PETER PASIPAMIRE
versus
TELEVISION INTERNATIONAL
and
HOPEWELL RUGODO CHIN'ONO

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 13 AND 14 OCTOBER, 3 AND 4 NOVEMBER 2011, 9 JULY AND 7 AUGUST 2012 AND 15 MAY 2013

Civil Trial

T. Bhatasara, for the plaintiff
P. Chakasikwa, for the defendant

MAVANGIRA J: The plaintiff claims against the defendants jointly and severally, the one paying the other to be absolved, payment of the sum of US$3 000. The basis for claiming the said amount is framed in the following terms: "being the amount the defendants undertook to pay Plaintiff for his participation and role in the HIV and AIDS documentary 'Pain in My Heart', which despite demand, the defendants have refused, neglected and /or failed to pay." The plaintiff contends that the claim is based on a verbal agreement entered into between the parties in early 2007 in which agreement the second defendant represented the first defendant.

The defendants on the other hand, disputes the claim and contends that there was no such agreement. It is contended that the plaintiff failed to discharge the onus on it to prove the existence and the terms of such an agreement. The court is urged to disbelieve his evidence. It is also contended that should this court nevertheless find that an agreement was entered into, such agreement would have been contrary to law as it involved a transaction in foreign currency for which there was no requisite exchange control authority. It is contended that the agreement, should one be found to exist, cannot therefore be enforced on account of its illegality. The second defendant also says that he produced the documentary film in part fulfilment of the requirements for his Masters Degree in Documentary Practice with Brunel University.

Two issues were referred for determination by the trial court. They are stated as:

" 1. Whether the parties entered into an oral agreement in terms of which the defendants undertook to pay the plaintiff for his participation in the HIV/AIDS documentary film "PAIN IN MY HEART."

2. If the answer to 1 above is yes then what were the terms of the oral agreement entered into between the parties and whether the defendants have breached the agreement." That the plaintiff participated in the HIV/AIDS documentary film "Pain in My Heart" admits of no question. That he did so upon request or at the instance primarily of the second defendant cannot in my view, on the basis of the evidence placed before the court, be disputed. The plaintiff acceded to the request. It is clear from the evidence including the video recording of the film, that plaintiff and second defendant conversed about the plaintiff's participation in the video. The probabilities are that there was an oral agreement concluded between them pertaining to the plaintiff's participation. The issue or question for determination in my view, is therefore whether in the oral agreement the second defendant undertook and agreed to pay to the plaintiff US$3 000 for his participation. It is only on this material aspect of payment to the plaintiff that the parties differ.

Had there been no agreement on the shooting of the documentary film with the plaintiff as a participant, the plaintiff would not have participated and featured therein. A viewing of the video recording confirms that the plaintiff's appearance therein was not by coincidence. He was aware of what was happening, as obviously was the second defendant. The plaintiff was meant to feature considerably therein as was the case with Angeline Chiyanike.

The plaintiff was clear in his evidence that the terms of the oral agreement included that the second defendant was to pay him US$3 000 and that this payment was to be made after completion of the documentary film. The plaintiff was to take part in the documentary and give his life story especially as it relates to HIV/AIDS. In the absence of Dr. Bonde or Mai Kuda to rebut the plaintiff's version or confirm the defendants', the plaintiff's version is believable and in fact the more probable version. This is so because as the participation of the plaintiff and other participants would be of benefit to the second defendant, it would only be natural for the second defendant to discuss with the plaintiff, after being introduced to the plaintiff by Dr. Bonde, the terms of the plaintiff's participation. It is highly unlikely that Dr. Bonde would have finalised terms and conditions of the agreement with the plaintiff when the second defendant was available to do so himself. In any event, even if it were for a moment to be accepted that Dr. Bonde negotiated the terms of the agreement with the plaintiff, she would only have done so on behalf of the second defendant.

The plaintiff's evidence was that one Dr. Bonde brought the second defendant to the cabin which he occupied at No. 5 Acacia Road, Westgate in Harare. Dr. Bonde introduced the second defendant to him and told him that she wanted to have photographs of him taken by the second defendant. After that the second defendant greeted him and told him that he was going to give him $3 000. The $3 000 was to be payment for the photographs of the plaintiff that were going to be taken. Dr. Bonde was about 3 metres away when the second defendant said this. The plaintiff said that he agreed to be paid the said amount of money. The second defendant then took a photograph of him. He said that he wanted members of the public to know about HIV/AIDS. As it turned out when the plaintiff referred to or talked about photographs being taken of him, he meant the video recording that was done and is captured in exhibit 1.

It is contended by the defendants that the plaintiff's claim is motivated by greed as well as the erroneous belief that the film made a lot of money and that this is evidenced by the fact that he only made his claim a year after the documentary film was released or completed and also after he had got to know about its success and that it had won an award. Furthermore, that he had also got to know that the second defendant had set up a fund for Angeline Chiyanike's children. He also contends that it was Dr. Bonde who talked to her patients, the plaintiff included, to find out if they were agreeable to participate in the documentary film.

