

REPORTABLE (49)

DELTA BEVERAGES (PRIVATE) LIMITED
v
BLAKEY INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABAWE
BHUNU JA, MAKONI JA & CHITAKUNYE AJA
HARARE, 24 MAY 2021 & 30 MAY 2022

T. Mpofu, for the appellant

F. Girach, for the respondent

Judgment No. SC 59/22

CHITAKUNYE AJA: This is an appeal against the whole judgment of the High Court

(“the court *a quo*”) handed down on 1 December 2020 dismissing the appellant’s application for a declaratur.

Whilst in the midst of considering the judgment the appellant’s legal practitioners wrote a letter in October 2021 to the Registrar seeking audience with the court over proceedings in the court *a quo* and what they claimed to have discovered post the appeal hearing. Such communication was brought to our attention. Our concern was on the appropriateness of the procedure and purpose of such audience. In reaction the respondent’s legal practitioners asked the appellant’s legal practitioners to clarify the appropriateness of such an approach. As it turned out the appellant’s legal practitioners have not come back to the Registrar. It is this court’s view that it was incumbent upon appellant’s legal practitioners to clarify the appropriateness of their request in view of the fact that the appeal had

been heard and was awaiting judgement. It is also our view that this should not continue to hold back the delivery of our judgement. We therefore now proceed to determine the matter.

FACTUAL BACKGROUND

The appellant is a company duly incorporated in Zimbabwe whilst the respondent is a foreign company duly incorporated in South Africa.

It is common cause that the appellant and the respondent have been doing business with each other for some time albeit they are not agreed as to when they started doing business together. The appellant alleged that it is since 2012 whilst the respondent contended that it is since 2007. Nothing much turns on the date of commencement of their relationship. What is important to note is the fact that they have been in this relationship for many years.

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On 11 June 2020 the appellant filed a court application for a declaratur before the court *a quo* in terms of s 14 of the High Court Act [*Chapter 7:06*]. It sought that the written Supply Agreement between the parties dated 16 March 2018 be declared void, invalid and of no legal effect on the basis that it was not its act and it was entered into in contravention of the laws of Zimbabwe.

The appellant alleged that the respondent had been its supplier in respect of plastic products since 2012 on an *ad hoc* basis. The appellant's Supply Chain Director, Cynthia Malaba (Cynthia), had signed an agreement with the respondent on 16 March 2018 when she had no authority to sign on its behalf. It was the appellant's case that its senior officers did not know of the existence of the agreement up till an internal audit was conducted in July 2019. As such, until the discovery of the agreement the appellant operated under the belief that the respondent was being contracted on an

ad hoc basis like other suppliers. The appellant averred that the agreement had not undergone the standard review and approval processes in terms of the appellant's procurement processes. It further alleged that the respondent had previously made attempts to procure the conclusion of a supply agreement with the appellant by bribing the appellant's employees but it had failed.

The appellant averred that after discovering the agreement it engaged the respondent and indicated that it did not recognise the validity of the contract for the following reasons:

- (i) The contract committed the appellant to order a stipulated minimum quantity of goods from the respondent while the respondent was empowered to unilaterally increase the prices merely by giving the appellant 30 days' notice.
- (ii) The contract was in direct contravention of the Competition Act [*Chapter 14:28*] (Competition Act) in that it gave the respondent exclusive rights to supply the appellant with the products thus shutting out other competitors. It thus contained an unfair business practice.
- (iii) The contract had not been approved in terms of the Exchange Control Regulations 1996 yet it required the appellant to pay the respondent in South Africa.
- (iv) The contract gave the respondent the sole prerogative to terminate the agreement which right the appellant was denied and it compelled the appellant to accept defective goods from the respondent.
- (v) The contract provided that the applicable law was South African law and yet the appellant is domiciled in Zimbabwe and bound by Zimbabwean laws.

The respondent opposed the application and contended that the contract was valid. It averred that the relationship between the parties had commenced in 2007. Since that year the

appellant would place orders for flexible packaging materials with the respondent on an *ad hoc* basis. The respondent contended that the demand for the materials had increased and in 2018 its representatives met with the appellant's representatives to negotiate terms of a written agreement. This resulted in the contract in question being entered into between the respondent and the appellant, represented by Cynthia, who held herself out as a lawfully appointed representative clothed with the authority to sign the agreement on the appellant's behalf.

