1. DOBROCK HOLDINGS (PVT) LTD APPLICANT
versus
TURNER AND SONS (PVT) LTD 1ST RESPONDENT
and
ANTHONY S. TURNER 2ND RESPONDENT
and
MARTIN E. KING 3RD RESPONDENT

2. TURNER AND SONS (PVT) LTD
APPLICANT
versus
ZAMBEZI PADDLE STEAMER (PVT) LTD 1ST RESPONDENT
and
DOBROCK (PVT) LTD 2ND RESPONDENT

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 13 July, 1 November and
6 December 2006

Opposed Application

Mr *A.P. de Bourbon SC*, for applicant in Case No. HC 5186/05 and
for respondent in Case No. HC 5264/05
Mrs *J.Wood*, for respondents in Case No. HC 5186 and
for applicant in HC 5264/05

KUDYA J: An order for the consolidation of these two matters was granted by UCHENA J, by consent with no order as to costs on 2 June 2006 for hearing before me on 7 June 2006 in Case Number 3157/06. The first application, Case No. HC 5186/05, concerns an order for specific performance while the second one Case No. 5264/05 seeks an order for the provisional liquidation of Zambezi Paddle Steamer (Pvt) Ltd (hereinafter called ZPS).

On 7 June 2006, at the request of the parties, I postponed the hearing to 13 July 2006. When the hearing resumed Mrs *Wood* for Turner and Sons

applied for the forced recusal of Mr *de Bourbon* for Dobrocks (Pvt) Ltd on the basis that he had been an arbitrator between these parties in 1994. She referred to *Pertisilis v Calaterra & Anor* 1999 (1) ZLR 70(H) as authority for the proposition that the legal practitioner who acted for a former client is precluded from representing a different client in circumstances where a conflict of interest is likely to arise between the former and present client. SMITH J set out the basis of the rule at 74C as being that:-

> "A legal practitioner who represents the adversary of his own client in litigation would clearly be violating his or her duty of loyalty and the common law rules against conflict of interest."

He proceeded to survey American, English, South Africa and Zimbabwean decided cases on the point at pages 74C – 77 F. While he held that neither a partner nor his employee could represent an opponent of a former client in order to fulfill the adage that justice must not only be done but that it must manifestly and undoubtedly be seen to be done, he nevertheless permitted a partner to represent the opponent on the basis that there was no allegation that the other partner had acquired information from the papers in the possession of his firm which could be used to the former client's disadvantage.

Mrs *Wood* contended that justice will not be seen to be done if Mr *de Bourbon* was allowed to represent Dobrock especially on the liquidation case where Turner and Sons allege a deadlock has manifested itself between the joint shareholders, a fact found by Mr *de Bourbon* as arbitrator to exist in his 25 June 1994 ruling. She further foresaw a need to call Mr *de Bourbon* on the deadlock issue in the liquidation case.

Mr *de Bourbon* countered by contending that he did not represent either Dobrock or Turner and Sons but acted in a quasi-judicial capacity. He knew of no law which debarred him from representing either party as long as he had not possessed confidential information which could be used to the detriment of his client's adversary. He referred to *Benmac Manufacturing (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52(H). In that case,

Mr *de Bourbon* accepted a general retainer from Angelique Enterprises in a matter in which that company was involved in a dispute with Albco. He was at that time already seized with a retainer for Benmac Manufacturing in its contest with Angelique Enterprises, *supra*. He had accepted the retainer in the matter against Albco after assurance from his instructing attorney that there would be no conflict of interest. It was accepted in that case by that attorney that he had not come into contact with any confidential information which would prejudice Angelique Enterprises in its contest with Benmac. The Law Society and two other counsel had absolved him of any impropriety but the managing director of Angelique Enterprise Mr Holland was not satisfied with their findings and advise.

REYNOLDS J held that Angelique Enterprises had not shown that Mr *de Bourbon* had in fact become acquainted with information that could be used to its detriment which would result in real mischief and real prejudice if he continued to act for Benmac Manufacturing. He did express his reservation on a legal practitioner acting for and against his client in the same or different matters.

Mr *de Bourbon* submitted that he had not acquired any information that he could possibly utilize to the prejudice of Turner and Sons and that his impartiality in 1994 had not been impugned by any of the parties.

I went through the arbitral award. It concerned and dealt with the share of each joint shareholder in the extra costs, which were above the original cost of construction of the large commercial houseboat which ZPS was to own. Turner and Sons was not able to show what information Mr *de Bourbon* accessed which could prejudice its present defence and claim. If anything I was satisfied that the arbitral award stands on its own and there would be no need to call the arbitrator to testify on it. I accordingly dismissed the application for the forced withdrawal of Dobrock's counsel.

