

SAVECHEM PRIVATE LIMITED
And
PETROS RUBENGO
Versus
MASIMBA INDUSTRIES (PVT) LTD
And
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 15 January & 14 February 2025

Ruling on a preliminary point

L. Jonasi for the applicants
E. Mangezi for first respondent
No appearance for second respondent

CHILIMBE J

BACKGROUND

[1] I struck this matter off the roll mainly on the basis that a US\$2,000 claim did not amount to a commercial dispute as defined by r 3(1) of the Commercial Court Rules¹. I delivered the reasons for my ruling *ex tempore* on 15 January 2025 after hearing argument on the point. I nonetheless furnish same in writing hereunder at the requests of the applicants

THE ORIGINAL DISPUTE

[2] The relevant facts are as follows; - first applicant (“Savechem”) and first respondent (“Masimba”) are entities registered per the laws of Zimbabwe. Their further particulars or characteristics as commercial entities were not furnished. The parties concluded a lease agreement sometime in May 2019.

[3] In terms thereof, Savechem occupied Masimba’s premises known as 56A Main Street, Bindura. Second respondent, Mr. Rubengo who is a director of Savechem, bound himself as surety for the due performance by Savechem of its tenancy obligations.

¹ The High Court of Zimbabwe (Commercial Division) Rules SI 123/20, the rules governing proceedings in the Commercial Division of the High Court of Zimbabwe, referred herein as the Commercial Court.

[4] Both Savechem and Mr Rubengo (“the applicants”) subsequently breached their respective obligations. Masimba instituted proceedings in this court under case number HCHC 261/23 on 17 March 2023. It claimed in the main, arrear rentals in the sum of US\$17,719,03. The court ordered, inter alia, Savechem and Mr Rubengo to pay Masimba US\$13,659,16 as arrear rentals, and US\$3,500,00 as costs of suit.

[5] The applicants paid an amount ZWL 62, 993, 463,00. This payment, in their opinion, fully discharged the debt. Masimba argued that the payment fell short by US\$2,000. The applicants disputed Masimba’s reconciliation. They accused Masimba of applying an illegal black market exchange rate to their ZWL payment, resulting in the shortfall. Masimba persisted with its demand. The applicants refused to yield. With the parties deadlocked, Masimba instructed second respondent (the Sheriff) to execute and recover the US\$2,000 balance deemed outstanding.

THE APPLICATION FOR A DECLARATORY ORDER

[6] The Sheriff attached Savechem’s goods on 24 July 2024. The applicants immediately approached this court for declaratory relief in terms s 14 of the High Court Act [Chapter 7:06] raising issue as to; -

“Whether the payment of ZWL\$ ZWL 62 993 463 by the first and second Respondent is a full and final settlement of the Respondent's judgment debt/ in short, the court is being asked to declare whether or not the payment made by the First and Second Applicants discharged the debt. If so, the second Respondent resultantly should release the first and second Applicants good under attachment.”²

[7] The applicants contended that they had satisfied all the requirements for the grant of such relief. The requisite authorities on the point were cited³. Including a suite of judicial decisions and statutory pronouncements on the settlement of local obligations in local currency.⁴ Masimba resisted the application. Its position being that the attempt to meet the judgment debt

² See paragraph 1 of applicants’ heads of argument filed of record.

³ *Ex P Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (25) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) *Munn Publishing (Pvt) Ltd v ZBC* 1994(1) ZLR 337(S) at 343-344; *United Notch & Diamond Co (Pty) Ltd & Ors v Aisa Hotels Ltd & Anor* 1972 (4) SA 409C at 415; *Milamu & Anor v South African Medical and Dental Council & Anor* 1990 (1) SA 899T at 902G-H;

⁴ Finance Act No.2 of 2019 and Statutory 57/73 Instrument (S.I) 212 of 2019, Statutory Instrument 33 and 142 of 2019. S.I 212 of 2019, Finance (No. 2) Act, 2019, *Falcon Gold Zimbabwe Limited v Taxing Officer N.O & Anor* SC 25-2024, *Zambezi Gas Zimbabwe (Private) Limited v N.R Barber and Anor* SC 3-20 and *Zimbabwe Football Association v Custen Pickweli and 15 others and Another* HH 12-21

in local ZWL did not fully discharge the applicants from liability. The Sheriff elected to remain neutral.

