

ILASHA MINING (PVT) LTD**And****YATAKALA TRADING (PVT) LTD
t/a VIKING HARDWARE DISTRIBUTORS**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 18 DECEMBER 2017 & 1 FEBRUARY 2018**Urgent Chamber Application***Advocate L. Nkomo* for the applicant
Advocate Harshiti for the respondent

MAKONESE J: The applicant approached this court on an urgent basis seeking a declaratory order in the following terms:

- “1. It is hereby declared that no binding contract of sale was concluded between the applicant and the respondent in respect of equipment listed in the pro forma invoices QU106252 and QU106278 issued by the respondent to the applicant and submitted by the applicant to Fidelity Printers and Refiners (Pvt) Ltd.
2. Any purported transaction by the respondent utilizing the loan funds of US\$1 808 829,00 paid by Fidelity Printers and Refiners (Pvt) Ltd into the respondents’ bank accounts be and is hereby declared null and void and of no force and effect.
3. The respondent be and is hereby ordered to pay to the applicant or to the applicant’s nominee the sum of US\$1 808 829,00 together with interest thereon at the prescribed rate of interest calculated from the date of this order to date of full payment.
4. The respondent to pay the costs of suit on an attorney and client scale.”

Factual background

The facts giving rise to this application for a declaratur are that on 6th September 2017, the applicant concluded a written loan facility agreement with Fidelity Printers and Refiners (Pvt) Ltd (hereinafter referred to as Fidelity). In terms of the loan agreement funds to an aggregate amount of US\$2 500 000 were availed to the applicant for the purposes of capitalizing

its business operations by *inter alia*, purchasing mining equipment to ramp up gold mining and processing. Prior to the conclusion of the loan facility agreement with Fidelity the applicant requested pro-forma invoices from the respondent listing particular equipment and the prices for the sole purpose of submitting the same to fidelity as an indication of the type of equipment the applicant intended to purchase and the price range for such equipment. Following the submission by the applicant of the respondent's pro-forma invoices to Fidelity, the applicant and Fidelity agreed on the disbursement of part of the funds pursuant to the provisions of clause 5.2 of the loan agreement. It is important to observe here that the loan agreement was purely between Fidelity and the applicant. The respondent was essentially not part of that loan agreement and there was no privity of contract between Fidelity and respondent. It is clear from the provisions of the loan agreement that the loan facility funds amounting to US\$1 808 899,00 were released by Fidelity directly to the respondent, at the instance, and, for the benefit of the applicant. Respondent had been identified as a potential supplier of the mining equipment intended to be purchased by the applicant. After Fidelity transferred part of the loan facility funds, the respondent and applicant failed to agree on the pricing of the mining equipment. Applicant contended that the prices were highly inflated and sought quotations from other suppliers for comparison. The respondent intimated that it had utilized the loan funds in its possession by purchasing part of the equipment and called upon applicant to collect such equipment. The applicant, refused to sign the pro-forma invoices and to collect the equipment purportedly purchased with the loan funds without a prior contract between applicant and respondent. The applicant's position is that the respondent had no mandate or legal basis to purport to utilize the applicant's loan funds for any purpose without a prior agreement. Respondent refused to release the loan funds, whilst insisting that the applicant should instead collect part of the mining equipment that had been sourced. Faced with the respondent's refusal to release the loan funds as requested by applicant, applicant filed an urgent chamber application on an *ex parte* basis under case number HC 3165/17 seeking urgent relief in the form of an order compelling respondent to release the funds to the applicant. On the 1st of December 2017 a provisional order was granted in favour of the applicant against the respondent. It emerged that on 5th December 2017 respondent had filed an appeal at the Supreme Court under case number

SC 1024/17 against the granting of the provisional order .On the 12th December 2017 the Supreme Court issued a consent order staying execution of a writ issued under case number HC 3165/17. On the 13th December 2017 an urgent application for leave to execute pending appeal was removed from the roll as it had been overtaken by the Supreme Court order. On the 14th December 2017, the applicant filed a notice of abandonment of the provisional order granted in its favour under case number HC 3165/17.

