REPORTABLE (75)

ENGEN PETROLEUM ZIMBABWE (PRIVATE) LIMITED
v
LITHOTEC (PRIVATE) LIMITED t/a **FRAME WORK MEDIA**

SUPREME COURT OF ZIMBABWE
BHUNU JA, KUDYA JA & MWAYERA JA
HARARE: 27 NOVEMBER 2023 & 25 JULY 2024

T. Mpofu, for the appellant

A. Nyamukondiwa, for the respondent

KUDYA JA: The appellant appeals against the whole judgment handed down by the High Court (the court *a quo*) on 1 March 2023. The court *a quo* ordered the appellant to pay to the respondent the sum of US$74 332.58 together with interest thereon at the rate of 5 *per centum per annum* from 12 December 2013 to the date of payment in full and costs of suit.

THE FACTS

The appellant is Engen Petroleum Zimbabwe (EPZ), which is a locally registered private company. It was incorporated in that name on 15 December 1998. The respondent, Lithotec (Pvt) Ltd t/a as Framework Media is also a locally registered private company.

THE ENGEN GROUP

At all material times, EPZ and its sister company Engen Oil Zimbabwe (Pvt) Ltd (EOZ), which was registered in that name on 23 May 2012, were wholly owned subsidiaries of Engen Holdings Zimbabwe Ltd (EHZ). These three separate and distinct local entities all shared the same registered location, address, directors, management and staff. Together with Engen Petroleum Limited of South Africa (EPLSA) they were subsidiaries of Engen Offshore Holdings (Mauritius) Ltd (Engen Mauritius).

These companies form part of the worldwide Engen Group. The existence of such an Engen Group is stated in Annexure A, entitled "Approach to Service Charge Fee to Affiliates" of the services to be rendered, which is attached to the "Management Services Agreement" (MSA) consummated between EPLSA and the appellant on 1 January 2013. In terms of clause 3.41 of the MSA, EPLSA was a shareholder in the appellant. The appellant was an affiliate of EPLSA. An affiliate is defined as a connected party or company, which "is a separate legal entity incorporated in the country in which it operates." Clause 6.2 mandated the appellant to submit monthly management reports on the services rendered to EPLSA. In terms of clause 8.2, the appellant was precluded from ceding the MSA without the consent of EPLSA, while clause 8.3 permitted EPLSA to cede the agreement without any reference to the appellant.

<u>THE INVITATION TO TENDER</u>

On 7 May 2012, International Quantity Surveyors CC (IQS), a South African closed corporation, floated a tender for and on behalf of the appellant. The tender was headlined "Engen: Engen Petroleum Zimbabwe (Pvt) Ltd (EPZ): Tender: Rebranding of Existing Service Stations in Zimbabwe: Issued 7 May 2012 International Quantity Surveyors."

The tender was divided into five parts. The provisions in Part 1, headlined "Tender/Contract Conditions and Part 5 headlined "Tender Form-Personal Information" are relevant to the determination of this appeal.

We advert to clauses 1, 2, 22, 23 and 24 in Part 1. Clause 1 stipulated the tender documents were to be delivered to EPLSA in Cape Town or e-mailed to fernando.serra@engen oil.com in South Africa. Clause 2 stated that:

> "It is understood and agreed that a binding contract between successful tenderer and the Client in accordance with the conditions embodied in this document (see clause 22) will come into existence immediately upon the posting of a letter addressed to the tenderer at the address stated in the tender notifying the tenderer the acceptance of his tender and that this letter shall be read and construed as forming part of this contract."

The relevant portion of clause 22 provided that:

> "Applications for payment are to be submitted to the client's local representative and or to the project' quantity surveyor once 50% or complete works has been completed. After the client's local representative or project quantity surveyor has settled on an agreed, *(sic)* payment certificates will be issued to client only once a copy of the contractor's tax invoice has been received. Payment against your application will not
be made until we are in possession of a tax invoice equivalent to the amount certified by the project quantity surveyor. The original tax invoice must be submitted to the client's local representative."

The term "Client Representative" is contained in clauses 23 and 24. The client representative was responsible for approving occupational health and safety method statements prior to the commencement of works and receiving built drawings after the completion of the project.

The tender form in Part 5 was addressed to EPZ in Harare. The prospective tenderer agreed to contract for and complete the contract works described in the tender in

accordance with the tender conditions stated in the tender documents. The term "Employer" appears for the first time on this form as an acronym for the appellant.

THE CONTRACT

The signed contract is embodied in the letter dated 24 August 2012, which was copied to C Gilbert, Engen Head Office, Cape Town South Africa. It read:

> "ZIMBABWE: REBRANDING OF EXISTING SERVICE STATIONS-APPOINTMENT FOR THE INSTALLATION OF SIGNAGE
>
> On behalf of Engen Oil Zimbabwe, you are herewith appointed as contractor for the installation of signage at the following sites".

