

CASE NO. 1.

HC 1148/22

TWENTY THIRD CENTURY SYSTEMS (PVT) LTD

versus

NATIONAL SOCIAL SECURITY AUTHORITY

CASE NO. 2.

HC 7384/20

NATIONAL SOCIAL SECURITY AUTHORITY

versus

TWENTY THIRD CENTURY SYSTEMS (PVT) LTD

and

LEADBAKE ENTERPRISES (PVT) LTD

and

BLESSMORE CHANAKIRA

and

AUXILLIA DANAYI MUNYEZA

and

HENRY CHIKOVA

HIGH COURT OF ZIMBABWE

MANZUNZU J

HARARE, 17 May & 31 August 2023

COURT APPLICATION

F R T Chakabuda, for the Plaintiff in case No. 1
E Mubaiwa, for the 1st to 4th Defendants in case No.2
M D Muchada, for 5th Defendant in case No. 2

MANZUNZU J

A. INTRODUCTION

The oral application for the consolidation of these two matters was fiercely contested. Advocate Chakabuda moved the application representing Twenty Third Century Systems (Pvt)

Ltd. This meant the rest of the parties in the two cases became respondents and have opposed the application.

B. BACKGROUND

Essentially, there is a dispute between National Social Security Authority (NSSA) and Twenty Third Century Systems (Pvt) Ltd (TTCS). In 2012 NSSA advertised a public tender for the supply and implementation of ICT social security system. As a result of the bidding process, NSSA and TTCS signed a supply and implementation contract on 31 October 2013. In pursuant to the contract NSSA paid TTCS a total of US\$10 445 582.00.

NSSA has sued TTCS in HC 7384/20 seeking a declaratur that the contract entered into by the parties is unlawful and invalid and for restitution of the amount paid pursuant to the alleged illegal contract. NSSA also seeks as against 2nd, 3rd and 4th defendants an order that their property be declared specially executable for their role in providing security for the due performance of the contract. Liability of 5th defendant is based on negligent performance of duty.

The alternative claim by NSSA is based on breach of contract, that is, in the event the court finds the contract to be valid.

The 1st, 2nd, 3rd and 4th defendants raised a special plea and exception to the summons. The special plea was struck off the roll in the judgment by my brother Chilimbe J on 26 October 2022.

In respect to case number 1 under HC 1148/22, TTCS has sued NSSA based on a contract born out of the 31 October 2013 contract, that is the is the end user licence agreement entered into by the parties on 20 December 2013. Based on these two agreements TTCS seeks for payment of annual maintenance fees and fees for software licences.

C. THE APPLICATION

The application for consolidation was moved in terms of rule 34 of the High Court Rules, 2021 which provides that;

“34. Consolidation of actions

Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon—

(a) the said actions shall proceed as one action;

(b) the provisions of rule 32(25) shall with the necessary changes apply with regard to the action so consolidated; and

(c) the court may make any order which it considers fit with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.” (underline is mine)

The application by Advocate Chakabuda for consolidation was very long and detailed. He supported his arguments with both local and foreign case authorities. One could tell how well researched he was on the subject. The gist of his argument remained that it was convenient to consolidate the two matters because of the following reasons;

- (1) The question of validity or otherwise of the contract is central in both cases, NSSA claims the contract is invalid while TTCS claims the contract is valid.
- (2) If the cases are consolidated, the court has the advantage to dispose the issue of validity or otherwise of the contract in one sitting
- (3) NSSA in HC 7384/20 has a claim sounding in money on allegations of invalidity of a contract, while TTCS in HC 1148/22 has a claim sounding in money on allegations of breach.
- (4) In HC 1148/22 TTCS sues on a secondary agreement the end user agreement born out of the primary agreement.
- (5) In HC 1148/22 NSSA pleads *lis pendens* to say you cannot sue me as long as the validity of the contract in HC 7384/20 is not determined.
- (6) If the plea of *lis pendens* were to succeed, it means then the court will revert back to HC 7348/20, something which can be avoided if the matters are consolidated.
- (7) In HC 1148/22 NSSA discovers pleadings in HC 7348/20.
- (8) The advantage of consolidation is that the ventilation of the factual correctness of whether or not the contract is valid can be done at once.
- (9) HC 1148/22 is ready for trial and it will be irregular for TTCS to call the court to determine liability on a contract whose validity is being challenged in HC 7348/20.

- (10) There is a possibility of conflicting judgments if the matters are not consolidated.
- (11) It is inconvenient to both parties for the matters to proceed without consolidation.
- (12) If HC 1148/22 were to proceed at the exclusion of 2nd to 4th defendants, that will be prejudicial to them because the outcome may affect execution of their property without them being heard on the issue of validity of the contract.
- (13) The enforceability of the two contracts is a legal question for determination for both cases.

