ADDAX ENERGY SA

Versus

C AND T MINING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 27 June 2023 and 28 February 2024

Trial cause

M.Simango for plaintiff
C.Mavhondo for defendant

CHILIMBE J

BACKGROUND

[1] Plaintiff ("Addax") is a peregrine registered in Geneva, Switzerland. It procures petroleum fuels from the United Arab Emirates, India and Russia to supply the Zimbabwean market. Defendant is a local fuel monger[1] and recipient of fuel from Addax.

[2] Addax claimed, in its declaration, that it delivered diesel worth US$1,379,601 to defendant. In terms of the oral agreement between the parties, defendant was obliged to pay for the product within 14 days of delivery. No payment was received despite further follow ups after the 14-day period had elapsed. Addax averred that it then terminated the contract on 1 June 2022, and demanded return of the fuel supplied.

[3] At commencement of trial, Addax abandoned its original claim for an order for (i) delivery of 412.000 litres of petroleum, (ii) seizures of the same quantity of fuel from defendant and (iii) payment for the 412,000 litres of petroleum in United States Dollars at ruling Zimbabwe Energy Regulatory Authority (ZERA) ruling rate per litre.

[4] Addax reduced its claim to (i) US$ 269, 735.88 as the balance due on the quantity of fuel delivered to defendant and (ii) an order that the debt was a foreign obligation payable in United

[1] See *Lonrho Logistics (Pvt) Ltd v Ram Petroleum (Pvt) Ltd* SC 50-22.

States Dollars ("USD"). The defendant admitted the amount claimed. It however denied that the debt qualified as a foreign obligation payable exclusively in USD. Its offer to settle the debt in local currency at the applicable rate was rejected by Addax.

THE ISSUES FOR, AND EVIDENCE DURING TRIAL

[5] Apart from costs, the real issue for determination at trial was redrawn as follows after amendment of the claim; -

> *"Whether admitted debt of US$ 269,735.88 constituted a foreign obligation payable exclusively in foreign currency."*

[6] Addax led evidence from a Mr Iddo Tonderai Mudavanhu. He described himself as "one of the local partners" of Addax. The exact nature of the witness`s partnership with Addax was not further explained. Both during the evidence- in -chief and under cross-examination. Mr. Mudavanhu`s testimony suggested that he was well-acquainted with Addax`s Zimbabwean business affairs in general, as well as its dealings with defendant in particular.

[7] The witness described defendant as a client of Addax. In that respect, defendant regularly received fuel supplies from Addax. On the terms of the contract between the two parties, the witness spoke both generally and specifically. The agreement for supply of fuel was oral. Fuel was sold on a cash basis as it could also be supplied on credit. In either case fuel was paid for in USD. Addax operated what he termed a "transitory offshore account" with the local Ecobank bank.

[8] A description of this account was not rendered. Addax enjoyed, according to Mr. Mudavanhu, approvals from the Reserve Bank of Zimbabwe (RBZ) to trade locally in foreign currency. According to the witness, fuel sales were "off shore transactions". This term was also not subjected to further elaboration. Addax conducted a "KYC" (know-your-customer) due diligence on all new clients. The matters addressed by this customer due diligence were not detailed.

[9] Mr. Mudavanhu stated that Addax sourced fuel from as far afield as the United Arab Emirates, India and Russia. It landed the fuel at a warehouse in the Masasa area of Harare from

whence the product was then distributed. Transactions were concluded through email communication exchanged between Addax and its local customers.

[10] Under cross-examination by Mr. *Mavhondo* for the defendant, Mr. Mudavanhu insisted that he had personally dealt with defendant company over fuel transactions. He claimed that he exercised oversight on all Addax transactions locally. He also viewed all communications between Addax and defendant. When pressed to confirm if he was party to the oral agreement between Addax and defendant, the witness revealed that "defendant dealt with our sales team."

[11] He also confessed that he could not recall the details of defendant's contact person with Addax. When challenged to state where Addax`s local offices were, the witness cited Chispite in Harare. He could not relate the specific address, describing such as a being part of a complex. The witness adhered to his earlier testimony that Addax enjoyed a special dispensation from the RBZ and could only trade in foreign currency. The witness`s evidence was generally blemished by a general lack of detail. Especially on the critical aspects meant to proffer the full circumstances of the contract; -its terms and performance.

[12] Defendant called one witness, Mr Felix Chinhamo, who indicated that he was "its director". The witness outlined defendant`s relationship with Addax. He stated that he was introduced to Addax by a person called Lisa ("a colleague"), from an entity known as Maropafadzo Energy. He engaged one Jean Baptiste and another gentleman called Hadrien from Addax. Jean Baptise was Addax`s key decision maker. He first met these two men at what he described as Addax`s offices in Hillside, Harare.

[13] Thereafter, the witness testified that he regularly interacted with both Jean Baptiste and Hadrien. But he dealt more with Jean Baptiste than the latter. He communicated via both email and telephone. Transactions for the supply on a consignment of fuel or deals were concluded orally and then confirmed through email.

