Judgment No. HB 98/2002
Case No. HC 814/2002

ARTCRAFT FURNITURE MANUFACTURING

versus

TOKOZANI (PVT) LTD

and

RAJESH NARARINDAS HASSAMAL

and

SEAN WILLIAM JAMES REDDING

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 12 JULY & 15 AUGUST 2002

Miss P Dube for the applicant
N Ndlovu for the respondent

Judgment

CHEDA J: On 21 May 2001 plaintiff (hereinafter referred to as "applicant") entered into an agreement of sale with 1st, 2nd and 3rd defendants (hereinafter referred to as 1st, 2nd and 3rd respondents respectively). First Respondent agreed to purchase certain assets and stock from applicant. One of the terms of the agreement was that 1st respondent register a Notorial General Covering Bond over the assets sold within 30 days of the date of sale. The said bond was to be in favour of applicant. The bond was only registered on 30 January 2002. It was clear

that registration was done outside the agreed time. There is therefore a *prima facie* breach of one of the terms of the agreement of sale. As a result of this perceived breach by 1st respondent applicant issued summons against 1st, 2nd and 3rd respondents out of this court on 5 February 2002 for the sum of $1 824 586,30 which was however amended to the sum of $1 562 081,69 as applicant conceded that it

owed respondents the sum of $854 585,00, therefore applicant's claim is for:

(a) $1 562 081,69 and
(b) interest thereto at the rate of 45% per annum from 1 February 2002 to date of full payment.

Paragraph 1.4 of the contract reads:

"The purchasers shall issue instruction to Lazarus and Sarif Legal Practitioners of Bulawayo to register a Notarial General Covering Bond over the assets(annexure "A") for the value of $4 200 000,00 (four million two hundred dollars) in favour of the sellers to be lodged within 30 days from the effective date of sale."

The effective date of sale is 31 May 2001 as stipulated by paragraph 5.1 of the said agreement. In response to the summons issued out of this court, 1st, 2nd and 3rd respondents caused an appearance to defend to be entered through their legal practitioner of record on 11 February 2002. Applicant applied for summary judgment on 20 March 2002 to which respondents opposed. Mr Neville Rohan Buffee a Director of applicant in his founding affidavit for the summary judgment avers that respondent were in breach of the agreement by virtue of their failure to register a Notarial General Covering Bond within 30 days as agreed.

Clause 6 is a breach clause and it reads:

"In the event that the purchasers fail to make any payment provided for herein on due date or otherwise committing a breach of any of the conditions hereof, and failing to make such payment or remedy such a breach within 14 days of written notice, in addition and without prejudice to any other rights available at law.

6.1 To claim immediate payment of the balance of the purchase price together with any other amounts outstanding in terms of the agreement hereof; or
6.2 ...
6.3 ..."

It is on the basis of clause 6.1 that applicant now prays that summary judgment be granted in its favour. Respondents oppose the application on the basis that:

(a) they are not in breach as applicant only delivered the necessary documents for the registration of the bond in January 2002.
(b) applicant has withheld a lot of money which is necessary for the transfer fees for the registration of the bond.
(c) that applicant has waived its right to cancel the agreement as it continued to accept monthly rentals for the premises and the purchase price from the time it alleges that the breach took place.
(d) that summons was issued for other reasons because they were issued after the bond had been registered.
(e) that there was a verbal agreement whereby 1st respondent agreed to sell its products through applicant.

It is pertinent to note that clause 6.6 of the said agreement stipulates that:

> "In the event that there should be any dispute concerning the interpretation or implementation of this agreement excluding the purchaser's obligation to make payment such dispute shall be referred to the senior partner for the time being of Lazarus and Sarif, Mr Charles Lazarus who shall resolve the dispute in accordance with the principles of equity and fair play and whose written determination shall be final and binding incapable of appeal."

At the hearing respondents raised a point *in limine* being that applicant was not properly before the court as they were supposed to exhaust all the remedies provided for in the agreement of sale. They also argued that the arbitration clause specifically states that the parties should bring this matter before an arbitrator in the event of a dispute regarding the interpretation or implementation of this agreement. The question to be asked is whether the present dispute falls within the ambit of this court or an arbitrator. *Miss Dube* for applicant argued that this dispute is not for arbitration as it does not deal with implementation but payment which is specifically excluded by clause 6.6. The Chambers Concise Dictionary 1988 defines implementation as "to give effect to; to fulfill or perform". Arbitration is now an integral part of our legal procedures for dispute resolution. Arbitration is defined by Butler and Finsen, *Arbitration in SA Law & Practice* Juta & Co Cape Town 1993 at page 1 as:

> "Arbitration is a procedure whereby the parties refer that dispute to a third party, known as an arbitrator for a final decision after the arbitrator has first impartially received and considered evidence and submissions from the parties. The reference to the arbitrator takes place pursuant to an agreement between the parties the arbitrator is resolving the dispute, is not an ordinary court of law but a person chosen by the parties."

