ELASTOS CHINYAKATA
versus
MALIAN AZIMANA FAILAHMED
T/A CRYSTAL CABS
and
MALIAN AZIMANA FAILAHMED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 & 29 July 2015

Opposed Application

J. Koto, for applicant
No appearance by Respondent

TSANGA J: The applicant Elastos Chinyakata seeks a declaratory order declaring a contract void and granting him specified monetary rights for payments he made under the contract. He entered into a 'rent to buy' an agreement of sale with the respondent, Malian Azimania Failahmed trading as Crystal Cabs on 2 May 2011. The car which is the subject matter of the agreement is described as a *Toyota Spacio* Registration ADB 3702. He says under the agreement he relinquished his rights to a salary and would instead be remunerated in terms of the car he was using, which would be his after an 8 month period of working for the respondent. However, within that 8 month period he was to have beat a target of US$13.000.00 in remittances to the respondent. The terms of the agreement were that he was to remit a minimum of $50.00 daily, Monday to Saturday, or $300.00 a week from whatever earnings the car made during this period. Expenses for running the vehicles were to be met by applicant.

The applicant says that it was only towards the end of the 8 month period that he realised the impossibility of meeting the target since at the end of that time frame he would only have paid $10 800.00 at the rate of $50.00 a day. He says that when he failed to meet the deadline, the time line was moved forward and the figure was adjusted to US$15 000.00 from $13 000.00 that had been agreed. He admits to having an accident with the car on 1

December 2011. He was allocated another vehicle, whose registration was ACE 8271. He says he was however now finding it difficult to pay $300.00 a week using that particular vehicle and was paying $250.00 instead. On 20 February 2012 he got the previous car back.

On the 31st May 2012 he had another accident. This time the vehicle was declared a write off. He says he was given another car to drive to enable him to continue to fulfil his contract. He says it was also agreed that he would be given another vehicle to be bought from the proceeds of the insurance. He further says he continued to use this 2nd vehicle up to the 16th of August 2012 when the vehicle he had been using was confiscated from him.

Following the confiscation of the car, he instituted these proceedings. Having learnt that the company was not a registered entity, he argues that the agreement was void as at all times his contract was with City Cabs, which now turns out to be non-existent. He also says that the respondent was paid US $5000.00 by the insurance company which was not passed on to him, although he says the respondent claims to have been $4 600.00. Instead of buying the replacement vehicle, the respondent used the money.

In his declaratory order he seeks to be paid pack all the money he paid believing there was a valid contract. Alternatively, he argues that there was a partnership whereby the respondent provided the vehicle and he provided the labour. He prays that the court makes a declaratory order that he should be paid half of the money he paid to the respondent being $7500.00. As a third alternative, he prays that it be declared that he remained an employee of the respondent from 2 May 2011 to 16 August 2012.

Malian Azimania Failahmed filed an opposing affidavit to the above claim as the respondent. She averred that this was a simple rent to buy agreement whereby the applicant was to pay $50.00 a day or $300.00 a week. She further pointed out that the car was surrendered to the applicant who had an accident with it damaging it beyond repair. The respondent also stated therein that the applicant paid an admission of guilt for negligent driving. She also highlighted that there is nothing to determine or declare in this matter as the rights of parties are clearly spelt out in the agreement. Her position was that the applicant did not pay the full amount but instead destroyed the car prejudicing the respondent of the balance of the purchase price. The respondent says the $4600.00 the insurance paid was not enough to cover the purchase price. The respondent's position is that she cannot give the applicant money on top of losing a motor vehicle as if was the respondent who damaged it.

The respondent was however in default of appearance at the hearing and was accordingly barred. In default of appearance by the respondent, the applicant sought a

judgment voiding the contract on the basis of that he thought he had entered into a contract with a registered entity. He also sought a judgment on the basis that the contract was impossible to perform. The order he ultimately sought was that the agreement of May 2 between the parties be declared null and void and that the respondent be ordered to pay back all the money she received from the applicant in pursuit of the invalid agreement. The court sought clarity on the merits of the application, heard the matter and reserved its judgment.

I will accordingly deal with the two primary issues raised by the applicant, namely the invalidity of the contract due to the non-registration of the company and then the issue of impossibility in the performance of the contract.

