

ASP MARKETING CC
versus
LUNAR CHICKENS [PVT] LTD
and
GIDEON GONO
and
NEW DONNINGTON HOLDINGS [PVT] LTD
and
RIMAITIDYE ENTERPRISES [PVT] LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 2 & 3 March 2023

Date of judgment: 27 September 2023

Civil trial – special pleas

F. Mahere, for the plaintiff
T. Biti, for the defendants

MAFUSIRE J

[1] This is a determination on the defendants' special pleas. To minimise confusion, the parties shall be referred to by their names or acronyms.

[2] In the main, the plaintiff, ASP Marketing, claims against the first and second defendants, Lunar Chickens and Gideon Gono respectively, jointly and severally, payment of the sum of US\$2 201 044-05, together with interest thereon at the prescribe rate. The claim is for the balance of the purchase price for goods sold and delivered, namely maize grain and soya beans. This followed a contract between ASP Marketing and Lunar Chickens duly represented by Gideon Gono. ASP Marketing seeks the piercing of Lunar Chickens' corporate veil to make Gideon Gono personally liable for the same debt jointly with Lunar Chickens. This is on the basis that not only was he the *alter ego* of Lunar Chickens but also that at the material time he conducted the affairs of Lunar Chickens recklessly or fraudulently and misrepresented its true financial standing to the detriment of ASP Marketing.

[3] In the alternative, ASP Marketing claims against all the defendants, jointly and severally, the sum of US\$1 345 644-66, together with interest thereon at the prescribed rate. The alternative claim is for unjust enrichment. ASP Marketing avers that the defendants received and enjoyed the goods that it had supplied to Lunar Chickens at Gideon Gono's special instance and request, but that in spite of that none of them agrees to reimburse it, resulting in the defendants being unjustly enriched and ASP Marketing being unjustly impoverished. The sum claimed in this regard is said to be the extent of the unjust enrichment of the defendants and concomitantly, the extent of the impoverishment by ASP Marketing.

[4] ASP Marketing avers that on several occasions the defendants, through Gideon Gono, have acknowledged the debt due to it thereby interrupting the running of prescription.

[5] ASP Marketing is a close corporation. It is registered in South Africa where it operates from. All the defendants are companies registered and operating in Zimbabwe. They have a common shareholding. Gideon Gono was the Executive Chairman of the group.

[6] The pleadings disclose that between 2009 and 2010 ASP Marketing sold and delivered several tonnes of maize and soya beans to Lunar Chickens following a contract. The contract for the supply of maize was verbal. It was concluded in 2009. Delivery followed immediately thereafter. At Gideon Gono's instruction, delivery was made to a farm near Norton owned by the third respondent, New Donnington Farm.

[7] The contract for the supply of soya beans was in writing. It was executed on 11 May 2010. Delivery followed immediately thereafter. On the same day, the parties did conclude another contract in writing for the supply of maize by ASP Marketing to Lunar Chickens. But no delivery followed this contract. So, ASP Marketing's claim herein is in respect of the first maize contract in 2009, which was verbal, and the soya bean contract in May 2010, which was in writing. Out of the entire amount owing on the two contracts, ASP Marketing has only received the sum of US\$140 000-00. Therefore, this suit is for the balance of the purchase price, or unjust enrichment, in the sums aforesaid.

[8] The defendants have raised some special defences. They have also pleaded over to the merits. Their plea to the merits is that contrary to what appears to be contracts for the supply and delivery of maize and soya beans, the real agreement between the parties was that ASP

Marketing was buying equity in Lunar Chickens through the supply of those products. Lunar Chickens would be evaluated. The value of the maize and soya beans supplied by ASP Marketing would be prorated against the Lunar Chickens' net worth. The percentage shareholding would be worked out from there. It is averred that ASP Marketing's equity in Lunar Chickens amounted to 1.7%. It is denied that the defendants owe the amounts claimed but that instead, ASP Marketing has reneged on its agreement to take up equity in Lunar Chickens.

