CAFCA LIMITED
versus
RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 26 May 2010, 8 June 2010 and 15 September 2010

Adv *Morris*, for the plaintiff
T. Chitapi, for the defendant

MTSHIYA J: On 29 July 2008 the plaintiff issued summons against the defendant for the following relief:-

"(a) payment of the sum of US$750 000.00.
(b) interest a *tempore morae* at the London Interbank rate for United States dollars 3.5% per annum from 1 September 2005 to date of payment.
(c) Costs of suit."

The background to the relief sought can briefly be narrated as follows:-

The plaintiff is a manufacturer and supplier of exclusive range of cables for the transmission and distribution of energy and communications involving entities like the Zimbabwe Electricity Supply Authority, the Rural Electrification Agency and Tel-One. The plaintiff's business caters for both domestic and export markets. As at end of 2003, 50% of its sales volumes were largely in exports.

In 2004 the plaintiff's business experienced slow growth. This was due to inflation and other factors. In October 2004 the plaintiff approached the defendant for assistance. The defendant was then operating a foreign currency auction system. Through that system the defendant made available, each week, from 25% of export proceeds, an amount of foreign currency for which commercial banks would submit bids for their customers. On the basis of those bids allocations would then be made to the highest bidder(s).

In line with the auction system, on 24 October 2004, the defendant, through its Governor, informed the plaintiff that, if it (plaintiff) submitted bids to the auction the defendant would ensure that it (plaintiff) succeeded to the extent of US$150 000 per week to enable it to pay for essential inputs in its operations. That process was indeed put into place on a weekly basis as from 14 January 2005 up to June 2005. This was a special arrangement where the plaintiff would, instead of placing a bid, it would merely be advised through a telephone call each week from the defendant's officials that the said allocation of US$150 000 was ready. All the plaintiff was required to do in turn was to pay the

Zimbabwe dollar equivalent within 24 hours. The plaintiff would then in turn transfer, through a commercial bank, the requisite Zimbabwean dollar amount and details of the foreign suppliers to be paid in foreign currency (i.e from the US$150 000 allocated to the plaintiff).

The allocation of US$150 000 was, with effect from 16 June 2005, increased to US$250 000. Weekly allocations at that new level were made to the plaintiff until the end of July 2005. The allocation system was continued in August 2005 resulting in the plaintiff making three transfers of undisputed payments in Zimbabwe dollars for the equivalent of the amount of US$750 000 now being claimed by the plaintiff. The payments were in each case accompanied by details of external creditors to be paid by the defendant. Notwithstanding the payment of the equivalent amount in Zimbabwe dollars by the plaintiff, the defendant has to date not forwarded the foreign currency to the plaintiff's external creditors or refunded the plaintiff with the said amount of US$750 000. In fact the plaintiff has already, through other sources, paid its suppliers.

The above, in brief, explains why the plaintiff has resorted to this court action claiming the said amount of US$750 000.

With both the plaintiff and the defendant having amended their pleadings at the pretrial conference it was agreed that the issues for trial were:-

" a) whether defendant is contractually obliged to pay plaintiff the sum of US$750 000.00;
b) whether defendant is estopped from denying its obligation to pay plaintiff the sum of US$750 000.00;
c) whether defendant's tender to repay the sums of Zimbabwean currency paid to it by plaintiff is a proper tender which plaintiff is obliged to accept."

At the commencement of the trial I indicated to both parties that, given the fact that both parties were generally agreed on what transpired, my view was that the matter could be determined through merely hearing arguments from both sides. The plaintiff was, however, opposed to that approach and preferred to lead evidence. The defendant then also adopted the same stance. I therefore had no option but to allow the parties to lead *viva voce* evidence.

The plaintiff's only witness, Mr E.W. Turina (Turina) said he was the Chief Executive Officer of the plaintiff at the time of the purchase of US$750 000 from the defendant. He had, however, left the employ of the plaintiff in June 2006.

