LOVEMORE MANGEZI
versus
TOLROSE INVESTMENTS (PRIVATE) LIMITED
and
SWIMMING POOL & UNDERWATER REPAIR COMPANY
(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 6 June 2018

Civil Trial

R Bwanali, for the plaintiff
V. Muza, for the defendant

MUSHORE J: This is a claim by the plaintiff for payment in the sum of US$340,000-00, arising from work done and performed by the plaintiff under a contract between the plaintiff and the defendants dated the 25th July 2015. The whole contract is recorded in two documents, those being a Service Level Agreement dated the 25th July 2015 and an Addendum to the Service Level Agreement dated the 1st November 2016. Both documents were signed by the parties.

The plaintiff is a Mining Service Provider (or consultant) specialising in regularising the paperwork pertaining to mining matters. He is a type of 'fixer' of problems arising in the mining industry. The first defendant is a company which purchased and held gold mining claims. The second defendant is the first defendant's holding company.

It is common cause that prior to the defendants hiring the plaintiff, the defendants' mining activities at Glencairn Mine were being illegally disrupted by a company called Xelod Investments which had illegally transferred gold mining claims belonging to the first defendant to Xelod Investments. In addition, Xelod Investments had taken physical control of the first defendant's mining operations and was blocking first defendant's principals and employees' access to their own mining claims. Thus on or about July 2015, the defendants hired the plaintiff, in his capacity as a Service Provider to assist them in gaining control of their mining claims and entered into the following agreement:-

"SERVICE LEVEL AGREEMENT

ENTERED INTO BY AND BETWEEN

TOLROSE INVESTMENTS (PRIVATE) LIMITED & SWIMMING POOL AND UNDERWATR REPAIR COMPANY (PRIVATE) LIMITED (the client) ON THE ONE HAND

AND

LOVEMORE MANGEZI (THE SERVICE PROVIDER)

The Service Level Agreement is for the Service Provider to provide the Client with advice and services with respect to client regaining control of Glencairn Mine situated in Eiffel Flats, Kadoma District.

The services to be provided include but are not limited to the following:

- Procuring the return of Tolrose mining claims illegally transferred to Xelod Investments, by ensuring a reversal of the Xelod transfer.
- Ensuring the legal removal of Xelod from Glencairn Mine.
- Ensuring unhindered access to and control of Glencairn Mine by client.

In return client will pay the Service Provider a success fee of $350,000-00 payable as follows:

The success fee is to be paid in instalments at a rate equivalent to one kilogram of gold per month. The first instalment is due after 60 days from the date of gaining unhindered control of the mine, (thereafter each subsequent instalment will be paid on the last day of each month.

The Service Provider will however earn an allowance of $5,000-00 per month in the first sixty days deductible from the success fee.

The client will provide transport and other logistical support to the Service Provider in lieu of operational costs.

This agreed and signed at Harare on 27 July 2015

{signed by both parties}"

Plaintiff alleges that he discharged his mandate in full in terms of the Service Level Agreement and that after the first and second defendants failed to pay the initial instalment within the 60 days after the defendants had obtained unencumbered access to Glencairn Mine, a second agreement (the Addendum) was then prepared and signed by the parties on the 1st November 2016. The defendants accept that they prepared both agreements. The Addendum which was signed by the parties on the 1st November 2016 appears to have allowed the defendants more time to pay the plaintiff his fee. It also seems to reflect the *status quo* regarding the performance of the contract as at the 1st November 2016. The Addendum reads as follows:

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"ADDENDUM TO THE SERVICE LEVEL AGREEMENT OF 27 JULY 2015

TOLROSE INVESTMENTS (PRIVATE) LIMITED & SWIMMING POOL AND UNDERWATER REPAIR COMPANY (PRIVATE) LIMITED (the client) ON THE ONE HAND

AND

LOVEMORE MANGEZI (THE SERVICE PROVIDER)

This Addendum should be read in conjunction with the Service Level Agreement signed between the parties on July 27, 2015.

The client confirms that the Service Provider has successfully discharged the mandate given on July 26, 2015 in that:

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- On 9 February 2016 client mining claims were restored to its name;
- Xelod was removed from Glencairn Mine in mid-April 2016; and
- Client now has unhindered access and control of Glencairn Mine.