CONCERNS ARISING FROM THE APPLICATION

[8] The parties' dispute over US2,000 raised the immediate question of its commercial significance. The amount in question generated no commercial substance. In fact, it fell far below the Commercial Court's minimum monetary jurisdictional threshold of US\$50,000 as prescribed r 3(2) of the Commercial Court Rules which prescribes that; -

(2) The monetary jurisdiction of the court shall be an amount, or the value thereof, that exceeds the monetary jurisdiction of the magistrates' commercial courts by the equivalent of one United States dollar (US\$1) in the functional currency of Zimbabwe at any point in time⁵.

[9] Further, the legal and factual issues under contest drew no significant commercial consequence. These concerns over the matter came against broader considerations over the mandate and purpose of this court. The Commercial Court being a specialised Division of the High Court of Zimbabwe established by the below proclamation by the Chief Justice on 27 October 2017; -

“ NOTICE is hereby given in terms of section 46A of the High Court Act [Chapter 7:06], that after consultation with the Judge President and in the interest of expediting justice delivery and promoting the ease of access to justice, a specialised division of the High Court to be known as the Commercial Division of the High Court is hereby created to adjudicate commercial law disputes and hear all appeals, reviews, applications and petitions which lie to the High Court relating to commercial disputes. HON. L. MALABA, 27-10-2017.” [Underlined and emboldened for emphasis]

[10] The exercise of [original, appellate, interlocutory, or consequential] jurisdiction stipulated in the proclamation was operationalised by the Commercial Court Rules. Rule 4 (1) of the said rules stipulates that all proceedings involving such commercial disputes shall be governed, unless excluded by some other law, by the Commercial Court Rules. Rule 5 in turn, reiterates

⁵ By the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, SI 45 of 2023, published on 31 March 2023, the Magistrate Court's civil jurisdiction was set at US\$50,000

that the Commercial Court shall deal with commercial disputes. By r 3 (1), the Commercial Court Rules define a commercial dispute in the following terms; -

“commercial dispute” means a dispute of a civil nature considered by the court to be of commercial significance, including any claim or application arising out of a transaction of trade or commerce but not limited to—

(a) the formation of a business or commercial organisation;

(b) the formation, management, transfer or dissolution of any business entity;

(c) the contractual relationship of a business entity with another such entity or with another person or persons undertaken in the course of business, other than with a person or persons who are employees;

(d) the contractual liability of a business or of a person engaged in a business that arises in the course of business activity other than arising from a contract of employment;

(e) disputes primarily involving banking and financial services;

(f) disputes relating to the restructuring or payment of business debts, including business rescue and insolvency;

(g) the enforcement of an arbitral award of a business of a commercial nature;

(h) a business dispute that is between an individual, a company, co-operative, partnership, syndicate, trust or other entity which does not arise from a contract of employment;

(i) disputes arising from the exploitation of oil and gas reserves or other natural resources of a commercial nature;

(j) any dispute of a commercial nature arising out of insolvency, insurance claims, competition and anti-trust law or legislation, the Companies and Other Business Entities Act [Chapter 24:31], pension funds and disputes relating to pensions or the operation of a pension fund;

(k) any dispute relating to the management of a business or commercial organisation, including a dispute relating to the management of a business executive directors of a company and its shareholders or executive directors and the company;

(l) any dispute relating to the contractual relationship or liability of a business, commercial organisation or person with other bodies or persons outside the business or commercial organisation arising out of business or commercial activities;

(m) banking and financial services;

(n) the restructuring or payment of commercial debts 623 High Court (Commercial Division) Rules, 2020 by or to a business or commercial organisation or person; and

(o) any other dispute that the Judge President may designate as a “commercial dispute” upon request by any of the parties to the dispute;

[11] Consequently, in order for parties to access the jurisdiction of the Commercial Court, their matters must meet the level of commercial significance envisaged under r 3 (1) of the Commercial Court Rules. Unless their matters pass such gateway, the court may not grant litigants its judicial ear.