I also postponed the hearing *sine die* and granted by consent authority to Turner and Sons to file a further affidavit in response to Dobrock's

supplementary affidavit. I further reserved the question of costs in the provisional liquidation claim to which these additional affidavits pertained.

I eventually, set down the matter for hearing on 1 November 2006. I directed that the parties argue the specific performance case first and thereafter proceed to argue the liquidation case.

On 12 October 2005, Dobrock filed the court application for specific performance against Turner and Sons and two others. It sought the following order:-

1. That the respondents jointly as well as severally, the one paying the other to be absolved shall forthwith undertake all that is necessary and required, including making all payments and completion and signing all documents required in order to procure transfer without delay by first respondent to applicant of first respondent's entire shareholding in Zambezi Paddle Steamer (Pvt) Ltd.
2. That immediately upon registration of transfer in the share register of ZPS applicant shall pay to first respondent the balance of the purchase price for the said shares such balance being the sum of $138 million.
3. That the respondents jointly as well as severally, the one paying the other to be absolved, shall pay the costs of this application on the scale of legal practitioner and own client.

The application was served on the three respondents on 13 October 2005 (see Peter Dobson's opposing affidavit of 9 November 2005 for which this averment was accepted by Antony Turner on 2 December 2005). The three respondents filed their opposition papers on 27 October 2005 and prayed for the dismissal of the applicant's case with costs on the higher scale and made reference to the liquidation claim, case number HC 5264/2005.

Case number 5264/05 is a court application brought on 17 October 2005 by Turner and Sons (Pvt) Ltd against ZPS and Dobrock. It prayed for

the winding up of ZPS and that a liquidator be appointed in the following terms:-

1. That first respondent Zimbabwe Paddle Steamers (Pvt) Ltd be provisionally wound up pending the granting of an order in terms of paragraph 3 hereof or the discharge of this order.
2. That Mrs Theresa Grimmel of KPMG Chartered Accountants, Mutual Gardens 100, The Chase, Emerald Hill, Harare be appointed as provisional liquidator of first respondent company with the powers set out in section 221 of the Act.
3. Any interested party appear before this court sitting at Harare on (a date sixty days from the date of the order) to show cause why an order should not be made placing first respondent's company in liquidation and order that the costs of these proceedings all be costs of the liquidation.
4. That this order shall be published once in the Government Gazette and once in the Herald Newspaper. Publication shall be in the short form annexed to this order.
5. Any person intending to oppose or support the application on the return day of this order shall:-
    5.1. Give due notice to the applicant at *Messrs Byron Venturas & Partners*, 2nd Floor Tanganyika House, Corner 3rd Street/Kwame Nkrumah Avenue, Harare.
    5.2. Serve on the applicant at the address given above a copy of any affidavit, which he files with the Registrar of the High Court.

The application for provisional liquidation was served on the respondents on 17 October 2005, who entered opposition on 31 October 2005 and filed on that day their opposing affidavit by fascimile. The actual opposing affidavit was filed on 9 November 2005.

These two applications were consolidated on the bases that the principal parties were the same and that the fundamental issue in each matter related to the ownership and management control of ZPS.

The pleadings in these consolidated matters are voluminous. The founding, opposing, answering and supplementary affidavits are reinforced by an assortment of attachments which consists of the memorandum of association of ZPS, electronic mail between the parties and other documents raised by various people who worked for the parties in various capacities. I have read all these documents. It is apparent from these documents that there are areas in which the parties agree and others where they are at variance.

It is appropriate that I first deal with the facts as I have determined them to be from the wealth of information that is set out in the pleadings in both these cases.

The preliminary details on the formation of ZPS on 3 April 1989 are set out in detail by Anthony Turner (Antony) in his founding affidavit in the liquidation matter, case HC 5264/05 (Case No. 2). Those details were admitted to by Peter Jameson Dobson (Peter) in his opposing affidavit in that case.

Turner and Sons (Pvt) Ltd (T & S) agreed with Dobrock in 1988 on a joint venture to construct and thereafter operate a 'Mississippi River Boat' for commercial use on Lake Kariba. The concept of the "Southern Belle" was created by T & S who approached Dobrock. Dobrock agreed to become its joint partner in the venture and to provide working capital and investment in the project. ZPS was incorporated as the special purpose vehicle through which the large commercial houseboat MV Southern Belle would be owned and operated.

ZPS was incorporated in terms of the Companies Act [*Chapter 24:03*] with an issued share capital of $30 000 divided into 30 000 shares of $1.00

each fully paid up. Each of the two joint partners subscribed to 15 000 shares of $1.00 each in ZPS.

