DOVES FUNERAL ASSURANCE (PRIVATE) LIMITED
versus
ZIMBABWE PLATINUM MINE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 11, 12, 13, 14 October 2016, 3 & 30 March,
7 & 20 April 2022 & 1 February 2023

Civil Trial

S Hashiti, for the plaintiff
ABC Chinake, for the defendant

TSANGA J: The plaintiff, Doves Funeral Assurance (Private) Limited, (hereinafter referred to as Doves), sued the defendant Zimbabwe Platinum Mine (Private) Limited (hereinafter referred to as Zimplats), for the following:

i) A declaratory order that the purported unilateral rescission of the agreement between the parties by the defendant on the 7th of October 2013 be declared to be unlawful.
ii) That consequent to (i) above, the defendant be ordered to finalise the implementation of the Zimplats Employee Funeral Scheme with the plaintiff.
iii) In the alternative to (ii) above, an order that the defendant be ordered to pay plaintiff damages in the amount of four million one hundred and ninety five thousand five hundred and forty three dollars (US $4 195 543.00).
iv) Costs of suit

THE BACKGROUND

Zimplats issued a written invitation for tenders on the 27th of December 2012 for bids for the provision of an employee funeral scheme. What is common cause between the parties is that the *Tender Procedure* specifically stated that the conditions mentioned in a set of specified documents collectively referred to as the *Tender Document* were to form the basis of the contract entered into between Zimplats and the successful Tenderer. Clause 2.2 of the *Tender Procedure* set out the following as constituting the overall *Tender Document:*

- Letter of invitation to Tender
- Tender Procedure
- Conditions of Tendering
- Scope of works

- Special Conditions of Contract
- Appendix A -Tender Form
- Appendix B – Zimplats General Conditions of Contract

On 20 March 2013, Zimplats communicated in writing to Doves that it had been adjudged to be the successful tenderer. It simultaneously communicated therein that a contract was being worked on and would follow for signing. It is not in dispute that a draft contract was written and exchanged hands but was never signed. Instead, on the 7th of October 2013, Zimplats communicated that it was cancelling the tender process leading to this present action. What informs the dispute is whether at the time of cancellation, there was a valid contract in place which entitles Doves to damages from Zimplats for wrongful cancellation.

According to Doves, the communication on the 20th of March 2013, regarding the successful tender, constituted an agreement in terms of which it was bound to establish the *Zimplats Employee Funeral Scheme* for Zimplats on the basis of terms and conditions set out in its *General Conditions of Contract*. Zimplats position, on the other hand, is that the communication of the success of the tender did not constitute the full terms and conditions of the contract between it and the successful tenderer, since in terms of clause 1.3 of the *Tender Procedure* document, submission of the form would constitute an agreement to be bound to a written contract with the defendant whose terms and conditions were set out in the *Zimplats General Conditions of Contract.* In other words, according to Zimplats, the final terms and conditions of contract would be determined by a written agreement.

Against this background, the issues referred to trial upon which evidence was led by the plaintiff were as follows:

1. Whether or not there is a contract between the plaintiff and the defendant for the provision an Employee Funeral Scheme by the plaintiff to the defendant.
2. Was the agreement governed by the tender documents or unsigned contracts?
3. Whether or not the defendant unlawfully terminated the contract between the parties.
4. Whether the defendant is liable to the plaintiff.
5. Did the plaintiff suffer damages and if so in what amount.

THE PLAINTIFF'S EVIDENCE

Mr Talent Maziwisa the principal officer of Doves Funeral Assurance and the Chief Executive of Doves Holdings gave evidence in chief, on account of his involvement in the process of the tender from start to finish. He stated that following the purchase of the

necessary tender documents, Doves had done a power point presentation to Zimplats, who in addition, had visited their premises. It was thereafter that Doves had been phoned advising it of the success of its tender.

The summary of his evidence upon which he based the argument on whether there was a valid contract in existence at the time of cancellation, was that the parties had met after the award of the tender, whereupon it had been agreed to move the effective date of implementation to May 1 2013. He said that the parties had also agreed at that point that Doves would summarise its benefits and structure, which information would be attached to the forms that individual employees would complete as well as provide information on their dependants. He told the court that it was also agreed at that point that Doves would receive a schedule of employees from Zimplats who were already on an internal fund.

In addition, upon winning the tender, he said it had been agreed that Zimplats would provide Doves with a template of a contract. His evidence was that effective service would be provided to all Zimplats employees whilst registration was in progress. He said Doves had gone ahead to implement the scheme full throttle on the basis of this understanding. He told the court that the written contract was not part of the conditions of the tender. He also stated that when Doves prepared its tender, it was at no point advised that the bid would be conditional to a written contract and neither had this been mentioned when an inspection of their premises had been done or when the list of beneficiaries had been obtained. He also highlighted though that a draft contract had been availed after the tender, which the parties had gone through although it had not been finally signed. He said when the letter of termination was received, Doves had already provided services to about 33 beneficiaries. He also stressed that nowhere in the tender documents was there any provision for the termination of the contract on notice.

His evidence drew on clause 17.5 on termination in the *General Conditions of Contract* to highlight that the provision did not talk of termination of the contract at the instance of one party for no reason or where there had not been any failure or breach. To provide context, clause 17.5 was couched as follows:

> "17.5 In the alternative to the above, the Principal may, in its sole discretion, terminate the CONTRACT without committing breach of the contract if the PRINCIPAL is of the opinion that the CONTRACTOR has not performed in accordance with the provisions of CONTRACT, or where in the PRINCIPAL'S opinion the business relationship between the parties has deteriorated or has been irreparably damaged or where the CONTRACTOR has, in the PRINCIPAL'S opinion, not performed with the necessary skill, care and diligence,

> consistent with the generally accepted standards within the reliant industry, or other relevant standards of practice where applicable."

He also spoke in his evidence to the contents of Clause 3.2 of the *General Conditions of Contract* which in essence stated that there was to be no variation to the contract or consensual termination unless recorded in writing and signed by both parties and duly authorised representatives. Mr Maziwisa said the parties had not recorded any such variations. Whilst he said that the tender conditions provided for ways of termination, the termination of the contract was not in accordance with what had been provided.

As regards the draft contract which was eventually never signed, his evidence was that it was simply meant to reduce all conditions in writing and was meant to be ceremonial. He also made reference to Clause 3.3 of the *General Conditions of Contract* which outlined the documents which were to be taken into consideration in the event of a dispute. He highlighted that in the hierarchy of documents, the memorandum of agreement only ranked as number three, after the Special Conditions of Contract and the General Conditions of Contract. It was couched as follows:

> "3.3 If conflict between the documents comprising the CONTRACT should occur the order of precedence in interpreting the CONTRACT shall be:
> a) the Special Conditions of Contract
> b) the General Conditions of Contract
> c) the Memorandum of Agreement
> d) the Purchase Order
> e) any other documents."

As regards an audit that Zimplats had requested to be done by the company *Ernst and Young* subsequent to the award of the tender, Mr Maziwisa's evidence was that they had written to Zimplats on the 23rd of April 2013 seeking to gain an understanding of why the audit was being done since it had never been part of the conditions of the tender. He told the court that the response they had received was that since Zimplats was part of a publicly listed company, it had to adhere to good business practices but that it was still committed to doing business once the process was complete.

His evidence also addressed the offer of US $30 000.00 in final settlement of the matter which he deemed a mockery as Doves had not breached the contract which was long term in nature. In terms of how he had arrived at the figure of US $4 195 543.00 claimed in the summons, his evidence was that the figure was actuarial, and based on the period that the contract would have run. He said the contract would have matured at 20 years.

In cross examination, he agreed that in a tender of this nature it would have been expected to sign a contract although he emphasised that he was placing reliance on the contract that arose by virtue of winning the tender. He accepted that the *Tender Document* included the *"General Conditions of Contract"* which governed the relationship and that clause 1.3 of that document contemplated a written contract.

