

REPORTABLE: (131)

MIDLANDS STATE UNIVERSITY
v
GALAXY ENGINEERING DESIGN CONSULTANTS (PRIVATE)
LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA & MATHONSI JA
HARARE: 17 SEPTEMBER 21 & 1 NOVEMBER 2021

L. Uriri, for the appellant

T. Zhuwarara, for the respondent

Judgment No. SC 127/21

Civil Appeal No. SC 438/19

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MATHONSI JA: This is an appeal against the judgment of the High Court (the court *a quo*) rendered in favour of the respondent on 24 July 2019 following a full trial. The judgment directed the appellant to pay to the respondent interest on the sum of \$84 827,17 at the rate of 19.5% per annum from 1 November 2010 to the date that amount was paid to the respondent.

In addition, the appellant was ordered to pay to the respondent the sum of US\$ 3 207 450,68 together with interest thereon at the rate of 19.5% per annum from 1 November 2010 to date of payment and costs of suit.

This Court observes that the dispute between the parties was resolved purely on findings of credibility of the two witnesses pitted against each other in respect of whose evidence the trial court made factual findings. That led the court *a quo* to conclude that at the time the appellant gave instructions for cessation of work which was being performed by the respondent in terms of the contracts, the latter had already completed its mandate of designs and drawings for the appellant. Payment in terms of the contracts entered into by the parties was therefore due.

The court finds that on appeal the appellant has not made a case for interference by the appellate court with the credibility and factual findings of the court *a quo*. The appellant has not even begun to set out any valid grounds for impugning the findings of the court *a quo* in that regard.

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Regarding the relief in United States dollars granted *a quo*, the court finds that it was incompetent as the court *a quo* was precluded from granting relief denominated in foreign currency. The liability of the appellant fell due several years before 22 February 2019, the effective date.

In terms of s 4(1)(d) of Statutory Instrument 33/19, as interpreted by this Court in *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC 3/20, the liability of the appellant having been expressed in United States dollars immediately before the effective date of 22 February 2019, fell within the remit of that provision. As such, relief should have been granted in Zimbabwe dollars at the rate of one to one to the United States dollars.

The court also finds that the question of interest on the sum of US\$84 827,17 paid by the appellant following admissions it made at the pre-trial conference of the parties before a judge, was an issue placed before the court *a quo* for determination. That court was obliged to determine it.

Having found the appellant liable, the court *a quo* was correct to award interest on that amount. The court however finds that, as with the rest of the liability, that interest should also be reckoned in the local currency at the same rate.

BACKGROUND FACTS

The appellant, a tertiary institution established in terms of s 3 of the Midlands State University Act [*Chapter 25:21*], engaged the respondent, a company involved in the business of providing civil engineering services, to design civil and engineering works for it on 3 September 2003.

The appellant desired the respondent to design and produce drawings for the construction of certain buildings and Master Site Services at its main University Campus in Gweru. As a result, the parties concluded and signed seven contracts, four of which form the basis of the present dispute.

These are: Contract 1 for the construction of the Faculty of Commerce and Information Systems, Faculty of Law and Administration on Block, Contract 2 for the

Faculty of Architecture, Art and Design, Contract 3 for the Vice Chancellor's House; and Contract 4 being the Master Site Service Design for the whole site, that is the Master Plan.

Contract 5 for the Faculty of Natural Resources, Contract 6 for the Faculty of Science & Technology and Contract 7 for the Commercial Centre and Sports facilities fall outside the scope of the present case. The contracts entered into by the parties comprised of the Standard Form Zimbabwe Association of Consulting Engineers (ZACE) contracts and memorandum of agreement for each of them.

The conditions of engagement prescribed the manner in which the engineering works contained in the contracts were to be undertaken. These included stage one; a report relating to consultation between the parties, inspection of the site and ~~stage two~~ ^{stage two} related to the preliminary design involving preparation of plans, drawings and making modifications on the designs.

Stage three related to the establishment of final design criteria and included the development of the design. In stage four, the consultant would work on the drawings themselves. The respondent performed certain work in terms of the contracts although there is no convergence between the parties as to the stage reached by the works at the time of disengagement.

What is however common cause is that the construction of the relevant buildings had advanced when, on 14 June 2005 and 5 August 2005, the appellant addressed

letters to the respondent instructing it to stop work on all the projects. It is at that point that the dispute arose as to the amount of work the respondent had already performed in fulfilment of the contracts when it was instructed to stop working. The balance due by the appellant for what had been done was also disputed.

The position taken by the respondent was that at that point it had already completed all the work that needed to be done on all the four contracts. The respondent insisted that, having fulfilled its contractual mandate, it was entitled to payment for the full services rendered within the scope of clause 18 of the Zimbabwe Association of Consultant Engineers Standard Contract.

On the other hand the appellant was adamant that it had completed the work as per the contracts. It contended that when it directed the respondent to stop all work on the project on 5 August 2005, it had not completed its mandate. The appellant insisted that the respondent had continued to work after being instructed to stop and as such, any work performed by the respondent after the instruction to stop had been given could not be paid for, the respondent having been on a frolic of its own.

The appellant also took the position that an amendment had been effected to the original contracts to introduce a clause which placed the obligation to pay for the projects on a third party, the government of Zimbabwe until such time that the third party gave a signal that it had allocated funds for payment, no payment was due to the appellant in terms of the contracts. In any event, so the appellant continued, the respondent had been paid in full for the works that it performed.

PROCEEDINGS BEFORE THE HIGH COURT

On 16 July 2015 the respondent instituted summons action against the appellant based on the four contracts mentioned above. The respondent claimed payment of the sum of \$3 292 277,90 together with interest on that amount at the rate of 19,5% annum calculated from 1 November 2010 to date of payment. It also claimed collection commission.

The basis of the claim was that the respondent had provided professional consulting civil engineering services in respect of the first, second, third and fourth construction projects for the appellant in fulfilment of all its contractual obligations. The respondent averred that following its issuance of invoices for settlement, the appellant failed or neglected to pay in breach of the contracts between the parties.

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The appellant contested the action. It refuted that the respondent fulfilled all its contractual obligations. The appellant asserted that it stopped the respondent from carrying out any further work on the project on 5 August 2005 before completion of the mandate.

As such, so the appellant contended, the respondent was not entitled to payment for any additional work performed after that date.

Regarding payment, the appellant relied on an addendum to the agreement which was signed by the parties and introduced clause 4.1 to it. According to the appellant, the clause in question regulated how the respondent was to be paid. It contained a suspensive

condition which was not satisfied. For that reason, no further payment was due to the respondent.

In terms of clause 4

“4. Fees Chargeable and Reimbursements

Notwithstanding the provisions in paragraph 17 (under the heading Fees and Expenses) of the conditions of Engagement ZACE Forum 2 1999,

- 4.1 The parties herein agree that the client is a public institution, wholly funded in its operations by the Government of Zimbabwe and that it is wholly dependant on the national budget for its funding, which budget is announced once every year. It is therefore agreed that the Consultant will hold in abeyance all invoices until advised by the client that funds are now available. In this case the client will act in good faith and advise the Consultant to submit invoices within 14 days of receiving funds. Thereafter the client shall settle invoices within 60 days of receipt from the Consultant.

If such accounts are then not paid within 60 days from date of invoice, interest may be charged at 1.2 times the prevailing bank overdraft rate available to the Consulting Engineer.”(The underlining is for emphasis). Judgment No. SC 127/21 Civil Appeal No. SC 438/19

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At the pre-trial conference of the parties before a judge, the appellant made an admission recorded in the statement of agreed facts, later prepared and submitted to the trial court, as follows:-

“7 It is also common cause that defendant paid the sum of US \$84 827.17, of Project 1. The parties agree that, this was in full and final payment in respect of that project and it is no longer in contention save for

[] only the interest amount that remains unpaid.” (The underlining is for emphasis)

Following the submission of a statement of agreed facts in terms of which the matter was referred to trial, only 3 narrow issues were placed before the court *a quo* for determination. These are:-

- “a). Whether or not the plaintiff had completed all the works as at the 5th of August 2005, when the defendant gave instruction to stop all work.
- b) If so, what is the *quantum* of fees due to the plaintiff.
- c) If not, what stage of work had plaintiff reached by the 5th of August 2005 and what *quantum* of fees is it entitled (to) for such work if any.”

FINDINGS OF THE COURT A QUO

At the trial, each party led evidence from one witness. The respondent relied on the evidence of Engineer Wilfred Tamayi Vengesai to prove its case while the appellant brought in Engineer Innocent Masunungure to disprove it.