Despite these compelling reasons for a consolidation, the respondents nevertheless opposed the application. The grounds upon which the application has been opposed are summarized hereunder;

Mr Muchada outlined what he said were difficulties in consolidating the two matters, in that:

- a) The delictual action against the 5th defendant is for damages arising out of the alleged negligence and has nothing to do with the alleged invalidity of the contract – that on its own makes consolidation difficult.
- b) The 5th defendant has not yet filed a plea in HC 7384/20.
- c) HC 1148/22 is ready for trial, yet HC 7384/20 is not and a consolidation will delay the completion of the matters.

Apart from the difficulties expressed in the event of a consolidation, Mr Muchada said could not comment on the different **facets** of the application raised by the applicant.

Advocate Mubaiwa expressed the same sentiments of the difficulties in consolidating the matters and advanced the grounds of opposition as follows;

- a) That the application was *mala fide* and more so when an order is sought such as to effect an amendment and joinder of parties in the absence of a proper application to that effect.
- b) The two matters do not only involve NSSA and TTCS but other parties.
- c) The contracts upon which the parties sue each other are different.

- d) There is no similarity in the causes of action
- e) A referral to trial is an order of the court
- f) Consolidation suspends the matter which is ready for trial which binds both the parties and the court.
- g) Consolidation amounts to a review of the order referring the matter to trial
- h) The issues for trial are not yet known in HC 7348/20 because the case has not yet gone through a PTC.
- i) Application is a delay tactic for a party who does not want to go to trial.

ANALYSIS

It is within the discretion of the court to order consolidation. The discretion must be exercised judiciously. Rule 34 allows a court to order a consolidation where it appears to the court that it is convenient. This means the court must always ask itself the question, “is it convenient to consolidate the matters?” Each case will be determined according to its own circumstances.

I am persuaded by the reasons given in the application in favour of consolidation. The fact that one matter is ready for trial and the other is still at pleading stage is of no consequence in my view. What comes out clear in both cases is whether or not the agreement signed between NSSA and TTCS is valid or not. All other issues are consequential to this main issue.

NSSA in HC 7348/20 seeks the invalidation of the contract signed on 31 October 2013 or alternatively hold TTCS to be in breach of the said agreement. In HC 1148/22 the other two issues for trial are whether or not the agreement of 31 October 2013 is *void ab initio* and whether or not TTCS breached the said agreement. If these matters are not consolidated, it means that witnesses who are called to give evidence in relation to these two issues will be called twice to repeat their evidence possibly before different Judges. It is absurd to have separate trials for the two cases.

I disagree with the respondents' position that there are no similarities in the causes of action. This is simply because the second agreement is born out of the first one. Issues of the two cases are intertwined and difficult to separate. All the defendants' alleged liability is linked to the two agreements. Even the delictual action against 5th defendant cannot stand without reference to the agreements. It is this delict upon which the respondents seem to drive their strength on in opposing a consolidation. Even if 5th defendant was not a party to the agreement, he can still answer to the allegation whether or not he was negligent in making payments in accordance with the terms of the agreement.

While delay is to be occasioned by a consolidation, that must be weighed against the interests of justice. The fact that HC 7348/20 has not yet gone through a pre-trial conference is neither here nor there. The issues are easily discerned from the pleadings already filed.

The relief sought in this application has gone beyond a mere consolidation. Rules of the High Court (Commercial Division) 2020 have been invoked in an effort to expand the relief. I do not think that is proper.

DISPOSITION

A proper case having been made for consolidation, it is ordered that:

1. The application for consolidation of the two matters filed under HC 1148/22 and HC 7384/20 be and is hereby granted in terms of Rule 34 of the High Court Rules, 2021
2. A case management conference shall be held before the presiding Judge to deal with inter alia—
 - (i) the scheduling of the matter;
 - (ii) the setting of deadlines for the filing of any further documents and or pleadings;
 - (iii) agreeing on the set down dates for the hearing of the main dispute or any interlocutory matters;
 - (iv) the giving of general directions in relation to the consolidation and the dispute;
3. Costs shall be in the cause of the consolidated matter.

Devittie, Rudolf and Timba, legal practitioners for the plaintiff in case No. 1

Mutumbwa Mugabe and Partners, legal practitioners for defendant in case No. 1

Mutumbwa Mugabe and Partners, legal practitioners for the plaintiff in case No. 2

Devittie, Rudolf and Timba, legal practitioners for the 1st to 4th defendants in case No. 2

Maguchu and Muchada, legal practitioners for 5th defendant in case No. 2