

ZIMBABWE UNITED PASSENGER COMPANY
versus
PACKHORSE SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 8 February 2018 & 23 January 2019

Opposed

T Magwaliba, for the applicant

T Mafukidze & A Moyo, for the respondent

MAKONI J: The applicant approached this court seeking an order that the respondent pays to it the sum of USD972 323.00 in terms of an agreement executed between the parties on 20 June 2013. The background to the matter is clearly set out in the applicant's heads of argument and I will borrow heavily from them.

- 3.1 In case number HC 45218/07 (judgment number HH 299/12) the High Court handed down a judgment against the applicant in favour of the respondent. the judgment ordered the applicant to pay the respondent the sum of US\$763 068.00 together with interest at the rate of %5 per annum and costs of suit.
- 3.2 The applicant though intending to appeal against the judgment was out of time. Accordingly, it instituted an application for leave to appeal out of time in the Supreme Court in case number SC 155/13.
- 3.3 In case number SC 192/13, the applicant also instituted an urgent application for stay of execution of the High Court's judgment pending the determination of the application for leave to execute pending appeal in case number SC 155/13.
- 3.4 The respondent consented to the grant of leave to appeal out of time and extension of time within which to appeal as sought by the applicant in case number SC 155/13.

- 3.5 By the time that agreement was reached, in order to stave off execution against its property, the applicant had already paid the sum of US\$1000 000.00 to the respondent's legal practitioners Messrs Kantor and Immerman in respect of a portion of the judgment debt, the Deputy Sheriff's commission and the auctioneers charges.
- 3.6 Terms were therefore agreed in respect of the payment of the balance pending the determination of the appeal against the High Court judgment.
- 3.7 In clause 5 of the agreement, it was agreed that:
“In the event of ZUPCO succeeding in the appeal, Packhorse shall refund ZUPCO all amounts paid to it in terms of this agreement.”
- 3.8 On 23 February 2017, the Supreme Court granted the applicant's appeal in case number SC 216/13 (judgment number SC 13/17).
4. Upon the grant of the appeal in favour of the applicant on 23 February 2017, in terms of clause 5 of the agreement between the parties the respondent became obliged to refund all amounts which had been paid by the applicant pursuant to the said agreement. The total amount paid by 23 February was the sum of US\$972 323.00.

After the Supreme Court judgment and on 24 February 2017, the applicant wrote a letter to the respondent demanding a refund of the sum of US\$972 320.00. The respondent disputed liability resulting in the applicant instituting the present proceedings.

The application is opposed on four grounds, viz

1. The respondent acted as an agent for a disclosed principal in the transaction. Payments made to the transaction were therefore remitted to the principal.
If the applicant intends to obtain any refund it must of necessity show
 - a) that it is not indebted to Scania (respondent's disclosed principle).
 - b) that there was no legal or factual basis for the payments
 - c) look to Scania for any payment made without cause.
2. The applicant will be unjustly enriched if the relief sought is granted. The applicant received the buses and utilised them in a business without paying for them, it now intend to obtain money either from the agent or the principal.

3. The claim is *contra bonos mores*. The effect of the applicant's claim is that it wishes to extract the money for free. This runs contrary to all acceptable commercial moral standards.
4. The claim in violation respondent's constitutional rights.

The claim is in violation of s 71 of the Constitution of Zimbabwe Amendment (No 20) Act 2013.

The respondent raised of a further defence of non-joinder of Scania South Africa in its Heads of Argument.

Mr *Magwaliba* submitted that the applicant's case is predicated upon an agreement entered into between the parties. That agreement has clause 5 which is specific that if the applicant succeeds in the Supreme Court, then the respondent was obligated to pay back all the amounts that it received from applicant together with interest and costs. The Supreme Court granted judgment in applicant's favour and the respondent is now obliged to pay as per its undertaking. A demand for payment was made and the respondent did not oblige. The applicant is therefore entitled to judgment in terms of the draft order.

As regards the issue of joinder of Scania, he submitted that the applicant has no claim against Scania. The undertaking to refund the money was made by the respondent in its own right. Further he submitted that r 87 of the High Court Rules 1971 enjoins the court to resolve issues as between the parties that appear before it. *In casu* no relief is being sought against Scania. The matter can be resolved in the absence of Scania.

Regarding the issue of agency of the respondent, Mr *Magwaliba* submitted that the agreement in issue was entered into by the respondent in its capacity as a principal. It does not refer to the respondent as the agent of an undissolved principal. On the constitutional argument he submitted that it does not arise as it is Scania which sold the buses and it has a right to sue the applicant if is so minded. He further contended that Scania compromised its rights in an agreement on p 136 of the record. The sum agreed was paid in full and final settlement to Scania.

