DISTRIBUTABLE 38

ZIMBABWE POWER COMPANY (PRIVATE) LIMITED
v
INTRATREK ZIMBABWE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA AND BERE JA
HARARE: OCTOBER 14 2019 & MAY 10 2021

T Zhuwarara with *T D Tivadar,* for the Applicant.

A de Bourbon with *L Uriri,* for the Respondent.

BHUNU JA: Before us is an appeal against the entire judgment of the High Court upholding the Respondent's application for a declaration of validity of the parties' contract of service coupled with an order for specific performance.

It is common knowledge that this country is facing a critical shortage of electricity, a vital necessity for the socio-economic wellbeing of the citizenry and the nation at large. The two parties who turned contractual protagonists were entrusted with improving the availability of this scarce resource in Gwanda. They have however been embroiled in perpetual contractual disputes for the past five or so years without any meaningful progress towards achieving the intended objective. It is therefore of utmost importance that their contractual disputes must be resolved expeditiously for the common good.

THE PARTIES

Both parties are dully incorporated companies registered as such in terms of the laws of Zimbabwe. The appellant is a State owned legal entity and a subsidiary of ZESA Holdings (PVT) LTD. Its mandate is to own, operate and maintain electricity generating equipment and plants on behalf of its principal. On the other hand, the respondent is a privately owned engineering company in the business of installing solar electricity generating equipment and plants.

RESPONDENT'S PRELIMINARY OBJECTION

On 11 October 2019 relying on the dicta in *Cohen v Cohen*[1] the respondent filed notice of a preliminary objection to this appeal arguing that it is improperly before the court as the appellant has already complied with the impugned judgment. That preliminary objection has since been withdrawn and is of no moment.

FACTUAL BACKGROUND

Sometime in 2013 the Appellant through the Procurement Regulatory Authority of Zimbabwe (PRAZ) floated a tender for the construction of 3 x 100MW Photovoltaic solar plants at Gwanda, Insukamini and Munyati. The Respondent won the tender to construct one of the solar power stations at Gwanda.

Following the award of the tender to the Respondent, the parties concluded an engineering, procurement and construction contract on 23 October 2015. The contractual document designated the parties as Employer and Contractor respectively. The agreed condition precedent were couched under clause 5 in the following terms:

[1] . 1980 ZLR 286

"This contract shall otherwise commence (the "Commencement Date") in full force and effect on the date when the following conditions precedent (the "Conditions Precedent") are satisfied:

(a) the finance agreements have been signed, come into force and effect and all of the conditions to the first drawdown of funds (other than in relation to any condition which relate solely to the effectiveness of the Contract) have been satisfied.

(b) the Advance Payment Demand Guarantee is provided to the Employer by the Contractor in accordance with Sub-Clause 14.2;

(c) the Contractor receives the amount of the advance payment in accordance with Sub-Clause 14.2;

(d) the performance security is provided to the Employer by the Contractor in accordance with Sub-Clause 14.2;

(e) the completion of feasibility studies with bankable findings alignable to the implementation of the project;

(f) Due Diligence exercise by the Employer;

(g) Production of the Environmental impact Assessment (EIA) Certificate;

(h) Acquisition of land for the project by the Employer as informed by the feasibility studies;

(i) Corporate authorisations having been obtained by both parties.

If all or any of the Conditions Precedent have not been satisfied on or before the date being twenty-four (24) months after the date of signature of the Contract by both Parties (the "CP Satisfaction period"), the Parties shall meet to review progress towards satisfaction of such Conditions Precedent and the Employer may in its sole discretion on or at any time prior to that date being 24 months after the date of the signature of this agreement by both Parties elect to extend the CP Satisfaction period by a further 6 months by giving notice thereof to the Contractor. If the Conditions Precedent are not satisfied on or before the expiry of the CP Satisfaction Period (as may have been extended), either party may elect to terminate the Contract by notice to the other provided that if a party is causing a delay to the satisfaction of any of the Conditions Precedents as at the date on which it seeks to terminate, such party shall not be entitled to exercise such right of termination while such cause of delay subsists.

In the event of any such termination, then, without prejudice to the Parties' rights, obligations and liabilities under and in respect of the provisions which come into force on the date of the execution of this agreement (as provided for in the first sentence of this clause 5), neither Party shall have any liabilities to the other arising under or in connection with such termination under or in connection with the contract (including this agreement)".

Apart from the Conditions Precedent the parties also agreed under clause 8 of the contract that the respondent shall carry out Pre-commencement Works as set out in Schedule 11 of the contract. The clause provides as follows;

> "Prior to the contract commencement Date, the Employer and the Contractor may, subject to availability of funds, agree (to) undertake and complete all, or part, of the initial activities following the Contract Effective Date as described, and under the terms set out, in Schedule (11) to this agreement (the **"Pre Commencement Activities")**. The Contractor shall be responsible for any liabilities whatsoever which may arise in the course of executing the initial Activities referred to in Schedule (11) in the ordinary course of Contract. The Contractor shall contribute up to $1 000 000 (one million United States Dollars) towards the execution of the Pre Commencement Activities. There shall be no increase in the Contract price associated with the performance of Pre Commencement Activities". (*sic*)

It is common cause that the respondent failed to meet the prescribed Conditions Precedent under clause 5 (a) – (i} of the contract. The failure to meet its contractual obligations culminated in the appellant in its sole discretion extending the performance period by a further 6 Months to 23 April 2018 in terms of clause 5 (i) of the contract. Despite the extension, the Conditions Precedent remain unfulfilled to date. The respondent's failure to fulfil its contractual obligations triggered a plethora of accusations and counter accusations as to who was to blame for the failure to fulfil the initial contractual obligations to kick-start the project.

On 4 April 2018 the appellant wrote to the respondent giving notice of its intention not to extend the contract beyond 23 April 2018 should the respondent remain in breach of contract by that date. It then alluded to its intention to resort to the contractual remedies provided for in the contract. The letter reads in Part:

> "ZPC exercised its sole discretion to extend the conditions Precedent Satisfaction Date from 23 October 2017 to 23 April 2018. In terms of clause 5 of the EPC Contract Agreement All the Conditions Precedent set out in clause 5 (a) – (i) should have been satisfied on or before the expiry of the CP Satisfaction Period (as may have been extended) i.e. by **23 April 2018.**

> We note that to date, certain conditions Precedent to the Commencement of the Contract have not yet been satisfied. The EPC Contract Agreement does not allow the Employer to further extend the CP Satisfaction Period should these remain unsatisfied by the extended date of 23 April 2018. By copy of this letter you are hereby notified that ZPC shall not extent the CT Satisfaction date beyond 23 April 2018.
>
> Further, ZPC shall stand guided by the provisions of the Contract in determining the consequences of the non-renewal of the CP Satisfaction Date, should the CPs remain unsatisfied by 23 April 2018".

On 9 April 2018 the respondent replied to the appellant's letter objecting to the notice on the basis that it was null and void on account that a dispute which had a bearing on the period of performance had been referred to the Arbitrator. The running of the CP Satisfaction period was therefore suspended until the outcome of the pending arbitration proceedings. It denied responsibility for the delay. It averred that both parties had continued to perform their respective obligations until 8 January 2018 when the respondent declared a dispute that was then referred to the arbitrator for settlement.

Despite the respondent's protestations, the appellant was adamant that the parties' contract had lapsed by operation of law owing to the respondent's non-fulfilment of the conditions precedent within the prescribed time limit. In consequence thereof, it demanded that the respondent vacate the project site within 14 days. In addition, the respondent demanded a refund of all the advance payments.

In a desperate bid to pre-empt the appellant's threatened termination of the contract and claim of a refund of all monies advanced, the appellant instituted proceedings in the Court *a quo* by notice of motion on 6 September 2018 seeking the following relief:

"(a) that the respondent (ZPC) be and is hereby ordered to pay the applicant all sums due to the Applicant's sub-contractors in terms of addendum No. 1 to the ECP contract.

(b) That the applicant be and is hereby ordered to complete the pre-commencement works specified in **Clause 8** to the EPC Contract Agreement as read with schedule 11 of the EPC Contract within a period of **180 days** from the date of this order.

(c) That the Conditions Precedent satisfaction period be extended by a period of 24 months to enable the Respondent to perform its contractual obligations.

In the alternative to the above relief sought:

(d) Respondent be and is hereby ordered to pay the Claimant damages in the sum of US$25,000,000 (Twenty-Five million United States dollars) arising from the prejudice suffered by the applicant consequent to the respondent's repudiation and breach of the terms of the EPC contract.

In its founding affidavit deposed to by its Managing Director Wicknel Chivhayo, the respondent averred that the application for the above relief sought was triggered by the appellant's claim that the parties' contract had expired and demand for eviction within 14 days of the notice. At the hearing before the judge *a quo* the appellant was adamant that the contract had lapsed because of the respondent's breach of contract in failing to fulfil the agreed Conditions Precedent.

At that hearing in the court *a quo* the appellant took the preliminary point was it a point *in limine* or a send of appeal that the respondent used the wrong procedure in approaching the court *a quo* by way of application instead of summons proceedings in circumstances where there are numerous material disputes of facts.

The law relating to when one ought to proceed by application or motion proceedings instead of summons or action proceedings is a well-known beaten path. Consequently, the learned judge *a quo* was alive to the necessary legal considerations for determining that issue. He correctly cited the law as articulated in the well-known case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[2] where MARRAY AJP properly articulated the applicable law saying:

> "It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated *infra*), the court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under r 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting pleadings, or with a direction that pleadings are to be filed. Or **the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of any ascertainment, but in the hope of inducing the court to apply r 9 to what is essentially the subject of an ordinary trial action".** (My emphasis).