It defined contract as follows:

> 1.3 "CONTRACT" means the contract between the PRINCIPAL and the CONTRACTOR in respect of the contract works to be delivered by the CONTRACTOR, which consist of this document, the purchase order placed by the PRINCIPAL on the contractor and **such other documents as are agreed and signed by the Parties recording the terms of which the CONTRACT works are to be executed**, and any other subsequent amendments thereto."

In cross examination, clause 17.5 of the *General Conditions of Contract* which dealt with breach and termination as already outlined above, was also read into the record on the basis that its contents pointed to the fact that Zimplats had sole discretion to terminate in terms of that clause. It was put to Mr Maziwisa that on the basis of this clause, breach could include non-disclosure or the emergence of information about Doves which did not satisfy the tenderer and which affected the credibility of Doves. It was further put to him that against this reality, if Zimplats got out of the contract on the basis of this clause, it would not be committing any breach. His response was that there had to be a basis for the breach which he denied existed, as the subsequent audit which was carried out by Zimplats had never been part of the tender process.

Additionally, it was put to him that the share ratio and liquidity requirements that are set by the insurance and Pensions Fund Commission (IPEC) had been violated by Doves, and that the audit had become necessary due to issues of solvency, governance and structure of shareholding of the company. Mr Maziwisa's position was that whilst they had consented to the audit being done, this was in the spirit of moving things forward as opposed to this having been a part of the tender process. He stated that in response to the queries raised by *Ernest and Young*, that the observations were contained in a report which was not final to which Doves had provided its comments. However, he said he did not have in court that correspondence sent to *Ernst and Young* correcting their report.

It was equally put to him in cross examination that the report had found no audited accounts going back more than three years and neither had audited accounts been produced for this trial despite the fact that the claim was for damages for loss of profit - a position which was said to be largely determined by audited accounts. His response was that the

company was audited and that the reason the accounts had not been produced was that they had not been requested. He was also emphatic that the loss was on the basis of the contract and not where Doves was coming from. He said its financial viability had been proven by virtue of acceptance of its tender. Whilst he confirmed that the termination of the contract followed the *Ernst and Young* report, he maintained that there was everything wrong with that very termination as this was on the basis of an audit which had never been a part of the tender.

In cross examination, clause 16 of the draft contract which dealt with termination by notice was also read into the record. It provided as follows:

> "Either party shall, without penalty, have the right to terminate this agreement at any time upon giving to the other party at least three (3) months written notice of its intention to do so. Save for any rights, obligations and or/ liabilities that may have accrued up to the date of such termination and subject to the provisions of clause 18 below, neither Party shall have any rights, obligations or liabilities against the other Party after such termination of the Agreement."

Mr Maziwisa's response to this paragraph was that this was one of the paragraphs to which Doves had highlighted amendments in an email dated 10 April 2013. The nature of the amendments was again not placed before the court.

Furthermore, it was put to him that clause 19 of the *General Conditions of Contract* which dealt with dispute resolution was clear that the first avenue to be followed would be arbitration. His response to this was that the letter of 7th October 2013 terminating the contract had taken the steam away from pursuance of the various avenues that had been initiated in trying to solve the dispute.

The second witness who gave evidence on behalf of the plaintiff was **Mr Albert Mawungwe.** He gave this evidence in his capacity as the then General Manager for sales and marketing at Doves at the material time of the tender. He confirmed the process as highlighted by Mr Maziwisa regarding the activities that had taken place after the winning of the tender. He also confirmed that they had received a list of employees from the Human Resources department of Zimplats to facilitate their field work on beneficiaries once the tender had been won. His evidence was that the annual premium lost for that year was US$972 000. 00, which he said was arrived at on the basis of a calculation of the average premium per household multiplied by the number of persons per household.