The joint shareholders agreed that T & S would first build a model of the craft and thereafter carryout the necessary construction work and interior design of the vessel at a contracted price. Dobrock would source both local and foreign raw materials for this construction. The total costs of both these operations would be the total cost of the vessel and would be met equally by the joint shareholders. The agreement was reduced to writing and signed on 31 May 1991.

The arbitral award of 15 June 1994 indicated that the vessel was completed in 1994. The original construction price was set at $5 950 000.00. The issue before the arbitrator centred on the amount by which the original contract price increased, which issue he resolved.

ZPS was run for 18 months from the completion of the vessel in 1994 by T & S. Dobrock thereafter took over the management control of ZPS and appointed a managing director Adamson to run it. It was common cause that from 2000 the tourism industry went into decline and this affected the bottom line of the MV Southern Belle Operations of ZPS.

There is evidence, in the form of electronic mail exchanged between Peter and Anthony, the principal shareholders in Dobrock and T & S respectively, between 19 January 2003 and 7 April 2004 that the joint shareholders were prepared to sell their respective shareholdings in ZPS to the right suitor, if one came along. On 4 May 2004, ZPS managing director presented a report which highlighted the difficult circumstances the commercial houseboat operations were in. It required urgent maintenance and refurbishment to attain its former glittering glory.

On 6 June 2004, Antony indicated his decision to sell his shares in the commercial houseboat to Peter. This was a clear pointer to his unwillingness to inject funds for maintenance and refurbishment of the houseboat. On 18 June 2004 Peter indicated his willingness to inject $250 million, for this

purpose, provided his shareholding in ZPS increased by 10% while that of Athony was reduced by the same percentage. He suggested that the houseboat was valued at approximately $3.5 billion. He followed up this by another e-mail of 25 June 2004. He received a response on that same day (contained in an e-mail wrongly dated as 6 June 2004) from Antony in which he offered him his shareholding in ZPS for the sum of $250 million. Peter duly accepted the offer. He came to Harare and during the period 28 June to 14 July 2004 discussed with Antony on the terms of payment of Antony's entire shareholding.

He agreed to procure payment where and when Antony wanted. The purchase price was agreed at $250 million. It was to be paid by Peter into the account of Antony's daughter, Jenny, in the United Kingdom, the bank account details of which he received. The following day after the terms of payment had been agreed, Antony requested part payment of the purchase price in local currency. Peter alleged that he made out cheque payments to Chitekeshe of $115 million and to Vretto of $25 million, as part payment, a total of $140 million which Anthony used to buy a pick-up truck. This averment was not disputed by Antony, yet he maintained in his other affidavits that he was paid $138 million and $112 million remained outstanding. Peter in his prayer and in Mr *de Bourbon's* submissions on behalf of Peter's company, accepted that the outstanding purchase price was $112 million. No cheques or proof of payment in the sum of $140 million was produced. I am therefore prepared to hold that Peter paid $138 million and had an outstanding balance of $112 million.

Antony averred in his opposing affidavit that he required £12 000 to import a new engine for the craft that he was building, known as the "Zambezi Trader". This craft would not be in competition with the houseboat at all and he was building it for his own account with the moral support and blessing of Peter. Peter agreed to pay this amount into his daughter's bank account in the United Kingdom. He repeated this allegation

in paragraphs 31 and 32 of his founding affidavit in Case No. HC 5264/05. This was to be *in lieu* of the balance of the purchase price of $112 million. In Case No. 5264/05, in paragraphs 26 and 27 of his opposing affidavit Peter did not respond to these averments in so far as they refer to the alleged mode of payment in foreign currency.

That payment was to be in foreign currency is clear from Peter's own founding affidavit. In paragraph 18 he averred that even when he met Antony per chance at the Borrowdale Race Course in November 2004 he reassured him that notwithstanding the fall in the value of the Zimbabwean dollar against the Pound Sterling, the amount outstanding as the purchase price remained £12 000 being the amount in pounds in July 2004.

The two gentlemen agreed that the accountant and company secretary of ZPS, Paul Turner, (Paul) a partner in Ernst and Young Chartered Accountants, would effect the share transfer and receive Antony's letter of resignation as a director therein.

There was a delay in the transfer of the shares which was occasioned by Paul's attempts to structure a tax avoidance scheme for the benefit and at the insistence of Antony. I make this finding based on Antony's deliberate failure to respond to Paul's affidavit, which was filed in support of Peter's founding affidavit. It was agreed that on 3 August 2004 and 21 August 2004 Peter wrote to Anthony enquiring whether or not he had signed the necessary transfer documents and resigned as a director of ZPS, the two factors which would trigger the payment of the balance of the purchase price by Peter. It also appears that even on 5 November 2004, a date disputed by Athony who put it as being sometime in September 2004, when the two met at Borrowdale Race Course Antony intimated that he had been too busy to visit Paul. The parties reaffirmed that despite an adverse movement of the Zimbabwe dollar since July 2004, the balance of the purchase price would be paid into Antony's daughter's account in the United Kingdom at the exchange rate agreed in July 2004.

