

TRUSTCO MOBILE (PTY) LTD  
and  
TRUSTCO GROUP INTERNATIONAL (PTY) LTD  
versus  
ECONET WIRELESS (PVT) LTD  
and  
FIRST MUTUAL LIFE ASSURANCE GROUP

HIGH COURT OF ZIMBABWE  
MAVANGIRA J  
HARARE, 1 and 6 September and 12 October 2011

### **Urgent Chamber Application**

*T. Mpofu* and *S. Sadomba*, for the applicants  
*A.P. De Bourbon* and *J. Zindi*, for the first respondent  
*D. Gapare*, for the second respondent.

MAVANGIRA J: On 17 August 2011 the first applicant and the respondents concluded an agreement in terms of which the first applicant undertook to license to the first respondent certain intellectual property (“The Trustco Mobile Concept”) which would facilitate the provision of the free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime from the first respondent. An amendment was made to the agreement in January 2011.

Certain differences arose amongst the parties in relation to the said agreement. As a result the first applicant approached this court on an urgent basis in HC 6065/11 and on 25 July 2011 judgment was delivered in that matter in favour of the first applicant. A provisional order was granted in the following terms:

“Final Relief Sought

That you show cause why the following final order must not be granted.

1. Pending the determination of the dispute between the parties by the process of Arbitration in terms of the provisions of the Arbitration Act, the first respondent shall not take any steps neither shall it act in any such manner as is inconsistent with the rights of the applicants arising from the agreement between the parties (as amended), and shall not act in terms of any Arbitral Award that may be handed down.
2. The costs of this application shall be costs in the envisaged arbitration proceedings.

### Interim Relief Granted

That pending determination of this matter on the return date, applicants are granted the following relief:

1. The first respondent is directed to restore to the first applicant the internet based reporting links and all access to Trustco Mobile hardware and software, thus enabling it to monitor and process airtime purchase transactions and otherwise perform its obligations in terms of the agreement; and
2. The first respondent be directed to refrain from undertaking and implementing a competing, infringing service to that provided by the first applicant in terms of the agreement.”

The first respondent has not complied with the order. Rather, on 27 July 2011 the first respondent noted an appeal in the Supreme Court. Consequently, on 4 August 2011, the applicants filed the instant urgent chamber application in which they seek a Provisional Order in the following terms:

#### “TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. Pending the determination of the dispute between the parties by the process of Arbitration in terms of the provisions of the Arbitration Act, the provisional order in HC 6065/11 shall remain operational notwithstanding any appeals that may be filed by the respondents.
2. First respondent shall pay the costs of this application.

#### INTERIM RELIEF GRANTED

Applicants are hereby granted the following relief:

1. First and second applicants be and are hereby allowed to execute the judgment of the Honourable Justice MUTEMA handed down in HC 6065/11 on 25 July 2011 notwithstanding first respondent’s appeal filed under SC 171/11.
2. This order shall remain operational notwithstanding any appeal that may be noted by first respondent.

At the hearing Advocate *Mpofu* indicated that the applicants are no longer pursuing the relief sought in para 2 of the interim relief.

The applicants contend in the founding affidavit, *inter alia*, that the noting of the appeal against the judgment in HC 6065/11 is incompetent and invalid insofar as the judgment was interlocutory in nature and, having been granted on a provisional basis, it granted interim relief only. As the judgment or order was not final in effect, it is contended, the purported appeal is invalid and a nullity. However, at the hearing, Advocate *Mpofu* indicated that this point or contention is no longer being pursued. Rather, he submitted, leave to execute pending appeal ought to be granted because the judgment appealed against is not appealable by reason of the provisions of the Arbitration Act, [*Cap 7:15*], particular reference being made to Article 9(4) thereof. He submitted that a reading of paras 3 and 4 at p 7 of the judgment clearly shows that the court came to the conclusion that it was affording relief pursuant to article 9 of the Arbitration Act. He submitted that the provisions of the Model Law on International Commercial Arbitration are part and parcel of the Arbitration Act and therefore have the force of statutory provisions. He cited *Mtewa and Anor v Mupamhadzi* 2007(1) ZLR 253 (S) in support of this proposition. He further submitted that the court does not have the equitable jurisdiction to dispense with compliance with the Model Law and cited *Courtesy Connection (Pvt) Ltd & Anor v Mupamhadzi* 2006 (1) ZLR 479 (H) in which it was held that once the prescription period set in the Model Law runs out, the right to set aside an arbitral award is lost and that no court has been granted the power to revive that right once it has been lost. He made the further submission that in terms of Article 9 (4) of the Model Law, a decision made by the High Court in terms of para 1 of the same article shall not be subject to appeal and that as the decision in HC 6065/11 was made in terms of the provisions of the Model Law, section 43 of the High Court Act, [*Cap 7:06*] is not applicable *in casu*. The section provides:

“43(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.”

Article 9(4) provides:

“The decision of the High Court upon any request made in terms of para (1) of this article shall not be subject to appeal.”

In *casu*, paras 3 and 4 of the judgment in HC 6065/11 (HH 158/11) read:

“Article 9 of the Arbitration Act, [Cap 7:15] empowers the High Court via ss 1,2 and 3 to grant, upon request, an interim measure of protection in the form of an interdict or other interim measure to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual where the arbitral tribunal has not yet been appointed and the matter is urgent.