[12] The specialised mandate of the Commercial Court, its place within the institution of the High Court, and the meaning of commercial dispute per r 3(1) have been fully articulated in a number of decisions. See *Matthew Rosenfeldt v The Brackenhills Trust & 4 Ors* HH 348-23, *Blakey Investments (Pty) Ltd v Delta Beverages (Pvt) Ltd & 2 Ors* HH 388-23; *Centenary Tobacco (Pvt) Ltd v CMED* HH 591-24, and *Hashiti & Anor v Seedco* HH 615-24.

[13] These decisions also give guidance on (a) why the Commercial Court must ensure that matters coming before it are indeed, commercial disputes and (b) how a party approaching this

court can demonstrate that its matter qualifies as a commercial dispute in terms of r 3(1) of the Commercial Court Rules.

WHAT CONSTITUTES A COMMERCIAL DISPUTE

[14] In *Hashiti v Seedco*, I again opined (as I had in *Rosenfeldt*), that a party was practically at large when it came to demonstrating commercial significance. The below example from The Practice Directive on the Gauteng & Gauteng Local Divisions of the South African High Court, dated 3 October 2018, [see paragraph 89 in *Rosenfeldt*], gives further insights. It states thus; -

“A ‘Commercial Court case’ is ordinarily a substantial case that has as its foundation a broadly commercial transaction or commercial relationship. The following are a list of examples, which might depend on their particular facts or legal aspects, qualify as commercial court cases: Any claim arising out of the transaction of trade and commerce and includes any claim relating to:

- (a) the export or import of goods;
- (b) the carriage of goods by land, sea, air or pipeline;
- (c) the exploitation of oil and gas reserves or other natural resources that do not involve Administrative Law;
- (d) insurance and reinsurance;
- (e) banking and financial services
- (f) the operation of markets and exchanges;
- (g) the purchase and sale of commodities;
- (h) medical scheme matters;
- (i) commercial matters arising out of business rescue and insolvency cases;
- (j) all commercial matters affecting companies arising out of the Companies Act 71 of 2008 and its interpretation;
- (k) arbitration;
- (l) delictual cases that take place in a commercial context for, e.g. unlawful competition cases;

- (m) generally, appropriate contractual matters;
- (n) intellectual property cases.”

[15] In that respect, a party whose dispute bears commercial significance ought to be able to amply demonstrate such without struggling. How they do so is entirely up to the party. As observed in *Hashiti v Seedco*,

“[86] Further, what constitutes “commercial significance” is neither defined nor indicated in the rules. As such, the term “commercial significance” creates as much of a challenge as it does an opportunity. It extends the latitude to an earnest litigant to genuinely articulate the commerciality of its claim. Commercial significance may relate to the positive or negative impact of the dispute.

[87] Impacted by such dispute may be a party`s balance sheet including share price, employees, customers, trade partners, market or regulators. Equally diverse will be the nature of the said significance. Whether earth shattering or mundane, it must be easy for a party in particular, to demonstrate commercial significance, in as much as it becomes the task of the court, to evaluate the veracity of such.”

[16] The significance may therefore be drawn from an endless list of causes including the legal, and commercial. Looking inward, surely, every line, figure, proposition, model or even cells in a spreadsheet in management accounts, strategic plans and other business records should inspire the same earnest litigant to distil the true extent of a dispute`s commercial significance? These indicative suggestions are not however, an invitation for litigants to swamp the court with undigested commercial prognoses and inscrutable columns of figures.

WAS THE DECLARATUR A COMMERCIAL DISPUTE?

[17] Against these considerations, I invited *mero motu*, the parties herein to address the court on whether the prayer for a declaratur and its opposition constituted a dispute of a civil nature which the court could consider as carrying commercial significance. Put differently, whether the court should exercise its jurisdiction of the dispute.

[18] Mr *Jonasi* for the applicants contended that indeed the matter was properly before the court. It was a commercial dispute as defined in terms of r 3(1). Counsel raised four main arguments. Firstly, that the application automatically qualified as a commercial dispute because

it derived from one- namely HCHC 261/23. If the court had accepted HCHC 126/23 as a commercial dispute, then surely the resultant application for declaratur was entitled to ride on that status. In raising this argument, counsel did not delve further into the commercially compelling parameters of the landlord and tenant relationship between Masimba and Savechem.