The learned judge again correctly cited the appropriate case law in defining the meaning and import of a material dispute of fact arising during the course of application proceedings. To this end he cited the *dictum* in *Super Plant Investment (Pvt) Ltd v Chidavaenzi*[3]. In that case, MAKARAU J as she then was observed that:

> "A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

The purpose and object of motion proceedings is to quickly dispose of matters where there are no material disputes of facts or where such disputes can easily be resolved on

[2] 1949 (30 SA 1155 T at 1162
[3] HH 92/09

the papers without *viva voce* evidence. Although the court may allow evidence to be led under rule 239 (b) this should be limited to clarifying simple issues without turning motion proceedings into a full-fledged trial. Litigants should take heed of the warning sounded by MARRAY AJP in *Room Hire Co (Pty) Ltd (supra)*. It is risky for litigants to commence proceedings fraught with material disputes of fact in the hope that they may be converted to trial proceedings if the court finds that they cannot be determined on the papers. The court has however a wide discretion when confronted with an application fraught with intractable material disputes of facts. The danger is that in the exercise of its discretion the court may dismiss the application with costs[4]. The learned authors Herbstein and Winsen state that:

> "The application may be dismissed with costs when the applicant should have realised when launching the application that a serious dispute of fact was bound to develop".

The appellant's grounds of appeal raise pertinent material disputes of facts which were placed before the court *a quo* for determination. It is prudent to restate the grounds of appeal for clarity's sake:

GROUNDS OF APPEAL

"1. The Court *a quo* erred by holding that there were no material disputes of fact between the parties and that could appropriately proceed under the court application procedure.

2. The court *a quo* erred in failing to deal with the issue that the respondent did not disclose the entirety of the parties' contract, thereby preventing the court from adjudicating over the same.

3. The court *a quo* erred in its construction of clause 5 of the parties' contract relating to the fulfilment (or otherwise) of the conditions precedent.

4. The court *a quo* erred in holding that the appellant tacitly waived express terms of the contract relating to the fulfilment of the conditions precedent.

[4] Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa* Fifth Edition Vol. 1 p 40

5. The court *a quo* (erred) in holding that the respondent was entitled to fictional fulfilment of the conditions precedent.

6. The court *a quo* erred in its construction of the contractual obligations relating to the respondent's advance payment guarantee.

7. The court *a quo* erred in holding that appellant frustrated respondent's ability to fulfil the conditions precedent.

8. The court *a quo's* order requiring the parties to meet as provided for in clause 5 of the contract contradicted its findings in relation to the fulfilment whether by waiver or otherwise of the conditions precedent.

9. The court *a quo* erred in ordering specific performance of the contract when the of the contract when the respondent had not performed/had breached its obligation in terms of the pre-commencement works contract."

A reading of the impugned judgment shows that indeed the court *a quo* made the factual findings complained of in the grounds of appeal without hearing *viva voce* evidence. Undoubtedly these were serious intractable material disputes of fact incapable of resolution without *viva voce* evidence. It is therefore plain that the case at hand was riddled with serious material disputes of facts that could only be resolved through *viva voce* evidence. There are allegations and counter factual allegations as to who is to blame for the alleged breach of contract. There is also a dispute as to whether or not the contract has since expired due to the effluxion of time. The factual issues of waiver and non-disclosure were raised and hotly contested such that they could not be resolved without *viva voce* evidence.

It is trite that the respondent's claim for damages in para (d) of its claim in the court a quo rendered the claim unsuited for disposal by application proceedings.

DISPOSITION

Without any further ado, it is clear that this was a case incapable of resolution without going to trial to determine the merits on the basis of *viva voce* evidence. The respondent's endeavour to avoid trial in the face of glaring material disputes of facts gives the unmistaken impression that it had something to hide that could be unearthed in the course of trial proceedings. Considering that the respondent was represented by a competent firm of legal practitioners, it is inconceivable and not in the least probable that it was ignorant of the proper procedure to adopt in the circumstances of this case.

We therefore come to the unanimous conclusion that the respondent deliberately chose the wrong procedure to shield itself from the glare of a full-fledged trial to wood wink the court *a quo* and it succeeded. The court accordingly sustains the appellant's objection *in limine*. That being the case, the impugned judgment of the court *a quo* cannot stand. The respondent took a dive into the dark and deliberately threw all caution sounded by precedent to the wind. This therefore is a proper case where the court *a quo* should have expressed its displeasure by dismissing the application with costs.

The respondent has asked for punitive costs at the higher scale. Having carefully considered the request we find that this is a borderline case and let the respondent escape with a severe warning.

It is accordingly ordered that:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

   "The application be and is hereby dismissed with costs".

GWAUNZA DCJ I agree

BERE JA No longer in office

Wintertons, appellant's legal practitioners

Manase and Manase, respondent's legal practitioners