The parties have agreed that the balance of the outstanding success fee will be discharged as follows:

- $50,000-00 per month for the next 4 months commencing on 30 November 2016.
- Thereafter $30,000-00 per month until full and final settlement.

It is agreed by the parties that should client production and cash flows permit the Service Provider shall be paid whatever remaining balance as a lump sum.

This agreed and signed at Harare on 01 November 2016.

{signed by both parties}"

Plaintiff is claiming payment in full, for services rendered to the defendants. Plaintiff alleges that he discharged his mandate in full in mid-April 2016 and that the Addendum agreement is testimony of that fact. He alleged that despite performing his obligations in terms of the contract, the defendants breached the contract by only paying $10,000-00 of the $350,000-00 due to him.

Defendants' plea is ambiguous and confusing. In paragraphs 4 and 5 of their plea, the defendants plead that plaintiff has not discharged his mandate in that their access to the mine remained hindered by the Directors of Xelod Investments who remained in occupation of the mine residence and who were still harassing the defendants. In the same plea however, they do an about turn by averring that the plaintiff has discharged his mandate in full in terms of the contract. Thus, on the one hand and in the same plea the defendants agree with plaintiff that they entered into the contract with the plaintiff and that plaintiff did all he was contractually bound to do; and on the other hand they pleaded that they cancelled the agreements in February 2017 due to plaintiff's breach; and that by virtue of such cancellation, they are no longer bound to pay the plaintiff his fee. They also state that they paid the plaintiff the November and

December 2016 instalments of $5000-00 each and a further $24,437-00 in April and October 2016; but that because of plaintiff's breach they cancelled the agreement on the 3rd February 2017 and as such are no longer liable to the plaintiff for payment of the remaining US$340,000-00 which the plaintiff claims is still owed to him by the defendants.

The joint PTC minute recorded the issues for determination as follows:

1. "Whether or not Plaintiff discharged his mandate in terms of the Service Level Agreement?
2. Whether or not Defendants are indebted to the Plaintiff in the sum claimed in the summons or at all?
3. Whether or not the Service Level Agreement and the Addendum thereto were validly terminated?"

The intention of the parties to the contract.

The intention of the parties to a contract is elicited from the contract itself. The law pertaining to the intention of the parties to a contract is well established in our law. In *Union Government v Vianini Pipes (Pty) Ltd* 1941 AD 43 it was held by the Court that:-

> "When a contract has been reduced to writing, the writing is in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the documents be contradicted, altered to or varied by parol evidence.."

Messrs Van Der Merwe, Van Huyssteen, Reinecke and Lubbe in their book entitled "*Contract: General Principles Forth Edition (Juta)'* expound as follows at page 263:-

> "The need for interpretation of contract usually arises where the language or symbols used by the contractants to express their agreement are vague or incapable of bearing one meaning".

The courts seek the intention of the parties from the ordinary and grammatical meaning of the words used.

In the present matter, the agreements as contained in a Service Level Agreement and in an Addendum to the Service Level Agreement are simple to follow. The language used in them appears to leave no room for an ambiguity. In fact the language used is clear and to the point. Both agreements create no areas for confusion and the intention of the parties is clearly established from the plain language used by the parties to those agreements

The 'other' breach alleged by the defendant.

In their plea filed of record, the defendants complained that plaintiff had breached the contract by his failure to secure unhindered access and control of Glencairn Mine to the defendants. However, during the trial hearing a new cause of complaint emerged from the defendants alleging that the plaintiff breached the contract by failing to inspect the defendant's mining claims and failing to ensure that the mining licences were in order. The latter complaint

made by the defendants does not stand up to scrutiny because of the following reasons when one reads the contract and the defendants' pleadings themselves:-

Firstly, the purported obligation by the plaintiff to inspect the mining claims and licences does not arise from the clear and unambiguous language in the contract;

Secondly plaintiff did not need to inspect the mining licences in order to achieve the objective behind the contract which was to evict the Directors of Xelod from the mine and no such step is mentioned in the agreement as being necessary for the due performance of the parties' obligations towards one another;

Thirdly, the breach as alleged was not pleaded to by the defendants as a defence to the plaintiff's claim and consequently that defence cannot be relied on by the defendants in seeking to resile from their obligations.

