TAWANA POWER CORPORATION (PVT) LTD
versus
THE MINISTER OF LANDS, AGRICULTURE,
WATER, CLIMATE AND RURAL RESETTLEMENT
and
VICE PRESIDENT C.G.D.N. CHIWENGA N.O.
and
ZIMBABWE NATIONAL WATER AUTHORITY
and
PROCUREMENT REGULATORY AUTHORITY
OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 25 November 2019 and 25 January 2023

Court Application

Adv *T Chinyoka,* for the applicant
Ms *O Zvedi*, for the first, second and fourth respondents
Mr *J Dondo*, for the third respondent

CHINAMORA J:

Background facts

The dispute before me stems from a misunderstanding between the applicant and the first respondent over an agreement signed on 22 May 2018 between the applicant and the government of Zimbabwe represented by the first respondent. The "Memorandum of Agreement" ("the MOA"), which is the subject of this litigation appears on pages 112-127 of the record marked Annexure "F". The agreement sets out the terms and conditions governing the funding of a bankable feasibility study for the Kondo and Chitowe dams Multi-Purpose Project. In brief, the Kondo and Chitowe dams Multi-Purpose Project is a major water infrastructure initiative on the Save River intended to unlock the socio-economic development potential of the Save and Runde catchments. It is worth mentioning that this agreement was preceded by a Memorandum of

Understanding ("the MOU"), which is on p(s) 50-61of the record marked Annexure "B", was signed on 19 February 2013. Article 4 of the MOA sets out the scope and purpose of the project, namely, to provide:

(a) Six (6) billion cubic metres of raw water storage;

(b) Unlock one hundred thousand (100,000) hectares of land for large scale irrigation;

(c) Generation in excess of two hundred and seventy (270) megawatts of peaking hydro-electricity at Kondo dam gorge;

(d) Generation of three comma five (3, 5) megawatts of hydro-electricity at Chitowe dam's east bank canal; and

(e) Possible annual water supply contract of four hundred (400) million cubic metres four hundred thousand (400 000) mega litres to the Republic of South Africa.

In addition to the above developments, there were other various key infrastructures that were envisaged by the agreement. In principle, the parties agreed to cooperate in order to achieve the objects of the agreement. This was to be done by putting together resources for the conduct of a feasibility study to assess the viability of the project on the terms of the agreement and in line with the Joint Venture Act [*Chapter 22:22*] or other relevant laws of Zimbabwe. It is important to examine what exactly was agreed by the parties in the MOA.

The terms and conditions of the agreement

Of importance to this application is Article 5 which stipulates in clause 5.1 the financial obligations of the applicant *via-a-vis* the feasibility study, and is couched as follows:

> "The bidder shall provide funding for the undertaking of a bankable feasibility study of the Multi-Purpose Project within six (6) months from the effective date of this agreement, unless the term is extended by six (6) months, or such lesser term, upon application by the bidder and approval by the Contracting Authority and further, upon proof of the imminent availability of funds".
> **[My own emphasis]**

An additional notable aspect is that, in terms of clause 5.2, if the applicant failed to secure the funding, the agreement would automatically lapse. Furthermore, in terms of Article 11, the parties agreed that if any dispute arose in relation to the interpretation and implementation of the MOA, that dispute would be referred to arbitration, if the parties failed to resolve it. The same

Article in clause 11.2 provides that, the matter would be entertained by a single arbitrator to be selected by agreement between the parties or, failing such agreement, to be nominated by the President of the Law Society of Zimbabwe. In addition, the party referring the matter to arbitration was obligated to notify the other party in writing not later than thirty (30) calendar days and the arbitration would be conducted in accordance with the provisions of the Arbitration Act [*Chapter 7:15*].

At this juncture, I wish to highlight that ordinarily where there is an Arbitration clause in an agreement this court will decline jurisdiction of the matter. However, I have decided to entertain the matter since none of the parties raised an objection to the jurisdiction of this court in light of the Arbitral clause contained in the MOA. In this respect, Article 8 of the Model Law is clear that referral is instigated by the parties. It reads"

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".

Since none of the parties raised or argued the jurisdictional point at the hearing of the matter, I was left with the distinct impression that the parties had no intention of invoking Article 11, preferring to defer to this court's jurisdiction. As there are no points in *limine*, let me now consider the respective arguments of the parties on the merits.

The applicant's case

I have already noted that prior to the signing of the agreement, the applicant and the first respondent had concluded an MOU 19 February 2013 for the development of the Multi-Purpose Project. The MOU expired on 18 February 2015, upon which negotiations began leading to the agreement. It is applicant's submission that, on 3 March 2019, the first respondent advertised (through the third respondent) for "International Tenders for the Development of Water Infrastructure in Zimbabwe". The applicant perceived this as a violation of the agreement embodied in the MOA. It submitted that, according to the invitation, projects available for tender included the Kondo-Chitowe dam project and the reason for the project being put to tender was that the agreement had expired. It is for that reason that the applicant approached this court in

essence seeking a declaration that the agreement between the applicant and the first respondent is still binding on the parties. In the alternative, the applicant is seeking damages as against the first respondent in the sum of US$1,483,550, 000.00 (one billion four hundred and fifty thousand United States dollars) arising from the prejudice suffered by the applicant consequent to the first respondent's repudiation and breach of agreement and illegal use of the applicant's intellectual property in the tender.