[9] The defendants' special defences are as follows:

- **Prescription:** that in terms of the Prescription Act [*Chapter 8:11*], ordinary debts become prescribed after the lapse of three years, and that given that ASP Marketing's summons was only issued in 2014 for debts that had become due within three years of 2009 and 2010, such claims have become prescribed;
- **Arbitration:** that the two written contracts on 11 May 2010 provided that any unresolved dispute from such contracts would be submitted to arbitration in South Africa and that therefore this court has no jurisdiction to determine this claim;
- **Illegality:** that the contracts between the parties are illegal and void for want of compliance with s 11 of the Exchange Control Regulations, 1996 [SI 109 of 1996] in that Lunar Chickens incurred an obligation to pay foreign currency outside Zimbabwe without the approval of the exchange control authorities;
- **Lack of authority:** that the current proceedings have not been properly authorized by ASP Marketing because firstly, the authority to institute any legal proceedings in regards to the two contracts had only been conferred on one Alida Aletta Craukamp [*“Craukamp”*] and secondly, that such authority had only been in respect of a court application and not an action, and that in fact, a court application had once been instituted in this court but had subsequently been converted to an action by persons lacking the authority to do so;

- **Failure to pay security for costs:** that being a foreign company with no assets in Zimbabwe, and having paid no security for the defendants' costs as permitted by law, ASP Marketing is disentitled from pursuing action against the defendants.

[10] By the time of the trial the last objection above, the one relating to the alleged failure to pay security for costs, had apparently just petered off. It did not even feature on the list of issues on the joint pre-trial conference minute. But two more special defences seem to have been added on. These are:

Currency of the claim: that following the enactment of SI 33 of 2019, any such money as might have been due and owing by the defendants to ASP Marketing, would now be payable in the local currency of Zimbabwe as opposed to the United States dollar since the type of debt in question was not a "foreign obligation" within the meaning of that statutory instrument, and

Misjoinder: that New Donnington Farm and the fourth defendant, Rimaitidye, have been improperly cited in these proceedings because ASP Marketing has no cause of action against them.

[11] Following various pre-trial conferences, case management and case mapping sessions, it was arranged that evidence would be led on the defendants' special pleas aforesaid. But when it came to that, only one Selwyn James Vandeyar [**"Vandeyar"**] gave evidence on behalf of ASP Marketing. The defendants led no evidence.

[12] Vandeyar's evidence, distilled, went like this. At all material times he was a 50% shareholder in ASP Marketing. He was also the Managing Director. The other 50% equity was held by Craukamp. She was also the Financial Director. At the material times, ASP Marketing was supplying grain to the Government of Zimbabwe. It sourced its products from South Africa for delivery to Zimbabwe. It was involved in contract farming with South African farmers. Funding for its operations was coming from financial institutions. Through its dealings with the Government of Zimbabwe, officials from ASP Marketing, including himself and Craukamp, got acquainted with Gideon Gono. It was him that had introduced them to the then Vice President of the Republic of Zimbabwe, the Late Mr Joseph Msika. At

the relevant time, Gideon Gono was the Governor of the Reserve Bank of Zimbabwe. He ran numerous businesses of his own, including a chicken project through Lunar Chickens.

[13] Sometime in 2009 Gideon Gono brokered a deal with ASP Marketing for the supply of non-genetically modified maize to Lunar Chickens. ASP Marketing was represented by Vandeyar, Craukamp and one Saul Ngoweni [*“Ngoweni”*]. The tonnage, the prices, the delivery time-frames, the payment modalities, and so on, were all agreed upon. The agreement was verbal. Gideon Gono gave strong assurances that he would procure all the necessary authorisations and licences, including the import permits. As Governor for the central bank, and one apparently so close to the **city seat** of power, ASP Marketing required little persuasion that Gideon Gono would obtain all that would be required.

