DANANGWE DISTRICT YOUTH MINING COOPERATIVE SOCIETY LIMITED
versus
BRECKRIDGE INVESTMENTS PRIVATE LIMITED
and
LESCAUT INVESTMENTS PRIVATE LIMITED
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 February 2019 & 22 March, 2019

Opposed Application

F.M. Katsande , for the plaintiff
Z. Lunga, for 1st & 2nd defendants
No appearance for 3rd defendant

MANGOTA J: I heard the defendants' exception on 25 February, 2019. I delivered an *ex tempore* judgment in which I dismissed the same with costs.

On 26 February, 2019 the defendants addressed a letter to the registrar of this court. They indicated that they want to appeal my decision. They requested that they be furnished with reasons for the same. These are they.

The plaintiff claims from the defendants:

(i) an order for specific performance and, in the alternative

(ii) a retention or improvement lien;

(iii) damages for breach of contract or unjust enrichment- and

(iv) interest on the sums claimed at the prescribed rate per annum from the date of summons to date of payment, as well as

(v) costs of suit.

The plaintiff anchors its claim on a written agreement which it concluded with the defendants on 21 December, 2016. In terms of the mentioned contract, the first defendant issued the plaintiff with a permit to work for the plaintiff's account some mining claims which are registered with the third defendant in the name of the second defendant. The first defendant

pledged to obtain, within a reasonable period, a geological survey report. The plaintiff and defendants agreed between them that, when the geological survey report was at hand, they would, in good faith, negotiate for the grant of a tribute agreement which they would submit to the third defendant for approval and registration.

In anticipation of the parties' contract of 21 December 2016, the plaintiff invested on the defendants' claims. It established, on the same, infrastructure which is to the tune of over $5 million.

For reasons which are known to no one else but the defendants, the latter did not obtain the geological survey report. Their inaction on the mentioned matter constitutes the plaintiff's cause of action. It is for the stated reason that it filed the suit.

The first and second defendants entered appearance to defend. They excepted to the plaintiff's declaration. They allege that the plaintiff's reliance upon an agreement to negotiate a tribute agreement cannot found its cause of action. They insist that the summons and declaration do not disclose a cause of action. They state that the retention lien which the plaintiff pleads in its alternative claim does not found a cause of action. They insist that the lien is a weapon of defence and not one of attack. They state that it is a defence to an vindicatory action. They aver that the claim which relates to breach of contract and unjust enrichment cannot hold. They allege that breach of an agreement which is yet to come into existence is not enforceable at law. They move the court to dismiss the plaintiff's claim with costs which are on a higher scale.

The defendants place reliance on *Premier Free State and Ors* v *Free Estate (Pvt) Ltd,* 200 (3) SA 413 (SCA) for the position which they take of the matter which relates to the exception they are raising. The case is to the effect that an agreement to negotiate another agreement is not enforceable. They submit that the plaintiff's prayer for specific performance cannot stand.

The plaintiff, on the other hand, places reliance on the doctrine of fictional fulfillment in regard to its main claim. It refers to the agreement which the defendants and it concluded on 21 December, 2016. The agreement, it submits, contains a condition which the defendants have not fulfilled. It argues that the unfulfilled condition be deemed to have been fictionally fulfilled as a result of which the parties must be compelled to move to the next stage of what was within their contemplation when they concluded the agreement of 21 December, 2016.

The doctrine of fictional fulfillment is part of our law. Farlam & Hathaway explain the meaning and import of the same. They do so at p 442, 3rd ed of their Contract, Cases, Materials and Commentary. They state of the same as follows:

> "The theoretical explanation of the doctrine of fictional fulfillment of conditions espoused by the courts is the rule that a party cannot take advantage of his own default, to the loss or injury of another ….. It does emphasise that a party who frustrates the condition commits a wrong which …. can consists only in the breach of a contractual duty not to interfere with the operation of the condition". [emphasis added].

Olivier sees breach of contract as the principle which underpins the doctrine. He states in his *Legal Fictions* p 155 that:

> "It must be evident that when a condition is imposed in a contract and it is a true condition, i.e not dependent on the will or whim of one of the contracting parties, it gives rise to a mutual obligation not to frustrate the contract, not to repudiate it or to render performance impossible, etc. Prevention of the fulfillment of a condition does not differ qualitatively from repudiation or rendering performance impossible. It is contrary to the duties imposed by the contract on the debtor" [emphasis added].