[14] The arrangements between the parties were further detailed as follows by Mr. Chinhamo; -he would discuss with Jean Baptiste the fuel quantity, pricing as well as identity of the off taker. With that out of the way, the witness and Jean Baptiste then agreed on whether to supply

the fuel on cash or credit. Proceeds from fuel sales were deposited into Addax's account with Ecobank.

[15] As regards currency to settle invoices for duel sales, the witness testified thus; -the parties had no specific agreement. Some transactions were conducted in the Zimbabwe Dollar (ZWL). But other consignments were sold in United States Dollars. The USD delivered better profitability. In addition, the USD made further fuel procurement easier. Where fuel was sold in ZWL,the proceeds were then applied to purchase the USD from the RBZ or defendant`s own bank. The witness denied that fuel supplies were to be paid for strictly in USD.He stated that at one-point ZERA directed that fuel sales be conducted in ZWL. Sales of fuel in USD would therefore have been illegal.

[16] It was the witness`s evidence that defendant had been dealing with Addax for a number of years. The relationship commenced "before COVID" and endured until terminated by Addax. During the relationship, Addax operated from Zimbabwe based at its Hillside offices. He reached that conclusion because Addax told him so verbally. In addition, Addax`s website confirmed so and the company received payments locally. The witness confessed ignorance of the Chispite office referred to by Mr. Mudavanhu in his earlier testimony. In closing his evidence-in-chief, Mr. Chinhamo disputed that the debt owed to Addax by defendant was a foreign obligation.

[17] Under cross examination, Mr. Chinhamo testified as follows; -during the period 2021 to 2022, defendant never paid for fuel supplies in ZWL. He admitted that ZERA never stopped fuel sales in USD. But defendant received payments in ZWL which was applied toward purchasing USD. From the payments due to Addax, the parties deducted a component for fuel excise duty as well as defendant`s fees. Although the preferred mode of payment was USD, then agreement was not exclusively so.

[18] The witness stated that he met Jean Baptiste in Zimbabwe. He stated that defendant actually operated in Zambia as well. But its transactions with Addax were local. Mr. Chinhamo` s evidence was similarly blighted by lack of specific details. I considered his testimony more cogent than that of Mr. Mudavanhu. He admitted that the USD was the preferred currency of

business between the parties. But he was quite firm that it was not the exclusive currency under the contract.

APPLICATION OF THE LAW TO THE EVIDENCE

[19] Counsel from both sides filed closing submissions. Mr. *Simango* for the plaintiff focussed on the law. Mr. *Mavhondo* for the defendant directed greater attention toward the evidence. I am indebted to both. The issue to determine herein flows from the definition of a "foreign obligation" Does the admitted debt of US$ 269,735.88 qualify as a foreign obligation?

[20] In addressing this question, the Supreme Court in *Breastplate Service (Pvt) Ltd* v *Cambria Africa Plc* SC 66-20 reduced the inquiry to the following two issues at page 7. [I annotate the two issues in parenthesis in the excerpt below]; -

> "What is more contentious *in casu* is ***[1]*** the status of the respondent in this country and ***[2]*** the nature of the transaction between the parties. These two issues are obviously interrelated and need to be considered together in the context of this appeal."

[21] The court went further to state that such an analysis had to establish the "material substance" to be considered when dealing with foreign loans and foreign obligation. It was stated thus at in *Breastplate;* -

> "The term "foreign loans and obligations denominated in any foreign currency", as it appears in s 44C (2) of the Reserve Bank Act, is not defined in S.I. 33 of 2019 or in any other relevant legislation that I am aware of. Its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they have entered into."

[22] This same approach to establish the "*material substance*" was followed in all the "foreign loans-foreign obligations" decisions in both this and the Supreme Court. (See *Valentine T. Mushayakurara* v *Zimbabwe Leaf Tobacco Company (Private) Limited* SC 108-21; *Homelink*

(Pvt) Ltd v Clever Maputseni SC 4-22; *Zimbabwe Leaf Tobacco v Cooke* HH 412-21; *Tilsit Stationeries (Pvt) Ltd & Anor v Drive Control Corporation (Pty) Ltd* HB 252-20.

[23] What constitutes a foreign obligation is therefore well-settled law in Zimbabwe. The special characteristic of foreign obligations is that they become payable in foreign currency. In fact the correct terminology is; -foreign obligations denominated in foreign currency as set out is s 44C (2) (b) of the Reserve Bank Act [Chapter 22:15] which provides that; -

> "foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

[24] As this is a well-traversed area of law, it will not be necessary to retrace the background to these statutory prescriptions. But as a general precept, one can safely state that the market has a perceptible appetite for foreign currency. To the extent that most creditors will generally insist on settlement of transactions in foreign currency. This is so despite statutory limitations or intrusions into modes of payment within the jurisdiction.

[25] The question herein is what is the "material substance" of (i) Addax`s presence in the jurisdiction and (ii) the contract between the parties? As noted above, both witnesses gravitated toward the generic rather than detailed. It was not disputed that Addax was registered (meaning incorporated) in Geneva, Switzerland. Defendant however testified that Addax had a local office "in Hillside". In doing so, defendant proffered no specific address. Nor did it make positive averments regarding those particulars of characteristics which motivated the conclusion that Addax had a local office.