He conceded in cross examination that the list that had been obtained from Zimplats did not reveal any material information such as the age of the employees, whether married or

not and whether they had children which would have enabled it to have a more accurate picture of the households for the purposes of calculating what it deemed to be the premium due. He also conceded that the number of dependents to be covered would have been specific to an employee. With regard to the form's lack of detail, he agreed that the schedule was an empty schedule and that it was the reason they had had to go into the field to ascertain the reality on the ground. He also stated that he was unable to recall how many people had actually completed the exercise of filling out Dove's forms and also how many of those who filled actually had four dependants. He also conceded that it was material how many dependents a person had as it would have a bearing on the premium.

Whilst he accepted that a draft contract had exchanged hands, like Mr Maziwisa, he stated that he had assumed this to be mere procedure rather than that a written contract was necessary even when referred to clause 1.3.5 of the *Tender Procedure* document which read as follows:

> "1.3.5 The Tenderer's standards terms and conditions will not apply. Terms, conditions and exceptions in the Tender Form which depart from the terms referred to in this Tender Document are to be deemed as rejected by Zimplats except to the extent that they may be expressly included in a formal written contract between Zimplats and the Tenderer."

The third witness who gave evidence was **Ms Melody Nare**, an employee of Beacon. Though not yet an actuary herself she stated that had worked on the actuarial report in terms of number crunching. Whilst she had done the calculations, she had submitted her report for approval to Ms Kafesu her boss who is the actual actuary who had signed off in respect of her findings. She confirmed that Beacon generally provides actuarial services to Doves. She described actuarial services as final calculations to mitigate risk of uncertain events in the future. She said assumptions used are based on past data, market data and any specifics relating to the entity in question.

Her evidence was that they had been asked by Doves to calculate profit to be made from a contract to provide funeral services. Doves had provided a list of 2087 people with identity numbers and also the cost of providing funeral services and how it would be charging for these services. She described the actuarial technique that had been used to calculate the net value of the arrangement Doves had with Zimplats as the "net present value appraisal method". Given the data availed, she further explained that she had had to make assumptions regarding ages since she was not given any of this data. She clarified that the figure she had arrived at of US$3 223 543.00 was for a 20 year period which she said indicated the profit

that would have been made over the entire period if the policy was left in place. She elucidated that she had made the assumption that 70% of the employees were married and had children and would need family cover since the data provided did not include this information. She had further assumed that 10% of the cost of provision of services would cover children.

In cross-examination, she conceded that if the assumptions are incorrect the result will be wrong. She conceded that the data she had was incomplete and that ideally the information that should have been there for an accurate picture included the dates of birth, whether married or not, and the number of children employees had. She said that Doves had indicated that this data was not available. She also stated however in cross examination, that when looking at profitability, the balance sheet does not have an impact on profit itself. Furthermore, she stated that to operate an insurance policy there would need to be capital otherwise a company would not be allowed to operate. As such, she had not asked for the profit data as it was not relevant to her calculations of profit for the contract. She stated in re-examination that though this data should ideally be availed it did not make her work impossible as she was able to work by making assumptions.

Ms Pelagio Kafesu the actual actuary also gave her evidence. She confirmed that the number crunching had been done by Ms Nare and that she had thereafter checked the reasonability of the numbers and the assumptions that had been used. She explained that the assumptions used in the report were demographic, looking at the mortality, and, economic with a focus on the financial situation. Assumptions had also been made on cash flows that would come through as well as a discount to today's values. In cross examination, her inflation and interest rates that had informed the report were queried. It was put to her that her financial projections were unrealistic in light of the shrinking economy and that some insurance companies had in fact closed.

She stated in cross-examination that her calculations were not based on a 20 year contract but on a 20 year premium paying period. Like Ms Nare, she also stressed that the issue of Dove's solvency was not an issue and this data was never requested because what they were looking at was the profitability of a contract. She also explained that the data, relating to individuals was not detrimental as it did not affect how the premium was calculated. Furthermore, she explained that that even without the empirical data markets behave similarly. She explained that the 70% assumption for married people was also based on experience garnered for benefits involving family members. In re-examination, she

clarified that in a group scheme people are not taken for undertaking. She further explained the meaning of assumption in the context of actuarial science as "the best estimate of a variable that is being examined".