The plaintiff's statement is that the contract which it concluded with the defendants on 21 December 2016 was/is premised on the understanding that the parties would relate to each other in good faith. It insists that it is this element of good faith which persuaded it to make improvements of over $5 million on the defendants' claims. Its argument is that the negotiations which the parties contemplated between them after the production of the geological survey report which the defendants undertook to obtain gave certainty to it that a tribute agreement would be made to come into existence for submission to the third defendant who would approve and register the same in its favour. It is on the strength of the above stated matter that it moves for specific performance. It insists that the geological survey report be deemed to have been obtained and, if it is not, the defendants be compelled to produce it. It insists, further, that the contract which the parties were to negotiate after the defendants had obtained the geological survey report be deemed to have been fictionally fulfilled as between the parties so that the tribute agreement which was within the contemplation of the parties' contract of 21 December, 2016 is submitted to the third defendant for approval and registration.

The defendants, it is observed, committed themselves to obtain the geological survey report within a reasonable period of time. They made the commitment on 21 December, 2016. They did not do so from the mentioned date todate. The period which they have taken to perform what they

undertook to do is, by any stretch of imagination, unreasonable. They knew and know that the geological survey report was/is a *sine qua non* aspect of their negotiation for the grant of the tribute to the plaintiff. They intentionally allowed the plaintiff to pin its hopes on the good faith which formed part of the parties' contract of 21 December, 2016. They watched the plaintiff sink its investment on their claims. They intentionally refrained from obtaining the geological survey report. They advanced no reason at all for their inaction. They, in all probability, entertained the necessary *mala fides* to frustrate the plaintiff's efforts.

The above-observed matters do, in my view, take the parties' case outside the generally accepted principle which is enunciated in *Premier, Free Estate and Others* v *Firedom Free Estate (Pvt) Ltd (supra)* upon which the defendants rely. The current case is distinguishable on the basis that the defendants made up their mind to, as it were, throw the plaintiff into a deep hole out of which they do not want it to climb. They made representations which were/are premised on good faith to it. They made a fundamental breach of the good faith principle which they expressed in their contract of 21 December, 2016. They are, therefore, fictionally deemed to have obtained the geological survey report as well as to have negotiated with the plaintiff for the grant of the tribute agreement to it. The plaintiff's prayer, with which I agree, is that they should submit the same to the third defendant for approval and registration. The fictional fulfillment of the condition gave rise to an obligation on the part of the defendants to grant a tribute agreement to the plaintiff.

The first and second defendants cannot have it both ways. They cannot be allowed to approbate and reprobate. They cannot, in other words, be allowed to reap where they did not sow any seed. They must comply with the obligation which they expressly agreed to live by. They should, therefore, perform in pursuance of the fictionally fulfilled contract. They have no option but to perform.

That the defendants breached the contract which they concluded with the plaintiff on 21 December, 2016 requires little, if any, debate. It is, therefore, for the mentioned reason that the plaintiff filed its alternative claim. It remains alive to the fact that, where the court finds against it in its main claim, it should be allowed to recover its investment as well as to claim what it would have earned from the tribute agreement if the defendant had allowed the same to consummate.

The defendants maintain the view that a retention/improvement lien cannot found a cause of action. It is, they allege, a weapon of defence and not one of attack. They cite a number of South

African case authorities in support of the position which they take of the matter. Amongst them are those of *Broklyn House Furnishers* v *Knoetze and Sons*, 1970 (3) SA 264 (A), *Ford* v *Reed, Bros*, 1922 TPD 435 and many others which I have not mentioned in this judgment.

The plaintiff's position, on the same, is that the exercise of the lien is an ancillary relief to the enrichment claim. It alleges that its substance must be pleaded. The pleading, it insists, does not transform its formulation into a cause of action. It, in the mentioned regard, places reliance on *Mkombachoto* vs *Commercial Bank of Zimbabwe Ltd & Anor*, 2002 (1) ZLR at 24 H to 25 A which reads:

> "…..where a person has expended money or labour on someone else's thing, he has the right to retain possession of that thing, which may be movable or immovable, until he has been compensated. A right of retention …..,commonly referred to as a *lien*, is a right tacitly conferred by law on a person who is in possession of the property of another, on which he has expended money or money's worth, of retaining possession of the property until he has been duly compensated."

The long and short of the statement of the plaintiff is that it expended money on the claims of the defendants. It remains alive to the *mala fides* which they display to it when, for no reason, they breached the contract of 21 December, 2016. It accepts the position which is to the effect that, as a general rule, a *lien* is a weapon of defence. It, however, seeks to pre-empt the possible vindicatory action which the defendants may mount against it by moving the court to grant a retention *lien* to it in advance.

The plaintiff is not saying the *lien* which it is moving the court to grant to it is its cause of action. The *lien*, it insists, is a relief which it is seeking. That relief, it says, is anchored upon the defendants' breach of contract which it concluded with them on 21 December 2016.

The defendants could easily have had the matter which relates to the issue of the *lien* addressed if they had acted in terms of r 140 of the High Court Rules, 1971. They would have known that the *lien* is the relief which the plaintiff is moving the court to grant to it. They would have known further that the *lien* is anchored on their breach of the contract of 21 December, 2016 and that the intention of the plaintiff is to have the parties return to the status *quo ante* the contract of 21 December, 2016.

The plaintiff's cause of action in relation to the *lien* and unjust enrichment is, therefore, anchored on the defendants' breach of contract of 21 December, 2016. It might not have drafted its summons and declaration in an elegant manner to bring out the stated aspect of its case. That,

however, cannot be regarded as being fatal to its case as long as it amends the same to reflect the real cause upon which its action is premised. The bottom line is that it anchors its alternative claim on the defendants' breach of contract.

It is on the strength of the contract of 21 December, 2016 that the first defendant issued the plaintiff with a permit. The permit was to enable the plaintiff to work the second defendant's claims which are registered with the third defendant. It was within the contemplation of the parties as expressed in their contract of 21 December, 2016 that:

(i) the first defendant would obtain the geological survey report within a reasonable period; and that, once the same was at hand-

(ii) the parties' negotiation for the grant of the tribute agreement to the plaintiff would be a foregone conclusion.

The plaintiff cannot be faulted when, in anticipation of the defendants' living up to their commitment, it invested on their claims money to the tune of over $5 million. It was prejudiced by the conduct of the defendants.

The defendants breached the contract of 21 December, 2016. They refrained from obtaining the geological survey report. It is just and fair that the plaintiff be allowed to recover from them its investment which it ploughed onto their claims as a result of the misrepresentation which they made to it. Not allowing it to recover such would unjustly enrich them at its expense.

The plaintiff's intention to enter into a tribute agreement with the defendants was not just for the fun of it. It remained alive to the fact that a three-year tribute being granted to it would allow it to make a huge profit for itself. It estimates the same to be in the region of $50 million. Its claim for general damages of the stated sum is unassailable. It arises out of the defendants' breach of contract of 21 December 2016.

The defendants agreed to obtain the geological survey report within a reasonable period of time. They have not done so from 21 December 2016 todate. They advance no reason for their inaction. Almost two years have come and gone by without them obtaining the report. They do not explain, to the satisfaction of the plaintiff, the challenges, if any, which they encountered and still encounter in their effort to obtain the report. If challenges stood in their way which, in my view is not the case, the probabilities are that they would have made those known to the plaintiff. The fact that they did not do so points in the direction that they intentionally made up their minds to frustrate

the plaintiff's effort to have the tribute registered in its favour. It is an unreasonable period of time for them not to have obtained the report for two years running. It is unfair on their part to except to the plaintiff's claim when they know that:

a) they are the cause of the plaintiff's prejudice - and
b) they breached the contract which they concluded with it on 21 December 2016. A *fortiori* when they leave the substance of the plaintiff's cause of action and anchor their exception on matters which are of no consequence to the case. They know that the plaintiff's alternative claim rests on their breach of contract.

As has already been stated, the defendants could have acted in terms of r 140 of the Rules of this court. They could have requested the plaintiff to formulate its claim in such a manner that it clearly and succinctly states its cause of action. The plaintiff could easily have addressed their concerns by amending its pleadings so as to remove the cause of their complaint.

Without altering the substance of the plaintiff's alternative claim which rests on the defendants' breach of contract out of which it claims quantified and general damages and by the power conferred upon me by Rule 141 of the High Court Rules, 1971 I direct the plaintiff to furnish the defendants with a further and better statement of the nature of its claim. It is my further directive that the same be furnished within ten (10) days of this judgment. (See *Adler* v *Elliot,* 1988 (2) ZLR 283 (SC) at 292 B)

The defendants' exception is premised on technicalities and not on the substance of the case. It leaves the substance of the claim in an unscathed manner. The exception cannot stand. It is, therefore, dismissed with costs.

F.M Katsande and Partners, plaintiff's legal practitioners
Lunga Attorneys, 1st & 2nd Defendant's legal practitioners