Thereafter 11 sites, comprising 10 service stations and a depot are listed. The letter prescribed the scope of works, additional contractual conditions and payment modalities. The contractor was required to submit claims to the Local Project manager and copy IQS. IQS in liaison with the local project manager would approve and issue a payment certificate [PC]. The PC together with the attached invoices from the respondent, would be submitted to Clarence Gilbert at EPLSA at Engen Oil Zimbabwe Box 35 Cape Town for approval and payment. The respondent would issue a United States dollar denominated invoice in the amount on the PC to EOZ. Payment would be made within 30 days from IQS's date of payment valuation.

Clauses 3 and 7 of the payment conditions stated that:

> "3. Thereafter an invoice will be requested from contractor to match payment certificate and only after receiving this invoice the payment certificate will be issued to Engen Petroleum Head Office in Cape Town South Africa <u>for approval and payment</u>."
>
> 7. Should the contractor not comply with the above requirement, they will experience delay in payments."

The contract was signed on 6 September 2012 by the then respective managing directors of EOZ (Cremion Mapfumba) and respondent (Phil Makumbe).

THE PAYMENT CERTIFICATES

The *pro forma* of the payment certificates used in the present matter is derived from the Principal Building Agreement (PBA) prepared by the Joint Building Contracts Committee of South Africa. A sample of the PBA JBCC Series 2000-Edition 5.0 which was reprinted in July 2007 is available at unisa.ac.za. Clause 31.0 provides the payment certificate schedule that was used in all five PCs issued by IQS in the present matter. In this regard, each of the five PCs encodes the following headline. "Payment Certificate issued in terms of clause 31.0 of the JBCC Principal Building Agreement". Immediately below these words appear the name of the Employer, Contractor, Works and Site. At the bottom of each certificate the following legend appears: "signed by quantity surveyor who as agent of the employer certifies that the positive or negative amount stated in D 15.0 above is due and payable.". The signature of IQS's BG Van Rooyen and the date are duly appended next to the declaration.

The first four PCs were issued on 6 November 2012, 20 December 2012, 21 December 2012 and 11 April 2013. They were paid by electronic transfer on 14 November 2012, 27 December 2012, 31 December 2012 and 29 April 2013, respectively. On each of these PCs, the Employer was EOZ and the respondent was the contractor. Each PC was accompanied by the respondent's invoices drawn to EOZ in an aggregate amount equivalent to the valuation on the respective PC. These documents were submitted to Clarence Gilbert at EOZ, Box 35 Cape Town for approval and payment. Apparently, Gilbert then forwarded them to EOZ in Harare for payment. As indicated above, EOZ duly paid out the amounts indicated on the PCs.

THE DISPUTED PC 5

PC 5 was issued as a reconciliation of the previous four certificates in the sum of US$74 332.58. It is a recovery statement issued in terms of Clause 33.0 of the JBCC Principal Building Agreement. Like these four, it religiously followed their path of issue. The notable difference was that whilst the respondent's invoices were drawn to EOZ, IQS substituted the appellant (under Employer) for EOZ. The appellant refused to pay. Aggrieved, the respondent instituted action proceedings in the court *a quo* on 14 March 2014.

OTHER DOCUMENTS

Some two months after the respondent issued summons against it, on 18 May 2014, the appellant commissioned KPMG to conduct a forensic audit of the "de-branding, rebranding, fitting and construction services contract" between itself and the respondent. The auditors found that additional works raised by the respondent would be verified by the local project manager who submitted them to EPLSA for approval and costing. The information was confirmed by the e-mails filed of record which were exchanged between the respondent, the Zimbabwe based project manager, IQS and Clarence Gilbert. A wholesome reading of the audit report shows that the auditors treated the appellant as one and the same entity with EOZ.

In addition, a flurry of e-mails was exchanged between the respondent and IQS on the one hand and IQS and EPZ on the other between 17 February 2014 and 5 March 2014. This was again followed up by Clarence Gilbert in a letter to Phil Makumbe on 25 July 2017. The respondent demanded payment from Gilbert at EPLSA. The unwavering position taken by Gilbert and IQS was that EPZ was obliged to honour the liquid document. EPZ studiously declined to pay out the certified invoiced amount. It never disputed liability on the basis that it was the wrong debtor but did so on other spurious grounds.

On 18 March 2014, the respondent issued summons in the court *a quo* demanding payment of US$74 332.59, interest and costs. In its plea, filed on 7 May 2014, the appellant disputed liability on two bases. The first was that it never consummated an agreement with the respondent. The second was that it denied that IQS was ever its nominated agent.

