RODIN MZYECE
versus
GRAIN MARKETING BOARD

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 October 2021 and 3 February 2023

Opposed application – specific performance

Mr N Tonhodzayi, for the applicant
Mr N Mugandiwa, for the respondent

CHINAMORA J

Factual background

In the application before me, the applicant seeks specific performance of an employment contract. The background facts are not heavily disputed, hence, I will highlight them in brief. The applicant was employed by the respondent as corporate Secretary until the 31 March 2020, when his contract was terminated on notice. In terms of the agreement (hereinafter called "the 2015 contract"), the applicant was employed for a fixed period of four (4) years. The contract gave him a number of benefits specified in clause 10, which I now summarize below:

1. School/college fees benefits being 100% fees for not more than 3 children
2. An all-terrain 4 x 4 vehicle suitable for an executive position.
3. The applicant was entitled to purchase the aforesaid vehicle at book value at the expiry of the contract. This is contained in clause10.9.2.

The benefits which accrued to the applicant in terms of the contract which expired on 31 May 2015 were carried over to the contract which expired on 31 May 2019. Such benefits form part of the exit package (per clause 14.0), and are listed below:

a) Six months 12hour security guard;
b) Payment of school fees for the applicant's (3) children for 6 months;

c) Medical Aid cover for 6months
d) Six months of fully paid on subscription for social club and professional organization
e) Six months fully paid premiums to his funeral policy
f) Payment of Applicant's pension funds as per the pensions fund policy.

After its expiry, the 2015 contract was renewed in 2019 for 5 years on different terms and conditions. However, the contract was terminated in March 2020. In *casu*, the applicant seeks specific performance of benefits accruing from the 2015 and 2019 contracts. His founding affidavit (in paragraph 4) reads:

> 'This is an application to compel specific performance of the respondent to comply with the terms of the memorandum of an employment agreement between myself and the respondent dated 26 May 2015".

In response, the respondent, raised the preliminary point that the applicant cannot seek specific performance of a terminated contract. It asserted that there must an existing contract and proof of a breach of its terms for specific performance to be afforded to a party. The applicant, in his answering affidavit, objected that there was no opposition before the court, since the deponent of the opposing affidavit was not authorized to act for the company as no board resolution was attached. The applicant added that, the deponent was not the respondent's Chief Executive Officer. Before, I make my determination, I will begin by setting out the law pertaining to the points in *limine* which are before the court.

The applicable law

The law with regarding whether or not a board resolution should be attached to the application to demonstrate authority, is not entirely settled in this jurisdiction. From the onset, let me mention that I am conscious that each matter must be dealt with on its own merits. Some examples will help illustrate my point. In *African Banking Corporation of Zimbabwe Ltd t/a Banc ABC* v *PWC Motors and Ors* HH 123-12, MATHONSI J (as he then was) referred with approval to *Mall (Cape) (Pty) Ltd* v *Merino Ko-opraise Bpk* 1957 (2) SA 345 (C) which states:

> "All the court is required to do is to satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorized person." The learned judge further states as follows on the same p 3: "Indeed where the deponent of an affidavit has said that she has the authority of the company to represent it, there is no reason for the court to

> disbelieve her unless it is shown evidence to the contrary and where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application. That is as it should be because an affidavit is evidence acceptable in court as it is a statement sworn before a commissioner of oaths … where it states that the deponent has authority, it can only be disbelieved where there exists evidence to the contrary. It is not enough for one to just challenge the existence of authority without more as the respondent has done." **[My own emphasis]**

See also *Tian Ze Tobacco Company (Private) Limited* v *Muntuyedwa* HH-626-15

In endorsing the compelling logic of the above proposition, it is important to state that Clement Guta (the deponent) is employed by GMB and the applicant knows him. The issue of attaching a board resolution must not impede the hearing of a matter, when it is clear that it is the company that is litigating. The rationale for attaching the board resolution is to ensure that there is clarity in who is litigating, and that the company would be bound by the court decision. In the present circumstances I am convinced that the deponent has authority to act for GMB. This preliminary objection is dismissed for lack of merit.

I will now deal with the respondent's point in *limine* on specific performance of an admittedly expired contract. The law relevant to specific performance is clear and straightforward. Nevertheless, I reiterate that it is elementary law that a claim for specific performance is only be available where the contract is subsisting. Put differently, the relief cannot be afforded after the contract has been terminated. In this connection, in *Claudio Chiarelli* v *Bouna Investments (Pvt) Ltd t/a Bouna Safaris, Travel and Tours* HH 678-15, MATANDA-MOYO J pertinently stated the law in the following terms:

> "Specific performance is an extraordinary equitable remedy that compels a party to execute a contract in terms of the precise terms agreed upon. It is an order which grants the applicant what he bargained for in the contract. A valid contract must exist between the parties and the party seeking specific performance must have substantially fulfilled his obligations in terms of the contract".
> **[My own emphasis]**

The same position appears in the *obiter dictum* of DUBE J (as she then was) in *Brighton Manengureni v Zenedious Kakomo and Ors* HH 489-20, which states:

> "An order for specific performance enables the innocent party to compel performance of the terms of the contract upon breach. There must be a binding contract in existence and a breach of the terms of the contract." **[My own emphasis]**

Since the contract which founds the applicant's relief no longer exists, it beggars belief why the present application was mounted. I find that the point in *limine* raised carries weight. While the issue of specific performance was presented and argued as a point in *limine*, in my view, the enquiry is really about whether or not a cause of action exists in *casu*. To the extent that in terms of the law specific performance cannot be granted if there is no existing binding contract, it is the same as saying that the applicant has not established a cause of action for the relief sought. Therefore, it follows that a finding that the employment contract had either expired resolves the issue before the court on the merits if the relief of specific performance hinges on that contract. Consequently, I have to dismiss the application for the reasons I have stated.

The general rule is that costs follow the event, I do not intend to depart from that approach. Looking at the papers submitted by the parties, it was apparent that the employment contract had expired. This fact was evident from the papers, and the applicant knew it. Of course, the contact had been terminated on notice. Yet the applicant, nonetheless, brought this application, which is based on contract which, as he knew, no longer existed. For such conduct, this court ought to express its displeasure by an award of costs on the scale of attorney and client. This level of costs, while exceptionally ordered, can be awarded if it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation. Let me make the parenthesis comment that claim for punitive costs at the attorney and client scale by the respondent is startling.

In the result, I make the following order:

1. The point in *limine* raised by the applicant is hereby dismissed.
2. The point in *limine* taken by the respondent is hereby upheld.
3. The application is hereby dismissed.
4. The applicant shall pay the respondent's costs on the attorney and client scale.

Musendekwa Mtisi, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners