

DEASURY INVESTMENTS (PRIVATE) LIMITED
t/a TONDERAI MUSIC CORPORATION
versus
FUNGISAI ZVAKAVAPANO
and
NGAAVONGWE RECORDS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BHUNU H
HARARE, 2 March and 10 March 2004

Urgent Application

Mr *Moyo*, for the applicant
Mr *Sinyoro*, for the 1st respondent
Mr *Kanokanga*, for the 2nd respondent

BHUNU J: This is a tug of war between two music production companies, Deasury Investments (Private) Limited trading as Tonderai Music Corporation, the applicant and Ngaavongwe records (Private) Limited, the second respondent for the services of a young talented musician Fungisai Zvakavapano the first respondent.

On the 11th of March 2001 the second respondent concluded a contract of service with the first respondent whereby she undertook to compose and play music for recording by the company for purposes of production, distribution and marketing, The contract had a life span of 5 years, running from 11th January 2001 to 10th March 2006.

Clause 6.3 of the agreement provides that:

“6.3 The parties hereby agree that during the period of this agreement should the artist, his or her shareholder or anybody associated with the artist or any partnership or member of their immediate families enter into music composing and production such music shall be offered to the company and shall be subjected to the terms and conditions of this agreement. This therefore implies that any band member (part of the artist) shall not be entitled to have his or her separate works with another company during the currency of this agreement.”

During the currency of the above contract and sometime in September 2003 the first respondent entered into a contract of service with the applicant where she undertook to produce not less than three music albums with the applicant. The contract was to run from 1st October 2003 to 31st August 2005.

Clause 9 of the contract provides that:

“The artist (1st respondent) undertakes and guarantees to the recording Company signature to this agreement that she is not bound by any contract or other obligation to any person, firm or company which will prevent her from obligation under this agreement. However, the recording company indemnifies the artist against any litigation that may arise regarding the same to a maximum of Z\$5 million.”

The first respondent has now abandoned the applicant and gone back to record with the second respondent. In doing so she abandoned preparatory work which has been done at great expense.

The applicant now seeks to hold the first respondent to the terms of its contract.

When counsel for the second respondent pointed to the existence of his client and the first respondent’s original contract, counsel for the applicant retorted that by her conduct in concluding a contract with the applicant, first respondent must be deemed to have breached the first contract with the second respondent.

If that argument is to be taken to its logical conclusion it means that when the first respondent abandoned the applicant to go back to the second respondent she breached her contract with the applicant.

It appears to me that by going back to the second respondent’s stables the first respondent was novating her original contract with the second respondent upon realization that she was in breach of contract.

It is clear to me that the first respondent has breached her original contract with the second respondent as well as her contract with the applicant. What now remains is the new contract between the first and second respondents. That being the case the applicant may pursue its contractual remedies for breach of contract. It cannot seek to restrain first and second respondents from exercising the terms of an apparently valid contract when its contract has been invalidated by breach if not the original contract which required that any subsequent work by the first respondent accedes to the second respondent during the currency of the contract.

In the result I am not persuaded that the applicant has established a *prima facie* case warranting the granting of a temporary interdict restraining the respondents from exercising the terms of their current agreement.

It is accordingly ordered that the application be and is hereby dismissed with costs.

Scanlen & Holderness, the applicant's legal practitioners.

Sinyoro. Muungani & Company, first respondent's legal practitioners.

Kanokanga & Associates, 2nd respondent's legal practitioners.