The pleadings in the present matter closed in October 2014. Sometime in 2017, in the case between *Engen Oil Zimbabwe (Pvt) Ltd and Lithotec Private (Ltd) t/a Framework Media* HC 370/17, EOZ sued the respondent for overpayment in respect of the four PCs. The contested action was dismissed with costs in judgment No. HH 416/20, on 24 June 2020. The present matter only resumed *a quo* on 12 May 2021, when the respondent filed its discovery papers.

It is noteworthy that the appellant's erstwhile legal practitioners *inter alia* wrote two letters to the respondent's legal practitioners on 7 July 2021 and 11 August 2021. In both letters, the assertion was made that the appellant and EPLSA belonged to the Engen group of companies. In the second letter, the appellant's legal practitioners further indicated that due to the magnitude of the rebranding exercise, the appellant and not EOZ, drew on EPLSA's experience in managing similar projects.

At the pre-trial conference held on 17 October 2022, two issues were referred to trial. The first was whether the appellant was liable to make payment to the respondent in respect of Payment Certificate No. 5. The second, which arose because of the introduction of a new currency regime in the country on 22 February 2019 by the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019, SI 33 of 2019, was whether the claimed amount was a foreign obligation payable in United States dollars.

THE PLEADINGS IN THE COURT *A QUO*

The pleadings in the court *a quo* were very simple. The respondent pleaded a contractual cause of action. The appellant denied liability on the basis that it was not the party that had consummated the contract with the respondent. It further disputed ever appointing IQS as its agent.

THE TRIAL EVIDENCE

In a bid to establish its claim, the respondent, which was the plaintiff *a quo*, called the evidence of its managing director, one Martin Jani. It also produced a 160-page bundle of documents, Exhibit 1. After the court *a quo* declined to absolve the appellant from the instance, the appellant, who was the defendant, called the evidence of Farayi Learnmore Nyamukapa, who doubled up as the Finance Manager of all the three Engen entities in Zimbabwe at the time the tender was consummated and implemented. It produced two bundles of documentary evidence, Exhibits 2 and 3, encompassing some 133 pages.

The import of Jani's testimony was that the appellant, EOZ, EHZ, EPLSA and Engen Offshore Holdings (Mauritius) Ltd, notwithstanding that they were separate legal entities, were not independent of each other but constituted a single economic entity. He was adamant that the appellant and EOZ, though separate in form, were in substance, one and the same entity. He premised his view on the similar address that IQS directed the prior four PCs to EOZ and the standalone PC to appellant. Even though both were addressed to Gilbert by IQS at the same address, the four PCs were sent to EOZ and the standalone one to the appellant. Even though he asserted that the respondent had consummated the de-branding and re-branding contract with the appellant, he remained unconcerned with the true Engen entity that contracted with the respondent. He also insisted that the appellant's liability stemmed from the fact that PC 5, was a liquid document, which had been issued by the appellant's agent, IQS and was

therefore payable on demand. He believed that, as the tender was floated in the name and for the benefit of the appellant, it was liable to pay the claimed amount in the currency agreed in the contract. He demanded payment in foreign currency, firstly, in compliance with that specific term of the contract. Secondly, because the tenor of Clauses 2 and 22 of the tender and clause 3 of the payment conditions of the contract specified that payment would be made from South Africa. Thirdly, because the PC in question was a liquid document issued by appellant's own agent (IQS) and passed for approval and payment to appellant's project manager in South Africa, (Gilbert).

While in his evidence Nyamukapa touted the separate legal personality of the appellant and EOZ, he confirmed the symbiotic relationship between them. He stated that the two companies shared the same head office, shareholders, directors, senior management, head office staff and bank accounts. He produced the registration certificates of the two entities, which showed that the appellant assumed its name on 15 December 1998 while EOZ was incorporated on 23 May 2012. He further testified that Engen (Mauritius) was a significant shareholder in both EHL and EPLSA. He also stated that EPLSA had rebranded 4 service stations belonging to EPZ before the tender. He also testified that it had an MSA with the appellant and none with EOZ. He maintained by reference to the e-mails from Gilbert to EPZ that no payment was due from EPLSA.

Under cross examination he stated that notwithstanding that EOZ owned the service stations while EPZ was responsible for procuring fuel and lubricants for sale thereat, the two entities operated the service stations together. We reproduce an excerpt of his testimony, at p 448 of the electronic record:

> "I was finance director for Engen Petroleum. I was also FD for Engine Oil. The managing director was Cremion Mapfumba. He was also the managing director for

> Engine Oil. Both Engine Oil and Engen Petroleum were operating service stations together. Engine Oil was the holder of most of the service stations except for 4 service stations. Engen Petroleum was responsible for procurement of fuels and lubricants. Engen petroleum would procure and sell to Engine Oil. Without the one, the other would not operate. Engine Oil and Engen Petroleum belonged to the same holding company. They were subsidiaries of the same holding company."