[19] Secondly, Mr. *Jonasi* submitted that the dispute was consequential in the enforcement of the order in HCHC 261/23. The main matter needed to be consummated through enforcement for effectiveness. The present application therefore formed part of that critical process. As such, it rendered the current matter equally important in the dispute resolution equation.

[20] Thirdly, Mr. *Jonasi* took the view that the present dispute was, based on its own merit, clearly a matter of commercial significance. The legal issues relating to currency and adherence to the various prescriptions of the law imbued the matter with commercial significance was argued. Counsel did not extend his argument to the facts of the matter as a source of commercial significance.

[21] As his fourth point, counsel accepted that the magistrates court enjoyed monetary jurisdiction over US\$2,000 disputes. He however submitted that the applicants were compelled to approach this court because the magistrates court did not have the power to grant declaratory relief. He cited the decision of *Luckson Mature v Samuel Chidima* HB 156-16 in support thereof. The fourth point may be dispensed with. The applicants did not, in that argument, explain why they opted for the Commercial rather than the General Division of the High Court.

[22] In response, Mr. *Mangezi* for Masimba, took the position that quite clearly, the matter was not a commercial dispute. He drew a distinction, between the present dispute and HCHC261/23. He argued that a declaratur was founded on a different causa from the original claim for a debt. He also argued that the matters in contention were ordinary and raised no special considerations as to elevate the dispute to commercial significance.

ANALYSIS OF THE LEGAL ARGUMENTS

[23] How tenable are Mr. *Jonasi*'s arguments? Does the present application automatically pass the test in r 3(1) because it derives from the original dispute in HCHC 126/23? And that it becomes a commercial dispute by virtue of it being a consequential enforcement procedure to give effect to HCHC 126/23? Do the arguments raised from both sides of the opposed application generate issues of commercial significance? I will address each aspect in turn,

THE DECLARATUR IS ANCILLARY TO THE MAIN CASE IN HCHC 126/23

[24] This matter is not interlocutory to HCHC 261/23. Although related, the present application is a fresh matter. Its resolution is not entirely dependent on the original. It can be independently and separately disposed of. The Chief Justice's Proclamation refers to matters "related to a commercial dispute". The commercial nexus must be articulated through the cloisters of r 3(1).

[25] As noted, the applicants did not proffer any additional features of commercial significance around the main dispute. The landlord and tenant dispute was resolved. Savechem vacated Masimba's premises. Which effectively buried the original controversy which concerned the court at the inception of HCHC 261/23. The umbilical cord alone does not imbue the present matter with commercial significance. Accordingly, this argument therefore failed.

THE DECLARATUR SOUGHT IS A CONSEQUENTIAL ENFORCEMENT PROCEDURE

[26] The administration of justice has a ready framework for enforcement of judicial decisions. The mechanisms include judicial processes provided for in the rules to enforce, challenge, halt or suspend execution of court outcomes. Rule 42 (2) of the Commercial Court Rules as read with Part XI of the High Court Rules deals with execution and superannuation of judgments. In that regard, the rules, in Part XI allow an array of consequential proceedings available to parties.

[27] So too does r 44 (3) of the Commercial Court Rules provide for applications for stay of execution pending appeal. Arguably (because the court must still retain its discretion), such proceedings need not pass the r 3(1) test. The present application however, clearly falls outside this class of proceedings. It is a prayer for declaratory relief in terms of s 14 of the High Court rather than a procedural request brought under the rules of court. Further, the applicants have not cited any other administrative grounds such as the facility of r 3(1) (o); or the court's regulation of its own processes. Similarly, the second argument was dismissed.

THAT THE APPLICATION ON ITS OWN SIGNIFIES COMMERCIAL SIGNFICANCE.

[28] As noted in the preceding paragraphs, no cogent submissions on the commercial magnitude of the dispute were tendered. The decisions of *Rosenfeldt*, *Hashiti* and *Blakey* set out the general and specific factors to consider in demonstrating the commercial significance of a matter. The applicants have proffered none.