Although it had been indicated that Dr. Bonde would testify for the defendants, she was never called. No explanation was proffered why she was not called to testify. One would assume that the defendants would view her evidence as crucial in view of the plaintiff's categorical stance that he entered into the agreement with the second defendant and that it was the second defendant and not Dr. Bonde, who undertook to pay him US$3 000 after the completion of the documentary film. The defendants' failure to call one Mai Kuda who the second defendant said was present and within hearing distance when the agreement was made allegedly between the plaintiff and Dr. Bonde also tends to tilt the scales in favour of the plaintiff's version being the more probable one. The plaintiff on the other hand explained the delay in bringing the claim and stated in his evidence that he was bed ridden for a long time. He trusted that the second defendant would return to Zimbabwe and pay him. He also did not have the second defendant's contact details hence his conduct of approaching the Police at one stage long after the completion of the film.

While the plaintiff tended to display a rather comical yet apparently natural quick wit, his decision to approach the police for resolution of his grievance in this matter does, amongst other things confirm that he is not well versed insofar as the niceties of legal issues and procedures in particular, are concerned. He is unsophisticated in that regard yet he cannot be said to be unintelligent even though he said that he did not attend school at all. It is for this reason that I find persuasive the plaintiff's counsel's submission that the plaintiff's professed motivation that was solicited from him as heard on the video recording, that is that of wanting other people to benefit, cannot be either disbelieved or held against the plaintiff. It is highly improbable, given his level of intelligence and apparent general appreciation of life, that he would have said, for purposes of the video recording, that his motivation was that he was going to be paid US$3 000. In any event, payment of US$3 000 to him does not preclude the fact that other people may benefit from the documentary film in which he participated and told his life story insofar as it relates to HIV/AIDS. Furthermore, when the second defendant asked the plaintiff that question on camera, the likelihood is that he was expecting him to give the very answer that he gave and not the allegedly agreed or anticipated payment.

The plaintiff's claim has not prescribed. The complained about "delay" in bringing this action was explained by the plaintiff. As rightly submitted by the plaintiff's legal practitioner, the delay, which plaintiff denies, did not amount to a waiver of his rights. The suggestion that he waived his rights is thus baseless as there is a strong presumption against waiver, the onus being on the party alleging or asserting it, to prove it. Such allegation must in any event be specially pleaded and in *casu* it was not. In *Barclays Bank of Zimbabwe (Pvt) Ltd v Binga Products (Pvt) Ltd* 1984 (2) ZLR 76 at85E-H, DUMBUTSHENA CJ, stated:

> "In *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (AD) at 778D-E, STEYN CJ laid down clearly the state of mind of the person who abandons his right. He said:
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> > '... in the case of a waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue ... but in *Martin v De Kock* 1948 (2) SA 719 (AD) at733, this Court indicated that view may possibly require reconsideration. It sets I think, a higher standard than that adopted in *Lewis v Rutherford* 1924 AD 261 at 263, where INNES CJ says:
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> > > 'the onus is strictly on the appellant. He must show that the respondent with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.'

The documentary film itself indicates that the first defendant presents a Hopewell Chin'ono film. It indicates that the documentary film was produced by the second defendant through the first defendant. It does not mention that the film is in partial fulfilment of a Masters Degree programme. At the start of the film the second defendant says, "I decided to make a film ... a film without political acrimony." The acknowledgments at the end of the film are also telling. There is no mention of any of the second defendant's professors at Brunel University as one would expect, whether as editor(s) or in any other befitting capacity. In fact, as also admitted by the second defendant himself, there is nothing in it that shows that it was done as part of his studies. There is no mention even of the faculty where he did the studies that required the production of the documentary film. It is the second defendant and his company, the first defendant, who are mentioned. It is thus not proven, on the evidence on record including the documentary film itself, that it was produced for purposes of partial fulfilment of his Masters Degree and not for commercial purposes.

It is a fact that the first defendant was not yet formed at the time of the contracting. As rightly submitted by the plaintiff's legal practitioner, the first defendant expressly or impliedly ratified and implemented the agreement by producing the film. It performed work in accordance with the agreement. The cases of *Graphics Africa (Zimbabwe) (Pvt) Ltd v Rank Xerox Ltd* 1989 (1) ZLR 292 (HC) and *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 at 384G were cited in support of the proposition that at common law, it is clear that the promoters of a company prior to incorporation could individually enter into a contract for the benefit of such a company to be formed and on its incorporation the newly formed company could adopt the contract.

The oral agreement in this matter is a valid agreement. In *Farmers' Cooperative Society v Ben* 1912 AD 343 at 350 INNES JA stated with regard to the law on specific performance:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract."