THE RESPONDENT'S SUBMISSIONS *A QUO*

Mr *Nyamukondiwa*, who appeared for the respondent *a quo*, took three submissions in regard to the first triable issue. The first was that, notwithstanding that the contract was concluded in the name of EOZ, the appellant was liable to make payment in respect of PC 5 on the basis that it was a single economic entity with EOZ and EPLSA. He relied on the authority of *Blue Track Investments (Pvt) Ltd & Ors* v *Nedbank Zimbabwe Ltd* SC 53/21, *Starafrica Corporation Ltd* v *Zimbabwe Sugar Refinery Workers Union* SC 65/21**,** *Deputy Sheriff Harare* v *Trinpac Investments (Pvt) Ltd* 2011 (1) ZLR 548 (H) at 552D-F*, US v Milwaukee Refrigerator Transit Company* [1905] 42 Fed 247 at 255 and *DHN Food Distributors Ltd* v *London Borough of Tower Hamlets [*1976] 3 All ER 462 (CA) at 467. He invoked the single economic unit principle on the apparent indivisible and intertwined roles played by these admittedly group Engen entities in the floating, opening and adjudication of the tender, execution of the contract, and the initiation, approval and payment for the invoiced works.

The second submission was that the appellant's liability flowed from the very fact that PC5, which was issued in its name by its duly appointed agent IQS was a liquid document. He relied on the authority of *Joob Joob Investments (Pty) Ltd* v *Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para [27] and *Axton Matrix Construction CC* v *Metsimaholo Local Municipality* [2012] ZAFSHC 196 at para [27].

The third submission was that the contract made in the name of EOZ ought to be attributed to the appellant because the invitation to tender obliquely identified the appellant as the prospective contractant with the winning tenderer. He argued that the words “client” and “employer” were in reference to the appellant. He therefore submitted that since the tender was incorporated into the contract, the appellant was privy to the contract.

On the second issue, Mr *Nyamukondiwa* contended that the new currency regime did not affect the payment obligations due from a foreign entity. He argued that, as para. 3 (on payment) of the written contract specifically placed the duty to approve and pay for the invoiced works on EPLSA, the provisions of s 4 (1) (d) of SI 33/19 were inapplicable to the respondent’s claim. He therefore submitted that the claim ought to be satisfied in United States dollars and not in local currency.

THE APPELLANT’S SUBMISSIONS *A QUO*

Mrs *Matsika*, who appeared for the appellant *a quo*, made the following submissions. In regards to the first triable issue, she contended that as the contract was clearly consummated between the respondent and EOZ, it could not properly be attributed to the appellant on the basis that the words “client” and “employer” impliedly referred to the appellant. She argued that the contrary submission by the respondent was at variance with the remarks of the Supreme Court in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* 2018 (1) ZLR 449 (S) at paras [27] and [29] and the sentiments in Christie’ s *The Law of Contract in South Africa* 5th ed at p 260. The two authorities advance the proposition that a party who is not privy to a contract cannot be sued on such a contract. She therefore argued that as the appellant was not a contracting party it could not be found liable for the claimed amount.

In regards to the single economic entity submission, Mrs *Matsika* argued that the doctrine could not be invoked against the appellant in the absence of proven fraud, dishonesty, improper conduct or evidence that the appellant owned the shares or controlled every aspect of EOZ. She therefore submitted that the corporate veil which preserves the separate corporate identity of the appellant, EOZ and the other named Engen entities could not be properly lifted in the present matter. Her argument was based on the remarks made in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 803H and *Deputy Sheriff v Trinpac, supra* and *Waltersteiner* v *Moir; Moor* v *Waltersteiner & Ors* [1974] 3 All ER 217 (CA), [1974] 1 WLR 991 (CA) at 1013.

In respect of the liquid document argument, she submitted that, though PC 5 was extant, it could not found liability against the appellant because the appellant was neither a party nor privy to the contract between the respondent and EOZ.

On the second triable issue Mrs *Matsika* contended that as Gilbert had clearly stated in his e-mail of 24 February 2014 that payment of PC 5 was "something I have little control over", EPLSA, which employed him, could not be regarded as the prospective payer of the claimed amount. She thus argued that as the liability was incurred on 12 December 2013, which was prior to 22 February 2019, it ought to be payable in local currency at the parity rate of 1:1 between the United States dollar and the local currency under the prescript of s 4 (1) (d) of SI 33/19. Her contention was based on the sentiments expressed in the seminal case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber* (Pvt) *Ltd & Anor* 2020 (1) ZLR 138 (S) at 144F. She further argued, on the authority of *Breastplate Service (Pvt) Ltd v Cambria Africa PLC SC* 66/20, *Mushayakarara v Zimbabwe Leaf Tobacco CO (Pvt) Ltd* SC 108/20 and *Tilsit Stationeries & Anor v Drive Control Corporation (Pty) Ltd* HB 252/20 that as the obligation

to pay was consummated between local entities and was not sourced offshore, it did not constitute a foreign obligation. She therefore submitted that it fell outside the ambit of the exceptions provided in s 44C (2) of the Reserve Bank Act [*Chapter 22:15*] and was, in the circumstances, payable in local currency.

