NJANIKE CONSTRUCTION (PRIVATE) LIMITED
versus
LA FARGE CEMENT ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 24 June 2021 & 12 January 2022

COURT APPLICATION

T Mpofu, for the applicant
S Murondoti with H Muza, for the respondent

MANZUNZU J: This is a court application in which the applicant seeks specific performance drawn in the following terms:

"IT IS ORDERED THAT:

1. Within seven days from the date of service of this order by the Sheriff of Zimbabwe the respondent shall deliver 25 200, 50 kg bags of PC 15 cement, at the applicant's address office No. 15 1st Floor Plumpton Chambers, Hebert Chitepo Street, Mutare, failure of which the Sheriff of Zimbabwe with or without the assistance of the Zimbabwe Republic Police and (sic) is hereby authorized to effect this order.
2. That the respondent shall pay costs of suite on a scale of attorney and client."

The applicant's case is that in May 2018 it purchased 27 000 bags of cement from the respondent at a price of US$10 per bag. As a result the applicant transferred US$270 000 to the respondent's account. Proof was attached of such transfer dated 24 May 2018. Although an invoice is alleged to have been raised by the respondent no such invoice was attached. Having paid, the applicant said it was then the duty of the respondent to deliver the cement upon applicant indicating to the respondent the date and place of delivery.

Applicant said it collected 3 600 bags at the end of 2018 leaving a balance of 23 400 bags with the respondent. With the introduction of SI 33 of 2019 Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act) and Issue of Real

Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations 2019, the applicant said respondent now claims could only release 240 bags. Correspondence from respondent were attached. I will revert to the contents of the two letters at a later stage in this judgment.

It is applicant's further evidence that it purchased another 1800 bags of cement on 17 April 2019 at a cost of $54 000. This explains why applicant seeks delivery of the total of 25 200 bags.

In opposition the respondent starts with a preliminary point which must not detain the court in its disposition because it has no merit. The applicant cited the respondent as "LA FARGE CEMENT ZIMBABWE LIMITED" and yet respondent says its correct name is "LAFARGE CEMENT (ZIMBABWE) LIMITED". It is clear from the above that the only difference is that in the first name there is space between LA and FARGE, with the second difference being the name ZIMBABWE, one in the brackets the other not bracketed. This slight difference does not confuse anyone neither does it deceive as to who the real respondent is. Minor errors of this kind should not call for the raising of points in *limine* other than parties agreeing as to the correct citation of the respondent.

It is trite that an application is valid only if instituted by an existent person, natural or juristic, against an equally existent legal or natural person. If the application is issued by or against a non-existent person then it is *null* and *void ab initio*. See *Steward Scottt Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S) at 572D; *Gariya Safaris (Pvt) Ltd* v *Van Wyk* 1996 (2) ZLR 246 (H) at 252G; JDM *Agro-Consult & Marketing (Pvt) Ltd* v *Editor, The Herald & Anor* 2007 (2) ZLR 71 (H) at 73 F-G.

This court has in the past dealt with mis-description of parties which does not render the application void. See *Crush Security (Pvt) Ltd* v *The Group Chief Executive Officer (Parirenyatwa Group of Hospitals) and Parirenyatwa Group of Hospitals* HH 715-14 where the court cited with approval the case of *van Vuuren* v *Braun & Summers* 1910 TPD 950 at 955 when the Court stated the following:

> "It is true that it will not be a flaw in the summons if the defendant is not described as accurately as he should be. If a man is baptised as 'George Smith' it is no defect in the summons to call him 'John Smith' because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inserting the defendant's name in court."

A mere mis-description of a party does not render an application void *ab initio*. Such a mis-description can be corrected. See *Devonia Shipping Ltd* v *MV Luis (Yeoman Shipping Co Ltd Intervening*) 1994 (2) SA 363(C) at 369.

In *casu,* I do not even think that the error qualifies to be called a mis-description. The respondent is properly described save the space created between letters. The brackets on the word ZIMBABWE is not even there on the respondent's letter head. It seems to me that the description of the respondent is not a citation of a non-existent party.

On the merits the respondent said that its customers are allowed to maintain accounts with it which will allow such customers to make deposits beforehand and when they need cement an invoice will then be raised prior to collection. It is further stated that:

> "traditionally, customers get quotations and pay against these but products are invoiced at the date of dispatch at the prices prevailing on such date whether or not one has deposited money beforehand. These terms do appear on all the quotations and invoices and such customers are notified of them." (Copy of the terms was attached).

The respondent denied that there was ever a contract for sale and delivery of 25 200 bags of cement as the requirements for such agreement were absent. It was alleged that all funds deposited with respondent remain in the customers' accounts until an order is placed and the funds will be allocated towards customer's purchase on the date of invoicing. There is emphasis that:

> "However, these deposits themselves and *per se* are not purchases. They allow a depositor in future to check with Lafarge whether or not cement is available against the deposited funds. If cement is available, Lafarge issues an invoice subject to the terms and conditions on that invoice and only at that stage does a contract of sale consummate."

The respondent denied that there was the meeting of minds of the parties in the sale or purchase of 27 000 bags of cement. A mere deposit into the respondent's account was viewed by the respondent as no proof for the purchase of 27 000 bags of cement.

While respondent admit writing two letters to the applicant on 18 August 2020 and 1 December 2020 it denies that it had anything to do with SI 33 of 2019 but rather the letters prove the fact that applicant kept an account with respondent and that the account was not invoiced.

By operation of the law, the respondent said that as at 4 October 2018 through monetary policy bank balances previously deposited as United States dollars were converted into RTGS. Applicant is said to be at liberty to redeem its balance of ZW$198 715 to buy cement at the prevailing price on the date of redemption.