THE DEFENDANT'S EVIDENCE

Mr Maswiswi gave evidence as the Human Resources Director for the defendant. He explained that in 2012 a decision had been made to outsource the defendant's funeral scheme and they had gone to tender. Guidelines had also been given on the service that was to be provided. The plaintiff had indeed been one of the companies that had responded. Having won the tender, a letter had been written on 20 March 2013 to the plaintiff advising it so and that the formality of writing a contract would now follow. He had become particularly involved in the process after the letter of 20 March 2013 when the two parties begun their back and forth engagement on the contract. He explained that it was during this stage that the defendant had gotten to know from the market concerns, relating to the plaintiff's liquidity and shareholding structure and corporate governance failures. There had been non-disclosure of the actual shareholders in the plaintiff, an issue was he said was an important requirement in the corporate world as it is essential to know who one is dealing with. The shareholder in the tender was said not to match the shareholder in reality. These were said to be different from those in the document submitted by the plaintiff. A major concern was also their insolvency and ability to meet their obligations with the defendant since it appeared that they did not have sufficient liquidity. The defendant being a public listed company with stringent corporate standards he said he had explained to the plaintiff of their need to dig deeper in seeking to understand plaintiff's structures.

He, in particular, was assigned to deal with these issues together with personnel from the finance and legal divisions. A professional services firm, *Ernst and Young*, had been engaged to do a due diligence exercise. Its purpose was to authenticate evidence received from the plaintiff at the time of the tender. The report from *Ernst and Young* had confirmed a lot of their concerns that the defendant's financials were not in order and could not be relied upon as reflecting the correct financial status of the plaintiff. It was then communicated to the defendant on the 7th of October 2013 that the defendant would no longer be proceeding with the contract. Therefore, although a draft contract was in existence at the time these concerns surfaced, it was then never finalised.

When Mr Maziwisa indicated that their expectation was still to proceed with the contract, the parties had lawyered up. A demand from US$4 865 121.00 had then been made

by the plaintiff to settle the matter but the defendant had refused to pay on the basis that no contract had been concluded. Experts, namely *African Actuarial Consultancy* had been engaged by the defendant on the amount claimed. He further explained that the defendant's view had been that even if there was deemed to have been a contract, according to the draft agreement, it was subject to three months' notice for either party to terminate. Thus, if anything was indeed owed, it would just be the amount for the notice period.

THE LEGAL SUBMISSIONS

Plaintiff's counsel, Mr *Hashiti*, argued that several concessions had been made by the defendant's sole witness which put this matter to rest, namely, that a tender had been awarded to the plaintiff; that the tender was implemented and that no notice of cancellation was ever given in terms of the Tender documents. Also no evidence of impossibility of performance was given by the defendant and further no expert evidence had been led by the defendant to rebut plaintiff's claim for damages.

He also submitted that the existence of the contract had been resolved by the Supreme Court on the basis of acceptance of the law of tenders mainly that once accepted a tender creates a binding contract. He drew on *PTC* v *Support Construction Private Limited* 1998 (2) ZLR at p 221. Moreover, he stated that the defendant could not purport to cancel that which did not exist and as such a contract clearly existed. The defendant's proffering of damages for three months was said not to no sense if it indeed mattered that the contract had not been signed.

The bid having been accepted on the 20th of March 2013, Mr *Hashiti* submitted that acceptance of the Tender resulted in a binding contract. He further submitted that any subsequent negotiations pointed towards implementation of that contract as opposed to inception of a contract. He further stressed that the defendant's offer of some damages was an indication of the existence of a contract.

Regarding the agreement being unsigned, he drew on *Afritrade International* v *Zimbabwe Revenue Authority* SC 3/2021 to argue that although generally an unsigned contract cannot ordinarily be relied upon as creating a valid contract, surrounding circumstances including prior dealings may give rise to the assumption that the terms and conditions in the unsigned agreement represent the intention of the parties. This was said to be so *in casu.*

On cancellation of the contract his submission was that the onus of proving this lay on the defendant to prove since it was the party alleging that this had been the eventuality.