In the alternative, she argued, on the authority of *Chimbandi* v *Mabel Canvas* SC 68/22 at para [27] and [29] that if the liability was payable in foreign currency it should be expressed in the equivalent amount thereof in local currency at the prevailing interbank rate on the date of payment.

JUDGMENT *A QUO*

The court *a quo* carefully and meticulously analyzed the relevant tender documents and contract together with their salient terms and conditions and the various e-mails exchanged between the respondent and Gilbert on the one hand and Gilbert and the appellant on the other Gilbert, in paras [15] to [20] of its judgment. It held that the identity of the employer on PC 5 was correct because paras. [2] and [22] of the invitation to tender showed that the appellant was privy to the contract. It reasoned that the appellant was the party referred to as the "client" and the "employer".

The court *a quo* further disregarded the separate corporate personalities of the appellant, EOZ and EPLSA mainly on the basis that their cumulative conduct in the entire tendering process and execution of the tender contract was indivisible, integrated and intertwined, thereby turning them into a single economic unit. It relied on the cases of *Littlewoods Stores* v *I.R.C.* [1969] 1 WLR 1241 (CA) at 1254, *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd & Ors* 1995 (4) SA 790 (A), 804 and *Eagle Liner Coaches*

(Pvt) Ltd v Paratema HH 655-16 to attribute liability to the appellant. It reasoned that the personnel behind the conclusion and execution of the contract and who sought to avoid and manipulate its effects on the basis of separate corporate personalities of the appellant and EOZ were the same. It also based its decision on the common cause intermingling shareholding, finance, engineering and management of the appellant and EOZ. It thus considered the appellant as privy to EOZ.

The court *a quo* also attributed liability on the appellant on the basis that PC 5 was a liquid document. It relied on the remarks made in the *Joob Joob* case, *supra* at para [27] that:

> " [27] Gorven AJ pointed out, with reference to *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd*1973 (4) SA 181 (D) at 183H - 184H, that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor. Relying further on the *Randcon* case (at 186G - 188G), the learned judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash. The certificates in question all fall within this ambit."

In respect of the currency of payment, it held that the claimed amount was payable in United States dollars. The court *a quo* held that this was permitted by the provisions of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2) SI 85/20, which, in its view, permitted the debtor to elect to discharge a debt chargeable in local currency in equivalent free funds in United States dollars at the prevailing interbank rate. The court *a quo* found that the appellant was a holder of free funds and determined that it had the duty to pay the claimed amount in United States

dollars. It also reasoned that clause 3 of the formal contract imposed the duty to pay in United States dollars on EPLSA, the South African incorporated member of the Engen cluster. It accordingly held that the payment by a foreign entity in the discharge of a local obligation was not affected by the new payment regime introduced into this country by SI 33/19, the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019, SI 142/2019 and kindred enactments. The court *a quo* therefore held that as the payment was due from South Africa, it ought to be paid in the currency agreed in the contract.

Aggrieved by the court *a quo's* determination, the appellant appeals to this Court on the following grounds of appeal.

THE GROUNDS OF APPEAL

"1. The court *a quo* seriously misdirected itself on the facts, such misdirection amounting to an error in law, in finding that appellant was the party that had, as a matter of fact, contracted with respondent.

2. A *fortiori*, the court *a quo* erred in effectively making a contract for the parties and in making appellant liable on a contract it was not party to.

3. Respondent having successfully resisted the prior in time litigation brought by Engen Oil Zimbabwe (Private) Limited (Engen) on the basis that Engen had properly paid for services rendered to it by the respondent, the court *a quo* erred in not coming to the conclusion that respondent was estopped from contending that the party it had a contract with was appellant and not Engen.

4. The court *a quo* erred in coming to the conclusion that S.I 85 of 2020 has the effect of redenominating debts that had been converted to the local currency by operation of S.I 33 of 2019.

5. A *fortiori*, the court *a quo* erred in making an award sounding in the United States of America dollar.

RELIEF SOUGHT

TAKE FURTHER NOTICE THAT appellants seek the following relief:

1. THAT the appeal is allowed with costs,
2. THAT the judgment of the court *a quo* is set aside and in its place is substituted the following:

"*The claim is dismissed with costs*.""

ISSUES

The following two issues arise from the grounds of appeal.

1. Whether the court *a quo* erred in attributing liability to the appellant on the basis of the single economic entity principle.
2. Whether the court *a quo* erred in granting an order sounding in foreign currency.

THE SUBMISSIONS BEFORE THIS COURT

At the commencement of the hearing, the respondent properly abandoned the preliminary point that it had raised in its written heads of argument. It is therefore unnecessary to make any further reference to it.

THE APPELLANT'S SUBMISSIONS

Mr *Mpofu* for the appellant, submitted that the court *a quo* manifestly misdirected itself in applying the single economic unit principle, thereby creating a non-existent contract between the respondent and the appellant. He contended that, as the respondent had pleaded a *causa* based on contract, the court *a quo* could not have properly related to the single economic unit principle to find the appellant liable. He further argued that the fact that the contract had actually been concluded with EOZ and not the appellant was not only apparent from the letter of 24 August 2014, which commenced with the words "On behalf

of Engen Oil Zimbabwe you are herewith appointed as a contractor for installation of signage at the following sites", but had also been admitted by the respondent in case No. HC 370/17. This was a matter in which EOZ sued the respondent for the recovery of a purported "over payment" in respect of PCs 1 to 4. The action was, for lack of evidence, dismissed in judgment No. HH 416/20. He argued that the respondent should have sued EOZ rather than the appellant. He founded this leg of his argument on the pertinent remarks made by this Court in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd, supra* at paras [25] and [26], which underscore the requirement for the parties and the court to relate to the pleadings in the resolution of disputes. Relying on *Nzara & Ors* v *Kashumba N.O & Ors* 2018 (1) ZLR 194 (S) at 200G- 202D, he submitted that, by determining the matter outside the pleadings, the court *a quo* had grossly misdirected itself, thus warranting the setting aside of its determination.

He also contended that there was no justifiable reason for the court *a quo* to invoke the special economic entity principle in the present matter. He argued that the requirements for doing so that are set out in the authorities such *Mkombachoto* v *Commercial Bank of Zimbabwe Ltd & Anor* 2002 (1) ZLR 21 (H) at 26H-27A of fraud or manifest injustice were not met *a quo*.

Mr *Mpofu* therefore submitted that the first two grounds of appeal were dispositive of the appeal.

Mr *Mpofu*, however, further argued that the court *a quo* improperly failed to relate to issue estoppel and thus dismiss the action before it. He contended that the issue of estoppel had been obliquely raised *a quo* by reference to Case No. HC 370/17, in the appellant's heads of argument. He submitted that, having conceded in that other case that it had

consummated a contract with the EOZ, it did not lie in the mouth of the respondent to seek payment from the appellant.

In respect of the payment order, he contended that the court *a quo* wrongly construed the provisions of s 6 (2) of SI 85/20. He argued that that provision did not permit the reconversion of a debt that had been converted from foreign currency to local currency back to foreign currency. He thus submitted that; the order of the court should have been denominated in local currency at the parity rate of 1:1 as the liability had crystallized on 13 December 2013. In the alternative, he submitted that, if the debt was payable in United States dollars, it ought to have been discharged at the equivalent prevailing interbank rate between the United States dollar and the local currency on the date of payment.

<u>THE RESPONDENT'S SUBMISSIONS</u>

Mr *Nyamukondiwa* for the respondent supported the determination of the court *a quo* in its entirety. He argued that all the three bases upon which the court *a quo* founded liability were established by the totality of the evidence that was adduced before it. He contended that privity of contract between the respondent on the one hand and the appellant and EOZ on the other had been established by firstly, the reference in the tender documents to the appellant as the "client" and "employer" and the concomitant benefit accruing to it. Secondly, by the very fact that PC 5, a liquid document, was issued by the appellant's own agent, IQS. Thirdly, by the conceded symbiotic relationship between the appellant, EOZ and EPLSA.

Mr *Nyamukondiwa* also supported the United States dollar denominated order. He argued that the appellant had not shown that it did not have free funds. He also argued that the tender contract, under payment conditions, delineated that approval and payment would be

made from South Africa. He therefore submitted that the contracted condition for a payment from a foreign source was unaffected by the new currency regime that was introduced by SI 33 and other kindred enactments. He also relied on *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Co of Zimbabwe* (1977 (2) ZLR 482 (SC) and *Echodelta Ltd* v *Kerr and Downey Safaris (Pvt) Ltd* 2004 (1) SA 508 (ZH) for the proposition that payment could be paid in the currency prescribed by the contract. He therefore submitted that as the currency of account prescribed in the contract was United Sates dollars, the court *a quo* correctly granted the order in that currency. He further argued that even though the liability was incurred and became due and payable on 12 December 2013, it only became a judgment debt after 22 February 2019. In those circumstances, so he argued, the *Mabel Canvas* case, *supra,* at paras [16] and [24] holds that a new obligation to pay is created by the judgment of the court outside the prescript of s 4 (1) (d) of SI 33/19. He however conceded that the same *Mabel Canvas* case at paras [27] and [29] case holds that such a debt would be payable in the equivalent local currency at the prevailing interbank rate on the date of payment.