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In assessing the credibility of the two witnesses the court *a quo* found;

“It is Engineer Wilfred Tamayi Vengesai’s evidence which accords with the documentary evidence. It accords also with the statement of agreed facts.

His testimony was clear and straight forward. It was not dented under cross-examination. The same cannot be said of defendant’s evidence. It went against the grain of documentary evidence.

The defendant’s witness contradicted the statement of Agreed Facts in fundamental respects. I also was not impressed with the demeanor of the defendant’s witness. He was evasive under cross- examination. It was clear to me that he was simply ducking and diving in a desperate endeavour to avoid the truth.

The net result is that I will accept the plaintiff’s testimony wherever it conflicts with that of the defendant.”

The court *a quo* went on to find that the appellant had commissioned the respondent to design and produce drawings for use by contractors in erecting the structures so

designed. It further found that by November 2004 the designs had been completed and forwarded to the appellant.

The court *a quo* based its finding in that regard on the fact that, after completion of the contractual mandate, the respondent had proceeded to break down the designs into nine sub-contracts to allow for stage implementation of the works to suit priority and funding of the appellant. In the court *a quo*'s view, this could not have been done if the contractual mandate had by then not been fulfilled.

In addition, the court *a quo* applied the doctrine of fictional fulfilment to conclude that the appellant, having acted in bad faith in failing to invite the respondent to submit estimates of fees owed, and in not bidding for funding from the Government of Zimbabwe for an unreasonably long time, the suspensive condition in clause 4.1 had been fulfilled. The court *a quo* then entered judgment in favour of the respondent as already stated.

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PROCEEDINGS BEFORE THIS COURT

The appellant was aggrieved. It noted the present appeal on the following grounds:-

1. The court *a quo* erred and misdirected itself in granting an order denominated in United States dollars when it was incompetent to do so.
2. The court *a quo* erred and misdirected itself in awarding respondent interest on the sum of US\$84 827.17 when such an issue was not among the issues which were submitted to the court *a quo* for determination by the parties.

3. The court *a quo* further erred in holding that respondent had completed all its contractual obligations when appellant instructed respondent to stop work in circumstances where the evidence showed that the respondent had not completed all the work.
4. The court *a quo* erred in awarding respondent's claim for an amount for the completion of the work in full, whereas the evidence before it pointed to the fact that the work was incomplete as at the cut-off date.
5. It was an error of law on the part of the court *a quo* to apply the doctrine of fictional fulfilment against the appellant in circumstances where a third party (Government of Zimbabwe) was the one which had an obligation to fulfil the suspensive condition.
6. The High Court misdirected itself in ignoring that the respondent had not proved the fulfilment of the suspensive condition.

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The grounds of appeal may be six but they are generally repetitive and speak to only two issues for determination in this appeal. They are whether the court *a quo* erred in entering judgment in favour of the respondent and ordering the appellant to pay interest and whether the court *a quo* erred in granting judgment denominated in the United States dollars.

Whether the court *a quo* erred in entering judgment in favour of the respondent

Mr *Uriri*, who appeared for the appellant, submitted that the finding of the court *a quo* that the respondent had completed all its contractual obligations at the time it was

instructed to stop work cannot withstand scrutiny. In counsel's view, such a finding runs counter to documentary evidence on record which indicates the contrary.

To support that assertion, counsel for the appellant drew attention to correspondence exchanged between the parties which discussed the works performed by the respondent. The letters in question, so it was argued, tend to show that right up to 5 August 2005, the parties were still discussing work which had not been completed.

Per contra, Mr *Zhuwarara* who appeared for the respondent, submitted in the main that the appellant's case at the trial and on appeal remains vexing in that while on one hand the appellant argues that the mandated work was not completed, on the other hand it argues that payment is not yet due. This is by virtue of the suspensive condition in clause 4.1 reposing the duty to pay on the Government of Zimbabwe.

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Counsel for the respondent drew attention to a letter dated 6 November, 2004 written by the appellant's own architects, Maboreke Architects, as proof that the work of producing drawings had been completed. He also referred to another letter dated 29 May 2015 to the Permanent Secretary in the Ministry of Higher & Tertiary Education, Science & Technology Development by the appellant's Vice Chancellor. The latter entreats the Ministry to assist with funds to settle the debt which had been demanded.

By virtue of their importance in the resolution of this appeal, I produce the letters hereunder. On 6 November 2004 Maboreke Architects wrote to the appellant as follows words:-

“RE:MSU-PROPOSED CONTRACT FOR THE IMPLEMENTATION OF THE MASTER SITE SERVICES

Forwarded herewith is a set of drawings from the Civil Engineer depicting the proposed works in eight different contracts for the realisation of the Master Site Services for your approval.

We are in concurrence with the Civil Engineer that the development of the structure precedes the building programme in order that the buildings will be adequately serviced on completion.”

It was submitted on behalf of the respondent that the contents of that letter suggest that as early as November 2004 work on the drawings had been completed. It is for that reason that the drawings had been forwarded to the architects who relayed them to the appellant.

On 29 May 2015, Professor N. M. Bhebe, the Vice Chancellor, wrote to the Ministry in the following:-

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“RE:OUTSTANDING FEES FOR GALAXY ENGINEERING CONSULTANCY SERVICES:MIDLANDS STATE UNIVERSITY.

The following matter refers.

Following our telephone conversation, please find attached demand letters from Gill, Godlonton & Gerrans Legal Practitioners who are representing Galaxy Engineering.

The demands are arising from the non-payment of services provided for the development of Midlands State University Master Plan (Civil Engineering Works, preliminary designs), services which were rendered in September 2003. The total bill was ZWD33 114 907 800.00.

As discussed please kindly go through the letters and determine how far the Ministry had paid for the services rendered. By copy of this letter, Galaxy Engineering Consultancy are being advised through their lawyers that their claim has been submitted to our parent Ministry for actioning.”

In the respondent’s view the foregoing letter was a clear acceptance that work was performed fully and that payment was due.

Regarding the issue of the suspensive condition, Mr *Uriri* submitted that it was an error on the part of the court *a quo* firstly to invoke the doctrine of fictional fulfilment because it was not pleaded by the respondent. Secondly the doctrine does not apply in circumstances where the party accused of having deliberately prevented the fulfilment of the obligation had no such obligation in the first place. This is so, it was submitted, because the obligation to pay lay with the Government of Zimbabwe.

To counter that argument, Mr *Zhuwarara* submitted that the court *a quo* was invited to relate to the doctrine by none other than the appellant itself.

This is so because in its closing submissions, the appellant had, citing the authority of R.H. Christie, *Business Law In Zimbabwe* at p57, argued that clause 4.1 of the contract was a condition precedent or suspensive condition. It suspended the payment of fees due to the respondent until such time that the appellant was placed in funds for the project by the Government of Zimbabwe.

To that extent, according to respondent's counsel, the court *a quo* was within its mandate to inquire into the issue. In doing so, the court *a quo* concluded that the appellant had deliberately frustrated the fulfilment of the condition precedent. For that reason fictional fulfilment applied.

On the order for payment of interest on the sum of \$84 827,17, it was submitted on behalf of the appellant that the question whether the respondent was entitled to claim

interest on that sum was not one of the issues placed before the court *a quo* for determination. Relying on the authority of *Nzara v Kashumba N.O & Ors* SC 18/18, counsel made the point that the function of the court is to determine only those disputes placed before it by the parties.

Again Mr *Zhuwarara* was of a different view. He pointed to a passage in the statement of agreed facts, which I have already quoted above, placing the issue of that interest squarely within the ambit of what the court *a quo* was asked to determine.

Finally, on the relief granted in United States dollars, counsel for the appellant submitted that it was incumbent upon the court *a quo*, in terms of s4(1)(d) of Statutory Instrument 33/19, to pronounce an order that does not conflict with that provision. Accordingly, so it was argued, the judgment should have sounded in the local currency. Judgment No. SC 127/21 Civil Appeal No. SC 438/19

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While conceding the effect of s4(1) (d) of SI 33/19, counsel for the respondent sought to defend the judgment *a quo* on the basis that the United States dollars denominated judgment shall be converted on the day of execution.

ANALYSIS

What was before the court *a quo* were two mutually destructive positions of the disputants. The respondent took a position, using documentary as well as *viva voce* evidence, that at the time it was instructed to cease operation, it had completed the work. On the other hand, the appellant, again using documentary and *viva voce* evidence, took the position that the work had not been completed.

I have related to both the *viva voce* and documentary evidence which confronted the court *a quo* above. The court *a quo* resolved the dispute on the basis of credibility of witnesses. It found the appellant's witness to be evasive and unreliable. It embraced the evidence of the respondent's witness as being reliable and in sync with the documentary evidence. On the letters I have reproduced above, the court *a quo* cannot be faulted for making those findings.

More importantly, neither the grounds of appeal relied upon by the appellant nor its submissions on appeal advert to the basis upon which an appellate court may interfere with factual and credibility findings of the lower court. As stated in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at p 670 C-D:

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“ The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion....”

On the issue of credibility of witnesses, again it is trite that an appellate court will not lightly interfere with findings of fact based on the credibility of witnesses. This is so because the trial court is eminently better placed to assess credibility than an appellate court.

In my view no foundation has been laid to allow this Court to interfere with the findings made *a quo* that at the time that the appellant gave instructions for cessation of work,

the respondent had already completed its mandate. In that regard it was entitled to payment in full.

The issue of interest on the money paid by the appellant following its admission at the pre trial conference resolves itself upon reference to the statement of agreed facts. I have quoted the part wherein the parties invited the court to determine interest.

In any event a claim for interest on the whole amount claimed was pleaded and was prayed for. The appellant made a partial admission. The court *a quo* was correct to grant interest on the sum of \$84 827,17 which was paid without interest.

That then brings me to the question of fictional fulfilment which was given undue attention by counsel. The way I understand it, the appellant seeks to be excused from liability on the basis that it inserted clause 4:1 in the contract through an *addendum*. The clause, quoted *verbatim* above, only recognises that the appellant is funded by a third party. It is not a novation or a substitution of the third party as a party to the contract. Significantly, it does not absolve the appellant, as the contracting party, from liability.

It occurs to me that the mere fact that a creditor may agree to receive payment from a third party on behalf of a debtor does not absolve the debtor from liability to perform in terms of the agreement. See *Dube v Mbokazi* (15843/ 2017) [2018] ZAGPPHC 699 (28 September 2015).

The reason why that is so is pretty obvious. It is because there is no privity of contract between the respondent and the Government which remained firmly outside the contract. In that regard, whether the funding came from the Government or not paled. The appellant remained liable. It was its responsibility to lobby for funding and settle its debt. It cannot seriously argue that it is still awaiting funding 16 years later. I reject that argument.

Finally, there is the issue of currency. I agree with Mr *Uriri* for the appellant that it was incompetent for the court *a quo* to grant judgment sounding in United States dollars. It is common cause that the liability of the appellant arose several years prior to 22 February 2019.

In terms of s 4(1)(d) of SI 33/19 all assets and liabilities Judgment No. SC 438/19
Civil Appeal No. SC 438/19 were to be paid in the local currency at the rate of 1:1. This court has already interpreted that provision in the case of *Zambezi Gas (Pvt) Ltd v N. R. Barber & Another, supra*.

In that case the court held that contractual obligations valued in United States dollar, immediately before the effective date were to be paid in RTGS dollars at parity or at a one-to-one rate.

DISPOSITION

Accordingly, there is merit in the first ground of appeal which is hereby upheld. The remaining grounds are completely devoid of merit and cannot succeed.

Regarding the issue of costs, a prayer was made on behalf of the respondent for costs to be awarded at an adverse scale. In submissions made before the court, that prayer was not motivated. In any event the appellant has been partially successful. Accordingly this is a case in which each party should bear its own costs.

In the result, it be and is hereby ordered as follows:-

1. The appeal partially succeeds with each party to bear its own costs.
2. The judgment of the court *a quo* is amended by the deletion of paragraphs 1 and 2 and their substitution with the following:-

- “1. Interest on the sum of RTGSS\$84 827, 17 at the rate of 19,5% per annum from 1 November 2010 to the date that sum was paid.
2. RTGS \$3 207 450.68 together with interest thereon at the rate of 19,5% per annum from 1 November 2010 to date of payment.”

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GWAUNZA DCJ : I agree

BHUNU JA : I agree

Dzimba Jaravaza & Associates, appellant’s legal practitioners

Gill, Godlonton & Gerrans, respondent’s legal practitioner