Fourthly, the purported cancellation of the contract by the defendants in February 2017, occurred 10 months after the date of discharge of the contract, the latter which occurred in April 2016. It is a simple observation of fact that a contract which no longer exists cannot be cancelled. Such cancellation would have had to occur during the currency of the agreement in order to have legal effect on the due performance of the defendants' obligations toward the plaintiff.

Fifthly, the defendants own conduct in having drawn up and signed the contracts annuls their purported claim that plaintiff was obligated to perform other obligations which are not contained in the agreements.

Further, the addendum was prepared by the defendants in apparent acknowledgment that that plaintiff had discharged his contractual obligations to the defendant in full. The addendum also sets out how the outstanding fee was going to be paid to the plaintiff. Although the defendants' alleged that they had made two other payments totalling US$24,427-00 in April and October 2016, in addition to the US$10,000-00 which plaintiff acknowledged had been paid to him, they did not produce any documentation in support of such further payments. In point of fact, the defendants' admission that they made a payment to the plaintiff post April 2016, is an indication that in October 2016 well after the elapse of the expiry date of the contract, the defendants believed that the plaintiff his discharged his contractual obligations. The payments of US$5000-00 each in November and December 2016 by the defendants to the plaintiff further belie the defendants' acknowledgement by conduct that plaintiff had performed his contractual obligations.

I also took judicial notice of the fact that the defendants chose not to file a counterclaim to recover the alleged payment $24,427-00 at the time that they filed their plea on the 17th May 2017, leading me to question the existence of such payments having been made at all and bringing the defendants' credibility further into question. For if indeed the defendants' averments were credible, then the defendants would have surely counterclaimed for the reimbursement of $34,427-00 which they have not done.

The introduction of a new defence not specifically pleaded to.

The rules prescribe that a defendant in an action must specifically plead the defence/s which he intends to rely on at the trial. As I mentioned earlier, the plea filed by defendants cites a different reason for alleging non-performance by plaintiff. The defence newly introduced at trial and which as I stated before is a significantly different defence is not mentioned in the plea.

Order 18 r 116 of the High Court Rules, 1971, specifies that a defence must be specifically pleaded.

> **"ORDER 18**
> **PLEA AND CLAIM IN RECONVENTION**
> 116. Plea: requisites
>
> (1) The defendant's answer to the plaintiff's declaration shall be called his plea, and it shall set forth concisely the nature of his defence, and deal with the allegations in the declaration as provided by sub rule (2) of rule 104.
>
> (2) Where the defendant relies upon several distinct grounds of defence or set- off founded upon separate and distinct facts, they shall be stated as far as may be separately and distinctly"

Because the new defence was not pleaded to by the defendants' nor introduced into the pleadings by way of an amendment to the plea, cannot be relied upon by the defendants in the present matter; neither is. It falls outside the scope of the issues to be adjudicated I the present matter.

Other important facts which arose during the trial.

During the cross-examination of defendant's witness by plaintiff's counsel, the court learned that the defendants had become embroiled in recent litigation (which was filed in this Court in January 2018) with 2nd defendant suing Jameson Rushwaya, one of the Directors of Xelod, whom plaintiff insisted he had removed from the mine in April 2016. In matter number HC 280/18, 2nd defendant filed an ex parte urgent application with this Court seeking re-possession of Glencairn Mine from Mr Rushwaya of Xelod. The relevance of that matter to the present proceedings is the contents of an affidavit sworn to by Mr Pattinson Timba in which

he makes an admission that the defendants had been in quiet and undisturbed possession of Glencairn Mine in April 2016. This is what Mr Timba said in his sworn statement:-

> "Para 12 of his founding affidavit in case number HC 280/18
>
> 12. Since on/about April 2016, Applicant *[Swimming Pool and Underwater Repair (Private) Limited]* (including myself as its alter-ego, other shareholders as well as Directors of Tolrose Investments (Pvt) Ltd, had enjoyed peaceful possession of Glencairn Mine through an absolute control and management at the exclusion of the Respondents and/or their respective company Xelod Investments (Pvt) Ltd. Effectively, Applicant has been in quiet and peaceful of Glencairn Mine ever since".