On issue estoppel, on the authority of *Muchakata* v *Netherburn* 1996 (1) ZLR 153 (S) at 157A he argued that, as the appellant had not specifically pleaded it *a quo*, it could not properly raise it for the first time on appeal. He therefore prayed for the dismissal of the appeal with costs.

ANALYSIS

We now turn to determine the issues that arise from the grounds of appeal and from the submissions made to this Court.

Whether the court *a quo* erred in attributing liability to the appellant on the basis of the single economic entity principle.

Mr *Mpofu's* main argument was that the appeal should succeed because the court *a quo* erred in determining the matter before it outside the pleaded case. It is correct that

in the *Medlog* case, *supra*, this Court cautioned against the resolution of court disputes outside the pleaded *causa*. GARWE JA (as he then was), who wrote the judgment for the Court stated at paras [25] and [26] that:

> "[25] The manner in which the respondent has handled its case both *a quo* and, in this Court, brings to the fore the question as to what the purpose of pleadings is. In general, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.
>
> [26] I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore, a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent."

Mr *Mpofu*, however, failed to advert to the other pertinent remarks that were articulated in the same judgment at paras [31.3] and [31.4] that:

> "31.3 In *Sager's Motors (Pvt) Ltd v Patel* 1968 (2) RLR 267 (A), Lewis AJA accepted that the above remarks correctly reflected the position in this country. At page 274 A – B he stated:
>
> > 'The *ratio decidendi* of the cases … referred to above is that where there has been a full and thorough investigation into all the circumstances of the case and a party has had every facility to place all the facts before the trial court, the court will not decline to adjudicate on an issue thus fully canvassed simply because the pleadings have not explicitly covered it.'
>
> 31.4 The above remarks were cited with approval by this Court in *Guardian Security Services (Pvt) Ltd v ZBC* 2002 (1) ZLR (S), 5 D – H, 6 A-B. That a court can determine an issue that is fully canvassed but not pleaded is therefore now settled in this jurisdiction.'"

While it is correct that the special economic entity issue was not raised in the pleadings, it is also common cause that it was fully ventilated in evidence by Jani and Nyamukapa, who testified for the parties *a quo*. Mr *Nyamukondiw*a and Mrs *Matsika*, further

fully canvased the issue in their detailed heads of argument *a quo*. The issue was therefore fully ventilated in evidence and argument *a quo*. It was therefore properly related to *a quo*.

The starting point in determining the correctness of the first issue on appeal is to take cognisance of the principle espoused in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E and *ZINWA* v *Mwoyounotsva* 2015 (1) ZLR 935 (S) at 940F. This Court has consistently stated that an appellate court will not interfere with a decision of a trial court based on findings of fact, unless there is a clear misdirection or the decision reached is irrational.

We did not hear Mr *Mpofu* contradict the contention by Mr N*yamukondiwa* that the court *a quo's* finding on the existence of a special economic entity comprising the appellant, EOZ and EPLSA was a finding of fact. The finding was based on the oral and documentary evidence adduced before the court *a quo.* The finding that the words "client" and "employer", which appeared in the invitation to tender, referred to the appellant, are for the reasons given by the court *a quo*, unassailable. It held at para [23] that:

> "Quite clearly, the documents themselves, especially the portions highlighted above, the manner the contract was executed on the ground, particularly the payment process, and manner of operations of the Engen cluster of companies, were all such that the defendant was very much privy to the contract. It was very much a part of it in its own right ..."

We only wish to add three other factors which tend to show that those words indeed referred to the appellant. The first is that the invitation to tender was, as appears on its face, drawn by IQS for and on behalf of the appellant on 7 May 2012. In addition, at the time that the document was conceived and floated, EOZ had not yet been created. It only came into existence on 23 May 2012. The words "client" and "employer", were used to identify the appellant. The second is that the KPMG forensic report, which was commissioned by the

appellant, alluded to the appellant as a party that had privity of contract with EOZ and the respondent. The third is that the appellant and not EOZ is the Engen entity that had a management services agreement with EPLSA. The interventions of that company through the active and indispensable role of Clarence Gilbert demonstrates the privity to the contract exhibited by the appellant. Indeed, the letter of the appellant's erstwhile legal practitioner dated 11 August 2021 expressly recognized this relationship between the two entities. The MSA indicates in Clause 3.4.1 that EPLSA is a shareholder in the appellant and in clause 8 and other clauses the overarching control that EPLSA wielded over the appellant. Again Clause 8.2 stipulates that the appellant was precluded from ceding the MSA to any other entity without the consent of the EPLSA. The use of Gilbert in the execution of the MSA in this tender clearly shows that the appellant was privy to the contract. Having been privy to the contract, the submission of PC5 to the appellant by its agent IQS and its EPLSA based overall project manager, Gilbert, was therefore not a mistake. It served to confirm the indivisible nature of the interaction between the EOZ, EPLSA and the appellant.

