

GRAMMA RECORDS (PRIVATE) LIMITED
and
CHARLES CHARAMBA
versus
HERMAN CHIMUSORO

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 13 and 19 September 2006 and February 2007

Opposed Court Application

Advocate *R Y Phillips*, for the applicants
Miss *N Tiyago*, for the respondent

GOWORA J: The second applicant is a well known and I might venture to say, renowned gospel artist in Zimbabwe. The first applicant is a recording company. From the papers, it is apparent, that for the performance which is the subject matter of this dispute the first applicant was contracted to arrange the recording of Charamba's live show. It seems that the respondent is also in the business of recording live shows and producing from such DVD's and video recordings. I have not been advised as such in specific terms but this my opinion based on the nature of the contract for determination by me.

On 13 September 2005, the first applicant's Managing Director, one Alan Wilson, addressed a letter Crossline Music & Video for the attention of the respondent. In the letter mention was made of a prior meeting between the parties and Charamba and one J Howard. The letter then confirms that a live show would be held by Charamba on 1st October 2005 at the H.I.C.C. The writer then details the requirements of the applicant as regards musical instruments and the public address system, which issues are not relevant for this matter. The pertinent portion of the letter in so far as it relates to the dispute before me is

contained in the paragraphs numbered (4) and (5) on the letter. The said paragraphs read as follows:

4) **24 Track Recording** It was agreed that Crossline would supply and operate the 24 track recording equipment producing a live recording as set out in your quotation (attached) at a revised charge as follows:-

a) 2 days rehearsal @ \$ 3 million (old currency) per day

b) Live show day @ \$ 70 million (old currency) for the show

All 24 track recording charges are inclusive of V.A.T

5) **DVD Filming and Editing** It was agreed that Crossline would film, edit and supply a finished DVD master of the live recording as set out in your quotation (attached) at a revised charge as follows:

a) 2 days rehearsal @ \$38.25 million per rehearsal day;

b) Live show day @ \$85 million for the show inclusive of editing and final DVD master.

All filming, editing and DVD master charges are inclusive of V.A.T.

This letter was responded to by the respondent on 18 September 2005. There were no alterations of the pertinent conditions pertaining to the contract except that details of how the contract was to be put into effect were now the subject of discussion therein. The total contract sum was \$372 500, and of this amount \$212 700 was paid by way of deposit before the show. An additional sum of \$159 800 is still outstanding and the applicants have offered payment of this amount against delivery of the items detailed in the draft order. An additional amount of \$18 million for lighting has been agreed between the parties and the applicants have offered to pay this amount as well.

The show was indeed held but it is obvious now that problems then ensued between the parties. The applicants contend that the

respondent has failed to perform his obligations in terms of the contract between the parties. The DVD master which the applicants required the respondent to produce and deliver to them has not been delivered as required in the contract. The applicant's claim that an initial DVD delivered to them does not contain a substantial portion of the live recording. The applicants have accordingly approached this court for an order in the following terms:-

IT IS ORDERED THAT:

1. Respondent shall within (48) hours of service of this order effect delivery to the 1st Applicant of the audio visual work and the sound recording in respect of the concert performed by the 2nd Applicant on the 1st October 2005 at the Harare International Conference Centre and all related sound recording.
2. The Respondent be and is hereby interdicted from utilizing in any way all or any part of the audio visual work and the sound recording in respect of the concert performed by the 2nd Applicant on the 1st of October 2005 at the Harare International Conference Centre and all related recordings.
3. The Respondent shall bear the applicant's costs of suit.

The application is vigorously opposed. In addition the respondent has himself filed a counter-claim, which the applicant, in turn, opposes. In the counter-claim the respondent contends that as a result of the instruments used by the 2nd applicant and other factors to do with the performance, the sound recording of the performance was not up to scratch. He therefore entered into a second contract with the two parties to record a better audio of the songs performed at the live concert to enhance the sound quality and remove what he termed

'discords'. Apart from claims for \$159 000 000.00 (old currency) and \$18 000 000.00 (old currency) the respondent is claiming payment for moneys which are not related to the contract entered into before the concert by the second applicant. The amounts also claimed are not liquid sums and it escapes me why the respondent thought it appropriate to adopt this procedure. I will however discuss further on that aspect when I deal with the counter-claim.