Mr *Mafukidze* submitted that the agreement must be interpreted in its context. He referred to *Natal Joint Municipal Pension Fund v Entubeni Municipality* 2012 (4) SA 593 (SCA) where it was stated that interpretation is a process of attributing meaning to the words used in a document be it legislation, or a contract, having regard to the context prove by reading the particular

provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. The context that he referred to *in casu* was the economic situation prevailing in Zimbabwe in 2002 regarding foreign currency shortages. This resulted in the cash cover agreements. The agreement in issue was entered into in the context the litigation whereby the applicant was contending that it did not buy the buses from the respondent. The respondents were agents of a principal.

What is at the centre of dispute between the parties is the Deed of Settlement entered into by the parties on 20 June 2013. Clause 5 of the agreement provides.

“In the event of ZUPCO succeeding in the appeal, Packhorse shall refund ZUPCO all amounts paid to it in terms of this agreement.”

It is common cause that the applicant succeeded in the Supreme Court. The amounts that were paid to the respondent in terms of the agreement are not in issue.

The agreement was made pursuant to a High Court judgment granted in favour of the respondent. A reading of the summons and declaration in HC 4218/07 and the Deed of Settlement reflects that the respondent was suing and acting in its own right.

The respondent seeks to resile from the agreement on the basis of the various grounds it raised in its opposition.

I would want to agree with the applicant’s position as put forward by Mr *Magwaliba*.

The parties are agreed on the law regarding interpretation of contracts as laid out in *Natal Joint Municipal pension Fund supra* where the following was stated

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective.

A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

One must have regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attended upon its coming into existence. *In casu* the relevant provision to be interpreted is clause 5 of the agreement. In my view, the circumstances attended upon its coming into existence would be the High Court judgment and the pending Supreme Court case. One would also have to have regard to the findings made by the Supreme Court. The High Court made a finding that the agreement sale of the buses was between the applicant (respondent) and the defendant (applicant) and that the applicant should pay the respondent the amount in issue.

The Supreme Court found otherwise on p 16 of the cyclostyled judgment where it states the following

“In casu, the evidence placed before the court a quo suggests that the cash cover agreements are not the agreements of sale. The evidence supports the conclusion that the transaction of the sale of the buses was between the appellant and Scania with the respondent only coming into the pictures at Scania’s instance, and only for the purpose of safeguarding the due performance of the agreement of sale of the buses, I conclude that the respondent did not proffer any evidence which substantiate its claim that it transacted with the appellant in respect of the purchase of the buses. It thus did not prove that which it had alleged.

Further credence is lent to this probability by the fact that the documentary evidence placed before the court a quo suggests that the appellant’s obligation to pay the purchase price for the buses was to Scania. Furthermore, that the Zimbabwe dollar amounts were held by the respondent so as to ensure the execution of the appellant’s obligation towards Scania. The case cover agreement record that the Zimbabwe dollar amounts were to be released upon the appellant’s fulfilment of its obligations to Scania. The appellant’s version is thus further shown to be the more likely of the two.”

It concluded by finding that the respondent did not prove that the transaction of the sale of the buses was between it and the applicant. It dismissed the respondent’s claim. With that disposition clause 5 of the agreement kicked in and that is the basis upon which applicant’s case is predicated on.

The above findings by the Supreme Court defeat all the defences raised by the respondent. Respondent’s case is that it was an agent of Scania South Africa and all the payments it received were on behalf of Scania and were remitted to it. Scania should have been joined to the present proceedings. Further the Applicant would be unjustly enriched if the relief sought is granted as it would receive a refund of the purchase price and retain the buses.

The issue that the respondent acted as an agent of Scania are not borne out by the Supreme Court judgment. The furthest the Supreme Court went was to find that the agreement of sale of the busses was entered into directly between Scania and the applicant. The respondent only came into the picture afterwards for the purpose of ensuring that the cash cover, which was in terms of separate agreements, would be utilized for purposes of obtaining payment.

The issue of joinder would also be defected. The dispute in the suit can be resolved as between the parties without the involvement of Scania. The undertaking to refund the money was made by the respondent in its own right and not as an agent for Scania. If the respondent felt that Scania's joinder was necessary for purposes of resolving the dispute between the parties it was at liberty to join it. Resolution of the present dispute will not impact on Scania's rights against the applicant if any, and Scania can still enforce such rights as the resolution of this dispute cannot be pleaded as *res judicata* by the Applicant against Scania.

The issues of public policy and violation of property rights cannot be sustained in view of the findings by the Supreme Court. It would be up to Scania, and not the respondent to raise such concerns. As it stands, there is evidence on record that Scania compromised its rights in terms of the agreement of sale and was paid in full in terms of the compromise.

In view of the above the applicant has made out a case for the relief sought and the respondent has not established a basis to resile from the agreement.

I will therefore make the following order.

1. Judgment be and is hereby entered in favour of the applicant against the respondent for the sum of US\$972 323.00 together with costs of suit and interest at the rate of 5% *per annum* from 27 February 2017 (the date of delivery of the letter of demand) to the date of full payment.

Magwaliba & Kwirira, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners