CENTRAL AFRICAN FORGE COMPANY (PVT) LTD
versus
ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 17 & 24 March 2023

Urgent Chamber Application

T Biti, for the applicant
N M Phiri, for the respondent

MUREMBA J: This is an urgent chamber application wherein the applicant is seeking the following order:

"**TERMS OF FINAL ORDER SOUGHT**

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

1. It is declared that the applicant is not an exporter or a partial exporter for the purposes of Reserve Bank of Zimbabwe enacted the Exchange Control (Payment for Electricity and Related Services in Foreign Currency by Exporters and Partial Exporters) Order, 2019, Statutory Instrument 249/19.

2. The respondent be and is hereby directed to rebill the applicant in Zimbabwe Dollars (ZWL$) being the legal tender applicable to the transaction and the respondent issue a fresh invoice.

INTERIM RELIEF GRANTED

Pending the return day, the applicant is granted the following relief: -

1. That the respondent be and is hereby ordered to restore the applicant's electricity connection at number 7 Galloway Road Norton."

The facts as per the applicant's founding affidavit are that it is in the business of manufacturing mining consumables and relies heavily on electricity for its operations. The respondent which has a duty to supply it with electricity levied it with an electricity bill in the sum of USD 189 535.00 on 24 February 2023. The respondent subsequently went ahead and disconnected its power supply. The applicant further averred that the respondent has no legal basis

to levy a bill against it in United States Dollars and to disconnect it from getting electricity. In terms of SI 249/19 the respondent was allowed to charge electricity bills in United States Dollars against exporters and partial exporters. That Statutory Instrument had a life span of 6 months. It was extended by SI 122/20 for 12 months. SI 122/20 then lapsed in May 2021 and was not renewed. The applicant averred as follows.

> "The applicant made it clear to the respondent that it was not a partial exporter or an exporter. Therefore, the regulations did not apply to it."

The impression that is given by this averment is that the applicant was levied or charged by the respondent as if it was an exporter or partial exporter on the basis of the lapsed or unrenewed statutory instrument. The applicant averred that it is neither an exporter nor a partial exporter.

The applicant averred that the matter is urgent owing to the fact that it requires revenue. The decision to disconnect its power supply impacts on its capacity to operate and its revenue. If the matter is not dealt with urgently it faces certain bankruptcy. Its 97 employees will be unemployed and it will not be able to recover from the bankruptcy.

In response to the application the respondent raised a point *in limine* to the effect that the matter is not urgent because the applicant had always known that it owed this bill since 2019. Back then the parties entered into a Secure Power Supply Agreement whose terms were that the applicant would pay for electricity in foreign currency for a dedicated supply of electricity. The respondent was importing electricity from South Africa specifically for customers who wanted an uninterrupted supply of electricity and had signed this agreement. The applicant was one such customer. It was on the basis of this agreement that the applicant accrued this USD bill between August 2019 and 31 December 2020. The urgency is thus self-created as the applicant always knew that it would be disconnected for non-payment of the bill. It took no action to either settle the bill or to challenge the bill. The respondent attached the agreement that the parties signed to its notice of opposition.

Having listened to arguments by both counsels, I am inclined to uphold the point *in limine* for the following reasons. At the hearing the applicant's counsel, Mr. *Biti* confirmed the existence of the agreement that the parties signed although he then went on to argue that the agreement was void because it was signed contrary to the law which made the Zimbabwean dollar the sole legal tender at the time the agreement was signed. Mr. *Biti* also confirmed that the bill in question was

levied between August 2019 and December 2020. There was therefore material non-disclosure by the applicant in its founding affidavit that the amount in question was levied way back between August 2019 and 31 December 2020 on the basis of a special agreement which the parties entered into which required the applicant to pay for electricity in United States dollars and obliged the respondent to import electricity from South Africa for it. Nowhere in its founding affidavit did the applicant disclose this information. I only became aware of the agreement after the respondent had filed its notice of opposition and attached the said agreement.

Let me hasten to point out that an application stands or falls on its founding papers. A failure to disclose material issues can render an urgent chamber application not urgent. A material issue is an issue that goes to the root of the application. In *Ncube v Mpofu N.O and Anor,* HB – 121- 11 Ndou J said, "*The failure to disclose the Tshabalala property is a material non-disclosure in this case. It goes to the core of urgency*." In *Graspeak Investments P/L & Anor* 2001 (2) ZLR 551 (H) it was held that courts should discourage urgent chamber applications which are characterised by material non-disclosure, *mala fides* or dishonesty. In *casu* the issue of the Secure Power Supply Agreement that the parties entered into goes to the root of the application because it is the basis upon which the applicant was levied in United States dollars by the respondent. Having deliberately chosen not to disclose this material issue, the applicant sought to mislead the court by making an averment that it was levied on the basis of a lapsed Statutory Instrument SI 122/20 when it was not an exporter or partial exporter. In para 19 of the founding affidavit the applicant also sought to give the impression that it was /levied for the very first time on 24 February 2023. I must say that this is the paragraph which made me formulate the opinion that the matter was urgent and set it down for hearing. Had the truth been told that this was a bill that had been outstanding since 2019-2020 and that it was levied on the basis of a special agreement that the parties had entered into, I would not have set down the matter for hearing on an urgent basis. For the court to deal with a matter on an urgent basis, the applicant should disclose fully and fairly all material facts known to him or her. The facts in the present case show that this is a clear case of the applicant having sat on its laurels and waited until the day of reckoning which was the day electricity was disconnected. This is why it chose not to disclose all the material facts of the case. I agree with the respondent's counsel that this is a case of self -created urgency by the applicant.

Mr *Biti* sought to argue that the agreement the parties entered into was *void ab initio* as it was contrary to the law which made the Zimbabwean dollar the sole legal tender at the time. He submitted that the agreement was therefore of no consequence and that as such the applicant had no obligation or reason to take any action since 2019 -2020 when the debt accrued. Whether or not the agreement was *void ab initio*, that is an issue for another day. The point that I make is that it was crucial and necessary for the applicant to disclose in its founding affidavit that it was levied on the basis of an agreement that the two parties entered into. After making this disclosure the applicant could then have gone on to explain why it had not paid the debt over the years and why it regarded the matter as urgent under the circumstances. The disclosure by the applicant of the existence of the special agreement between the parties would have created the platform for the parties to then argue whether or not the agreement was *void ab initio*. Looking at it, the issue of the validity of this agreement is what is central to the whole dispute between the parties. The applicant's failure to disclose the existence of the agreement negates the issue of urgency. A matter is not urgent when information which is central and crucial for its determination is not disclosed by the applicant.

In view of the foregoing, I will uphold the point *in limine* that the matter is not urgent. The respondent asked for costs on a higher scale but it did not seek to justify them. So, I will not grant them.

It is ordered that: -

1. The matter is struck off the roll.

2. The applicant shall pay the respondent's costs.

Tendai Biti Law, applicant's legal practitioners
Muvingi & Mugadza, respondent's legal practitioners