INTROWISE CATERING (PVT) LTD

Versus

RZM MUROWA (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 22 May & 2 December 2024

Trial cause by stated case

Mr.F. Mahere for plaintiff
Adv T.W. Nyamakura with *Mr.D. Matawu* for defendant

CHILIMBE J

BACKGROUND

[1] On the eve of trial, this matter converted into a stated case in terms of rule 4 (2) of the High Court (Commercial Division) Rules SI 123 of 2020 ("the Commercial Court Rules") and rule 52 of the High Court Rules SI 202 of 2021 ("the High Court Rules").

[2] The sole issue to be determined is the currency of settlement of the admitted quantum of US$452,218,62 between the ZWL or United States Dollars ("USD"). And a determination of that matter will depend on the interpretation of the parties` contract as read against the applicable regulatory framework.

THE DISPUTE

[3] The statement of agreed facts bears the following account; -plaintiff was hired to provide catering services at defendant`s mine and Harare sites. This agreement, reduced to a written memorandum dated 1 March 2015, ran on 12-month terms. The last cycle was represented by Addendum Number 6 to the main contract. I will revert to this contract in greater detail below. Defendant terminated the contract by written notice of 8 August 2023.Plaintiff`s final bill was rejected by defendant leading to institution of these proceedings.

[4] Plaintiff bases its claim on the following factors. Firstly, that the contract, by clause 2.1.1 stipulated that defendant would settle its obligations in USD.Secondly, plaintiff`s position is that consistent with provision, defendant always met the invoices presented to in in USD. Thirdly, plaintiff claimed that defendant was under a legal obligation to performance *in forma specifica*. As a fourth reason, plaintiff rejected defendant`s tender by insufficient as valid performance citing *Matukutire v Munatsi & Ors* HH 440-23.

THE ISSUES TO BE DETERMINED

[5] The single issue to be determined relates to whether the claim should be settled entirely in USD or with a local currency option. This issue requires analysis of the contract in question to ascertain the partes` arrangements over payment. Those arrangements will then be viewed against the regulatory framework and legal authorities to conclude the point.

[6] For that reason, the court`s task herein will follow that path to examine the contract and its clauses and address the outcome against the law as observed. This contractual analysis is based on the contrasting positions that as a matter of law, (a) the contractual payments were in USD (per plaintiff) and that same were in ZWL (defendant).

THE LEGAL ARGUMENTS

[7] As a starting point, both parties recognised this task to inquire into the contractual terms. Each entreated the court to recognise the principle in *Kundai Magodora & Ors v Care International* 2014 (1) ZLR 397 and uphold the parties` contract.

[8] Mr. *Mahere* for plaintiff persisted, in his written submissions, with the contention that the contractual payments were to rendered in USD. Counsel placed reliance, in that regard on this court`s decision in *International Finance Corporation v Itachi Plastics (Pvt) Ltd* HH 103-08 where the court per CHATUKUTA J (as she then was), observed at page 6, as follows on the question of performance *in forma specifica*; -

> "Performance must be *in forma specifica* unless a party has proved impossibility. (see *Lowveld Leather Products (Private) Limited v International Finance Corporation Limited & Anor* SC 114/2002, *Watergate (Private) Limited v Commercial Bank of Zimbabwe* SC. 78/05 and *Zimbabwe Development Bank v Zambezi Safari Lodges (Private) Limited & Ors* HH 95/2006. I am inclined to agree with *Mr. Mutero* that the defendants did not established impossibility of performance. As a result of the failure,

> it appears to me that there is no basis for this court to vary the terms of the agreement between the parties and order performance *per aequipollens"*.

[9] In counter-argument, defendant distinguished the pre 2019 authorities on in forma specifica referred to by plaintiff. The regulatory environment governing the monetary regime had vastly altered since 2019. According to Mr. *Nyamakura* for the defendant, "The law after February 2019, determines payment of debts based on them being either local or foreign obligations."

[10] Statutory Instrument 33/2019 and section 44C of the Reserve Bank Act [Chapter 22.15] became part of our law. He drew reliance from decisions such as including *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd* 2020 (1) ZLR 138 (S); *Breastplate Service (Pvt) Ltd v Cambria Africa PLC* SC 66 /20; and *Seedco (Pvt) Ltd v Credcorp Investments (Pvt) Ltd* HH 46-24 which distinguished foreign obligations from local ones.