Respondent vehemently denied the existence of a contract which agreement applicant allegedly failed to prove.

The applicant has objected to the deponent who deposed to the opposing affidavit and said one Tafadzwa Ngozo should have done so. I think the objection is misplaced. The choice

of who should represent the respondent lies with the respondent and cannot certainly lie with the applicant. By the same token the applicant chose its own representative.

The applicant repeated its averments that there was a contract for the purchase of 27 000 bags. The applicant seeks an order for specific performance. This is a remedy derived from a contract. The onus is on the applicant to prove that there is a contract between the parties and that he/she has or is willing to perform his contractual obligations and that the other party must be compelled by the court to perform his/her contractual obligations. In other words the applicant is simply saying the contract must be performed on the basis of its terms. In *Nkala* v *Nkala* HB 116/20 the court instructively stated:

> *"Specific performance is an extraordinary equitable remedy that compels a party to execute a contract in terms of the precise terms agreed upon. It is an order which grants the plaintiff what he bargained for in the contract. A valid contract must exist between the parties and the party seeking specific performance must have substantially fulfilled his obligations in terms of the contract."*

The respondent has opposed this application on the basis that there was no contract for sale or purchase between the parties. Respondent then gave a highly probable explanation of how applicant came to deposit some money with it.

The resolution of this application is centred on whether or not there was a contract between the parties. It is settled that a party who alleges must prove, see *Zupco Ltd* v *Parkhorse Services (Private) Ltd* SC 13/17. The burden of proof remains on a balance of probabilities. The requirements of a valid contract are known and are set out clearly in the applicant's heads. Broadly, one looks at whether there was an offer and acceptance and whether such has created an enforceable agreement. In *Victoria Falls Municipality* v *Nyathi & Ors* HB-2-12 the court had this to say:

> "It is trite that the most helpful way of determining whether there has been agreement, true or based on quasi-mutual assent, is to look for an offer and an acceptance of that offer. A binding contract is as a rule constituted by acceptance of an offer – *Reid Bros (SA) Ltd* v *Fisher Bearing Co Ltd* 1943 AD 232 at 241. But offer and acceptance must never be sought for their own sake but as aids in deciding whether an agreement has been reached. A true offer means an express or implied intention to be bound by the offeree's acceptance – the *aminus contrahendi* – *Sambou-Nasionale Bouvereniging* v *Friedman* 1979 (3) SA 978 (A) at 991G and *Spes Bona Bank Ltd* v *Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A)."

A party who decides to institute proceedings by way of motion should meet the expectations of taking such route. *"In application proceedings the cause of action must be set out fully in the founding affidavit and new matters should not be raised in the answering*

affidavit." per Supreme Court in *Mangwiza* v *Ziumbe NO and Anor* 2000 (2) ZLR 489. This is because the applicant's case stands or falls by its founding affidavit. Herbstein and Van Winsen, Civil Procedure of the Superior Courts in South Africa, third edition, at page 80 state that:

> "The general rule has been laid down repeatedly as that an applicant must stand or fall by its founding affidavit and the facts alleged therein. If applicant merely sets out a skeleton case any fortifying paragraphs in the replying affidavits must be struck out."

In *casu*, the founding affidavit is very brief, it sets out a skeleton case. It does not deal with the details of offer and acceptance. Mr Mpofu who argued the case for the applicant said this was a simple purchase of cement at the offered price with transport costs. I think it is much more than that and details of the said sale are missing from the founding affidavit. Why I say so is because the applicant tries to build its case from the answering affidavit. A founding affidavit is a six paged document supported by three annexures and carries with it scanty information let alone that which establishes the existence of a contract. In an attempt to make up a case after the notice of opposition, the applicant filed a 15 paged answering affidavit with the support of 15 annexures.

Clearly an applicant cannot make a case in the answering affidavit. This is against the backdrop that an application stands or falls on its founding affidavit. See *Fuyana* v *Moyo SC* 54/06, *Muchini* v *Adams and Ors* SC 47/13; *Austerlands (Pvt) Ltd* v *Trade and Investment Bank Ltd and Ors* SC 80/06; *Yunus Ahmed* v *Docking Station Safaris t/a CC Sales* SC 70/18.

This court had occasion to comment on the undesirability of raising fresh allegations in the answering affidavit which should have been contained in the founding affidavit. In *Turner & Sons (Private) Limited* v *Master of the High Court and Ors* HH 498/15 the court said the following:

> "The Answering Affidavit contains fresh allegations in the form of Annexure H and I to the Answering Affidavit on pages 283-287 and 309-311 and para 13 on p 354 of the Answering Affidavit to the notice of opposition by the Intervener which should have been contained in the Founding Affidavit. Neither the second respondent nor the Intervening Party has been afforded the opportunity to deal with those facts in an opposing affidavit."

The applicant has made a concerted effort to build a case in the answering affidavit which is not proper. Such should have been in the founding affidavit. This is why in *Kaskay Properties (Pvt) Ltd* v *Minister of Lands* HH 762/18 the court had this to say:

> "A litigant who makes a conscious decision to sue through motion, as opposed to action proceedings is enjoined to anticipate the respondent's defence. He must include in his

> founding affidavit all evidence which supports his case including such evidence as will rebut the respondent's defence."

I agree with the respondent that in the final analysis, the founding affidavit did not set out the case it sought to meet. Despite such failure, punitive costs asked for by the respondent are not warranted.

Disposition:

The application be and is hereby dismissed with costs.

Tendai Biti Law, applicant's legal practitioners
Rusinahama – Rabvukwa attorneys, respondent's legal practitioners