On 17 January 2005, Antony proceeded to appoint Peter Drummond and Martin King as directors of Turner & Sons, in his stead, who were charged with the responsibility of overseeing Turner & Sons's interests in the Southern Belle. A flurry of e-mails followed which attempted to resolve the issue of the sale of Antony's shares in the ZPS, who was claiming that the failure by Peter to pay the balance of the purchase price timeously amounted to repudiation of the contract. He therefore regarded himself released from the contract.

The negotiations by the parties culminated in a letter of 23 August 2004 by Turner & Sons's erstwhile legal practitioners to Dobrocks legal practitioners which set out the history of their association. In that letter T & S indicated that it would seek an order to wind up the company in terms of section 206(g) of the Companies Act, *supra*. Dobrock held the firm belief that it had purchased Turner & Sons shareholding and was therefore the sole shareholder in ZPS. These disagreements resulted in the two applications for specific performance and liquidation that are now before me.

The first issue for determination is whether or not a binding contract of sale was reached between Dobrock and Turner & Sons.

It is, I believe, common cause that an agreement of sale was entered into. In its opposing affidavit, in paragraph 17, Turner & Sons acknowledges that the parties had a loose gentleman's agreement. Antony concludes that paragraph by stating that "I believe with respect that the only explanation that is reasonable in the circumstances is that applicant repudiated the contract." Paragraph 49(iii) in Case No. HC 5264/05 by Turner & Sons is to the same effect. Turner & Sons's defence was in the main predicated on repudiation by conduct of the contract that was executed between the parties. Indeed Mrs *Wood*, for Turner & Sons, in paragraph 2 of her written heads of argument wrote:

> "It is apparent from the applicant's own case that the agreement in question was very loose even if it was binding between the parties."

Counsel concentrated their submissions on the question whether time was of the essence in the performance by Dobrock of the term relating to payment of the outstanding purchase price. It was on the assumption that it was of the essence that Turner & Sons alleged repudiation. The onus in my view lies on Turner & Sons to show that time was of the essence and that the failure by Dobrock to act timeously entitled it to rescind the contract.

Turner & Sons blamed Dobrock for the delay in paying the balance of the purchase price. The facts as I find them do not bear out the correctness of Turner & Sons's view. Paul indicated in his unchallenged affidavit that the tax avoidance scheme was initiated at the instance of Antony, and was for Turner & Sons's benefit. My view is that at that stage, Paul was working as an agent of Turner & Sons. It became, in my finding, the duty of T & S to impress on him to act with speed if time was of the essence to it. It is clear to me that Antony understood and appreciated that the balance of the purchase price would not be paid out until the share transfer had been effected by Paul, until Antony had resigned as a director of ZPS and until Antony had obtained a capital gains clearance certificate from the Zimbabwe Revenue Authority (ZIMRA).

The delay cannot therefore, be attributed to Dobrock. Peter, after all was desirous that transfer be effected with speed as shown by his enquiries of 4 August and 21 August 2004 which Antony did not acknowledge. Antony never did challenge the averment that when they met at Borrowdale race course he indicated that he was responsible for the delay for he was too busy to make a follow up with Paul. Paul after all was acting, as regards the tax avoidance scheme only, as an agent of Antony. It is therefore my finding on the papers that it was in fact Antony who was responsible for the delay. He could not, therefore, lawfully repudiate the contract by projecting his own inaction onto Dobrock.

Mrs *Wood* contended with reference to *Concrete Products Co Pty Ltd v Natal Leather Industries* 1946 NPD 377 at 380 and *Broderick Properties v*

Rood 1962(4) SA 447 that the mere fact that the agreement did not provide a particular date of performance did not mean that time was not of the essence. She submitted that to Peter's knowledge Antony had to purchase an engine for another boat that he was building for £12 000 immediately, that is at the time that they concluded the agreement. In her view though not spelt out in the oral agreement, the nature of that agreement and the purpose to which Antony wanted to utilize the funds were inherently indicative that both parties contemplated that payment had to be speedily made. Speed payment was inherent in the agreement itself. The proposition in my view conforms with the examples that were highlighted in *Broderick's case supra* concerning the purchase of theatre tickets and repairs of a motor vehicle at a garage which are required for use within a set time frame.