[11] Counsel submitted that, as a starting point, section 7 (1) of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 3) (Statutory Instrument 185 of 2020) contemplated that domestic transactions would be conducted and settled in local currency. According to Mr. *Nyamakura*, the import of this provision was expressed as follows by the Supreme Court in *Falcon Gold v Taxing Officer & Anor* SC 25-24 at [16]; -

> "[16] The introduction in S.I. 85/2020 of an election to pay in the United States dollar equivalent of the chargeable RTGS dollar did not change the currency of account to United States dollars. The phrase "chargeable in Zimbabwe dollars" in SI 185/2020 portrays the pricing primacy or dominancy of the local currency over any foreign currency. This, therefore, casts the local currency as the dominant currency of account. The election to pay the United States dollars (instead of the RTGS dollars chargeable) that the applicant chose to discharge its obligation to counsel, did not bind the second respondent to reimburse it in United States dollars or their equivalent at the prevailing rate on the date of payment. Rather, it bound the respondent to 2 reimburse the fee in RTGS dollars or if it elected to do so the equivalent United States dollars encapsulated on the fee note, on the invoice date."

[12] Finally, counsel for the plaintiff pointed to what he contended was evidence on record confirming the contractual currency as ZWL. These were;

> <u>Firstly clause 9.4 of the contract; -</u>

"Unless otherwise indicated in Schedule D or an applicable SOW, all invoices, Prices, and payments will be stated and made in the currency of the country identified in the address for Company in Key Terms."

Secondly, an email dated 13 September 2023 from plaintiff to defendant; -

"As Murowa was a ZWD client, and all purchases were in ZWD I'm also not sure how this has now been converted to USD total'."

ANALYSIS OF THE CONTRACTUAL TERMS

[13] As a starting point, a golden thread runs through practically all the authorities cited by counsel from each side. The determination of the applicable law, or currency regime to apply commenced with an examination of the parties` relationship. Thus the courts will consider the parties` contract to establish the recorded consensus on payment obligations. From there, the relevant regulatory guidelines are then applied before a determination is made on the claim (to be paid in USD) and defence (to pay in ZWL).

[14] On that basis, I turn to the parties` contract to ascertain the payment and currency arrangements. As noted above, Mr. *Nyamakura* drew attention to the currency clause 9.4 in the contract. But this clause did not explicitly stipulate the specific currency in respect of which the contract services were to be paid. Instead, clause 9.4 cross referenced to other parts of the contract.

[15] Contractual interpretation is a holistic exercise. This being the observation in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2 where it was held as follows at [29]; -

"29. The relevant general principles are authoritatively explained by Lord Hodge in his judgment in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at paras 10 to 15. So far as relevant to the present case, they may be summarised as follows: (1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. (2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its

objective meaning. (3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."

[16] With this guidance in mind, I believe it would be useful to conduct a scan of the various provisions of the contract. The agreement comprised of 7 parts or "Contract Documents" being;

1. Key Terms,
2. General Conditions-Schedule A
3. Special Conditions-Schedule B
4. Good and Services Supply-Schedule C
5. Prices-Schedule D
6. Supplier Insurance-Schedule E
7. SOWS (statements of work)-Schedule F
8. Delivery Points.

[17] Clause 1 of Schedule A defined "price" plainly to mean the cost for goods or services supplied including fees, adjustments or discounts. This definition made no mention of currency. Under the same schedule came clause 9 subtitled "Prices and Payment Terms". This clause did not advert to currency but focussed more of the plaintiff (Supplier)`s expenses in providing the services.

[18] Essentially, the contract required plaintiff to procure at its own cost, the necessary provisions. These included beverages served variously but especially at the bars or functions The costs under this head are those referred to in the email quoted above.

[19] Next came Schedule D on Prices. This was a short, two-clause part. Clause 1.1 provided for payment to plaintiff on a management fee of US$10,000 per month. Clause 1.2 allowed plaintiff to submit rates for its personnel as well as actual cost of food items procured at a mark-up of 8%.

[20] It is common cause that these items were presented in schedules and invoices boldly marked "USD Invoice" or "This is a USD Invoice. Despite the procurement of these items-especially food-in ZWL, plaintiff was compensated in USD. Two documents constituted Schedule F; - a blank standard SOW and SOW (1) specific to the contract. The draft unpopulated SOW did not refer to currency. Nor did SOW (1) which provided eponymously for standards of work as well as performance and invoicing controls.

[21] Finally, I turn to the contract extension Addendum No. 6 to this main agreement executed on 15 December 2022. This extension stipulated, under "Prices" in clause 2.1, that the parties

had agreed on stated USD rates per meal/plate. Addendum No.6 also carried the following provision in clause 2.4.2; -

> "The parties agree that due to an exchange difference on previous payments made by the Company [defendant], the amount of US$10,000 (ten thousand United States Dollars) shall be deducted from the invoices submitted by the Supplier in seven (7) equal instalments beginning in the month of December 2022."

ANALYSIS OF THE CONTRACT AND ARGUMENTS

[22] As noted, the starting point is to ascertain the currency of payment in terms of the contract. In *Kundai Magodora & Ors v Care International*, (supra) PATEL JA (as he then was) held that a court could not disregard the explicit provisions of a contract. Clause 9.4 of the contract provided that; -

> "Unless otherwise indicated in Schedule D or an applicable SOW, all invoices, Prices, and payments will be stated and made in the currency of the country identified in the address for Company in Key Terms."

[23] Despite its cross references and formula-based prescription, this clause is straightforward. The country referred to is Zimbabwe. And "…. the currency of the country" cannot, in my view is the ZWL. In saying so, I do not believe it is necessary to split hairs under tortuous discourses on multi-currency. The USD is not a currency of Zimbabwe. This observation in turn invites the conclusion that the currency of the contract, apart from exceptions, was the ZWL. The plaintiff did not train its case nor argument in the alternative position.

[24] But equally clear is the exception in the currency clause 9.4 above. The Prices Schedule D or SOW could stipulate the invoicing, payment or charging in a currency other than that of the country or ZWL. It is important to note that the exemption is restricted to Schedule D or a particular SOW. I start with Schedule D which provided in clause 1.1 for payment of monthly management fees at US$10,000.

[25] Apart from this clause, Schedule D made no other provision for payment of contractual fees in USD.The rest of the matters dealt with involved formulas for raising invoices or charges. But they did not reference such activities to the USD.A question may be raised as to the import of the USD charges for food/meals stated in clause 2.1 of Addendum No.6. The response must draw from whether this clause falls under the exemption stipulated in clause 9.4. Apparently,

Addendum No.6 does not, because all exemptions shall issue from either Schedule D or a specific SOW. Secondly, Addendum No.6 is not to be construed as a SOW. And coming to the SOWs themselves, I found no reference to currency of payment as already stated above.

[26] And for completeness, clause 2.1 of Schedule A ranks the contractual parts in priority for interpretation purposes. Clause 9.4, the currency clause enjoys precedence on interpretation in the event of conflict with any other currency clause inconsistent with 9.4. Which brings me to the implication of the exempted US$10, 000.This amount represented only part of the fees due to plaintiff under the contract.

[27] As already discussed, the contract had a supply and recompense aspect, in addition to the services provided. The herein claim did not partition plaintiff's dues in manner that permits severance of the management fees of US$10,000 from the rest. Plaintiff also argued, without raising waiver or estoppel, that since it raised invoices in USD which defendant settled without protest, the contract was in USD.

[28] To address that issue we must revert to the basics of contractual interpretation. In the absence of a suggestion that the contract was novated, the parties` written memorandum must guide us. A reading of the contract terms suggests that payment by defendant in USD would not alter the currency clause 9.4. This is because Schedule A provides as follows on waiver in clause 24.6; -

> "Either party`s waiver of any breach, of failure to enforce any term or condition of the Contract, will not affect, limit or waive such party`s right to enforce and compel strict compliance with each and every term or condition of the Contract."

DISPOSITION

[29] A reading of the contract suggests that the contract pricing was fixed in local currency. The contract also permitted the raising and payment of fees in alternate currencies. But only under the circumstances prescribed in Schedule D. Apart from the management fees set at US$10,000 per month in Schedule D, no other fees or payments were payable in USD.

[30] And in the absence of divisibility, the portion on management fees cannot be determined. Which means that plaintiff falls on the first hurdle of proving its right to be paid in USD under the contract. This finding obviates the need to address the question of whether payment in USD would have been competent given the currently regulatory framework. It also renders it

unnecessary to inquire into the tender because plaintiff did not persist with it. For that reason, the admitted claim will be allowed based on an option to settle in local currency.

[31] In closing I may mention that plaintiff`s protestation that payment in local currency amounted to unfairness provokes thought. To begin with, it appears that plaintiff benefitted from currency exchange movement as per clause of the Addendum No.6.It was made to disgorge a total amount of US$70,000. This ushers in the remarks by CHINHENGO J in *Muzeya NO* v *Marais & Anor* 2004 (1) ZLR 326 (H), at 338A-B, where he stated that; -

> "Therefore, a debt sounding in money must be paid in terms of the nominal value of the currency irrespective of any fluctuations in its purchasing power. In any event, I think the principle of nominalism is even-handed because it places the risk of depreciation of the currency on the creditor and that of appreciation on the debtor."

[32] On the question of costs, I remain unpersuaded by the spirited submissions from each side on reciprocal imposition of punitive costs. The reality of Zimbabwe`s economic adversities as a general observation, and currency turbulence in particular, have generated an equally tumultuous environment in business.

[33] The resultant questions over legal rights and commercial priorities require a sober-minded if not patient approach to address. I find neither mischief nor frivolity in either side`s case. And with each side having been met with partial success, I find it just and equitable that each party bears its own costs.

Accordingly, it is ordered as follows; -THAT

1. Defendant be and is ordered to pay plaintiff the sum of US$452,218,62 plus interest thereon at the prescribed rate from 25 August 2023 to the date of payment in full, with an option to pay the amount in question in local currency at the applicable official rate ruling on the date of payment.
2. That each party to bear its own costs.

Gill, Godlonton & Gerrans-plaintiff`s legal practitioners
Coghlan, Welsh & Guest-defendant`s legal practitioners.

[CHILIMBE____2/12/24]