OTC INTERNATIONAL
versus
SENATOR (PVT) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 5 July 2024 & 18 February 2025

CIVIL TRIAL

Mr T.S Manjengwa for the plaintiff
Adv E.T Matinenga with O. Tswangirai for the defendant

TAKUVA J:

Introduction and background facts

This matter is a civil action wherein the parties drew up a statement of agreed facts at the Pre-Trial Conference stage such that it became a stated case. All the facts are therefore common cause. It is the applicable law that is contentious. The brief background of the case is that sometime in 2014, plaintiff, which is a company incorporated in Germany, sold seven buses to the defendant which is a local company and such buses were delivered to the defendant as agreed. The purchase price for each bus was agreed at US$84 143, 28. It is agreed that the initial invoice of US$673 146,21 which reflected eight buses instead of seven buses was erroneous and that the corrected invoice reflected a sum of US$589 002,96 as the total purchase price of seven buses. The interest was agreed at 8%. It is agreed that the deposit which had been paid by the defendant into the trust account of plaintiff's erstwhile legal practitioners was returned to defendant after exchange authority to pay it abroad could not be obtained. In the course of the disputation concerning payment of the purchase price, the government of Zimbabwe introduced Statutory Instrument 33 of 2019 which mandated that the values of all contractual liabilities in United States dollars which predated 22 February 2019 should be at 1:1 rate with the then local RTGS dollar save for the discharge of foreign obligations. The defendant then deposited ZWL$673 146, 24 to the trust account of plaintiff's legal practitioners which amount was accepted by the plaintiff and converted to US$6 370, 36 in terms of section 4 (e) of the said Statutory Instrument.

The Issues for determination

On the 19th of October 2023, the parties agreed in their statement of agreed facts that the issues for determination are as follows:

1. Whether the High Court has jurisdiction to deal with the matter in view of Clause viii of the General Terms of Sales and Delivery applicable.
2. If the court has jurisdiction, whether the plaintiff's claim could be adjudicated on in the absence of a payment of security for the defendant's costs by the plaintiff.
3. Whether in view of the fact that the plaintiff's potential loss in the underlying transaction was covered by insurance, and therefore if such loss was to be recovered from the insurer, the plaintiff could still recover the amount from the defendant or whether the existence of insurance discharges the defendant from paying the amount in issue.
4. Whether in light of Statutory Instrument 33 of 2019, the defendant's liability to plaintiff is a foreign loan or obligation and therefore exempt from 1:1 rate of payment in terms of section 44C (2) (b) of the Reserve Bank Act 5/1999 or is the liability met/payable in terms of section 4 (1) (d) or section 4 (1) (e) of the said Statutory Instrument.

The parties duly filed their heads of argument as agreed. At the hearing of the matter, what ordinarily would have happened was that the court would have heard the parties' submissions on all the issues. However, such did not happen and for a good reason. It became apparent that the first two issues of jurisdiction and security costs which had been raised by the defendant as points in *limine* in its plea had to be decided first as a preliminary step before the court could delve to the other issues which appear to be arguments on the merits of the case. The court then heard arguments by counsel on these two issues and this judgment relates only to those two issues.

Jurisdiction

In its pleadings and heads of argument, the defendant had argued vehemently that this court lacks jurisdiction to deal with this matter on the basis that the parties agreed that the forum of adjudication should be in Germany where the contract was concluded. At the hearing, Advocate *Matinenga*'s submission was that he was unable to say that this court has no jurisdiction to adjudicate this matter. This to me was and is a clear signal that learned counsel appreciated that defendant was not standing on solid ground on that submission in light of clause

viii of the contract between the parties which clause in its literal and grammatical sense gave the plaintiff a right and option as the seller to institute legal proceedings at the defendant's residence as well. This then disposes the issue of jurisdiction as there is no other legal basis upon which this court can withhold its jurisdiction in dealing with this matter. I therefore hold that the court has jurisdiction to adjudicate the plaintiff's claim. The defendant's point in *limine* on jurisdiction is accordingly dismissed.

Security costs

The gist of the defendant's submission on this aspect was that since the plaintiff, which is a *peregrine*, has not paid security costs, the court should order it to pay security costs and the hearing of the case should be stayed pending such payment so that the defendant's costs could be secured in the event of plaintiff losing its claim. On the other hand, the gravamen of the plaintiff's submission was that the hearing of the case should not be stayed for the reason that the defendant has not properly placed the issue of payment of security costs before this court. Plaintiff's counsel contended that the defendant should have followed the procedure that is outlined in rule 75 of the High Court Rules, 2021. He went further to say that even before such rules were introduced, it still behooved the party seeking security costs to apply to the court so that the court could properly satisfy itself as to whether the *peregrine* should be made to pay security costs or not.

This court is alive to the fact that the plaintiff's claim was filed in 2016 before the advent of the current High Court Rules which were introduced in 2021. The general principle as it was then and which was not expressly captured in the High Court Rules, 1971was that security costs were subject to overall judicial discretion. The court could order their payment in a specific sum of money or stay proceedings pending quantification of such costs by the Registrar or dispense with them if there is reason to do so. The court could also proceed in its discretion to deal with the matter if the party demanding such costs would not have properly dealt with the issue of security costs prior to the hearing. The quantum of security costs, if disputed, was and is still fixed by the Registrar. See ***O'gormain* v *Forestry Commission and Others* HH – 107 – 06** and ***Redstone Mining Corp (Pvt) Ltd and Others* v *Diaoil Group Zimbabwe Limited and Others* 2015 (1) ZLR 643**.

In the recent case of ***Electricity Management Services Limited* v *Procurement Regulatory Authority of Zimbabwe and Others* HH – 68 – 24**, Honourable CHIRAWU – MUGOMBA J reiterated the position that this court retains a discretion on issues of security costs

over and above the provisions of rule 75 of the High Court Rules, 2021. The court also took notice of section 63 of the Companies and Other Business Entities Act [*Chapter 24:31*] which provides thus:

> "Where a company or foreign company or a private business corporation or company is plaintiff or applicant in any legal proceedings, the court may, at any stage on sufficient proof that there is reason to believe that the company, foreign company or private business corporation will be unable to pay the costs of the defendant or respondent if successful in his or her defense, require sufficient security to be given for those costs and may stay all proceedings till the security is given."

The above provision permits the court to stay proceedings at any stage and order payment of security costs if there is sufficient proof that a foreign company may not be able to pay the defendant's costs. This statutory provision should be applied in the context of rule 75 of the High Court Rules, 2021.

Before examining the provisions of rule 75 of the High Court Rules, 2021, it is pertinent to consider rule 109 thereof which provides for repeals and savings as follows:

> "The rules specified in the Second Schedule are repealed.
> Provided that anything validly commenced or done in terms of the repealed rules prior to the coming into force of these rules shall be deemed to have been validly commenced or done, as the case may be, in accordance with the equivalent provision of these rules."

Although Advocate *Matinenga*'s submission was that the court should relate to this matter with a view that the defendant raised the issue of security costs prior to the promulgation of the current rules, counsel could not point to a specific provision under the repealed rules as the procedural basis upon which the issue of security costs could be properly placed before the court by pleadings in an action and letters to the plaintiff's lawyers without a formal application. According to Mr *Manjengwa*, he submitted that a formal application was needful so that evidence could be properly placed before the court as to why the court should order or not order payment of security costs. Without such affidavits by the parties, counsel would be risking the impropriety of giving evidence to the court over the bar. I agree. Accordingly, I hold that there is no valid procedural step that was taken by the defendant to place the issue of security costs properly before the court. The defendant could not discharge such evidential burden without placing sworn evidence before this court especially when it was apparent that the plaintiff was disputing the manner in which the issue of security costs had been placed before the court.

Over and above the above considerations, nothing still prevented the defendant from raising the issue of security costs in the manner that is stipulated in rule 75 between 2021 and

now which is a period of almost three years after the current rules were promulgated and when the matter was still pending before this court. Rule 75 (1) to (3) is clear and reads thus:

> (1) "A party entitled and desiring to demand security costs from another shall, as soon as possible after the commencement of proceedings, deliver a notice setting forth the grounds upon which security is claimed and the amount demanded.
> (2) If the amount of security only is contested, the registrar shall determine the amount to be given and his or her decision shall be final.
> (3) If the party from whom security is demanded contests his or her liability to give security or if he or she fails to furnish security in the amount demanded or in the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to a judge or court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with."

The demands of the above rule stand clear. There is no reason why the defendant has failed to follow the requirements of the above rule. To that extent, the issue of security costs is not properly before this court. The proceedings cannot be stayed so as to accommodate the laxity of the defendant in its failure to properly attend to the issue of security costs. This court cannot ignore its rules and adjudicate on the issue of security costs when such issue has not been properly placed before the registrar first as provided in the rules. Such course would open a floodgate for litigants to flout this court's rules at whim and to this court's inconvenience. To stay the current proceedings so as to wait for the defendant to act properly would be, again, an act of defeating the purpose of rule 75 (1) which mandates that such issue should be attended to at the very earliest opportunity when the pleadings are in their infancy. Demanding security costs at the earliest stage and indicating the amount such that the Registrar could quantify the value if there is any dispute enhances efficiency and also eliminates any prejudice and time wastage in litigation. This court cannot be seen to countenance a flagrant breach of its rules as such stance would result in inconsistency, unpredictability, confusion and disorder in its operations. The need for a court of law to adhere to the statutes and rules despite its inherent powers was recently articulated by GOWORA JCC in *Matsika and Another* v *Chingwena and Others* CCZ – 09 – 24 wherein at page 33 of the cyclostyled judgment it was held thus:

> "Whilst the jurisdiction of a court is specifically accorded in the Constitution and it's enabling Act, its procedures are regulated by the rules that it makes. The exercise of inherent jurisdiction does not entail the creation of additional jurisdiction or the amendment of rules. Rather it is a residual power that the court possesses and retains for use in the interests of justice, or when not to do so may result in an injustice. In other words, it is a power that the court calls upon to fashion a remedy in the interests of justice."

Disposition

This court shall therefore adhere to the rules. The issue of the determination of security costs is not properly before this court. The defendant's point in *limine* that the proceedings be stayed until the plaintiff has paid security costs is hereby dismissed as it has not been properly raised. There is no reason to depart from the general rule that costs follow the cause.

The court orders as follows:

1. The defendant's point in *limine* on jurisdiction be and is hereby dismissed.
2. The defendant's point in *limine* to have the proceedings stayed until security costs are paid by the plaintiff be and is hereby dismissed.
3. The question of security costs shall only be entertained if properly placed before this court.
4. The matter shall be set down for hearing on the remaining issues.
5. The defendant shall bear the costs of this preliminary hearing at an ordinary scale.

TAKUVA J: …….

Wintertons, plaintiff's legal practitioners
Dube – Tachiona & Tswangirai, defendant's legal practitioners