The appreciation that I attribute to Antony of the conditions that had to be fulfilled before payment was made in my view removes his case from one relating to *mora ex re* (time set out in the contract) to one of *mora ex persona,* which requires demand before the time limits for performance are reached.

I associate myself with the statement of law that was propounded by GUBBAY CJ in *Asharia v Patel* 1991(2) ZLR 276 at 279G-280C. He stated thus:

> "The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio,* may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period of performance which is not unreasonable if unreasonable, the demand is ineffective.

> Where a debtor has fallen into the *mora ex persona* after demand, the creditor can acquire a right to cancel the contract by serving notice of rescission in which a second reasonable time limit is stipulated, making time of the essence. Both demand and notice of rescission are necessary in order to allow for cancellation for non-performance. The two may be, and commonly are, contained in the same notice. Such notice will then fulfil a double function. It will fix a time for performance after which the debtor will be in *mora*, and create a right in the creditor to rescind the contract on account of the *mora*."

In the present case, payment of the purchase price was not due immediately on conclusion of the contract. It was due as soon thereafter as was reasonably possible in the circumstances. The circumstances related to the transfer of Turner & Sons's shareholding by Paul, receipt by him of Antony's resignation letter and of a clearance certificate from ZIMRA. It was within Antony's power to expedite these matters. Indeed that it was not immediate was clearly demonstrated by the use put by Antony of the part payment which was made of $138 million. He bought a pick up vehicle. He also was duty bound to place Peter in *mora* if he believed that a delay had been occasioned in paying up the outstanding balance of the purchase price.

Christie in *The Law of Contract in South Africa 3rd edition Butterworths* 1996 deals with the line of cases culminating in Broderick, *supra* at pages 556 to 557. At page 555 he stated:

> "The general rule, will be seen in the next section, is that when the contract does not fix a time for performance there can be no *mora ex re,* only *mora ex persona*, so a demand by the creditor is necessary in order to place the debtor *in mora*. Whether there are exceptions to this general rule is a question that has led to differences of judicial opinion, but the present law can be stated with a fair degree of confidence."

It seems to me that in Zimbabwe, *Asharia v Patel*, *supra* has provided the answer. It confirms the correctness of the general rule as set out by Christie. It appears to me too that the differences of judicial opinion that Christie noted may be resolved by applying the general rule to the particular facts of each matter in order to ascertain its validity to the time frames as

contemplated by the parties. It is only after this has been done that a decision on whether *mora ex re* or *mora ex persona*, applies can be made.

I, therefore, hold in the present matter that Turner & Sons could not lawfully repudiate the contract without first placing Dobrock in *mora*.

Mrs *Wood* further submitted with reference to section 11(1) of the Exchange Control Regulations 1996 (SI 109/96) that on applicant's own case, the agreement was illegal because payment of the balance of the purchase price was to be made outside the country. Mr *de Bourbon*, on the other hand submitted that the contract was not illegal. He contended that there was nothing on the papers to show that the obligations of Dobrock would be met by it. Rather, so he opined, it was only in the nature of assistance between friends, between Peter and Antony which was permissible in terms of the Exchange Control Regulations.

There is a plethora of cases which have been determined by both the High and Supreme Court which are in point. My starting point is section 11 of the Exchange Control Regulations, *supra.* It reads:

> "11(1) Subject to subsection (2) unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall -
> a) make payment outside Zimbabwe or
> b) incur any obligation to make payment outside Zimbabwe
>
> (2) Subsection (1) shall not apply to:-
> a) any act done by an individual with free funds which were available to him at the time of the act concerned;
> b) any lawful transaction with money in a foreign currency account."

Mrs *Wood* contended that Dobrock was registered in Zimbabwe and was therefore resident in this country. This contention is in my view correct, as it reflects the position set out in section 3(1) of the Exchange Control Regulations, *supra*, for artificial persons. She further contended that Dobrock had not shown that it had been authorized by the Exchange Control Authority before it incurred the obligation to make payment outside Zimbabwe. It had not demonstrated that this was a lawful transaction with

money in a foreign currency account. She contended further that the free funds exception was applicable to individuals and not to companies, and that Dobrock could not save the agreement on that basis as it was inapplicable to it.

