the amount advanced to the respondent may never procure the same quantities of diesel as would have been procured when the parties signed the agreement. At any rate, the applicant is not even going to be refunded the sum of US$2 700 000.00 in the same currency it was paid to the respondent. On its part, the respondent has failed to justify its retention of the said amount in the absence of any claim against the applicant. The balance of convenience is clearly favour of granting the relief sought herein.

Resultantly, IT IS ORDERED THAT:

1. The applicant be and is hereby granted leave to execute judgment No. HH 26/21 granted by this court under case HC 1897/16 on 13th January 2021.
2. The applicant shall furnish security to the satisfaction of the Registrar.
3. In the event of an appeal being noted against this order, notwithstanding such noting of appeal, this order be and is hereby declared operative and in effect and shall not be suspended.
4. Costs will be in the cause.

Magwaliba & Kwirira, applicant's legal practitioners
Guwuriro & Associates, respondent's legal practitioners