On 18th December 2017, the respondent filed a notice of opposition in this matter which was predicated on an opposing affidavit deposed by Mr S. Shlomo Lepar. The position taken by the respondent is that the matter is not urgent nor merited. The respondent raised the following points *in limine*:-

Firstly, respondent contends that there is a clear dispute of fact which cannot be decided on the papers, but through the leading of *viva voce* evidence. The applicant asserts that there was no contract concluded by applicant and respondent, whilst on the other hand respondent contends that a contract of sale was reached between the parties.

Secondly, respondent argued that the matter was not urgent. Thirdly the respondent argued that the non-joinder of Fidelity to these proceedings was fatal.

Fourthly, the notice of abandonment is incompetent in that the applicant should have ensured the reversal of the transfer of a payment of US\$176 308,00, an amount transferred from respondent's bank account pursuant to the provisional order granted under case number HC 3165/17.

Finally, that last point in *limine* raised by respondent is that the order sought by the applicant, in particular paragraph 3 cannot be granted in that it is inconsistent with section 14 of the High Court Act (Chapter 7:06) which is the basis of the application.

Issues for determination

In this matter these are the issues that must be determined and resolved.

- (i) Whether or not the matter is urgent.
- (ii) Whether or not the applicant has met the requirements of a declaratory order as enshrined in section 14 the High Court.
- (iii) Whether or not there is a material dispute of fact which cannot be decided on the papers filed of record.
- (iv) Whether or not the non-joinder of Fidelity Printers and Refiners (Pvt) Ltd is fatal.
- (v) Whether or not the notice of abandonment is incomplete and if so whether that is fatal to the application.
- (vi) Most pertinently, whether or not a valid contract was concluded between the parties.

I now proceed to deal with these issues seriatim.

Whether the matter is urgent

The first issue I must dispose of is whether or not this matter is urgent. I must decide based on the facts placed before me whether this one of those special cases which deserves to have the normal and ordinary rules of this court suspended, the stipulated time periods to be waived, other litigants' interests to be temporarily overlooked the judge to "drop" everything, have his vacation interrupted, and give audience to the applicant because failure to do so would result in "palpable injustice" in the circumstances. Put differently, can it be said that if this applicant is not allowed to be heard ahead of other litigants who are already in the queue there will be an inexcusable failure to do justice timeously, such that any subsequent attempt to do justice would be meaningless or ineffective. The subject of what constitutes urgency has been discussed and decided in numerous cases in this court and the Supreme Court. It is now settled that:

“A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hallow because of the delay in obtaining it.”

See *Dilwin Investments (Pvt) Ltd t/a Formscaff v Japa Engineering Comp Ltd* HH-116-98.

See also *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 189

What has been established by the various decided cases is that a matter is urgent if it cannot wait when the need to act arises. A matter will be evidently urgent if irreparable harm is likely to arise if the matter is not dealt with on an urgent basis. The applicant must demonstrate that he has treated the matter in an urgent manner and that there is no satisfactory remedy available to the applicant.

The critical question faced by the court in determining whether the matter is urgent is in the first place, to decide whether or not to give priority to the application by dealing with it on an urgent basis. In arriving at a decision on this issue the court is called upon to exercise its discretion. Such discretion must, however be exercised judiciously taking into account the factors argued in favour of and against the matter being treated as urgent. If convinced that the matter is urgent, a hearing must be conducted and the court must then make an appropriate order. If the court is not convinced that the matter is not urgent, the matter will not be heard and removed from the roll, in which event, the matter may be referred for hearing on the ordinary roll of court applications.

In this matter it is clear that the urgency is founded and predicted on commercial urgency. The applicant cannot be expected to wait for the matter to proceed on the ordinary roll of applications. A huge amount of money has been released into the respondent's bank account. Applicant is suffering serious financial prejudice as the loan facility with Fidelity has to be serviced and will attract huge penalties by way of interest accrued. It is evident that this one of

those cases which cannot wait. There can be no doubt that irreparable prejudice will result, if the matter is not dealt with immediately and without any delay. There is *prima facie* evidence that the applicant treated the matter as urgent. Most importantly, there can be no satisfactory relief to the applicant .

To that end and for this cause, I find that the applicant has met the criteria set out for the requirements of urgency as set out in decided cases.