In *International Who's Who Ltd v Bernstein Clothing (Pvt) Ltd* SC 28/99, MUCHECHETERE JA, considered the effect of section 8(1) of the Exchange Control Regulations RGN 399/77 where the respondent, a limited liability company registered locally incurred an obligation to pay 20 450 Swiss francs to the appellant, a limited liability company registered in England, in Johannesburg for transmission to Vaduz, Switzerland. The respondent raised a point *in limine* averring illegality. At page 4-5 of the cyclostyled judgment, the learned judge of appeal stated as follows:

> "At the outset I should state that I agree with Mr *Moyo's* submission that the contract between the parties was illegal, invalid and unenforceable because it was in breach of s 8 (1) of the said Regulations. The provisions of the section are peremptory. See *Abreu v Campos* 1975(1) RLR 198 and *Swart v Smuts* 1971(1) SA 819 at 829-30.
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> As already indicated above, the appellant conceded that no authority had been obtained by the parties from the relevant authority for any payment outside Zimbabwe when the contract was entered into. On the law see *Macape Pty Ltd v Executrix, Estate Forrester* 1991(1) ZLR 315 at 320D-E where McNALLY JA said:
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> > "In other words, when one is concerned with payments INSIDE Zimbabwe (s 7 of the said Regulations) it is perfectly lawful to enter into the agreement to pay. But without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments OUTSIDE Zimbabwe (s8 of the said Regulations) it is unlawful even to enter into the agreement to pay without first obtaining the authority of the Minister which has been delegated to the Reserve Bank." (my emphasis)
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> See also *Abreu v Campos*, *supra*; *Young v Van Resnburg* 1991(2) ZLR 149(s) at 155 *Adleu v Elliot* 1988(2) ZLR 283(s) at 287."

The facts in the *Young v Van Rensburg* case, *supra*, are distinguishable from the present matter. It involved individuals who were foreign residents. Its importance in my view lies in the sentiments of KORSAH JA at page 153G - 154A where he agreed with Mr *de Bourbon* in that case that subparagraph 8(1)(a) which barred a Zimbabwean resident from doing any act, outlawed the doing of even a single act. It is noteworthy that section 8 of the 1977 Regulations is the precursor to section 11 in the 1996 Regulations even though there are some variations in the wording of the two sections in these respective regulations.

In *International Who's Who Limited case*, *supra*, MUCHECHETERE JA agreed with the observation of Mc NALLY JA in *Macape's case*, *supra* that an agreement to pay outside Zimbabwe by a resident without Exchange Control authority where the resident was not an individual without free funds or where the resident was not utilising money in a foreign currency account, was *void ab initio*.

In *Hattingh and Others v Van Kleek* 1997(2) ZLR 240 were a foreign visitor to Zimbabwe, Van Kleek, who was not aware that the Exchange Control Regulations prohibited local residents from incurring obligations to pay money abroad, agreed to give a loan to a Zimbabwean to be used to develop a Safari business and the money loaned was to be paid into that Zimbabwean's bank account outside Zimbabwe, and that Zimbabwean and two other locals signed a promisory note to repay the loan, the High Court then ordered the locals to repay the loan. They appealed on the basis that they acted illegally by incurring an obligation to make payment outside Zimbabwe without the requisite exchange control authority. The appeal was dismissed.

KORSAH JA held at page 244D that:-

> "Section 8 of the Regulations only prohibits, but does not declare void or illegal, the transactions enumerated therein" and found that the transactions did not contravene section 8 of the regulations.

At page 246B he stated:

> "The cases clearly show that where a contract is on the face of it Legal but by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent, party relief, for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit."

The facts of *Van Kleek's case* are distinguishable from the present matter. In addition in *casu* both parties were aware that their agreement fell foul of the Exchange Control Regulations.

In *Greebe & Another v Famaps Investments (Private) Limited & Anor* HH 124-2004, MAVANGIRA J dealt with the question whether a local resident could withhold and keep the assets that accrued to him from a sale by another local resident of those assets situated in Zimbabwe in circumstances where no payment was made abroad as agreed, on the basis that to do so would violate section 11(1) (b) of the Exchange Control Regulations, 1996, *supra*.

She held that while the agreement contravened section 11 of the Regulations, the facts called for a relaxation of the *par delictum rule* for if she were to decline to do so, she would reward the purchaser by giving him a premium for deceit.

In *Adleu v Elliot* 1988(2) ZLR 283(S) GUBBAY JA at 290B recognised that in oral contracts the court had the power to determine whether the terms of that contract required exact performance or the performance of some equivalent act. He stated thus:

> "The application of this broad principle [that it is not for the court to remake a contract of the parties in line with INNES CJ in *Ambrose and Aitken v Johnson and Fletcher* 1917 AD 327 at 343 and the remarks of BEADLE CJ in *Holmes v Palley* 1975(2) RLR 98(AD) at 105C that one party to a contract was not entitled to expect that it will be carried out in a different manner than agreed because of the absence of prejudice] does not, of course, preclude a court from determining whether the parties to an agreement intended that a particular term thereof was to be fulfilled *in forma specifica*, that is in the exact manner agreed upon by the parties or *per acquipollens*, that is, by some equivalent act..