Mr Turina's evidence was in the main a confirmation of what was already contained in the pleadings. He said due to the scarcity of foreign currency the plaintiff had

reached an agreement with the defendant whereby bids from the plaintiff would be given preferential treatment. He confirmed that the information on the allocations was done telephonically and that once an allocation (ie the initial US$150 000 rising to $250 000) was made, the plaintiff was required to pay the equivalent in Zimbabwe dollars within twenty four hours (24) hours. The arrangement had worked well from January 2005 until August 2005 when the defendant failed/neglected to disburse US$750 000 to the plaintiff's customers/suppliers despite the fact that the plaintiff had paid the defendant the equivalent in Zimbabwe dollar as per the standing arrangement. The Zimbabwe dollars had been paid in three transfers on 1, 11, and 19 August 2005. This was to cater for the increased weekly allocation of US$250 000. He said when the first allocation was not released after payment of the equivalent Zimbabwe dollars the plaintiff had asked for an explanation but was promised that the money would be released. The same had happened with respect to the two subsequent payments.

After failure by the defendant to forward payment to its suppliers, the plaintiff had then borrowed money from other sources so as to meet supplier requirements. This had led to the withdrawal of invoices from the defendant, which invoices were produced as exh 1, 2 and 3.

Turina confirmed that before he left the employ of the plaintiff in 2006, negotiations for settlement were in progress and that the defendant had indicated that it would secure the US dollars at a later stage for the plaintiff or reimburse the plaintiff in Zimbabwe dollars. He said some of the discussions were not directly conducted with him. He had, however, later learnt that the defendant was not going to pay the US$750 000. It was his view that once the plaintiff effected payment of the equivalent Zimbabwe dollar amount of the allocated foreign currency "the contract was completed". He said the company had opted to wait because the Zimbabwe dollar had become worthless. Mr Turina stuck to his story under cross examination.

The defendant also called only one witness, a Mr B. Musoso (Musoso). The witness said he was employed by the defendant as its Head of Treasury Operations. He said the treasury division was responsible for settlement and payment of allocations. The auction system, he said, was run by a separate unit which was responsible for the allocations. The role of his department was to communicate with companies and advise them on foreign exchange rates. He was aware of a list of special allotees who received payment on a weekly basis. These were companies considered key to the national economy. These included plaintiff. He said there were thirty six (36) companies on the

special list and the allocations were made by the auction unit. Some of these were Boc Gases, Quest Motors, Unilever, Olivine Industries, Dunlop, National Oil Company of Zimbabwe (NOCZIM) and the fertilizer companies. Musoso said there were no formal contracts with the companies on the special list. The role of his department was to effect payment when funds were made available.

The witness said his department dispatched foreign exchange quotations to various interested companies. The quotations were meant to enable companies to mobilize the necessary funds before allocations were made. He said payment to allotees depended on instructions from what he called "the front office" and the availability of foreign currency. He said the the non-availability of foreign currency explained why the three payments made by the plaintiff in August were not honoured.

Musoso said when the auction system ceased in August 2005, there were many unpaid beneficiaries from the special list and the defendant decided to reimburse them in Zimbabwe dollars. He said he had heard that the plaintiff wanted reimbursement in US dollars instead of the Zimbabwe dollar. It was his evidence that in reimbursing beneficiaries the defendant did not take into account the devalued value of the Zimbabwe dollar because there was no financial obligation. "We were just returning whatever had been paid", he said.

Under cross examination Musoso maintained that the successful execution of the arrangement relied solely on the availability of foreign currency.

In addition to Musoso's evidence the defendant also relied on responses by Dr G. Gono (Governor of the Reserve Bank of Zimbabwe) and Patience Aisam (Manager Compliance – Treasury Division) to plaintiff's interrogatories filed on 29 September 2009. Both responses to interrogatories were filed on 17 November 2009.

In his response Dr Gono stated that he had, upon the specific request and representations from the plaintiff, advised that he would endeavour to source foreign currency for the plaintiff in the amounts mentioned (i.e initially US$150 000 rising to US$250 000). He said this was in recognition of the strategic role played by the plaintiff in the national economy. There was, however, no formal binding agreement. He said he had indeed been advised that "the plaintiff had made payments totaling Z$13 535 110 being the quoted equivalent at the auction rate of US$750 000", now being claimed by the plaintiff. However, he said "due to many other competing and pressing national requirements, the defendant was unable to avail the foreign currency not only to the

plaintiff but to many other companies in a similar situation who then accepted an offer for immediate refund. Plaintiff declined the refund."

It was his evidence that his officers had informed him that during August 2005 no disbursements were made to any applicant for foreign currency under the auction system.

In response to the plaintiff's interrogatories, Miss Patience Aisam confirmed that from "14 January 2005 to August 2005, she would, on a weekly basis, telephone or instruct that plaintiff be telephoned advising it that its application for foreign currency allocation had been approved." She also confirmed that the approved amounts were US$150 000 per week from 14 January 2005 to mid June 2005. There after the amount was increased to US$250 000 per week.