[14] Drawing on its experience from dealing with the Government of Zimbabwe, and having secured financial backing from its bankers, ASP Marketing expeditiously sourced maize grain from South African farmers and delivered it to Lunar Chickens in Zimbabwe. By December 2010 all the maize as per the agreement had been procured. On Gideon Gono’s instruction, delivery was made to New Donnington Farm. All the paper work, including the commercial invoices by ASP Marketing, the delivery notes, the goods received vouchers and the reconciliations on the tonnage delivered, was completed and counter-checked with Lunar Chickens’ staff on the ground. Some of the “goods received notes” were on Rimaitidye’s stationery.

[15] On 11 May 2010 ASP Marketing and Lunar Chickens concluded another contract for the supply of soya beans. This time the contract was in writing. Ngoweni signed for ASP Marketing. Gideon Gono signed for Lunar Chickens. Because no payment had been made in respect of the maize already delivered in terms of the previous verbal contract, the parties agreed to reduce that agreement to writing for record purposes. So, on the same day the parties, still being represented by the same persons, concluded another written contract for the supply of maize by ASP Marketing to Lunar Chickens. But no further deliveries of maize was ever made in pursuance of this written contract. The soya beans were duly delivered in terms of the contract. Similar paper work was completed. All deliveries were made at New Donnington Farm on Gideon Gono’s instructions.

[16] Over US\$2.2 million is owed by Gideon Gono and his companies in respect of the maize and soya bean deliveries. Of that amount, only US\$140 000-00 in cash was ever paid. The payment was in two tranches. Vandeyar could not remember when exactly they were made. But they were made indirectly from Gideon Gono's own free funds or the free funds of one or other of his companies. The first payment was made in Durban by someone representing Gideon Gono or his companies. The second payment was made in Harare by Gideon Gono himself.

[17] There never was any agreement for ASP Marketing to take up equity in Lunar Chickens. This had just been a mere proposal by Gideon Gono when ASP Marketing was pursuing recovery of its money. The proposal had been rejected out of hand. The non-payment of this huge amount severely crippled ASP Marketing financially. Among other things, its source of funding with financial institutions in South Africa was closed. It failed to pay its contract farmers. The business entity had to restructure.

[18] The corporate veil over Lunar Chickens has to be pierced. Gideon Gono never at any stage distinguished himself from his companies. There was no need for security for the debt. Gideon Gono was trusted. Close personal relationships and family ties had developed between himself and ASP Marketing personnel. He has on numerous occasions undertaken to pay off this debt, both verbally and in writing. As co-shareholders and co-business partners, there has been very close cooperation between Vandeyar and Craukamp over all business transactions, including the Lunar Chickens contracts. Neither party would do anything affecting ASP Marketing without the knowledge or involvement of the other. This action is duly authorised. The resolution to pursue recovery of the debt that was passed at the commencement of proceedings has never been revoked. Both shareholders are pushing for the recovery of the debt.

[19] Various documents were produced through Vandeyar. After his evidence the plaintiff's case on the defendants' special pleas was closed. The defence led no evidence. After the closing submissions, judgment was reserved. Here now is the judgment, each of the special defences being considered in turn.

i/ *Prescription*

[20] According to s 14, as read with s 15 and s 16 of the Prescription Act, except for the types of debts listed therein the periods of prescription for which are specified, any other debt becomes prescribed after the lapse of three years from the date when it is due. Prescription is an absolute bar to a person's right to claim once the debt has become extinguished by prescription. However, in terms of s 18 of this Act an express or tacit acknowledgement of liability by a debtor interrupts the running of prescription. The prescription only begins to run afresh from the date of such interruption. Furthermore, in terms of s 19(3) of the Act, the running of prescription is interrupted by the service of process on the debtor claiming payment of the debt.

[21] In this matter there is overwhelming evidence that Gideon Gono expressly and unequivocally acknowledged Lunar Chickens' liability to ASP Marketing in respect of the maize and soya bean deliveries in 2009 and 2010. The correspondence from himself to ASP Marketing in the form of electronic mail was produced in evidence and read into court. The first of such e-mails was on 5 July 2012 to Ngoweni. The intrinsic words of acknowledgement of debt, in informal short hand lingo, or chats acronyms, read as follows:

“I propose to pay, despite our current challenges, an amount starting next week of Rand 200k equivalent per week.

.....

In ten weeks that will b Rand 2mil and so forth.

If farmers want the debtors to pay someone else here they can indicate so we factor those instructions.”

[22] Vandeyar's evidence, which withstood intense cross-examination, was that in terms of the contracts, payment by the defendants would be due sixty [60] days after delivery. The maize deliveries in terms of the 2009 contract finished in May 2010. Thus sixty days thereafter fell in July 2010. Three years from there would have lapsed in June 2013. The aforesaid e-mail was on 5 July 2012. Therefore, prescription would have started to run afresh from that time for the next three years until June 2015. ASP Marketing took legal action by serving process on the defendants in June 2014. That was well within the period of prescription.

[23] However, notwithstanding that the aforesaid single act of acknowledgement of debt by Gideon Gono and the subsequent service of process as narrated above would be enough by themselves to defeat the defendants' special plea of prescription, the evidence established further that Gideon Gono had routinely gone on to send further emails to Asp Marketing, and had in them routinely acknowledged the indebtedness. In one such e-mail on 16 November 2012 to Ngoweni, he had unequivocally waived the right to rely on the special plea of prescription. He wrote in part:

“I kno I can't pay now not becoz Im unwilling but bcoz I can't. I will find some temporary shelter in the form of guarantee to buy time to make good my obligations. I kno about prescription times etc but that's not for me to take advantage of. Never!”

[24] The special plea of prescription has no merit.

ii/ *Arbitration*

[25] Clause 14 of the written agreements on 11 May 2010 provided that any unresolved dispute should be submitted to arbitration in South Africa. Each party would appoint its own arbitrator and the two of them would appoint a third one. Mr *Biti*, for the defendants, argues that by reason of that clause, this court lacks the jurisdiction to determine this dispute. In counter, *Ms Mahere*, for the plaintiff draws attention to s 171(1)(a) of the Constitution of Zimbabwe and the case of *Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H). Section 171(1)(a) of the Constitution provides that this court has the original jurisdiction over all civil and criminal matters throughout Zimbabwe. In *Cargill Zimbabwe*, it was held in part that an arbitration clause does not have the effect of ousting the jurisdiction of the court but that it merely seeks to complement the court process in resolving disputes by engaging in an alternative dispute resolving process that remains under the control of the courts.

[26] However, whether or not by reason of s 171(1)(a) of the Constitution the courts are at liberty to override or ignore an agreement by the parties to a contract to have their dispute resolved by arbitration is an issue that does not fall for determination in this matter. Furthermore, whether *Cargill Zimbabwe's* case above is precedent for the proposition that where in a contract containing an arbitration agreement, the courts can still proceed to

determine a dispute if one of them has approached it despite the special objection by the other, is also an issue that does not fall consideration.

[27] In this case, the first verbal contract between ASP Marketing and Lunar Chickens in 2009 that was for the supply of maize did not have an arbitration agreement. ASP Marketing performed its side of that contract in full. Of course, Vandeyar indicated that the second written contract on 11 May 2010 allegedly for the supply of maize was done for record purposes given that the original agreement had not been in writing. It is noted that this written contract now had an arbitration agreement. But this is just clutter. It is common cause that no further maize deliveries were made in terms of this contract. No dispute ever arose from that contract. In *Cargill Zimbabwe* it was held that for a court to stay proceedings and refer a matter before it to arbitration in terms of an arbitration agreement, there must be a dispute between the parties appearing *ex facie* the pleadings. The existence of a dispute is the *sine quo non* for such referral. Therefore, the defendants' special plea on arbitration cannot succeed in relation to the maize contract of 2009.

[28] The defendants' special plea on arbitration also cannot succeed for the further reason that the suit by ASP Marketing herein is against not only Lunar Chickens, the party to the contracts, but also the other three defendants on grounds much wider than a mere breach of contract. Although the whole suit hinges on breach of contract, against Gideon Gono liability is sought to be established on grounds of reckless conduct or fraud in inducing the alleged breach. Against the rest of the defendants, liability is sought on the basis of unjust enrichment. Unjust enrichment is a common law remedy that necessarily acknowledges the absence of a contractual relationship.