Materially, he emphasised that the defendant in fact had no proof of cancellation since no notice of cancellation had been given. Sticking with the standpoint that the conditions in the unsigned agreement represented the terms of the agreement, he zeroed in on clause 16 of the draft agreement being the relevant provision on cancellation, to argue that the mode cancellation as captured therein should have been followed to the letter and that this had not been done.

Further in terms of clause 18 of the draft contract, upon notice being given, Zimplats would continue to pay all premiums up to the date of cancellation and Doves was to settle all claims relating to the death of a beneficiary. None of the procedures had been followed.

Regarding the defendant's reasons for cancellation, his submissions were that reliance could not be placed on external or alien issues to the contract. It was enough that the plaintiff had given a warranty that it would perform the contract according to the dictates of the relevant industry's standard. As such issues of liquidity and shareholding raised by the defendant were said to be mere deviations and not part of the tender. In other words, they were argued to have no effect on the contract. Reliance was placed on *Asharia v Patel 119 (2) ZLR 276 SC* that alien issues are of no consequence.

Furthermore, the defendant's sole witness Mr Maziwisa who had cancelled the contract, was said to have no relevant qualification in insurance, assurance, or mathematics for that matter.

On the relief sought he emphasised that this in two parts made up of a main claim and an alternative one. The main claim is for a declaratory order that rescission was unilateral and unlawful and that being so, that there should be specific performance. Regarding specific performance the defendant was said not to have shown in evidence how this was no longer possible.

As for the claim in the alternative which he described as merely a bonus, this he said is one for damages. In arguing that damages would be appropriate should the main prayer not be granted, he re-emphasised that the defendant had not led any counter expert evidence to challenge the amount claimed.

Turning to the currency payable he insisted that the currency payable under the tender was the United States dollars and that presently Statutory Instrument 85 of 2020 *Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2)* permits a person to pay for goods in foreign currency using free funds.

As for costs his argument was that the plaintiff had been unnecessarily put out of pocket by the defendant in a bid to avoid a valid contract and that costs should be on a higher scale.

THE DEFENDANT'S SUBMISSION

Mr *Chinake,* for the defendant, submitted that in view of the *Zambezi Gas Zimbabwe Private Limited* v *NR Barber Private Limited and Anor* SC 3 / 2020 case, which unpacked the full implications of the monetary policy instruments introduced in 2019, the plaintiff's claim now sounds in Zimbabwean dollars and not United states dollars by operation of the law. He submitted that it is therefore a legal misnomer for the plaintiff to persist with this claim in United States dollars. Further, although the plaintiff had sought to amend its pleadings in spite of the *Zambezi Gas* case, that quest had been abandoned. This, the defendants argued, was a concession on the reality of the impact of the above case on its claim.

On whether there was a contract between the parties, he submitted that parties must be *ad idem* on the subject of the contract; its terms, financial terms and conditions as well as performance of the contract. He drew attention to provisions in the *Tender Procedure* document which anticipated a formal written contract between the parties in particular clauses such as 1.3.5, clause 2.1 and 2.2 all which anticipated a written and signed contract between the parties. He also emphasised clause 2.1 on *Conditions of Tendering,* in particular clause 2.1.2, stipulated that the conditions set out in the *Tender Document* would form the basis of the contract to be entered into by Zimplats and the successful Tenderer. Additionally, clause 2.2 clearly listed the *Special Conditions of Contract*" as one of the documents making up the Tender Documents.

Significantly reference was also drawn to clause 2.2.4 of the *Tender Procedure* documents which specifically excluded any liability for a claim of damages as follows:

> 2.2.4 Exclusion of Liability
>
> Zimplats shall not be liable in any respect whatsoever for any costs, damages, charges or expenses whatsoever or howsoever arising incurred by the Tenderer in relation to or in any way in connection with the preparation or submission of a tender pursuant hereto or for any losses, damages, or any other liability incurred to suffered by the Tenderer or any other person as a result of, or arising from the rejection of the tenderers Tender or Zimplats **withdrawal** or cancellation of the Tender process.