[29] Especially in view of the glaringly puny amount in dispute. The inconsequential nature of the amount was aggravated by the fact that even the US\$17,719,03 primary claim could have been disqualified had the matter been instituted in this court two weeks later after beyond 31 March 2023 when the court's minimum monetary jurisdiction was raised to US\$50,000.

[30] Further, the legal and factual contentions raised from either side were anchored on the interpretation of currency statutes and authorities. These matters, well-articulated in the authorities cited, constitute well-trodden legal pathways which generate no novel propositions. Nor did the parties invite any special interventions in their papers. In that regard, I disallowed the applicants' third contentions.

IF NOT TO BE HEARD IN THE COMMERCIAL DIVISION, THEN WHERE?

[31] Traditionally, the question of jurisdiction would not have arisen because residual matters such as the present application were routinely dealt with by the court. The Commercial Court Rules have however, introduced new perspectives which call for some adjustment to practice. In fact, such changes are traceable to the Judicial Laws Amendment (Ease of Settling Commercial and Other Disputes) Act Number 7 of 2017 ("JLA") enacted by Parliament on 23 June 2017.

[32] The JLA amended the High Court Act, by introducing s 46A. Section 46A (4) in turn, ushered in a selection process to direct specific matters to the correct Division of the High Court with the mandate and speciality to deal with such matters. It provides as follows; -

(4) Whenever the Registrar of the High Court issues out summons in any matter falling within the jurisdiction of a specialised division of a High Court, the Registrar shall set the matter down for determination by a judge in the division concerned.

[33] The High Court exists as a single institution. There is no reason why the present matter could not and cannot be dealt with by the General Division. Operationalisation of s 46A (4) of the High Court Act and r 3(1) of the Commercial Court Rules becomes a judicial and administrative matter. (See *Slice Through Investments (Pvt) Ltd v Nirgel Trucking and Plant Hire (Pvt) Ltd* HB 45-23 at [11], and *Hashiti v Seedco* at [65] and [66]).

[34] These decisions dealt with the High Court's inter-Divisional symbiosis envisaged by s 171 (3) of the Constitution. Section 171 (3) provides for divisionalisation of the High Court, but on the basis of parallel jurisdiction. It too reflecting the very consequence of change envisaged by s 176 of the Constitution which states; -

176 Inherent powers of Constitutional Court, Supreme Court and High Court

The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.

[35] The above guidance can be further articulated by reference to a passage from the seminal decision of *Zimnat Insurance Company Limited v Chawanda* 1990 (2) ZLR 143 (SC) where the Supreme Court held, at page 153 that; -

“Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice..... Therefore, the law must be constantly on the move, vigilant and flexible to current economic and social conditions.”

DISPOSITION

[36] The judiciary's considerable efforts in establishing the Commercial Court as a specialised Division of the High Court reflect the progressive intent envisaged in s 176 of the Constitution. The Commercial Court must therefore meet the expectations of the wider public. It must in that regard, focus on purpose and sidestep commercially prosaic disputes, including those which (like the present application), fall beneath the jurisdiction -of the Small Claims Court⁶.

[37] From a more direct procedural basis, it was observed that “*It is imperative to note that the High Court can only exercise its jurisdiction within the confines of the High Court Rules*”⁷.

⁶ US\$5,000 in terms of the Small Claims Courts (Jurisdiction) Notice, SI 43 of 2023

⁷ See the further context provided by PATEL JCC in the article titled *Jurisdiction of the High Court in the Judges' Induction Compendium: November 2021*, published by the Judicial Training Institute of Zimbabwe.

In that regard, r 3(1) must guide the filtration process of matters coming before the Commercial Court.

[38] Clearly, the matter before us is not a commercial dispute. It must be struck off the roll. On the issue of costs, I determined that each party should meet its own costs. The point was raised by the court *mero motu*. It is on the basis of the foregoing that I issued the below order; -

1. This matter fails to meet the qualification of a civil dispute of commercial significance as defined and required by r 3 (1) of the Commercial Court Rules 2020.
2. As such, the matter be and is hereby struck off the roll with each party to bear its own costs.

Chinamatira, Jonasi, Nyambira and Tambanewenyu-applicants' legal practitioners
Mangezi, Nleya and Partners-first respondent's legal practitioners

[CHILIMBE J __14/02/2025]