[29] Thus plainly, this is a matter that cannot be resolved by arbitration.

iii/ *Illegality*

[30] Section 11(1) of the Exchange Control Regulations provides that unless otherwise authorised by an exchange control authority, no Zimbabwean resident shall make any payment outside Zimbabwe or incur any obligation to make a payment outside Zimbabwe. However, in terms of s 11(2), this prohibition does not apply in regards to any act done by an

individual with free funds available to him at the time of the act, or any lawful transaction with money in a foreign **currency** account.

[31] The special plea by the defendants alleges in part that in respect of the two agreements for the supply of maize and soya beans, the parties specifically agreed that the defendants would make payment in United States dollars to an account provided by the defendant [*sic*] in South Africa being ASP Marketing's account held at ABSA Bank, Parktown branch, code 630-0356, account number 4059289516, Swift Code: ABSAJJZA. With respect, this is factually incorrect. Neither the oral agreement in 2009 nor the two written contracts in 2010 had this provision. The wording in the written contracts on "Payment" was "*By telegraphic transfer (T/T) 60 days after Presentation of invoice*". Undoubtedly, the defendants are conflating the agreements with the information on the invoices issued by ASP Marketing which, at the bottom left hand corner, had the account details for ASP Marketing. But the invoices were not the contracts.

[32] During his cross-examination of Vandeyar, Mr *Biti* was quite elaborate on, and persistent about the alleged brazen breach of Zimbabwean laws by ASP Marketing in its apparent zeal to push through the maize and soya bean deliveries regardless of whether or not all the necessary authorisations and permits had been put in place. This line of cross-examination seemed stimulated by Vandeyar's persistent reference to Gideon Gono having been the Governor of the Reserve of Zimbabwe and the concomitant insinuation that by reason of that position he could easily manipulate the granting of any necessary authorizations or permits. However, and with all due respect, this was just further clutter in the whole case. In terms of the exchange control regulations aforesaid, anyone resident in Zimbabwe with free funds or operating a foreign currency account does not require exchange control permission to make lawful foreign currency payments outside Zimbabwe. "Free funds" are monies lawfully held outside Zimbabwe by a Zimbabwean resident which he or she or it acquired otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by them in Zimbabwe.

[33] There was nothing in the agreements between ASP Marketing and Lunar Chickens, or anything shown by the defendants, that the law was breached in the respects pleaded. On the contrary, Vandeyar testified that the first payment was made out of Gideon Gono's free

funds, or the free funds held by one or other of his companies. The other payment was made locally. The defendants' special plea on illegality has no merit.

iv/ *Lack of authority*

[34] The defendants' position is that the present action has not been authorised by ASP Marketing as a corporate body, that the only person who was given the authority to represent ASP Marketing was Craukamp, that such authority was confined to instituting a court application, not an action, that Craukamp has since withdrawn from the suit but that Vandeyar is doing his own thing without proper authority.

[35] The relevant portion of an extract of the resolution by ASP Marketing which was signed by both Vandeyar and Craukamp **in** on 20 June 2014 read as follows:

Resolved:

1. That an application be lodged in the High Court Harare against Lunar Chickens Pvt Ltd to seek an order for payment of its indebtedness to ASP Marketing CC;
2. That **ALIDA ALETTA CRAUKAMP** be authorized to sign all affidavits on behalf of ASP Marketing CC and to sign all and any documents in general necessary to lodge such an application if [sic] the High Court."

[36] The pleadings show that these proceedings commenced by way of a court application in June 2014. Craukamp was the deponent to both the founding affidavit and the replying affidavit. Both Vandeyar and Ngoweni filed what were termed 'confirmatory affidavits' in which they confirmed the contents of Craukamp's founding affidavit as true and correct.