> Where the agreement is in writing and the language employed is sufficiently clear, the common intention of the parties must be extracted from the agreement itself. But if the language is ambiguous or where the agreement of the parties was oral, then the court is obliged to have regard to the surrounding circumstances, and to any other admissible evidence in order to ascertain whether the common intention of the parties was to be fulfilled *in forma specifica* or whether performance thereof by some equivalent act would suffice."

In *Adleu's case, supra* the parties entered into an agreement of sale in which part of the purchase price was payable abroad in foreign currency and the remainder at home in local currency. GUBBAY JA approved the four factors outlined by CLAASEN J *in Diggelen v de Bruin and Another* 1954(1) SA 188 SWA at 193B-G that:

> "1. If the surrounding circumstances and other admissible evidence afford no clue as to what was in the contemplation of the parties then there is a rebuttable presumption in favour of performance *in forma specifica*. But the presumption cannot be rebutted where it is clear from the terms of the contract that performance *in forma specifica* had been stipulated.
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> 2. In case if doubt the court will be more likely to find in favour of performance *per acquipollens* if the manner of performing the term is not material and also where performance *in forma specifica* is impossible through no serious fault on the promissors part.
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> 3. The act or performance tendered *per acquipollens* where such is permissible must be an equivalent act to that stipulated for or be of such a nature that it can make no material difference to the promise.
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> 4. Where the promissor succeeds in rebutting the presumption mentioned above, there may be circumstances falling short of impossibility and even where there may be some fault on the part of the promissor; a court may be justified in concluding that the promissor's perfomance or tendered performance amounted to substantial performance."

It seems to me, as appears from Dobrock's averment that the parties contemplated that payment would be in sterling pounds in England into the

account of Antony's daughter Jenny. Dobrock was willing to pay "where and when" T & S desired it be made. The agreement was sealed when T & S agreed to make payment in foreign currency in England. The parties thus contemplated exact performance and not some substantial performance. That exact performance was however illegal. There is no room for the application of CLAASEN J's formulation in *Diggelen's case*, *supra*, in these circumstances.

It is my view, that *Van Kleeks case, supra* does not apply to the present matter. Dobrock was aware that it was contravening the Exchange Control Regulations when it promised to pay "where and when" and agreed to pay in England. This is clear from the lack of particularity on the decision on the mode of payment that is apparent in its affidavits. I cannot allow this court to be an accomplice to an illegality by enforcing this illegal contract, as prayed for by Dobrock.

I agree with Mrs *Wood*, that Dobrock's claim on specific performance and other subsequent relief related thereto should be dismissed. After all Dobrock is not an individual so the free funds exception would not avail it. The oral agreement was transacted between the parties by individuals who were representing them respectively. Peter did not aver nor even suggest that he had free funds from which he would pay T and S. Even though he was an individual he was acting for Dobrock. He had no exchange control approval to incur the liability to pay on behalf Dobrock in foreign currency in England. The agreement reached is illegal, invalid, and unenforceable. See also *Barker v African Homesteads Touring and Safaris (Pvt) Ltd & Anor* SC 18/2003.

THE PROVISIONAL LIQUIDATION CLAIM CASE 5264/05

T and S seeks the liquidation of ZPS on the basis that the two shareholders in T & S and Dobrock have had a disharmonius and tumultuous working relationship.

It set out the history of that relationship from the period of the construction of the vessel which culminated in arbitration. Thereafter T and S ran the project until 1996 when Dobrock took over, and appointed a managing director who ran the affairs of ZPS. The tourism industry suffered a downturn after 2000 and the profitability of ZPS plummeted. Antony and Peter were desirous of disposing of their shareholding.

It is correct, as submitted by Dobrock, that the problems that beset the parties which culminated in arbitration were not catastrophic. The parties operated ZPS in fit and starts up to the conclusion of the illegal oral agreement of July 2004. Until January 2005, it appeared that T and S had given up on the management control of ZPS and had no interest in what was going on. It is also true that the e-mail exchanged showed decorum and civility until matters came to a head in 2005 as a result of the ill-fated agreement of sale.

In 2005, T and S earnestly sought to be appraised as a shareholder of its interest in ZPS. Dobrock stonewalled and took the attitude that T and S no longer had any interest in the joint venture to warrant its revived attention. The shareholding battle brought out the worst in the two personalities involved. They maligned each other's personalities and managerial competencies (see Dobrock's letter of 6 October 2005).

That the affairs of ZPS were not being run with the full participation of both shareholders is clear from the contents of the letter of 28 November 2005 which was written by T and S erstwhile legal practitioners requesting copies of all bank statements from 1995 to date and details of all passengers who travelled on the houseboat, how much it was paid and in what currency.

There were insinuations of financial misappropriations which were denied by Dobrock. A supplementary affidavit was filed by T and S in order to strengthen its application on 23 June 2006. That supplementary affidavit is replete with allegations of diversion of foreign currency proceeds from ZPS to other sister companies of Dobrock, a fact vehemently denied by Dobrock.

It also demonstrated a reluctance by Dobrock to release administrative records in regard to passenger information. It averred the possible misappropriation of foreign currency receipts due to ZPS.

The documentation was eventually supplied to Ernst and Young by Dobrock on 7 July 2006. It was filed with the leave of this court on 19 October 2006 in the form of an answering affidavit in response to the supplementary affidavit.

The documentation supplied showed that foreign currency generated by ZPS was utilised to pay an offshore loan of Intercontinental Trading (1992) (Private) Limited.

Dobrock denied that ZPS had not operated successfully in the 10 years between 1994 and 2004. It alleged that the relationship between Peter and Antony was friendly, harmonius, cordial and constructive up to January 2005. It denied managerial deadlock and denied stealing operating revenue principally foreign revenue from ZPS.

Its view was that the failure to complain since 1997 to the date of application showed T and S had been satisfied. It proposed a full audit of all cruises, foreign and local revenue from the records between 1999 to 2004 since those going back beyond a period of 7 years were no longer in existence.

It took the view that there were disputes of facts which could not be resolved on the papers. It prayed for the dismissal of the application.

It seems to me that notwithstanding the dispute of facts, I can make a robust determination of the two issues before me which are whether there is a deadlock and whether ZPS should be wound up. After all, T & S need only to establish on a *prima facie* basis that it is just and equitable that the company be provisionally wound up. It seems to me that a deadlock exists especially after the ill fated contract of sale. Clearly there is a justifiable lack of confidence in the conduct of the company's affairs. There are accusations,

supported by documentary evidence that foreign currency generated by ZPS has not been utilized for the benefit of ZPS business activities.

ZPS is a small domestic company. In accordance with the principal guidelines set out in *Sultan v Fryfern Enterprises (Pvt) Ltd & Another* 2000(1) ZLR188 which approved the remarks of House of Lords in *Ebrahimi v Westbourne Galleries* [1972] 2 ALLER 492, 1find that it is just and equitable that ZPS be provisionally wound up on that ground.

There does not appear to me to be any realistic, sufficient and reasonable remedy other than provisional liquidation. The bickering that has gone on can only be resolved by protracted negotiations whose outcome is uncertain. There is no alternative remedy in my estimation to winding up. Applicant has thus discharged the onus on it to justify the order sought.

I accordingly grant the order sought by T and S in case No. HC5264/05

COSTS

Turner and Sons has been successful in both applications. In the specific performance matter it sought the dismissal of Dobrock's application with costs on the higher scale. It cannot escape culpability for agreeing to an illegal agreement. Its pleadings were based on the principle of *repudiation* which I have not upheld. It seems to me fair and just that I grant it its costs in case No. HC 5186/05 on the ordinary scale.

As regards the liquidation claim the costs will be determined on the return date.

DISPOSITION

In the premises: It is ordered that:

1. The application in case No. HC 5186/05 be and is hereby dismissed with costs.
2. In case HC 5264
   2.1 The first respondent company Zambezi Paddle Steamers (Private) Limited is provisionally wound up pending the granting of an order in terms of paragraph 2:3 or the discharge of this order.

2.2 Mrs Theresa Grimmel of KPMG Chartered Accountants, Mutual Gardens 100 The Chase, Emerald Hill, Harare be appointed as Provisional Liquidator of the First Respondent Company with the powers set out in section 221 of the Companies Act [*Chapter 24:03*].

2.3 Any interested party may appear before this court sitting at Harare on the 14th day of February 2007 to show cause why an order should not be made placing the first respondent company in Liquidation and the costs of these proceedings all be costs of liquidation.

2.4 This order shall be published once in the Government Gazette and once in the Herald Newspaper. Publication shall be in the short form approved by the Registrar of this Honourable Court.

2.5 Any person intending to opposed or support the application on the return day of this order shall:

2.5.1 Give due notice to the applicant at *Messrs Byron Venturas & Partners*, 2nd Floor Tanganyika House, corner 3rd Street/Kwame Nkurumah Avenue, Harare.

2.5.2 Serve on the applicant at the address given above a copy of any affidavit which he files with the Registrar of the High Court.

Atherstone & Cook, applicant's legal practitioners in Case No. HC 5186/05
Byron Venturas & Partners, respondent's legal practitioners
Byron, Venturas & Partners, applicant's legal practitioners in Case No. HC 5264/05
Atherstone & Cook, respondent's legal practitioners in Case No. HC 5264/05