Whether applicant has met the requirements for a declaratory order

It is trite that an application for declaratory order ought to be made in terms of the High Court Act (Chapter 7:06). Section 14 of the Act provides that:

“The High Court may in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

It is axiomatic that an application for a declaratory order ought to be considered and ventilated in light of the provisions of section 14 of the High Court Act. The requirements of declaratory order were succinctly and aptly considered in the case of *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65. The court stated the position as follows:

“The condition precedent to the grant of a declaratory order under section 14 of the High Court Act of Zimbabwe, 1981 is that the applicant must be an “interested person”, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties is not a pre-requisite to the exercise of jurisdiction. See Ex P Chief Immigration Officer 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (25) at 376G-H; Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (S) and the cases cited ...”

In my view the requirements for the grant of a declaratur have been met. The second stage of the enquiry is to decide whether in the case before me is a proper one for the exercise of my discretion under section 14 of the High Court Act. It is my considered view that the application is one which enjoins this court to exercise its discretion judiciously in terms of section 14 of the High Court Act. I am satisfied that the existing rights and obligations of the parties have been succinctly placed in the founding affidavit and the opposing affidavits. A declaratory order is manifestly and potentially definitive in that in the event that I decide in favour of the applicant that no valid contract of sale was concluded the respondent will have no modicum of any right to continue holding on to the funds paid to it by Fidelity. Whether, I should however, grant the order as prayed, is an entirely different matter.

Whether there is a material dispute of fact incapable of resolution on the papers

The respondent contended that there is a clear dispute of fact which cannot be decided on the papers without leading oral evidence. That dispute being whether applicant and respondent concluded a binding contract of sale. The nub of the respondent's argument is that once the proforma invoices were transmitted to Fidelity and once payment was processed and effected on the strength of such invoices, the applicant and respondent entered into a valid contract of sale. The applicant contends that there is no material dispute of fact which cannot be resolved on the papers. In other words the court must decide on the papers whether the requirements of a valid contract exist and if not, whether a declaratur should be made to that effect. No *viva voce* evidence is needed to settle the issue as the parties' respective positions is articulated in the papers. In *Douglas Muzanenhano v Officer in Charge CID Law & Order and Others* CCZ 3/13, the Constitutional Court held as follows:

“As a general rule in motion proceedings the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. ...”

See also *Masukusa v National Foods Ltd and Anor* 1983 (1) ZLR 232

In *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) the Makarau(JP) (as she then was) held that:

“A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In this regard, and on the facts of this matter, the mere allegation of a possible dispute of fact is not conclusive of its existence.

See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)

The common thread that runs through the decided cases is that even where material disputes of fact exist, the court should take a robust and common sense approach to the dispute and endeavour to resolve it. If it succeeds then the matter ends there. If it does not, then the court has the option to either dismiss the application or refer the matter to trial for a resolution of the dispute. The court should only dismiss the application outright where the dispute must have been apparent when the applicant embarked on the application procedure.

It is my finding that the alleged dispute of facts is not material. The alleged disputes are indeed capable of resolution without the need to call viva voce evidence. The alleged dispute of facts is not material to the disposition of whether a declaratory order is appropriate in the circumstances of the case. It is common cause that both parties have already adduced and produced their documentary evidence to buttress and advance their arguments. Oral evidence will simply be a regurgitation of what has already been pleaded in the papers. I accordingly dispose of this preliminary issue and make a finding that any alleged disputes of fact are capable of resolution on the basis of the papers filed of record.

Whether non-joinder of Fidelity Printers is fatal to the application

It is settled that the non-joinder or mis-joinder of a party does not and cannot render the proceedings fatal. Order 13 Rule 87(1) of the High Court Rules provides that:

“No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

In this matter the court is required to determine whether or not a valid contract was entered into between the parties before it. Be that as it may, joining Fidelity would not take the matter any further. The court is well placed to determine the rights and obligations of the parties to this dispute inspite of the non-joinder of Fidelity. Consequently, the point *in limine* relating to non-joinder must fail.

See *Nyamweda v Georgias* 1988 (2) ZLR 422 (S) and *Rodger & Ors v Mulier & Ors* HH-2-10.