The terms of the contract were that the respondent would operate a 24 track recording equipment and produce a live recording of the concert. In addition the respondent was obliged to film, edit and supply a finished DVD master of the live recording. The respondent has compiled a DVD master which is still in his possession. Although his view is that the sound quality of the live recording is indifferent, he has facilitated the recording of better sound to go with the live recording. It is common cause that he has not been paid for the extra time spent by the second applicant and the band perfecting the sound quality. He is unwilling to release the DVD master until he has been paid for the extra hours. The applicants' attitude is that he has been paid a substantial amount by way of deposit for the live recording and the DVD and he should deliver to the applicants what he was contracted to produce. The attitude of the applicants is that at this stage the sound quality of the live recording is immaterial.

A reading of the case made out by the respondent seems to suggest that what the applicants are requesting is impossible to perform. The second applicant appears to have been on stage for at least three hours if not longer. The respondent suggests that due to the length of the songs performed, the number of songs performed and the time the whole show lasted, it is difficult to produce a two hour DVD.

Apart from stating that the respondent was to produce a DVD master of the live recording no other specifics were incorporated into the contract. No time limitation was set on the performance which the respondent was contracted to record. It appears that at the live performance it became clear that the respondent's equipment could not record the entire show and arrangements were made for second applicant's computer to create more storage space on the recording equipment to accommodate the concert. The applicants agree that the respondent's recording equipment had to be boosted up to increase its recording capacity. There seems to be no dispute that the second applicant in fact performed more than twenty four tracks. It is from this background that this court is required to decide whether or not the applicants are entitled to a DVD master according to the contract.

Neither of the legal practitioners, in argument sought to deal with the terms of the contract and whether or not same was capable of fulfillment in the specific terms. The contract specified that the respondent provide a 24 track recording equipment for purposes of capturing the live concert. The deponents to the affidavits did not dwell on the implications of this provision in the contract. If I construe the provision in its ordinary and literal sense, it presupposes, in my view that the applicants would wish to have twenty four tracks captured on audio and visual recording equipment. Thus the obligation on the respondent would therefore be to ensure that he captured twenty four tracks of the live performance. I would go further to presume that it is these tracks that would therefore be captured on the DVD master to be produced from the live recording. The applicants rejected the advance copy that was given to them by the respondent. The contention is made that it omitted a large portion of the live performance. The issue is therefore two fold. Firstly the question is to be decided whether or the applicants are entitled to the recording itself and the second rung

of the enquiry being what decision I should make in relation to the DVD master.

Both applicants contend that the audio and visual recording was commissioned by them and it therefore belongs to them. They are thus entitled to delivery against payment by them of 40% of the outstanding contract amount which they tender. The respondent claims that he has not been paid for the balance of the live recording as well as the extra studio time to rectify the errors in the audio recording and that until such time as he would have paid, he has a lien on the live recording.

Section 14 (4) of the Copyright and Neighbouring Rights Act [Chapter 26:05] (the Act) which the applicants base their right on provides as follows:

“Where a person commissions-

- (a) the taking of a photograph; or
- (b) the painting or drawing of a portrait; or
- (c) the making of a gravure; or
- (d) the making of an audio-visual work; or
- (e) the making of a sound recording;

and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of the commission, that person shall, subject to subsection (6), be the owner of any copyright subsisting in the work.”

Ownership in the copyright vests in the person who commissions its making once one either pays or agrees to pay for such copyright. Ownership is not qualified and the applicants in *casu* fall squarely within the ambit of the section. They paid part of the fee charged and agreed to pay the balance. They have in fact tendered payment of the balance against delivery to them of the copyright. As a consequence they own the copyright and the respondent in terms of the Act has no grounds to hold onto the copyright. Non payment of an amount allegedly due

cannot be a bar to the applicants obtaining a right to delivery of the same.

To further augment, the rights of an owner in a copyright, the Act in sections 19 and 20, grants exclusive rights in the owner to reproduce, cause to be published, import or export, sell, let or hire, or making an adaptation of the copyright itself. The respondent is not able I think to dispute that ownership in the audio-visual recording obtained from the concert belong to the applicants. He could only defeat their claim if could show that they have not paid or have not agreed to pay money's worth for the recording. The applicants paid by way of deposit 60% of the contract sum with the balance being due when the respondent delivered the recording. The applicants have in fact tendered payment of the balance against delivery and there is therefore defence that the respondent can proffer. I have however to consider if the respondent can hold onto the recording on the basis of an alleged lien for payment in respect of studio time to polish up the audio recording for the purposes of producing a better quality product.