[37] However, despite persistent enquiry by myself, none of the parties has been able to explain how and for what reason the application morphed into an action, and what the terms of that conversion were. Nonetheless, it seems common cause that the transformation was either by consent or that none of the parties had any issues with it. The pleadings further disclose that on the plaintiff's summary of evidence, it was Vandeyar that was listed as the witness for ASP Marketing. It was him that deposed to the plaintiff's discovery affidavit. On the joint pre-trial conference minute, ASP Marketing was going to call one witness, Vandeyar.

[38] In the absence of the defendants' own evidence showing how the present proceedings by ASP Marketing are unauthorised, the defendants' special plea on lack of authority remains a nude objection unworthy of any further consideration besides dismissal. Vandeyar testified that he and Craukamp are in this suit together and that the aforesaid June 2014 resolution to take legal action against the defendants for the unpaid for maize and soya bean deliveries has never been revoked. He remained unshaken under cross-examination. His coming to testify on behalf of ASP Marketing seems consistent with the pleadings. Consequently, the defendants' special plea lacks merit.

v/ *Currency of the claim*

[39] The joint pre-trial conference minute by the parties listed as one of the issues, the question whether or not the claim in the sum of US\$2 201 044-05 was still recoverable in the currency of the United States dollar following the enactment of SI 33 of 2019. It is not clear where this so-called special plea has sprung from. It was never pleaded. Issues for trial stem from the pleadings. It is a function of the pleadings to define with some degree of precision the nature and extent of the field of play.

[40] However, in spite of my concern above, since the parties did settle the issues for trial, and since these were endorsed at the various case management and case mapping conferences, it means that this particular issue also has to be determined

[41] 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] was part of the legislative architecture by central Government in its series of reforms of the local currency over some period of time. Through it, the Reserve Bank of Zimbabwe, among other things, introduced an electronic currency called the RTGS Dollar with effect from 22 February 2019 ("the effective date"). In paraphrase, the statutory instrument provided in part that for accounting and other purposes, all assets and liabilities previously valued and expressed in United States dollars, would be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar. However, certain assets and liabilities would be exempt from that valuation ratio. The exempt assets and liabilities

included foreign loans and obligations denominated in any foreign currency. These would continue to be payable in their foreign currency.

[42] The intent and purport of the defendants' objection on the currency of the claim are that ASP Marketing should not be claiming the \$2.2 million odd in the currency of the United States dollar because after SI 33 of 2019 all such debts became claimable only in the local currency. In other words, and according to this reasoning, US\$2.2 million became RTGS2.2 million.

[43] The defendants' special plea in this regard is neither dilatory nor in bar. It neither destroys the plaintiff's cause of action in any way nor postpones it. It is just an objection to nowhere. In the event that ASP Marketing succeeds on liability, the currency of the quantum may still have to be determined. Thus, this is an objection that needs not detain the court at this stage.

vi/ *Misjoinder*

[44] The special plea of misjoinder by New Donnington Farm and Rimaitidye is that they were not privy to any agreement between ASP Marketing or Gideon Gono and themselves and that, as such, there is no nexus between them and ASP Marketing.

[45] This objection is misplaced. It cannot be raised as a special plea in this particular matter. The joinder of these two defendants to these proceedings was by an order of this court on 16 July 2015. By that order, Gideon Gono, New Donnington Farm and Rimaitidye trading as R.T. Feeds were all joined as second, third and fourth respondents respectively to that application which, as pointed out already, subsequently morphed into a court action. They were directed to file their opposing affidavits within ten days of the order. The order was given in default. Whatever the reasons for the default, that court order is still *extant*. In fact, the pleadings show that within the time frame prescribed by the court, Gideon Gono and Rimaitidye went on to file their notices of opposition and opposing affidavits.

[46] None of the special pleas by the defendants has any merit. They are hereby all dismissed with costs. The trial of this matter shall resume on a date to be advised by the Registrar.

27 September 2023

A handwritten signature in blue ink, appearing to read 'Augustine', is written below the date.

Chambati, Mataka & Makonese, plaintiff's legal practitioners
Tendai Biti Law, defendants' legal practitioners