The first respondent's case

The first respondent opposed the application on the basis that the agreement automatically lapsed on the basis that the applicant failed to provide funding for the feasibility study as provided in Article 5 of the agreement. On the claim for damages, the first respondent argued that the applicant had failed to prove that it was entitled to damages as no evidence was put forward on how the damages were established and quantified as the figure only appears from the prayer. The second respondent disputed that it was the letter of the second respondent which led to the cancellation of their agreement. Further to this, the second respondent argued that there was no reason for citing the second respondent in the present proceedings. The third and fourth respondents indicated that they would abide by this court's decision. I will move to examine whether the relief sought can be afforded to the applicant.

Analysis of the case

I prefer to begin by considering the alternative claim for damages. The definition of damages is given by the learned authors, Visser and Potgieter, *Law of Damages*, 3ed, Juta (2016) at p 29 as:

> "Damage is the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of a person involved."

According to that definition, five essential elements of damage are espoused, namely, diminution or reduction, causation, interest, normative and time. The applicant in its founding affidavit, in particular, para 57 (at p 43 of the record) reads:

> "…it is submitted that the loss incurred by the applicant would be adequately compensated by an award of damages. The applicant having suffered damages for loss of income, costs

> associated with the project thus far, intellectual property theft and expenses on the project since 2012, an order for payment of damages in the sum of US$1,483,550, 000…"

I observe, however, that nowhere in the founding affidavit does applicant prove this claim as envisaged by Visser and Potgieter. In this respect the court has not been told what the applicant earns as income (either gross or not), and how the amount of US$1,483,550,000.00 has been computed. Also not pleaded are the particulars of the alleged theft of the applicant's intellectual property and the value attributed to it in the composite amount of US$1,483,550,000.00. In fact, the nature of the intellectual property has not been identified, as well as whether such intellectual property was registered for protection by copyright, patent, trademark and design laws. The loss associated with the project up to the time the proceedings were commenced was not stated, and no supporting documents (invoices or receipts) were provided to prove the expenses. It is settled law that he who alleges must prove and, in this regard, in *Astra Industries Limited* v *Chamburuka* SC 258/11 OMERJEE AJA stated that:

> 'The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation'. The applicant did not prove the grounds or advance any evidence to prove its case. In my view there in nothing before this court that warrants an award of damages".

On the basis of the allegation in para 57 of the applicant's affidavit, I am not satisfied that the applicant has established a case for the damages that it seeks. For my part, I also doubt the wisdom of bringing a claim for damages via the application procedure, especially where no evidence has been tendered to prove the costs incurred towards the project. I will now consider the relief of a declaratur that the applicant seeks.

The issue before this court is whether or not the agreement by and between the applicant and the first respondent lapsed or not. The starting point would be to discuss the obligations of the parties in the agreement. I have already acknowledged that Article 5.1 of the agreement explicitly places on the applicant an obligation to secure funding for the project within six (6) months. That clause is in peremptory terms. It does not end there because, Article 5.2 of the agreement also states categorically that:

> "If the Bidder fails to secure funding in terms of Article 5.1 above, this Agreement shall automatically lapse."

The clauses referred to above are clear and unambiguous; in essence, the applicant was obligated to fund the bankable feasibility study within six (6) months, failing which, the agreement would automatically lapse. In applicant's affidavit, it is clear that the applicant did not, as required by the MOA, fund the bankable feasibility study within the prescribed time frame. The applicant gives excuses as to why it failed to fund the feasibility study. It follows, the agreement automatically lapsed. The applicant sought to rely on Article 3 of the agreement which provides that:

> "The Parties agree in principle to co-operate in achieving the objects expressed herein, to exert efforts together for the conduct of a feasibility study to assess the viability of the project on such terms as the Parties may subsequently agree..."

The point I make is that, while this is an ingenuous attempt explain the applicant's obvious failure, I make one comment. As opposed to Article 3 which, in general, requires the parties to bring to bear their efforts together for the conduct of a feasibility study, Articles 5.1 and 5.2 specifically requires the applicant to fund the feasibility study. As the applicant did not do so, the parties agreed that the fate of the agreement was to lapse automatically lapse. The relief that is sought is based on demonstration that an applicant has an existing, future or contingent right. (See *Munn Publishing (Pvt)* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S). Since the applicant has not controverted what is clear from the record that it failed to secure funding within the six months stipulated in the MOA resulting in the agreement automatically lapsing, there is no right for this court to determine. In this this context, I make reference to the South African case of *Adbro Investment Co Ltd* v *Minister of the Interior* 1961 (3) SA 283 (T) at 285B-C, where WILLIAMSON J stated:

> "I think a proper case for a purely declaratory order is not made if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought".

I respectfully endorse the self-commending logic of the learned judge. This court cannot embark on an academic exercise to consider a right, which at the time this lawsuit was mounted, no longer existed as the agreement had lapsed. Accordingly, I find that the applicant's claim lacks

merit and the relief sought cannot be afforded. Having come to this conclusion, there is no reason for me to depart from the general rule that costs follow the outcome.

Disposition

The application is dismissed with costs.

John Mugogo Attorneys, applicant's legal practitioners
Civil Division of the Attorney General's Office, first, second and fourth respondent's legal practitioners
Messrs Dondo & Partners, third respondent's legal practitioners