Any person who is in possession of the property of another on which he has expended money or money's worth may be entitled to a lien over the property in question. The law recognizes two types of liens, namely salvage and improvement liens and debtor and creditor liens. However these liens exist under the common law. Mr *Philips* contends, which contention finds favour with me, that our law as regards copyright is now contained in the Act. In section 128 the common law is specifically ousted as pertains to the law of copyright. The section provides:-

“Subject to this Act, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other enactment.”

The respondent apart from submitting that he has alien over the recording has not proffered any authority for the submission. The Act does not provide for a lien over a copyright. The entire law of copyright is now contained in the Act and no copyright or right in the nature subsists except as provided for therein. The respondent has not sought to argue that a lien over the copyright exists notwithstanding the clear provisions of section 128. The respondent had the onus to establish the existence of a lien. He has not chosen to do so. In any event when one examines the provisions of section 14 (4) of the Act, it becomes clear that the Act does not envision the existence of a lien. Ownership is assured once one pays or agrees to pay for the commissioned copyright.

The applicants have contended that by not delivering to them the copyright as demanded the respondent is in violation of sections 51(2)(a)(iii) and 51(2)(b)(iii) thus entitling the applicants to the remedies provided for in section 52. The applicants further contend that by his possession of the copyright the respondent is in breach of section 59(1)(a)(iii) for which breach he would be liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both.

According to section 51(2)(a)(iii) a copyright is infringed if, a person, in the course of business, possesses it or exhibits it in public or distributes it. There were no facts placed before me by either of the applicants to show that the respondent had exhibited the copyright in public or that he had distributed it. What was not in dispute is that he had it in his possession. He was commissioned to produce the copyright, and a dispute has arisen between the parties. The emergence of the dispute prompted him to hold onto the copyright in the hopes of compelling the applicants to pay the amounts that are in dispute. Having produced the copyright his possession of it was lawful

until the dispute between the parties became insurmountable. Apart from a bald submission in the heads of argument and from counsel from the bar, I was not addressed on the meaning to be ascribed to the phrase, 'in the course of business, possesses or'. I think that the legal practitioners should have made an effort to construe what the word possess in this context means, especially if such possession is likely to result in criminal sanction. I am envisaging a person who acquires possession of the copyright from a person not entitled to possess it. Such person had no hand in its coming into being and has no relationship with the owner and came into possession without the authority of the owner. In my view such person has infringed the copyright. In so far as the respondent is concerned it would be necessary, before this court could hold in the circumstances surrounding his possession thereof, that a thorough examination of the meaning to be ascribed to the word 'possess' be undertaken. In the premises, I am not persuaded that the applicants have established that by holding onto the copyright in an effort to compel payment, the respondent has infringed the copyright. As the offence referred to in section 59(2)(a)(iii) stems from possession of the copyright under section 51(1)(a)(iii) I believe it is unnecessary for me to deal with the question of whether or not such possession renders the respondent to a conviction under section 59. In the absence of proof that the respondent has infringed the copyright I cannot find justification for granting an order for an interdict.

I turn now to consider the counter claim filed by the respondent. The draft order attaching to his papers is in the following terms:

IT IS ORDERED THAT:-

1. The counter-respondents are hereby ordered to pay jointly and severally the one paying the to be absolved, the sum of \$159 800 000.00 (one hundred and fifty nine million eight hundred thousand dollars), being the balance outstanding for

the cost of a Digital Versatile Disc (DVD) of the audio visual work and sound recording for the live performance by the 2nd applicant at the Harare International Conference Centre on the 1st of October 2005 plus interest at the prescribed rate to be charged from the 5th of October 2005 to date of full and final payment.

2. The counter-Respondents shall pay jointly and severally the one paying the other to be absolved, the sum of \$32 000 000.00 (thirty million dollars) being the amount due for the time spent recording in the counter-applicant's recording studio at 9 Maldon Avenue Greencroft Harare and the compact discs on which the material is recorded plus interest at the prescribed rate to be charged from 30 November 2005 to date of full and final payment.
3. The counter-Respondents shall pay jointly and severally, the one paying the other to be absolved, the sum of \$492 000 000.00 (four hundred and ninety two million dollars) being the amount due for the sound recording recorded in the counter-Applicant's recording studio at 9 Maldon Avenue Greencroft Harare plus interest at the prescribed rate to be calculated from 30 November 2005 to date full and final payment.
4. The counter-respondents shall pay jointly and severally, the one paying the other to be absolved, the sum of \$1 104 000 000.00 (one billion one hundred and four million dollars) being the cost of all the unedited audio-visual and sound recording for the live performance by the 2nd counter-Respondents at the Harare International Conference Centre on the 1st of October 2005 plus interest at the prescribed rate to be calculated from the 1st of November 2005 to date of full and final payment.
5. The counter-Respondents shall pay jointly and severally, the one paying the other to be absolved, the sum of \$18 000 000.00 (eighteen million dollars) being the cost of the stage lighting used at live performance by the 2nd counter-Respondents at the Harare International Conference on the 1st of October 2005 plus interest at the prescribed rate to be calculated from the 1st of November 2005 to date of full and final payment.
6. The Applicants shall pay the cost of suit.

In so far as the claim for payment to him by the applicants in the sum of \$159 800 000.00 there is no dispute that this money is due and owing. This is the balance owing on the contract between the parties for the recording by the respondent of the live show and the production by him of a DVD master. The applicants have in fact tendered payment on the amount against delivery to them of the contract items by the respondent. The issue of whether or not the respondent would be entitled to interest was not addressed. I cannot therefore make any order in respect of interest on the said sum. I note that the contract did not address the issue of interest but more that I cannot say.

As mentioned earlier in this judgment arising from an agreement between the respondent and the second applicant, the latter spent some time in the respondent's recording studio to enhance the quality of the sound recording captured during the live audience. This contract was entered into subsequent to the live show. According to the respondent it had been agreed that the applicant would be given an initial 10 hours free usage of the studio. Thereafter the respondent would charge at the rate of \$700 000 per hour for use of the facility. The respondent stated that he sent an invoice to the first applicant by e-mail. The copy of the e-mail he sent has not been attached to his papers.

Both applicants contend that he has not provided them with an invoice in respect of this claim and they are therefore not in a position to consider it. He has not established how much is due against this claim. As he chose to proceed by way of application instead of action I therefore have no option but to dismiss this claim even though it has not been found that it is not due and owing.

The claim for \$492 000 000.00 is also for the sound recording at the respondent's studio after the live show. It has not been justified on the papers before me. Again no invoice is attached, nor does the respondent establish on his papers that it is due and owing. He has not sent an invoice to the applicants who have indicated an inability to respond thereto in the absence of an invoice. Again it suffers the same fate as the last claim and it is accordingly dismissed.

The claim for \$1 104 000 000.00 is not adverted to in the respondent's affidavit. A perusal of the e-mails sent to the applicants by the respondent does not reveal any mention of this amount. However, it appears that the amount is what the respondent reckons he should be paid as of today for the visual and audio recordings of the live show based on the inflation rate that the country is experiencing. The respondent is legally represented. It is surprising that such a claim could have been made without any justification being made on his papers. Although the parties concluded a written contract no attempt has been made to link this claim to the contract or to distinguish the two. There is no averment that an additional contract was concluded for extra payment on the live recording. The cause of the claim has not been established and consequently it is dismissed.

In so far as the claim for \$18 million (old currency) is concerned the applicants have indicated in their application that they are willing to pay this amount subject to the production of an invoice by the respondent. In the premises there will be an order in the following terms:-

IT IS ORDERED THAT:

1. The Respondent shall, against payment to him by either or both applicants of the sum of \$159 800 000 (old currency) effect delivery to the 1st Applicant of the audio visual work and the sound recording in respect of the concert performed by the 2nd

Applicant on the 1st October 2005 at the Harare International Conference Centre and all related sound recording within 48 hours of service of this order.

2. The respondent shall pay the costs of this application.
3. The respondents counter claim be and is hereby dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Atherstone & Cook Legal Practitioners, respondent's legal practitioners