ZIMBABWE NATIONAL WATER AUTHORITY

Versus

KADOMA MUNICIPALITY

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 26 OCTOBER 2012 & 31 JANUARY 2013

N. Ndlovu for the applicant
S. Murambasvina for the respondent

Judgment

NDOU J: This is an application for summary judgment which is opposed by the respondent. The background facts are the following.

On 6 May 2004 the parties entered into a written agreement for the purchase and sale of rate water for a period of ten years. It was a term of the agreement that billing was per allocation as opposed to per consumption in that respondent undertook to pay for 15 000 mega litres of raw water per year regardless of whether it was the same or not. Respondent failed to pay applicant US$547 627,81 which was due as at the end of September 2011. The parties met on 17 October 2011 and agreed on a compromised figure of US$167 114,22 as being due. The respondent failed to pay up the acknowledged compromised debt prompting applicant to issue out summons under case number HC 1378/12 claiming for the said compromised sum together with interest at the rate of 5% per annum and collection commission. The applicant also sought an order for costs on a higher scale. The respondent entered appearance to defend.

Its plea is basically that billing per allocation is repugnant to public policy and it should pay for consumed water less what had been paid since October 2011. The applicant then maintained the present application for summary judgment under case number HC 2463/12. The respondent opposed the application in line with its said plea. The issue is whether it is against public policy for the applicant to bill a local authority per allocation as opposed to per consumption. It is trite law that a contract or term may be declared contrary to public policy if it is clearly inimical to the interests of the community, or it is contrary to law or morality or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive – *Botha* v *Finanscredit (Pvt) Ltd* 1989 (3) SA 773 (A) at 782 I – 783 C; *Olsen* v *Standaloft* 1983 (1) ZLR 67 (SC) and *Karimazondo* v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (SC). *In casu*, the respondent is a local authority i.e. a municipality contracting on behalf of Kadoma rate payers and residents who actually pay for the water in issue. Respondent is not a profit making organization but a public entity. The question is whether asking for respondent's residents and rate payers to pay for no water (value) received is

inimical to the interests of the said community. Is the agreement between the parties not contrary to the law or morality? Is such an agreement unconscionable? Is it not unduly harsh or oppressive? It is trite that summary judgment should not be granted when any real difficulty as to a matter of law arises – *Shingadia* v *Shingadia* 1966 (3) SA 24 (R) at 25F – 26A. Summary judgment proceedings are inappropriate for dealing with clearly arguable questions of law that should properly be dealt with on exception – *Hollandia Reinsurance Co Ltd* v *Nedcor Bank Ltd* 1993 (3) SA 574 (W). *In casu*, there are clearly arguable questions of law raised by the respondent and also in light of legislation governing fairness of consumer contracts in our jurisdiction, summary judgment is incompetent.

Accordingly, the application for summary judgment is dismissed with costs.

Cheda & Partners, applicant's legal practitioners
Jarvis, *Palframan c/o Hwalima*, *Moyo & Associates*, respondent's legal practitioners