The invalidity of the contract

As highlighted the argument herein is that the agreement was with a non-existent entity. The agreement reads as follows on the face of it and in its opening clauses:

Memorandum of Agreement
Entered into between
Malian Azimania Fazilahmed
t/a Crystal Cabs
(The 1st party herein)
Represented herein by its Director
Malian Azimania Fazilahmed
Of
Flat C2 Area D
Westgate
Harare
and

Chinyakata Elastos N

…….
(The 2nd Party herein)

Its preamble starts off with the following words:

> "Whereas the 1st party is duly registered companies (*sic*) carrying out, interalia the transport business involving taxis…."

Clearly from the above, the 1st party to the agreement is Malian Azimania Fazilahmed. She trades as Crystal Cabs. That is her trade name. The clause that states that the

"*1st party is duly registered companies"* makes little sense. It cannot be said that it shows that the company is registered under the Companies Act [*Chapter 24:03*]. It does not go to the heart of the contract. It purports to be some descriptive preamble but is devoid of meaning. There is nothing else in the agreement that suggests that the company was registered or that this was a material aspect to performance under the agreement or even to entering into the agreement itself. In fact, what is evident from reading the contract as a whole is that the agreement was with Malian Azimania Fazilahmed. Clause 17 of the agreement is also clear that the party entitled to cancel the contract is M Fazilahmed not Crystal Cabs. This again bolsters the reality that the agreement was with Malian Azimania Fazilahmed simply trading as Crystal Cabs. She is quite clearly the party that is linked to the entity that is unincorporated. She is identifiable and ascertainable as such from the very face of the agreement. The agreement is one clearly one that was fashioned on individual liability between the contracting parties.

In the face of an entity that is unincorporated or not registered, under common law its known parties or members would be liable to be sued as members in their own right. However, with the intervention of legislation, in terms of rule 8C of the High Court Rules 1971 bodies who use trade names can be sued as such. In *Gloar Design Team Versus Zimbabwe National Road Authority (Zinara)* HH 319/14 an architect was trading under the trade name *Gloar Design.* When he brought an action which was challenged, this was recognised as merely a trade name he used for business as the company was not registered. The primary advantage of incorporation is obviously that an entity is sued in its own name as separate and distinct from its members. It has corporate privileges which an unregistered corporation does not. Furthermore, entering into an agreement is not an exclusive corporate power. Unregistered entities can also enter into contracts using their trade names or association names. A contract cannot simply be illegal by virtue of some vague allusion to registration which turns out to be actually not the case and which has no bearing on the performance of the agreement.

I find that the applicant's argument that the agreement should be set aside on the basis that there was no registered entity by the name of City Cabs lacking in merit.

The impossibility of performance of the contract

The second ground emphasised by the Applicant is that the contract is impossible to perform under the current economic environment. In any event, a contract cannot be deemed

impossible to perform simply because a party has failed to reach certain economic targets. The applicant was aware of the economic situation at the time that the entered into the contract. The economic environment may present challenges but it certainly cannot be said that it made the contract impossible to perform. Also, whilst applicant purports to state how much he paid over, he does not state how much he made per day or on Sundays when he had no obligation to hand over any of the money. Furthermore, the impossibility in performing the contract is largely self-created stemming as it does from the accident which ultimately destroyed the car for good.

As stated in *MV Snow Crystal Transnet Ltd t/a National Ports Authority* v *Owner of MV Snow Crystal 2008 (4) SA 111 (SCA) at 128:*

> "As a general rule impossibility brought about by *vis major or casus fortuitous* will excuse performance of a contract .But it will not always do so. In each case it is necessary to look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule might, in the particular circumstances of the case, to be applied. The rule will not avail the defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault".

Furthermore, as stated in the case of *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) in an application for a declaration (or review) the court should look at the factual grounds upon which the application is based rather than the order sought. The applicant seeks to have the agreement set aside. It is clear that the agreement was one for rent to buy. The fact that the subject matter of the contract no longer exists had everything to do with the applicant. There is no basis upon which this court can find that the agreement was not valid. Consideration of public policy does not favour the granting of this declaratory order. The contract was freely entered into and the only reason why the applicant to date does not have the car as a source of income is because he had an accident with it and wrote it off before he finished paying for it. It makes no sense if he had not finished paying according to the varied agreement between the parties, for the insurance money to have been paid to him.

Accordingly, the application is devoid of merit and is dismissed.

There is no order as to costs.

Koto & Company, applicant's legal practitioners