The respondent also contended that there had been a similar prior written agreement between the parties wherein the said Cynthia had signed for the appellant and no issues of lack of authority or exchange control approval or breach of Zimbabwean laws had been raised and as such the appellant could not be allowed to avoid its contractual obligations by claiming that the contract was unlawful and therefore invalid. The respondent further averred that the agreement was to be construed under South African law as chosen by the parties and as such it was valid. It also asserted that the agreement provided for amendments in the case of difficulties and it had invited the appellant to discuss any issues of concern but the appellant had been unwilling to do so and as such it could not then seek to invalidate the contract. The respondent denied that the contract was unfair and oppressive and averred that both parties had performed their obligations under the agreement pursuant to its conclusion and as such the appellant was estopped from contending that the agreement was invalid. It thus sought the dismissal of the application with costs.

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THE COURT A QUO'S FINDINGS

In its decision the court *a quo* held, *inter alia*, that unless it was demonstrated that there was something in the foreign law which makes it inapplicable, it can be applied in our courts. The court proceeded to find that there was nothing submitted by the appellant which nonsuited the application of South African law. It therefore held that the parties' elected law in the agreement had to be applied.

The court *a quo* further found that there existed an agreement between the parties based on the fact that-

- (i) senior officials of the appellant knew about the existence of the agreement;
- (ii) Cynthia, who had signed the agreement on behalf of the appellant, was a Supply Chain Director; and
- (iii) the agreement she had signed was a supply agreement which her job description gave her the authority to act on behalf of the appellant.

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The court *a quo* held that Cynthia had ostensible authority and the appellant is estopped from denying this. The assertion by the appellant that its internal process had not been followed should not prejudice the respondent hence the application of the *Turquand* Rule.

In relation to the averments by the appellant that some clauses in the agreement infringed various statutes the court *a quo* held, *inter alia*, that: -

- (i) There was no breach of s 43 of the Competition Act. It stated that the 'exclusivity' clause makes provision for minimum quantities that the appellant should order, beyond which it was at liberty to order from any other supplier. It further noted that from the

evidence before it, there was precedent for operating outside the realm of exclusivity. It also noted that clause 22.7 of the agreement permitted any offending clause, or part thereof, to be severed from the contract or to be construed in a manner that was in conformity with the law. In *casu*, there was nothing stopping the parties from removing anything which suggested exclusivity.

(ii) On contravening s 11 of the Exchange Control Regulations, 1996, the court *a quo* held that the contract did not breach that section. The section proscribes payment or incurring any obligation to make payment outside Zimbabwe without first obtaining authority from an Exchange Control Authority. In this case the clause on payment did not state that the payment was to be made into an account outside the country but stated that payment was to be made into an account to be nominated by the respondent.

(iii) On the question of The Control of Goods (Open General Import Licence) (Amendment) Notice, Statutory Instrument No.122 of 2017, (SI 122/2017), the court *a quo* did not find in favour of the appellant. It in effect found that there was no breach as no evidence of such breach was proffered.

In essence the court *a quo* held that there were no breaches of local statutes. Any complaints on perceived infringements of local statutes and regulations were capable of being addressed in terms of the provisions in the agreement which provided for parties to seek amendments including severance of any offending clause. The court *a quo* noted that the respondent had invited the appellant to discuss the clauses alleged to be offensive but the appellant had been unresponsive.

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The court *a quo* further found that no substantiated evidence had been submitted to prove the allegation of commercial bribery. In the result, the court *a quo* concluded that the agreement was valid and there was no basis upon which it could nullify it. It therefore held that the appellant had failed to establish a basis upon which the court could grant the declaratory order sought and proceeded to dismiss the application with costs on the legal practitioner and client scale.

Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal. The appellant raised 9 grounds of appeal. The key issues arising from the grounds of appeal are:-

- (i) Whether or not the court *a quo* erred in finding that Cynthia had ostensible authority to enter into a valid agreement on behalf of the appellant thus making the contract binding on the appellant.
- (ii) Whether the court *a quo* did not pronounce itself on the alleged illegality of the contract in terms of laws and whether the contract is void for being contrary to such laws.
- (iii) Whether there was justification for costs on a punitive scale

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BEFORE THIS COURT

In motivating the appeal Mr *Mpofu*, for the appellant, submitted that the pith of the appellant's case is that firstly, the agreement is not of its act and it is therefore void *ab initio*. He submitted that the agreement was a product of the respondent's fraud and commercial bribery which was concluded with the appellant's junior employee who did not have the requisite authority to do so. He thus submitted that the court *a quo* erred and misdirected itself by failing to make a determination that the contract was void on the basis that it was not of the appellant's making and there was lack of

compliance with appellant's internal processes including board resolutions which gave Cynthia authority to enter into same.

In the second rung, counsel submitted that if this Court was to find that it is its act, the contract is void for breach of Zimbabwean laws. In this regard he submitted that the contract was a nullity since it contained provisions which contravened:-

- (i) Section 43 of Competition Act, [Chapter 14:28] which prohibits unfair business practice including exclusivity;
- (ii) Section 11 of the Exchange Control Regulations, 1996 which prohibits the making of any payment outside Zimbabwe or incurring of any obligation to make payment outside Zimbabwe without first obtaining authority or licence from an exchange control authority; and
- (iii) The Control of Goods (Open General Import Licence) (Notice) RGN 766 of 1974 as amended by S I 122/ 2017 which requires an importer in the position of the appellant to obtain an import permit or licence to import goods from outside the country before it can do so.

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He thus insisted that the court *a quo* erred and misdirected itself in holding that the contract was valid.

Counsel also submitted that the court *a quo* had failed to determine all the issues which the appellant had raised. He argued that the court *a quo* had failed to pronounce its findings on whether the agreement was in direct contravention of the Competition Act, the Exchange Control

Regulations, 1996 and the Control of Goods (Open General Import Licence) RGN 766/74 as amended by S I 122/ 2017. Counsel argued that the court had an obligation to apply its own law and the onus was on the respondent to prove that South African law was applicable in this case. He thus sought to have the appeal allowed and that an order be granted declaring the contract void and invalid.

Per contra, Mr Girach, for the respondent, submitted that there was no misdirection on the part of the court *a quo* in holding that the contract was binding on the appellant on the basis of ostensible authority. The finding that Cynthia had ostensible authority cannot be said to be in defiance of logic or contrary to the evidence placed before the court. Such a finding was in fact in tandem with the evidence placed before the court *a quo*. Counsel also submitted that the court *a quo* correctly found that the applicable law in terms of the parties' agreement was South African law. He submitted that the parties had, out of their free choice, agreed that the contract be governed by the law of South Africa. As such the appellant had the onus to prove that Zimbabwean law was applicable rather than the law chosen by the parties and yet it had omitted to do so. He further submitted that the appellant's stance on the choice of law made by the parties would render the entire concept of choice of law and the freedom of contract nugatory and will severely hinder international trade between private corporations.

Counsel further argued that the appellant could not seek to benefit from its own wrong doing since it had benefited from the agreement by taking delivery of the goods it was now seeking to be absolved from paying for. He further submitted that the severability clause allowed the parties to sever any offensive terms which therefore meant that there was no need to nullify the whole agreement. He thus sought to have the appeal dismissed with costs.

APPLICATION OF THE LAW TO THE FACTS

The first issue pertains to whether or not the court *a quo* misdirected itself in finding that Cynthia had ostensible authority and that the agreement between the parties was valid and binding on the appellant.

It is trite law that a contract is an agreement by two or more parties entered into with the serious intention of creating a legal obligation. In order for a contract to be binding it must meet the following criteria: it should be freely entered into, lawful, possible to perform, parties must have contractual capacity, made with the serious intention to contract, the parties must be *ad idem* and the agreement must not be vague. Where any person purports to be entering into a contract on behalf of another, such person must have authority to do so. Such authority may be express or implied (ostensible).

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It is trite that when interpreting a contract the courts must give effect to the intention of the parties. In *Joubert v Enslin* 1910 AD 6 INNES J stated as follows:

"The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties."

When a contract is reduced to writing, it becomes easier for the court to ascertain the intention of the parties. In *casu*, it was clear that there was a written agreement between the parties emanating from the relationship between them wherein the respondent supplied the appellant with plastic products at prices ascertained in terms of that agreement. The critical question was whether Cynthia had authority to enter into that written contract on behalf of the appellant. The court *a quo*

answered this question in the affirmative. It held that the evidence showed that Cynthia had ostensible authority to contract on behalf of the appellant.

In *Infrastructure Development Bank of Zimbabwe v Engen Petroleum Zimbabwe (Private) Limited* SC 16/20 at p 13 GUVAVA JA aptly espoused the law on ostensible authority as follows:-

“Ostensible authority or apparent authority exists where an agent’s words or conduct lead a reasonable person in a third party’s position to believe that the agent is authorized to act, even if the principal and the purported agent have never discussed such a relationship. The effect and meaning of ostensible authority was discussed in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paragraph 45, in which the case of *Hely-Hutchinson CA v Brayhead Ltd and Anor* [1968] 1 QB 549 (CA) at 583 A-G was referred to with approval. The court stated the following:

‘Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of the principal, the agent requires authority to do so, for the act to bind its principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred authority on a third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.’

The court went on to state the importance of ostensible authority and made the following remarks at paragraph 65:

“The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement. It cannot be gainsaid that on present facts, there is a yearning for justice and equity.”

Ostensible authority thus binds a principal over actions done by its agent in relation to third parties. Such principal is estopped from denying liability for the actions of the agent.

In *casu*, Cynthia was an agent of the appellant as she was employed by the appellant as the Supply Chain Director and there was nothing to show that she did not have the authority to sign the agreement on behalf of the appellant. In any event, the respondent submitted previous agreements between the parties which the appellant did not dispute. These agreements include a finance credit agreement signed by H. Huruva on 25 October 2013 as Procurement Manager for appellant. The second one is a Procurement agreement signed by Cynthia on behalf of the appellant on 28 October 2017, effective 1 October 2017, for the procurement of similar goods as in the disputed contract. Thus not only was Cynthia presented as the Procurement Supply Chain Director, she had also entered into a similar written supply agreement with the respondent the previous year before the contract in issue. That prior contract was apparently honoured by the appellant without any disputation. It was at its expiry that the contract in issue was then entered into in March 2018 by Cynthia.

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The appellant's contention that it was not aware of the contract in question till its internal audit of July 2019 was without merit. The audit report itself shows that other senior employees of the appellant were aware of this contract. For instance, a Mrs Mbelengwa, whose designation was General Manager-Procurement, acknowledged that she knew of the contract and when asked what steps had been taken to ensure that the contract had terms, conditions and clauses that were in the best interests of the appellant before signing off she stated: -

- “1. Senior management was involved in the approval of the contract and all necessary steps were taken to ensure that Delta's interests were taken into cognisance i.e. pricing competitiveness, quality and lead times in terms of delivery.
2. Clause 6 which is talking of exclusivity on agreement, but it doesn't preclude Delta from buying from another supplier if there is no written agreement. Also read it in conjunction with clause 8.2 which provides for the review of business operations.”

In response to further probing she stated, *inter alia*, that:

“In 2017 when the forex shortages started, all foreign orders were now being approved by the Supply Chain Director. The SBU GMs were also included in the approval process ...”

H. Huruva, now designated as the Group Procurement Manager (imports), also confirmed knowledge of the contract in question. When asked by the audit team to provide details of the process leading to the contract in question he conceded to his role in preparing the appellant’s requirements and that after he had worked out the requirements a contracting meeting was held at Delta Head Office(DHO) and Delta was represented by the General Manager and the Supply Chain Director. Thereafter the contract was shared with the imports team. He also confirmed that they were being guided by the March 2018 contract in their ordering requirements.

Besides the above officials there are also e-mails between the parties showing that other officers of the appellant were aware of this contract. Faced with all this **Judgment No. SC 59/22** **Overwhelming evidence** **Civil Appeal No. SC 368/20** court *a quo* cannot be faulted for finding that Cynthia had authority to enter into the contract on behalf of the appellant. The appellant had presented Cynthia as its Supply Chain Director with capacity to enter into binding agreements with the respondent and had in fact entered into another agreement of a similar nature with the respondent.

The contention that some internal processes were not followed was decided upon relying on the *Turquand* Rule. That Rule provides that when there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by irregularities which may take place in the internal management of the company. In *Infrastructure Bank* case (*supra*) this Court aptly noted that:

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“Section 12 of the Companies Act codifies the common law principle of the *Turquand* Rule. See *Govero v Ordeco (Private) Limited and another* SC 25/14, *Andrew Mills v Tanganda Tea Company Limited* HH12/13. The section provides for the presumption of regularity to an extent that any person who deals with a representative of a company is taken to presume that all procedures are regular. Section 12 is further reinforced by s 13 of the same Act which provides that such liability is not affected even where the company alleges that the representative acted in a fraudulent way.”

In casu, the respondent having previously conducted business with Cynthia on behalf of the appellant could not be expected to know or suspect that on this occasion Cynthia had not complied with all the internal processes. The court *a quo*'s finding that the written agreement was an act of the appellant and is binding on the appellant is thus unassailable. I accordingly find no merit in the appellant's appeal in this respect.

The next issue is whether the court *a quo* did not pronounce itself on the alleged breach of Zimbabwean laws and whether the contract is void for being contrary to such laws.

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Mr *Mpofu*'s submission that the court *a quo* did not make a determination on breaches of Zimbabwean laws was without merit. As is evident from findings of the court *a quo* alluded to above, the court pronounced itself on each of the alleged breaches. It found that the agreement was not in breach of s 43 of the Competition Act as appellant could still buy from other suppliers as confirmed by its officials. If there was any clause or part thereof which the appellant felt was now offensive, such could be severed in terms of the contract. It also held that there was no breach of s 11 of the Exchange Control Regulations as the contract did not state that payment had to be made outside the country. Equally there was no breach of the Control of Goods RGN 766/74 as amended by SI 122/2017.

In the light of the above findings the issue should thus be whether the court *a quo* erred and misdirected itself in reaching its determination on these aspects.

This issue must be examined from the fact that this contract has international aspects. These include that each party is incorporated in its own country of domicile. The respondent as the seller/ supplier signed the agreement in South Africa whereas the appellant as the buyer/importer signed the agreement in Zimbabwe. Where there are international aspects to a transaction, it is imperative that parties include clauses in the contract on both the governing law and jurisdiction, i.e. which country's law shall govern the contract and in which country's courts will any dispute be finally decided.

In *casu*, it was within the parties' rights to be precise as to which country's law shall govern their contract. There are varying factors that parties would have taken into account in deciding on the law to govern their contract. The law chosen by the parties will generally be respected by the courts of the other country in the spirit of sanctity and freedom of contract. A *caveat* to this general approach is that matters of public policy and mandatory laws of that other country may take precedence over governing law clauses, such as in the area of employment and exchange control regulations which are in the category of directly applicable statutes that override the choice of law. In *C F Forsyth: Private International Law*, 5th Edition Juta at p 318 the author states: -

“For the avoidance of doubt it should be made quite clear that the directly applicable statutes of the forum—as discussed above- stand outside the choice of law process. They apply according to their terms irrespective of the law the parties have chosen to govern the contract.”

In *casu*, the parties were alive to their freedom on choice of law and chose that the agreement was to be governed by and must be interpreted and construed in accordance with the laws of the Republic of South Africa.

However, cognisant of the circumstances of their agreement, including the mandatory laws or directly applicable statutes that may affect that choice of law, each party made certain warranties, representations and undertakings in clause 16.1 of the agreement. That clause provides, *inter alia*, that each party warrants, represents and undertakes to the other party that: -

“(c) the execution of and performance by it of its obligations under this Agreement does not contravene any law or regulation to which it is subject; and
(d) it will have all necessary consents, licences and approvals required in connection with the entry into and performance of its obligations under this Agreement.”

Having made the above warranties, representations and undertakings each party was obliged to ensure compliance with the peremptory laws of their respective countries. Any challenges in compliance were ably catered for by clause 22.7 which provided for amendment of any provision of the agreement that becomes invalid, illegal and unenforceable for reasons stated therein. That clause states as follows:-

“If any part of this Agreement is for any reason whatsoever, including a decision by any court, any legislation or any other requirement having the force of law, declared or becomes unenforceable, invalid or illegal, the Parties must negotiate and effect an amendment of this Agreement such that it is lawful and enforceable, retaining its essential terms or, failing such agreement between the parties, as far as possible this Agreement must be interpreted so as to exclude the offending provision but retain the essential terms of the Agreement.”

It is common cause that the parties have been doing business together for many years albeit on *ad hoc* basis. In October 2017 the parties entered into a written supply contract, the precursor to the agreement in question. The Zimbabwean statutes that the appellant wishes to hide behind in avoiding paying for goods supplied and consumed were in place. The appellant nevertheless met its obligations on the prior transactions. It was never argued that in the preceding

agreement appellant failed to meet its obligations due to a breach of the statutes in question. As already alluded to above, the agreement in question came into effect on 16 March 2018 and was to run till 31 December 2019. It was only when a demand for payment for goods supplied and consumed was raised that in July 2019 the appellant objected to the sum being claimed. The audit it carried out was premised on its belief that it was being overcharged. At that stage its query was not lack of compliance with the domestic statutes. Clearly this is a case of a party who previously met its obligations, now seeking to avoid the accrued debt yet it had consumed the goods for which payment was being demanded. I am of the view that the appellant cannot succeed in that quest.

For instance, regarding the submission that the contract contravened s 43 of the Competition Act by reason of containing an exclusivity clause; given the evidence before it, the court *a quo* aptly noted that the clause only provided for minimum quantities and the appellant continued to order from other suppliers on an *ad hoc* basis. Mrs Mbelengwa in her testimony before the audit team confirmed that the appellant would still buy from other suppliers on *ad hoc* basis as and when the need arose. In any event, as properly noted by the court *a quo*, the agreement contained a clause which provided for the parties to cause the agreement to be amended so as to exclude any offending provision. As such, any offending clause as suggested by the appellant on exclusivity could be cured through an amendment of same without nullifying the contract. The finding by the court *a quo* that the ‘exclusivity’ clause complained of by the appellant can be expunged, cannot be faulted. If the appellant was serious in its view that the ‘exclusivity’ clause was offensive, despite evidence from its officers that they did not treat this clause that way, it could simply have asked for an amendment to exclude that clause.

The test for severability as articulated in *Bligh-Wall v Bonaventure Zimbabwe (Pvt) Ltd & Another* 1998(2) ZLR 264 (SC) at 268 is basically whether the offending clause is substantially at the core of the contract or is subsidiary. If it is subsidiary and the parties would still have entered into the contract without the offending aspect of the clause then that part is severable.

In *casu*, the parties' contractual relationship did not depend on the clause in question. They had been trading for many years. The clause merely provided guarantee or assurance to the appellant that whenever it placed an order for certain quantities of goods it required, such goods would be available on the credit terms of the agreement. Previously the parties had traded without that clause and could still do so. The court *a quo* can thus not be faulted for finding that the agreement was in effect not exclusive.

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The finding that there was no breach of s 11 of the Exchange Control Regulations 1958/20 also not be faulted. The section proscribes the making of payments outside the country or the incurring of any obligation to make such payment without first obtaining authority from an Exchange Control Authority. In *casu*, the clause on payment did not state that payment was to be made outside the country. The onus was on the appellant to show that despite the absence of such a statement, it had in fact been asked to make payment outside the country. This the appellant did not do. Instead it sought to rely on an inference that since the respondent was domiciled in South Africa and the contract was to be governed by South African law, the court *a quo* should have inferred that payment had to be made in South Africa. As aptly noted by the court *a quo* the clause on payment (clause 12.5) simply stated that payment would be made 30 days after receiving a tax invoice into an account to be nominated by the respondent. By the time the appellant raised issues, the contract had run three quarters of its lifespan with the appellant placing orders, receiving the goods and consuming same on

the basis of the credit agreement. It was only upon receiving demand to pay outstanding sums for what it had consumed that it objected. The record does not reflect that the respondent had nominated an account in South Africa. As parties who had been trading with each other for many years the appellant must surely know how it had been making payments even in respect of the agreement in question prior to the raising of the sum it deemed overcharged.

As the onus was on the appellant to prove the unlawfulness of that clause, one would have expected it to simply furnish the tax invoices with the nominated account into which the funds were to be paid as proof that though the clause was silent on the place of payment such place was in fact in South Africa. Clearly the appellant failed to discharge the onus on it. Besides the onus being on the appellant, the obligation to obtain the necessary authority before entering into the contract was upon the appellant. In the agreement the appellant had warranted that it had complied with all the regulations that were required for it to be able to fulfil its obligations under the agreement. From its own averment such a warranty would have been false but nevertheless led to the respondent supplying it with the goods it required.

In *Hattingh & Others v Van Kleek* 1997(2) ZLR 240(S) the respondent was a foreigner who had entered into an agreement involving the payment of money outside Zimbabwe. The respondent was unaware of this country's Exchange Control Regulations whilst the other party was aware. This Court considered s 8(1) (a) (ii), (now s 11(1) (a) (ii), of the Exchange Control Regulations and various cases on the subject and at page 246B-C stated that:

“The cases clearly show that where a contract is on the face of it legal but, by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit.”

Thus the appellant's contention that it had not in fact obtained authority from the necessary authority despite the warranty in clause 16(1)(d) that it had all the necessary consents, licences and approvals to enable it to perform its obligations under the agreement would be akin to deceit which this court may not reward. Such conduct, if true, is repugnant and contrary to the ethos of international contracts between private business entities.

On the issue of the import permit, it is trite that the obligation was on the appellant as the importer to obtain the permit. The appellant did not state that it in fact received the goods and consumed them without having first obtained the requisite import permit. Such a permit would have been one of the licences or authority appellant warranted to have complied with in terms of the clause on warrants, representations and undertaking. The court *a quo* cannot be faulted for not finding for the appellant on this aspect as well.

Another aspect that militates against the appellant is that of public policy. It is not open to a party to seek to rely on its own default or illegality to avoid its obligations. These courts are loath to lend support to such a party. See *Standard Chartered Bank Limited v Matsika* 1997(2) ZLR 389 (SC).

In *Book v Davidson* 1988(1) ZLR 365(SC) at 378 DUMBUTSHENA CJ in discussing the sanctity of contract and public policy aptly noted that:-

“There is another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts.

If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider- that you are not lightly to interfere with this freedom of contract.

The ‘inviolability’ of contracts was described by LINDLEY MR in *E Underwood and Son Ltd v Barker* (1899)1CH 300(CA) at p305, as essential to trade and commerce. He continued thus, referring to the covenantor as the defendant:

‘to allow a person of mature age, and not imposed upon, to enter into contract, to obtain benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.’”

This speaks well to the circumstances of this case whereby after receiving and consuming goods on credit as per its orders, the appellant seeks to have that contract declared void and by that, avoid meeting its obligations to pay for the goods.

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In the circumstances, it cannot be said that the court *a quo* erred in dismissing the appellant’s case for the contract to be declared void for being contrary to Zimbabwean law as a ruse to avoid its obligations. 21

This Court is satisfied that the evidence adduced before the court *a quo* was clear and established the existence of a valid contract between the appellant and the respondent. It would be contrary to public policy to allow the appellant to escape its international obligations on the pretext of its own alleged default when previously it had met its obligations. The appeal has no merit and must be dismissed with costs.

COSTS

In the grounds of appeal the appellant had alleged that the court *a quo* erred and misdirected itself in awarding costs on a punitive scale when such was not warranted. This ground of appeal was, however, not pursued in the heads of argument and in motivating the appeal before this court. Where a ground of appeal is not addressed in the heads and in motivating the appeal the assumption is that it has been abandoned. That award will therefore not be tampered with.

As regards the costs of this appeal there is nothing warranting a departure from the general rule that costs follow the cause. There was equally no justification for costs on a higher scale. Costs will thus be on the ordinary scale.

DISPOSITION

The court *a quo*'s finding that the written agreement was an act of the appellants cannot be faulted given the evidence placed before it. The appellant is bound to the contract that it entered into. As the contract provided for amendments, if the appellant realised it had not bargained well, its recourse was to seek amendments in terms of the contract. The appeal is without merit.

Accordingly it is ordered that the appeal be and is hereby dismissed with costs.

BHUNU JA I agree

MAKONI JA I agree

Scanlen & Holderness legal practitioners, appellant's legal practitioners.

Atherstone & Cook legal practitioners, respondent's legal practitioners

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