In terms of the joint pretrial conference minute the issues for trial are those already listed at p 2 of this judgment.

Advocate *Morris* for the plaintiff submitted that the plaintiff's case was clear and did not warrant argument. He submitted that the undisputed evidence of Turina had confirmed that upon approaching the Governor of the Reserve Bank, Dr Gono, for assistance in obtaining foreign currency the plaintiff had been granted the status of a permanently successful bidder at the weekly foreign currency auctions. The plaintiff, with that status, did not need to place bids at the auction but was merely telephonically advised of the agreed weekly allocations. The practice, it was submitted, had been successfully operational from January 2005 to July 2005. Payment(s) requirements were availed to the plaintiff who complied at all times by effecting the payment (s) of the equivalent amount of the foreign currency in Zimbabwe dollars. The only condition was that "foreign currency will only be released after receipt of Zimbabwean dollars."

Advocate *Morris* submitted that after the foreign currency amounts were not paid in August 2005 the Deputy Governor, Mr Ncube, of the defendant offered the plaintiff the choice of having the money paid by the plaintiff refunded in local currency or waiting for the foreign currency to be made available. That evidence was not contradicted. I agree.

Advocate *Morris* further submitted that in practice there were two initial contractual arrangements. The first was the undertaking by the defendant that the plaintiff would be allocated foreign currency without the need to make bids at the auction system. The second was that once the plaintiff effected payment of the Zinbabwean dollars within twenty four hours (ie equivalent of the foreign currency) the foreign currency allocated would be made available. The plaintiff had, in all three instances in August 2005, complied with the payment requirements.

Advocate *Morris* said the third contractual arrangement, novating the August contracts, occurred when the defendant promised to pay the plaintiff the foreign currency when it became available. The plaintiff had in turn agreed to wait for payment until it became necessary to institute these proceedings. In support of the need for the plaintiff to institute legal proceedings Advocate *Morris* quoted from *Asharia v Patel* 1991 (2) ZLR 276 where the relevant part of the judgment of the former Chief Justice reads as follows:

> "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 thereafter 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 or *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 for performance which is not unreasonable. If unreasonable, the demand is ineffective……."

The promise to refund was made in 2005 and summons was issued on 29 July 2008.

It was Advocate *Morris* submission that the evidence of the defendant's witness (Musoso) was irrelevant since he had no direct dealings with the auction system. He said the defendant had failed to call witnesses who could have given meaningful testimony as to what actually happened. The only credible evidence available was that of Mr Turina, he argued. Advocate *Morris* concluded by submitting as follows:

"1. That it was the uncontradicted and unchallenged evidence on plaintiff that Deputy Governor Ncube gave an undertaking to pay plaintiff US$750 000.00 at a future unspecified date.
2. That this undertaking was accepted by plaintiff and formed a binding contract.
3. That the binding contract so formed created an obligation on defendant to perform within a reasonable time.
4. That after the lapse of a time that defendant has never claimed is unreasonable, plaintiff made interpellation by the issue of summons, calling for the enforcement of the contract.
5. That in the alternative, the second contractual event is binding on the parties.
6. In any event, defendant so conducted itself between January2004 and July 2005 as to cause plaintiff to believe that it had a contractual relationship on an occasion by occasion basis; that plaintiff did so believe and as a result of Defendant's actions and words, plaintiff altered its position to its detriment.
7. That in enforcing specific performance of a contract, the court is to treat the state like any other individual.
8. That in the circumstances defendant has done nothing to prevent plaintiff from being granted a judgment in terms of the summons."

Mr *Chitapi* for the defendant submitted that due to the scarcity of foreign currency the plaintiff and thirty (36) other complainants were placed on a list of companies considered as strategic in the national economy. Depending on availability, the defendant then agreed to allocate foreign currency to these companies – which included the plaintiff. He said no formal contracts were drawn in respect of the arrangements. He said the plaintiff had been offered a refund of the money it had paid upon failure by respondent to source the requisite foreign currency.

Mr *Chitapi* emphasized the point that the arrangement between the parties was always subject to the availability of foreign currency which the defendant could disburse. Arguing that there was no contractual obligation on the part of the defendant to pay the plaintiff the amount claimed, Mr *Chitapi* said it was never the consensus of the parties that the payment of the Zimbabwe dollars sealed the contractual arrangements. The payment, he said, was subject to the availability of foreign currency. The defendant, he submitted, could not have guaranteed payment because it did not know how much foreign currency would be generated from the auction system.

Mr *Chitapi* said the defendant's witness had confirmed that his department had not been allocated with foreign currency for disbursement.

In the main, Mr *Chitapi* submitted, "The plaintiff had been favoured with an allocation that it be given foreign currency of US$250 000.00 per week if the same was available. There was no intention to create contractual obligations." He said quotations sent to the plaintiff were not offers.

Mr *Chitapi* further submitted that the plaintiff had failed to prove that foreign currency was available at the time the allocations were made. He blamed the plaintiff for refusing to accept a refund in Zimbabwean dollars as had been done by the other companies.

In conclusion Mr *Chitapi* had this to say:

> "The issue of who was a better witness between plaintiff and defendant's witness is with respect of no great moment. Material facts are common cause. The court should take a holistic approach in the matter and determine what the intentions of the parties were and what relationship was created. It is submitted that it could not have been within the contemplation of the parties that a failure by the defendant to disburse foreign currency to plaintiff due to non availability would ground a cause of action for specific performance.
> In all the circumstances the plaintiff's claim should be dismissed with costs and it is noted it has refused the tender of the refund in Zimbabwe dollars".

I fully agree with Mr *Chitapi* that in *casu* the material facts are common cause and I made that observation at the commencement of the hearing of this matter.

My assessment is that apart from merely confirming what is already contained in the pleadings, nothing much turns on the oral evidence from the witnesses called by both parties. However, my view, on the one hand, is that the evidence of the defendant's witness was totally irrelevant because he was clearly a distant player in what took place in the actual allocation process. On the other hand, I find that Turina's evidence buttressed the respondent's responses to the interrogatories. The responses do not deny the practice that operated smoothly from January 2005 to July 2005. The only issue highlighted is that the arrangement was anchored on the availability of foreign currency. That is undeniable and indeed no allocation could have been made without the availability of foreign currency.

However, the main issue, in my view, is whether by allocating to the plaintiff US $150 000 and later US$250 000 from the auction system, the defendant then became obligated to release the money to the plaintiff upon payment by the plaintiff within twenty four hours of the Zimbabwe dollar equivalent at the defendant's instruction. In interrogating that issue one has to consider the following undisputed facts:-

a) Every week Patience Aisam of the defendant would telephone the plaintiff to advise on what had been allocated to the plaintiff and what had to be transferred through a Commercial Bank in Zimbabwe dollars - in fact it was confirmation of the sale to the plaintiff of the allocated amount, in this case US$250 000.
b) Upon advise from Patience Aisam, the plaintiff would, within twenty four (24) hours, transfer the Zimbabwe dollar equivalent. Indeed in response to the interrogations the Governor of the Reserve Bank of Zimbabwe says:

> "I am advised that during the month of August 2005, plaintiff made payment totaling Z$13 535 110.00 being the quoted equivalent at the auction rate of US$750 000 which the defendant had hoped to pay to the plaintiff. Due to many other competing and pressing national requirements the defendant was unable to avail the foreign currency, not only to plaintiff but to many other companies in a similar situation who then accepted an offer for immediate refund. Plaintiff declined the refund."

This is supported by para 4 of the defendant's plea which reads :

> "The defendant admits that the sums of money as set out in paragraph 2 of the plaintiff's further particulars were deposited with the defendant. The amounts would have exchanged for US$750 000.00 once this money had been successfully sourced by the defendant. The foreign currency was not

> availed to the plaintiff because the defendant was unable to mobilize the same."

It becomes crucial for the defendant to explain the reasons for Patience Aisam to set in motion the process, if foreign currency was unavailable. My view is simply that the allocation was only made against funds that were already available from the auction. Patience Aisam states:

> "I confirm that during the period referred to, that is to say, from about the 14th January 2005 to August 2005 (the month of August included) I would, on a weekly basis telephone or instruct that plaintiff be telephoned advising that its application for foreign currency had been approved."

It is important to note that Patience Aisam spoke of an "approved allocation and not successful bid." This was so because the plaintiff was on a special list that was not required to bid. There could, in my view, be no approval or allocation of what was not already available. Given the condition that the completion of each transaction was totally dependant upon the availability of foreign currency, the possibility of Aisam confirming allocation and asking for payment of the Zimbabwe dollar equivalent within 24 hours when there was no foreign currency already earmarked for the plaintiff is, in my view, very remote.