Once it is accepted that the single economic principle is an exception to the separate corporate legal principle, the arguments centred on *Magodora & Anor* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403C-D are unsustainable. This is because the special economic entity principle permits a court, in suitable circumstances, to attribute liability to any member or entity involved in such a unit or cluster.

Mr *Mpofu's* further argument that the court *a quo* was estopped from founding liability against the appellant by a consideration of the proceedings in case No. HC 370/20 was correctly repulsed by Mr *Nyamukondiwa*. It is trite that issue estoppel represents the other side of *res judicata.* This was stated by GUBBAY JA, as he then was, in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 at 313B-C in the following words:

> "The exception *rei judicatae* is based principally upon the public interest that there must be an end to litigation and that authority vested in judicial decisions be given effect to even if erroneous. See *Le Roux en' Ander v Roux* 1967(1) SA 446 (A) at 461H. It is a form of estoppel and means that where a final and definitive judgement is delivered by a competent court the parties to that judgment or their privies (or in the case of a judgment in rem, any other person) are not permitted to dispute its correctness." (Underlining for emphasis)

See also *Tongogara Rural District* v *Ndiripo* SC 19/23 at p 13.

It is settled law that like res *judicata*, issue estoppel must be specially pleaded. See *Technical Systems (Pty) Ltd* v *RTS Industries & Ors* [2021] ZAWCHC 35 and *Makonyere* v *Muchini & Ors* HH 46/2013. It is also worthy to repeat what this Court said in the *Netherburn* case*, supra*, at 157A that:

> "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 (A) at 23D-G."

Having failed to specially plead the defence, the appellant is precluded from raising it for the first time on appeal. It is not the type of issue to which the exception covered by the *Medlog* case, above, applies. In this instance, what is good for the goose is certainly not good for the gander.

We are satisfied that the findings of the court *a quo*, based as they were on the existence of privity of contract between the appellant, EOZ and EPLSA are unassailable. In the circumstances, the first, second and third grounds of appeal are dismissed for lack of merit.

WHETHER THE COURT *A QUO* ERRED IN GRANTING AN ORDER SOUNDING IN FOREIGN CURRENCY

In para[27] of its judgment the court *a quo* stated that:

> "The currency of the contract was USD. All previous PCs were paid for in USD. But that was because the USD was practically the sole legal tender at the time. The country was in the multi-currency dispensation in terms of which the USD was predominate. The law subsequently intervened. The multi-currency system was abolished. The RTGS dollar was made the sole legal tender. All the assets and liabilities previously valued in USD immediately before 22 February 2019 became values in RTGS for accounting and other purposes on a ratio of one-to-one. The plaintiff's claim pre-dates the above intervention. Contrary to its argument herein, its claim was undoubtedly affected. Going forward, the exchange rate would be determined by market forces when all foreign currency would be dispensed via an auction system on the basis of a willing-buyer willing seller."

The underlined words show that the court *a quo* was alive to the fact that, where the provisions of SI 33/19 are applicable, the new currency regime would have affected the currency in which the claimed amount would be paid. While it was clearly wrong to surmise that the appellant was a holder of free funds from which it could pay the claimed amount, it did not base its foreign currency sounding order on that basis. Rather para [29] discloses that the basis was that the appellant had in the formal contract indicated that payment would be made from South Africa. The court *a quo* reasoned thus:

> "[29] The defendant is trying to hide behind a finger. The plaintiff is eminently entitled to payment in USD. Among other things, it was made to believe, and objectively, the contract documents support this belief, that the contract price would come from the defendant's headquarters in South Africa. Whatever other arrangements the defendant and/or its "sister" companies in the "**Engen**" group might have made to effect the payments would not be of concern to the plaintiff so long as the contractual rights and obligations of the parties were observed.'"

We agree. The court *a quo* merely enforced clause 3 of the formal contract which stipulated that the contract price would be paid in United States dollars from South Africa. We are satisfied on the authority of the *Makwindi* and *Echodelta* cases, *supra,* that the order sounding in foreign currency made *a quo* is correct. In our view, it is not affected by the new currency dispensation that followed in the wake of SI 33/19.

In the circumstances we would also dismiss the fourth and fifth grounds of appeal for lack of merit.

COSTS

The circumstances of this case demand that costs follow the result.

DISPOSITION

In the premises, we make the following order:

"The appeal be and is hereby dismissed with costs."

BHUNU JA : I agree.

MWAYERA JA : I agree.

Wintertons, the appellant's legal practitioners.

Chigwanda Legal Practitioners, respondent's legal practitioners.