[26] The testimony submitted on behalf of Addax was not too helpful either. Mr. Mudavanhu, Addax`s witness, adverted to an address in Chispite which he could not specify. He then referred, as an afterthought in my view, to an entity known as Addax Zimbabwe. This was apparently different from Addax the plaintiff herein. Nonetheless, applying the test developed in Breastplate, I the evidence before me points to the conclusion that Addax is a foreign incorporated entity. Its local addresses do not fit the description of a principal place of business.

[27] I now come to the nature of dealings between the parties. The starting point in such inquiry will be the parties` contract. Herein, the parties` contract was oral rather than written. And the contract itself was what is sometimes referred to as an overarching agreement[2]. This being a contract defining the general framework under which subsequent transactions or sub-contracts are concluded.

[28] In that respect, I again must opine that the evidence led from both parties was, with respect, generally vacuous. Mr. Mudavanhu testified that he was Addax`s local partner. He did not detail the nature of the relationship between his company and Addax. Similarly, no detail was forthcoming from both including Mr. Chinhamo the defendant`s director and witness on the transactions.

[29] Reference was made to email and telephone calls exchanged in the course of structuring individual transactions. None of these were specifically referred to. Especially those relating to the very last transaction that led to the present dispute. This aspect is particularly important in ascertaining the transactional chains as well as payment mode. Mr. Mudavanhu suggested that Addax imported fuel into the country then distributed it to off takers. This aspect is important. It explains the reason why Addax retained a local partner and office; -to scout for customers to purchase the imported consignments.

[30] Mr. Mudavanhu testified that some customers paid for fuel in cash fuel whilst others enjoyed credit facilities. The distinction was not explained. Nor did the witness proffer detail as to whether their business sold to wholesalers or retailers. All this must be viewed against the evidence of Mr. Chinhamo who stuck to his position that the deliveries could be paid for in USD or ZWL. The witness was honest enough, in my view, to admit that whilst they tried to convert ZWL proceeds into USD, such was only for convenience -and profitability.

[31] This evidence is pivotal. Addax produced no effective counter to this averment. There was reference by its witness to some regulatory dispensation. But this was neither further explained nor proven. This matter becomes distinguishable from the "tobacco cases" (*Valentine T. Mushayakurara* v *Zimbabwe Leaf Tobacco Company (Private) Limited*; *Zimbabwe Leaf Tobacco v Cooke and Zimbabwe Leaf Tobacco (Private) Limited* v *Patricia Vengesayi & Anor*

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[2] See *Collotype Labels RSA (Pty) Ltd v Prinspark* CC & 2 Ors CPD 722/2016

SC 149-21). In those cases, the court looked at the commerciality or rationale behind tobacco financing. It was held thus in Mushayakurara; -

> "The court was seized with a *sui generis* contract. The tobacco grower agreement cannot be examined without reference to the source of funding. This is so because the nature of the funds advanced to tobacco growers under offshore funding contract arrangements must be preserved, as the funds are sourced solely for the purposes of tobacco growing. The term "Crop Finance", as provided for in the Tobacco Grower Contract Agreement, clearly links the money involved to offshore funds. If the respondent is an authorised dealer, the understanding is that funds obtained and advanced in United States dollars are repayable in the denominated currency.
>
> Tobacco is a crop that is sold in the market in foreign currency to enable beneficiaries of offshore funding arrangements to repay their creditors in foreign currency so that the latter are able to service their offshore funding contractual obligations. A party enters into a tobacco growers' contract, knowing that he or she or it is to be funded by an offshore loan denominated in United States dollars. He or she or it undertakes the obligation to repay the loan in that currency. As a consequence, the contract arrangements entered into by the individual tobacco growers and the respondent are an execution of the obligation to perform the offshore funding contracts entered into by the respondent and its creditors."

[32] The same cannot be said about the present transactions. The sales in question could not be ascertained. The fact that a product was imported into the country will not, on its own, qualify obligations arising therefrom as foreign.

DISPOSITION

[33] I am therefore not satisfied that plaintiff has made out its case that the amount admitted as owing was a foreign debt. In that regard, judgment will be awarded on the admitted portion. On costs, such must follow the successful party on the issue in contention, but none are due on the admitted portion which forms the second part of the order.

In that regard, it is hereby ordered that; -

1. Plaintiff`s prayer that the admitted debt in the sum of US$ 269, 735.88 be declared a foreign obligation payable exclusively in United States Dollars be and is hereby dismissed with costs.
2. Defendant be and is hereby ordered to pay plaintiff and amount of US$ 269, 735.88, which amount is payable in Zimbabwe Dollars at the ruling exchange rate on the date of settlement.

Mushoriwa Pasi Corporate Lawyers-plaintiff`s legal practitioners
Mhishi Nkomo Legal Practice-defendant`s legal practitioners

[CHILIMBE J____28/2/24]

HH 79-24
HCHC 49/22