In addition to the above it is important to determine at what stage a contract would be concluded between the parties. The scenario in the operation was as follows:

a) The Governor agreed to accord the plaintiff special treatment.
b) The Governor allocated a specific amount to the plaintiff on a "permanent" basis.
c) Patience Aisam would confirm the allocation and indicate the Zimbabwe dollar component to be paid within 24 hours; and
d) The plaintiff would within 24 hours comply and then forward a list of its customers to defendant for disbursement of funds.

The above scenario, clearly fits into Advocate *Morris*' submission that there were initially two contractual events (ie the Governor's undertaking and then the actual allocation accompanied by compliance on the part of the plaintiff). I am therefore unable to accept that the above scenario did not create binding obligations on the part of the defendant. To that end, I am of the view that upon compliance by the plaintiff, a binding contract was concluded and what remained was the release of the foreign currency purchased by the plaintiff. The case of *F.C. Hume (Pvt) Ltd v Minister of Natural Resources & Tourism* 1989 (3) ZLR 55 indeed supports this view. With the plaintiff having complied with all the

requirements, the contract was already in place and the defendant was obliged to meet its obligation.

The existence of the contract is further strengthened by the fact that the defendant admits that in August 2005, the plaintiff bought from it US$750 000 for a sum of Z$13 535 110. However, what the defendant is now saying is simply this:- "Yes you bought US$750 000 but give us time to mobilise it. We seem to have sold you what we did not have at the time." The defendant then places before the plaintiff two choices, namely reimbursement in the actual amount paid in Zimbabwe dollars or waiting until it mobilizes the amount of foreign currency already purchased by the plaintiff. That, in my view, is not to deny contractual obligation.

The plaintiff elected to wait until litigation became the only option. The plaintiff's election is based on the basis that devaluation has rendered the Zimbabwe dollar worthless. The defendant's witness confirmed that the refund was to be the actual Zimbabwe dollar paid without taking into account the issue of inflation and devaluation. It would, in the circumstances, be unreasonable to fault the plaintiff's election to await payment of what it actually purchased. The promise made by the deputy Governor of the defendant was not disputed in evidence. It was, in my view, not a novation of the earlier arrangements but a confirmation of same.

In his submissions Mr *Chitapi* merely stated:

> "(vii) He believed that foreign currency was available for the simple reason that quotations for payment of Zimbabwe dollars were sent to plaintiff and the plaintiff paid on them."

The above is in line with para 5 (b) of the plea which reads:-

> " c) The defendant denies that it has refused to compensate the plaintiff and avers that it has offered to refund the defendant what it paid as has been done with other companies who faced the same fate. The plaintiff has refused to be compensated in local currency and insisted on payment of US$750 000.00.
>
> Wherefore the plaintiff tendering to refund the defendant the amount it paid with interest at the prescribed rate of 30% per annum otherwise prays for the dismissal of the plaintiff's claim with costs".

Having determined that the defendant was contractually obliged to pay the plaintiff the sum of US$750 000 which the plaintiff purchased as agreed between the parties, it would be unreasonable to allow the defendant to dictate to the plaintiff the form of settlement the plaintiff should accept. That being the case the plaintiff's claim for specific performance is unassailable The defendant accepted the plaintiff's election for specific

performance ie by giving the plaintiff two choices – whereby the plaintiff elected to await payment of the purchased foreign currency. That position has not changed. The fact that other companies accepted refunds in Zimbabwe dollars, has no bearing on the agreement between the parties herein. The defendant is estopped from abandoning its obligation. In *International Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) the late ROBINSON J, in dealing with the issue of specific performance had this to say:-

> "I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is: businessmen beware. If you fail to honour your contracts, then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value at the time of the breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them . . ."

I agree with the above. Accordingly the sanctity of contractual arrangements should continue to be protected by courts of law.

In view of the foregoing find in favour of the plaintiff and order as follows:-

1. The defendant be and is hereby ordered to pay the plaintiff the sum of US$750 000 together with interest a *tempore morae* at the London Interbank rate for United States dollars 3.5% per annum from 1 September 2005 to date of payment; and

2. The defendant be and is hereby ordered to pay costs of suit.

Messrs Coghlan, Welsh & Guest, plaintiff's legal practitioners
T.H. Chitapi & Associates, defendant's legal practitioners