Furthermore, in terms of the draft agreement, clause 16 provided for termination by each party without penalty upon giving the other at least three months written notice of its intention to do so. Dispute resolution was also to be by arbitration. He also argued that this

court could simply dismiss this matter for being before the wrong forum. If a contract is found to have existed the argument was that it could be terminated by notice.

Additionally, the letter advising the plaintiff of the tender was said to have specifically stated that "a contract with all the details is being drawn and you will be invited to sign as soon as it gets ready. To the extent that no such document was ever signed he maintained that no binding agreement existed between the parties. In other words, the *Special Conditions of Contract* document had been drafted but never signed.

Mr *Chinake* equally argued that if the court took the view that the tender documents constitute the terms and conditions upon which the parties intended to contract, then it would have of necessity to also take a robust view that the parties were bound by the terms and conditions of those tender documents. In particular those would include that the contract was terminable on notice; that any termination did not give rise to an action for damages against the defendant and that Zimplats had a right to terminate the tender process without recourse at any time. There would therefore be no legal basis for claiming any damages.

He also submitted that the plaintiff's evidence on damages was speculative and had been largely prepared for the purposes of showing profitability of a contract. It was also said to be based on discredited assumptions. In any event the evidence was said to be invalid as the tender documents forbade or excluded a claim for damages. In addition, the profitability of a business or enterprise was said to be paramount in a claim for damages yet *in casu* no audited accounts had been produced and there was no evidence that the enterprise had ever been profitable. Materially, at the time the plaintiff's actuaries prepared their report they were said not to be in possession of any key biological data of the supposed beneficiaries. This included their names, ages, number of dependents, number of beneficiaries and premium paid by each. As such, the intended contract could not be priced in a vacuum.

In response to the above submissions, Mr *Hashiti* argued that the main issues had been skirted by the defendant such as acceptance of the contract due to acceptance of the bids; performance of the contract evincing its existence, failure to cancel procedurally and failure to disprove specific performance. As for the arbitration argument, he said this had not been pleaded and could not now be raised at this point when the issue was never referred to trial.

ANALYSIS

Firstly, I am in agreement with Mr *Hashiti* that the issue of arbitration was never referred as one of the trial issues and therefore there is no need to address it here as it was not

before me. Another point to dispense with very quickly is that there is absolutely no doubt that whatever the plaintiff was claiming, as of the 1st of February 2019, when the matter was still under litigation, the amount not being a foreign debt or obligation was converted to RTGS dollars at the time. There can be no sugar-coating this reality as per the *Zambezi Gas* decision.

The main issue for decision boils down to whether there was a valid contract between the parties that was unlawfully terminated and for which the plaintiff is entitled to specific performance or in the alternative damages which would now be in Zimbabwean dollars in terms of what was being claimed.

It is not in dispute that the tender was accepted. The legal onus rests on a party who alleges that the validity of a contract is not meant to take effect until reduced to writing. See *Afritrade International Limited* v *Zimbabwe Revenue Authority* and the cases discussed therein in particular *Woods* v *Walters* 1921 AD 303 at 305. In this case, whether the acceptance itself resulted in the binding contract between the parties is a question that is easily answered and ought to be answered by referring to the tender documents themselves. Clause 1.3.5 of the tender procedure documents has already been captured in so far as it alluded to acceptance of terms in a formal written contract. This is contrary to Mr Maziwisa's submission in his evidence that the contract would have been merely ceremonial. It was in fact a material aspect of the tender in terms of when the agreement would be deemed perfected. That intention cannot be ignored.