The admission made by Mr Timba in his sworn statement confirms the essence of plaintiff's case. It also substantially weakens the defendants' case.

Plaintiff made a very good impression in Court when he testified. His evidence was consistent and he remained calm even when the defendants' counsel attempted to undermine his professional acumen. Mr Timba testifying for the defendants struggled to explain why the defendants had admitted in their plea that plaintiff had discharged his contractual obligations. Further, whilst plaintiff's counsel was cross-examining Mr Timba, it emerged that the reason why the Directors of Xelod had assumed occupancy of the mine after April 2016, most likely was as a result of internal company issues to which the plaintiff would never have been privy, and which had no doubt led to the Directors of Xelod resuming occupancy of the mine well after the contract in the present matter had terminated.

Under cross-examination by counsel for the plaintiff in the present matter, it emerged that the defendant's had not taken the court into their confidence on a critical issue which pertained to the shareholding structure and the identifying of Jameson Rushwaya of Xelod, still being a Director and shareholder in both defendant companies in the present matter, those being Swimming Pool & Underwater Repair (Pvt) Ltd and Tolrose Investments (Private) Limited. Plaintiff's counsel produced an Order of this Honourable Court issued by TAGU J on the 26th June 2017; in matter number HC 7617/15 in which it was declared BY CONSENT that Mr Jameson Rushwaya of Xelod had an interest in the defendant companies as both a Director and a shareholder. Mr Timba did not refute that to be the *status quo* when he was being cross-examined by the plaintiff's counsel. The Order reads as follows:

> "In the matter between:-
>
Swimming Pool and Underwater Repair (Pvt) Ltd	1st Plaintiff
Aepromm Resources (Pvt) Ltd	2nd Plaintiff
Tolrose Investments (Pvt) Ltd	3rd Plaintiff
Patterson Fungayi Timba	4th Plaintiff

> AND

Jameson Rushwaya	1st Defendant
Annie Rushwaya	2nd Defendant
Xelod Investments (Pvt) Ltd	3rd Defendant
The Provincial Mining Director	4th Defendant
The Registrar of Companies	5th Defendant

26 June 2017

WHEREUPON, after reading documents filed of record and hearing counsel
IT IS ORDERED BY CONSENT THAT:-

1. The Shareholding in the second and third plaintiffs in terms of the returns of allotment forms No. CR2 filed on the 28th September 2004 and the 31st March 2010 respectively that is to say:-
   a. Swimming Pool and Underwater Repair (Pvt) Ltd holds 6150 shares in each entity.
   b. Jameson Rushwaya holds 2348 shares in each entity.
   c. One Way Ministries holds 1000 shares in each entity
   d. Tongesai Kapondo holds 499 shares in each entity; and
   e. Annie Rushwaya holds 1 share in each entity.
2. The directors of the second and third plaintiffs are as stated in the CR14s filed with the fifth defendant on the 31st March indicating the Directors in each entity to be as follows: Sabtenia Jakaza, Tongesai Kapondo, Stevenson Timba, Margaret Ditima, Patterson Fungayi Timba and Jameson Rushwaya with Samuel Mazowe as Secretary…"

The defendants made no disclosure of this critical information which information definitively demonstrates that the defendants were the authors of their current predicament and that the position which they now find themselves in is not attributable to plaintiff's non-performance of the contract. I have no hesitation in perceiving the concealment of this Court Order by the defendants as having been deliberate.

In conclusion therefore, and from the above, I am persuaded that plaintiff performed his obligations in terms of the contract. I find that the plaintiff has made out his case for payment of his fee as prayed for. Accordingly, I order as follows:-

'1st and 2nd defendants are hereby ordered to pay the plaintiff:-

(a) The sum of US$ 340,000-00 being an amount due to the plaintiff in terms of the Service Level Agreement of the 27 July 2015 and the Addendum to the Service Level Agreement of the 1st November 2016, together with interest calculated at the prescribed rate from the 1st November 2016 to the date of payment in full.

(b) Plaintiff's costs of suit'

Chikwengo & Taongai Law, plaintiff's legal practitioners

Muza & Nyapadzi, defendant's legal practitioners