That right has been reaffirmed in a multitude of cases including *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (HC) and *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1992 (2) SA 423 (ZS). In *casu* the plaintiff carried out his obligation under the contract. The authorities are also clear that because there is a recognised right of the wrong party, the law provides that the defendant bear the burden of alleging and

adducing evidence in support of facts or circumstances upon which they ask the court to exercise its discretion against an order for specific performance – *Tamarillo (Pvt) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A); *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd (supra).*

The defendants purported at a late stage of the proceedings to claim that the agreement was tainted with illegality as it was for payment in US dollars and therefore unenforceable. The defendants contend that the agreement was and is unlawful as it involved a transaction in foreign currency without the requisite authority of an exchange control authority such as the Minister of Finance, the Reserve Bank of Zimbabwe or an authorised dealer and that this is prohibited by section 10 of the Exchange Control Regulations, 1996 (S.I. 109/1996). They contend that the agreement was therefore an illegal agreement or transaction and that in view of section 41 of the Reserve Bank of Zimbabwe Act, Chapter 22:15 this court cannot order specific performance.

The plaintiff's legal practitioner on the other hand submitted that the plaintiff denies that the agreement is so tainted. Furthermore, that in any event, as the defence was not pleaded, the plaintiff had been deprived of an opportunity to lead evidence on the issue. He also submitted that assuming that the agreement is so tainted, the Court is urged to relax the *in pari delicto* rule in favour of the plaintiff and cited *Wycliff Matsika v Jumvea Zimbabwe Ltd & Anor HH 9/03* in support thereof.

Section 41 of the Reserve Bank of Zimbabwe Act reads:

"**41. Legal tender of banknotes**

(1) A tender of a banknote which has been issued by the Bank and which has not been demonetised in terms of subsection (2) shall be legal tender in payment within Zimbabwe of the amount expressed in the note.

(2) The President may, by statutory instrument, call in and demonetise any banknotes issued by the Bank, and shall likewise determine the manner in which and the period within which payment for such banknotes shall be made to the holders thereof.

It is not clear how this section impacts on this matter as it does not appear to deal with the issue for which it has purportedly been cited by the defendants' legal practitioner. Section 10 of the Exchange Control Regulations, 1996 provides in the relevant part:

"***10. Payments in Zimbabwe***

(1) Unless otherwise authorised by an exchange control authority, no person shall, in Zimbabwe—

(*a*) ... ; or

(*b*) make any payment to or for the credit of a Zimbabwean resident by order or on behalf of a foreign resident;
or
(*c*) ... ; or
(*d*) accept any payment from any person in respect of services that are to be provided outside Zimbabwe by another person.
(2) Subsection (1) shall not apply to—
(*a*) any payment lawfully made from money held in a foreign currency account; or
(*b*) such other transactions as may be prescribed."

The section appears to prohibit the making of any payment in foreign currency to or for the credit of a Zimbabwean. No payment in foreign currency was made between the parties. Rather, the evidence discloses that they entered into an agreement in terms of which payment in foreign currency was to be made upon fulfilment of agreed conditions. The section is couched differently from section 11 which requires authorisation not only for the making of payment in foreign currency outside Zimbabwe but also for incurring an obligation to make payment outside Zimbabwe except where the act is done by an individual, as opposed to a company for example, with free funds available to him at the time of the act concerned. In *Barker v African Homesteads Touring & Safaris (Pvt) Ltd & Anor* 2003 (2) ZLR 6 at 9E-G SANDURA JA stated:

> "The difference between s 10 (1) and s 11 (1) of the Regulations was stated by this court in *Macape (Pvt) Ltd v Executrix, Estate Forrester* 1991 (1) ZLR 315 (S) at 320B-D where McNALLY JA said:
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> > 'The essential point to be noted is that there is a clear difference between ss 7 (now s 10) and 8 (now s 11). The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay.
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> > In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. ... ."

On the submissions made by the defendants' legal practitioner, it does not appear that there was illegality in the agreement that was concluded regard being had to the relevant regulations and to the authorities cited above. It is also of significance that in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe (Pvt) Ltd* 1989 (3) SA 191 (ZS), it was held that in the absence of any legislative enactments which require Zimbabwean Courts to order payment in local currency only, a judgment sounding in foreign currency may be given.

On the evidence adduced before this court, the plaintiff has established on a balance of probabilities that the parties concluded a valid oral agreement one of whose terms was that he was to be paid US$3 000. He has also clearly established that he performed his obligations in terms of the agreement and that the defendants have not, in breach of that agreement, performed their obligation to pay him US$3 000. There being no excuse in fact and in law for the defendants' failure, the plaintiff is entitled to specific performance. The plaintiff's claim will therefore succeed for the above reasons. Costs will follow the cause.

In the result it is hereby ordered that the defendants shall, jointly and severally, the one paying the other to be absolved:

1. Pay to the plaintiff US$3 000.
2. Pay the plaintiff's costs of suit.

Sande & Associates, plaintiff's legal practitioners
Kantor & Immerman, defendants' legal practitioners.