Whether or not a valid contract was concluded

The position of our law of contract is that for there to be a binding contract there must be an offer and acceptance. The offer must be unqualified and unequivocal. The respondent's position is that indeed there was a contract of sale between the parties. The relief sought by the applicant is accordingly challenged. From a reading of the loan facility agreement, Fidelity reserved the right to make payments directy to respondent. Applicant agreed to such an arrangement and signed the loan agreement. In terms of clause 5.2 of the agreement the monies paid to the respondent were in respect of specific pro-forma invoices. The applicant consented to the payments being made to respondent well knowing that such payments were for the purchase of specific equipment listed in the pro-forma invoices. The funds totaling US\$1 808 899,00 were paid on the basis of two pro-forma invoices. There were a number of communications between the parties confirmed by “whatsapp” chats where the applicant undertook to expedite payments on the remaining invoices. Once procurement of equipment had commended, applicant was kept informed. Applicant's conduct suggests that there was indeed a binding contract between the parties. It is my view, that the parties reached a contract of sale in terms of which the applicant obtained pro-forma invoices for payment. An offer was made and accepted.

Payments were made to the respondent and procurement of the goods commenced. There was a clear *consensus ad idem* between the parties. If there was no such consensus the applicant should have objected immediately. The legal position is to the effect that:

“A sale in Roman-Dutch law has been defined as a contract in which one person promises to deliver a thing to another, who promises to deliver a thing to another, who on his part promises to pay a certain price.”

See *Chikoma v Mukwena* 1998 (1) ZLR 541.

In *Hoffmann & Charvalho v Minister of Agriculture* 1947 (2) SA 855 (T) at 860, the court stated as follows:

“Where parties intend to conclude a contract, thin they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the court ought rather to try and held the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of them to escape the consequences of all that he has done and all that he has intended ...”

I am acutely aware that the test for a meeting of the minds of the parties should involve the effect of their conduct on whether or not there was a contract. *Consesus ad idem* does not only take the subjective and mental state of the parties, but also takes into consideration the conduct of the parties.

See *Smith v Hughes* (1871) LR6QB587 where the test was set out in the following terms:

“If whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was asserting to the terms proposed by the other party, and such other party upon that belief enters into the contract with him the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

As I have indicated above, applying these principles to the established facts it is clear that a contract of sale was concluded between the parties.

Whether the notice of abandonment is incomplete

The respondent argued that applicant should have reversed the transfer of an amount of US\$176 308 which was transferred from respondent's bank account pursuant to a provisional order granted by this court under case number HC 3165/17. It was further argued that the notice of abandonment was not complete as there was no tender of the wasted legal costs. Until that is done, the respondent argued that the abandonment filed of record cannot take effect. Respondent further argued that, the abandonment cannot take effect with applicant retaining the benefits of the provisional order. In terms of the rules of the Supreme Court, 1964, in particular rule 33 (3), it is provided that:

“At anytime the respondent in an appeal or cross-appeal may by notice given to the registrar and the opposite party, abandon the whole or any part of the judgment appealed against.”

Quite clearly, the said rule permits the litigant to withdraw in whole or in part his appeal, subject to the tendering of wasted costs. I observe that the usual practice in these courts is that every notice of withdrawal or abandonment must provide for a tender of wasted costs. In the exercise of my discretion, and given the urgency of the matter it was my view that there was need to deal with all the preliminary issues raised and the merits in order to make a definitive determination for the parties. It is clear that there was commercial urgency and for that reason it was not prudent, in my view, to dispose of the matter on technicalities.

Costs of suit

Each party prayed for an award for costs on the legal practitioner and client scale. The question of punitive costs arises where a party has been unduly unreasonable or has unnecessarily put the other party out of pocket. Such costs are awarded where an application or a party's response to an applicant is motivated by malice. Where a party has adopted a wrong procedure and prejudiced the other side such costs may also be awarded. In this matter the matter is of extreme financial and commercial importance to both sides in the dispute. I find no

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sound legal or factual basis to make an order against the losing party for costs on the legal practitioner and client scale.

Disposition

Having found that a binding contract of sale was concluded by the parties when the respondent issued the two pro-forma invoices to the applicant and that the applicant submitted the two pro-forma invoices to Fidelity for the release of funds, I make the following order:

1. The application for a declaratur and consequential relief be and is hereby dismissed.
2. The applicant shall bear the costs of suit.

Ncube & Partners, applicant's legal practitioners
Messrs Coghlan & Welsh, respondent's legal practitioners