*In casu* the matter is urgent, the arbitration tribunal has not yet been appointed and the relief sought is designed to ensure that any award which may be made in the arbitral proceedings in favour of the applicants will not be rendered ineffectual

On this aspect Mr *de Bourbon* submitted that the parties’ agreement provides that arbitration would only be resorted to if negotiations failed. He submitted that there had been no negotiations and consequently there was no right to resort to arbitration. In the circumstances, he submitted, there was no right to interim measures being afforded the applicants. In any event, he further submitted, the court in HC 6065/11 was not faced with an Article 9 application. He submitted that the first respondent will in fact be amending its notice of appeal to the Supreme Court but has not done so yet.

It appears to me that the fact of the matter is that the court in granting the relief in HC 6065/11 found justification for doing so *inter alia* on Article 9 of the Model law as the extract cited earlier from the court’s judgment shows. This court is not tasked, nor is it competent, to debate or review the propriety of the decision in HC 6065/11. What is inescapable however, in my view, is the fact that in terms of Article 9 (4) that decision is not subject to appeal.

Mr *Mpofu* submitted that the first respondent cannot hide behind an appeal that has been invalidly noted, in failing to comply with its obligations under the order of the court in HC 6065/11.

In *Whata v Whata* 1994 (2) ZLR 277 (S) at 281 B-C GUBBAY CJ stated:

“The principle to be applied by the court considering the grant of an application for leave to execute on a judgment under appeal is what is just and equitable in all circumstances. The enquiry normally involves assessing such factors as: the potentiality of irreparable harm or prejudice being sustained by either the successful or the losing party, and, if by both, the balance of hardship or convenience; and the prospects of success on appeal, including whether the appeal is frivolous or vexatious or has been noted for some indirect purpose, such as to gain time or harass the other party. See the *South Cape Corporation* case supra at 545 E-G.’ (*South Cape Corporation (Pty) Ltd Eng Mgmt Svcs (Pty) Ltd* 1997 (3) SA 534 (A).

In *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) SMITH J articulated the same principle at 154F-9 as follows:

“In determining an application for leave to execute pending an appeal, the court must have regard to the “preponderance of equities”, the prospects of success on the part of the appellant and whether the appeal has been noted without “the bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party”: see *Fox and Carney (Pvt) Ltd v Carthew-Gabriel (2)* 1997 (4) SA 970 (R) and *ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H).”

It would appear to me on a consideration of these authorities that for the stronger reason, where, as appears to apply as in this case, a judgment is not appealable, there must be placed before the court tasked with determining an application for leave to execute pending appeal, compelling justification for refusing to grant an application such as the applicant’s in *casu*.

In *casu* it was contended that if the judgment in the HC 6065/11 is not complied with, the applicants would not be able to calculate the quantum of the damages which they would be seeking in the arbitration proceedings. The appeal would thus have the effect of rendering the intended arbitration futile because the applicants would not be able to determine the extent of their damages. It was contended that the applicants need to have access to the first respondent’s systems for this purpose. Furthermore, that in terms of this agreement the first respondent had some entitlements due to him for a period of six months and the significance of this six month period must be understood in the context that the agreement was a finite eighteen month agreement and that the contract period would run out before the arbitration.

On the other hand the first respondent’s stance appears to be mainly that the agreement was cancelled by mutual agreement and that as this court’s judgment in HC 6065/11 was therefore, in its view, wrongly made, execution of the judgment would be unpalatable to it. In the applicant’s description of the first respondent’s stance, it would be “ruinous to the first respondent’s business” to resuscitate, by the granting of leave to execute pending appeal, the relationship that had been created in terms of the agreement.

In my view, the balance of convenience or hardship favours the applicants. It appears to me that the applicants did place before this court adequate justification for a finding that the preponderance of equities favours the granting of the relief that they seek and that they must

therefore succeed. The first respondent on the other hand has not established sufficiently compelling grounds why the balance should tilt in its favour.

After the hearing in chambers; the parties were invited to make written submissions on the effect if any, on this matter of the case of *Lloyd Guwa and Another v Willoughby's Investments (Pvt) Ltd*. SC 31/09 (2009)(1) ZLR 368(S). In view of my findings above, it appears to me that it is not necessary any more to have regards to that case or to any of the written submissions filed on the applicants' behalf in response to the court's invitation.

For the above reasons the applicants application therefore succeeds. As already stated above, the applicants have abandoned, and properly so in my view, the relief sought in paragraph 2 of the interim relief sought.

In the result, a Provisional order will issue in the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. Pending the determination of the dispute between the parties by the process of Arbitration in terms of the provisions of the Arbitration Act, the provisional order in HC 6065/11 shall remain operational notwithstanding any appeals that may be filed by the respondents.
2. First respondent shall pay the costs of this application.

INTERIM RELIEF GRANTED

Applicants are hereby granted the following relief:-

1. First and second applicants be and are hereby allowed to execute the judgment of the Honourable Justice MUTEWA handed down in HC 6065/11 on 25 July 2011 notwithstanding first respondent's appeal under S.C. 171/11.”

SERVICE OF THE ORDER

1. The legal practitioners for the applicants be and are hereby granted leave to effect service of this provisional order under the respondents.

*Gill, Godlonton and Gerrans*, applicant's legal practitioners  
*Mtewa and Nyambirai*, first respondent's legal practitioners  
*Scanlen and Holderness*, second respondent's legal practitioners