The defendant has indeed referred to several provisions in the tender documents that point to the materiality of the written contract in this instance. When reference is had to all the clauses pointed out by the defendant's counsel in his closing submissions, it is evident that the mere acceptance of the tender was not the contract itself. The various tender documents have the written contract as an underlying theme. In other words, it is undisputable that a binding written contract was to be formed upon acceptance of the tender. The tender documents were certainly not written in a manner which kick started the contract on acceptance. Therefore whilst it may generally be the case that acceptance of a tender results in a contract, where the tender documents lay out the contrary, this cannot be ignored as those will be the terms the parties would have agreed to.

The aim was always to articulate the full agreement in a written document. In other words, there is absolutely no doubt from examining the tender documents that a contract was envisaged as an integral part of completing or perfecting the tender process. To the extent that

the contract was not executed to its logical conclusion purposefully, for reasons outlined by the defendant, there was simply no contract that can be deemed binding to justify specific performance. Also, looking at the Tender documents as a whole, the conclusion is that the agreement was at the time of withdrawal governed by those documents which did not permit a claim for damages for withdrawal. In any event, even if I am wrong in this regard, the damages were simply not proven even by the expert testimony of the plaintiff's actuary. This emerges from the fact that the expert witnesses largely agreed to working with ungrounded assumptions with the aim of showing the profitability of a would be contract. There is, however, no need to dwell at length with their evidence given that the tender excluded a claim for damages.

Whilst there was no provision for termination on notice in those tender documents this was included in the draft contract which was never finalized. Turning to the submission that though not signed the intention of the parties from their conduct was to be bound by the agreement, it is important to emphasise that the disagreement that led to the non-signing of the contract boiled down to the award of the tender itself. In a serious business world where things are expected to be done professionally, it would be unrealistic and simply self- serving rhetoric to suggest that a company's real financial standing is of no consequence or interest to an intended business partner. It is material. The fact that the disclosures complained about were, in the plaintiff's view, not part of the tender as argued by the plaintiff simply bolsters the obvious point that a tenderer is expected to disclose all material information pertaining to its status in good faith in order for the party seeking to contract to make an informed decision. Where it emerges that a tenderer's financial standing is not sound, or that the shareholders are not who they are said to be subsequent to an offer being made, it is in reality the non-disclosing party who would have acted in bad faith. This cannot be a case where the court ought now to facilitate acceptance of an uncompleted and unexecuted document when it is evident that the failure to do so indicated an unwillingness on the part of the defendant to thrust forward with the completion of the agreement due to material misinformation it deemed to have been provided by the tenderer leading to the award of the tender.

It would be tantamount to dragging an unwilling partner to the altar or worse still, condoning the operation of business gangster style, through arm-twisting, were a party to insist on specific performance for a contract that was never perfected or claim damages where the tender documents specifically provided to the contrary. More significantly, where the very award of the tender had been gotten through non-disclosure of key information, this

would hardly be in keeping with the ethos of promoting sound ethical business. In fact the inclusion in the tender documents that there would be no claim for damages in the event of withdrawal of a tender, caters for or addresses these types of scenario.

As for the argument that the plaintiff nonetheless had performed in terms of the unsigned contract, signifying a general acceptance of the terms and conditions in the draft document, this did not dispense with the need for a properly executed contract. Indeed a provision on termination on notice was included in the draft agreement whose thrust the defendant attempted to drawn on in good faith without prejudice to compensate the plaintiff for the minimum roll out begun pending certain necessary information that was to be availed by the defendant regarding its employees. This was before the unsavoury details concerning the plaintiff emerged. That offer to compensate had been the decent thing to do given that strictly speaking, in terms of the tender documents, there was no obligation to give anything and the contract had not been signed. It was plaintiff who refused the offer, opting instead to try and squeeze specific performance or alternatively to reap millions from the defendant. Plaintiff must bear the consequences of its choices. As the saying goes “a feather in hand is better than a bird in the air”. That offer to compensate on the basis of three months’ notice was without prejudice and it was rejected.

In the final analysis:

IT IS ORDERED THAT:

“The plaintiff’s claim is dismissed in its entirety with costs.”

Mutamangira & Associates, plaintiff’s legal practitioners
Kantor & Immerman, defendant’s legal practitioners