Pursuant to this notion, our legislature passed the Arbitration Act Chapter 7:02 giving effect to the resolution of some disputes by arbitration. In my view, therefore there are two essential elements in determining whether or not a dispute qualifies for arbitration, namely that the parties mutually agreed that in the event of a dispute such dispute should be referred to arbitration and that a dispute is in existence.

In the present matter it is apparent that these two elements are present, what, however, is disputed is whether the dispute in question, that is, the registration of the bond is excluded from being referred to the arbitrator. The major question which falls for determinations is whether or not the word "implementation" in the agreement refers to the failure or otherwise of the registration of the bond. The definition given *supra* refers to giving effect, fulfillment or performance of the said agreement of sale.

Miss Dube argues that this matter is not covered by clause 6.6 as it deals with payment only. However *Mr Ndlovu* for respondents while admitting that indeed there is a balance outstanding by respondent he goes further to argue that the whole matter has to take a totally different dimension by virtue of the fact that applicant has unlawfully withheld an amount of $854 585 and that the said breach of the agreement of sale was occasioned by their failure to perform their part of the contract which impeded the timeous registration of the bond. An additional factor is an allegation of a subsequent verbal agreement regarding the sale of 1st respondent products through applicant. These allegations can not certainly be resolved through the papers.

In my view there is a dispute of fact between the parties. In as much as the arbitration clause excludes reference to the arbitration, the other part of the said clause deals with a dispute arising out of the implementation or interpretations of the agreement. The question is whether the dispute in question is to do with the implementation or interpretation of the agreement of sale or is purely to deal with payment. In my view, the dispute would certainly have everything to do with payment

were it not for the self-help action by applicant in withholding what was otherwise due to respondents. What applicant did was not agreed to by the the respondents and as such it was a unilateral decision in a mutual bilateral contract. This conduct by applicant on its own, unfortunately introduces a major element in the contract being the delay of the registration of the bond and this renders the implementation of the agreement incapable of performance. It is this conduct which raises a dispute in this matter. Much has been said about the meaning of interpretation and implementation. In deciding what the word implementation means, I am of the view that regard must be had of the intention of the parties.

A contract of this nature requires performance, therefore ordinarily, should either party fail to perform the other should be able to institute legal proceedings to assert his legal rights. In the present case the parties specifically agreed that in the event of a dispute in relation to the implementation, such dispute should be referred to arbitration. The word implementation, in my opinion should be given its ordinary and everyday meaning bearing in mind the intention of the parties in commercial transactions. In *Hillas & Co Ltd* v *Arcos Ltd* 147 LTR 503 at 514 LORD WRIGHT remarked;

> "Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is ordinarily the duty of the court to constitute such documents fairly and broadly without being too astute or subtle in finding defects."

I am not in agreement with *Miss Dube* that the word implementation means anything else other than performance which performance is now doubtful for different reasons as held by the parties. This document was drafted by the parties with a clear intention and I am uncomfortable to strictly interpret the said clause with such restriction so as to defeat the parties' intention.

In *Union Governments* v *Smith* 1935 AD 232 His Lordship WESSELS CJ had this to say;

> "...We must look at the whole document, and if from other parts of the document itself it appears that the parties did not intend the literal meaning to convey their intention, or if to give them a literal meaning would result in an absurdity, then we must reject the literal meaning and give the words the meaning which the parties manifestly intended."

This *dicta* goes to show the extent the court go to give effect to the intention of the parties. In the present case the parties' intention was to exclude the issue of payment but I doubt if they intended to so exclude it where the other part would want to use it where itself is *prima facie* culpable.

I find that there is a dispute which dispute prevents the implementation of the agreement of sale. This dispute falls within the authority of the duly appointed arbitrator being Mr Charles Lazarus of Lazarus and Sarif.

I therefore find that applicant's interpretation of the meaning of the arbitration clause is unduly restrictive being not a true reflection of the intention of the parties.

I am accordingly satisfied that the point raised *in limine* is valid and there is therefore no need for me to consider the merits of the applicant's application. The application is therefore dismissed with costs.

Messrs Coghlan & Welsh applicant's legal practitioners
Messrs Lazarus & Sarif respondents' legal practitioners