FIREX SERVICES (PVT) LTD
versus
MAI KAI ESTATE DEVELOPMENT TRUST
and
BERNARD MUTANGA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 14, 15 March 2011 and 27 November 2013

CIVIL TRIAL

M. Mavhunga, for plaintiff
A. A. Debwe, for defendants

MUSAKWA J: The plaintiff claims from the defendants the following relief-

(a) Cancellation of the contract entered into between the parties.

(b) The return of electrical gadgets which the plaintiff claims it supplied to the defendants pursuant to the contract.

(c) Costs of suit.

It is common cause that the parties entered into a verbal contract for the installation of security equipment at the defendants' premises. This was in 2008. During the hearing there was a dispute on whether the defendants were already conducting business on the premises. However, in light of the nature of the issues to be resolved it would not be necessary to make a determination on this aspect.

The issues the parties agreed to refer to trial were as follows-

1. Whether the deed of settlement between the parties is legally binding.

2. If so, whether the dispute between the parties should be referred to arbitration.

3. What were the exact terms of the agreement between the parties?

4. Whether the plaintiff supplied and fixed electrical equipment worth US$18 808.00.

Lance Nettleton the plaintiff's managing director testified that he concluded a verbal contract with the second defendant. In March 2008 the plaintiff issued a statement on the work performed. The total value of the work performed amounted to US$18 830. When this was presented to the second defendant he promised payment. Numerous promises were subsequently made.

The defendants alternatively offered payment in the form of Old Mutual shares. However, this again did not materialize.

Upon the issuance of summons the defendants negotiated a settlement. A deed of settlement was drawn up but the defendants did not sign. The terms of the settlement were that the defendants would pay for each completed section and at that time a section worth US$4 000 had been completed. The plaintiff subsequently obtained default judgment. However, the defendants sought rescission on the basis that they had not signed the deed of settlement.

Lance Nettleton further testified that the plaintiff also installed electrical works, fence, access control, grille gates and alarm system. According to him, these have not been paid for.

The only work that was not completed was the installation of the closed circuit television system. The plaintiff had also commenced the erection of a fence to an adjoining property but this had not been completed.

The installed equipment was imported from South Africa. The agreement to install electrical equipment was concluded in September 2007. Whilst conceding that the plaintiff had no exchange control authority at the material time the witness explained that they entered into the transaction because of the volatility of the local currency. In one of their transactions the second defendant had paid R10 000 cash. Minor work was paid for in local currency. A provisional invoice for the work in progress was produced as an exhibit.

For the defendants, Bernard Mahara Mutanga testified. His evidence was to the effect that they decided to install security systems at their diamond processing business. This also entailed upgrading the alarm system and access control. Negotiations were conducted in local currency. The plaintiff intimated it could procure the equipment from South Africa.

Although payment was to be in local currency the problem arose at the conversion to the multi-currency system. The plaintiff refused payment in local currency. The defendants could not have paid in foreign currency without exchange control authority. The defendants dispute the amount claimed as they believe the work done is valued at US$4 600.

As the parties had not agreed on the amount quoted in the work in progress invoice totaling US$18 000 they agreed that the defendants would pay on the basis of work done. The second defendant disputed signing the deed of settlement after nine months as claimed by the plaintiff's representative. On the contrary, the second defendant claimed to have signed it on 29 December 2009.

Bernard Mahara Mutanga further testified that the installations were not completed in three phases. As a result, the defendants could only pay for unperformed work by way of a fifty percent deposit.

After pre-trial conference the defendants agreed to pay US$4 681. An order by consent that was granted was produced as exhibit three. According to the witness, having failed to agree on the provisional invoice, the parties agreed on the deed of settlement which was produced as an exhibit.

In respect of all transactions the defendants sought exchange control authority to pay in foreign currency. The deed of settlement was the basis of the parties' relationship. The witness also contended that the terms of the parties' verbal agreement had not been articulated by the plaintiff's representative. Finally, he stated that whatever was not included in the December 2008 document had been paid for.

In his address Mr. *Mavhunga* urged the court to find for the plaintiff. He submitted that a contract was concluded between the parties. Being mindful of the fact that there was no exchange control authority, he urged the court to relax the in *pari delicto melior est conditio possidentis* rule. In support thereof he cited the cases of *J* v *Cassim* 1939 A.D. 437, *Hatley And Others* v *Van Click* 1987 (2) ZLR 240 (S), *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) and *Patterson* v *Hajbhay* 1940 T. P.D. 182.

It was Mr. *Mavhunga*'s further submission that the defendant never denied that the plaintiff made the installations claimed. The issue of illegality was never referred for trial.

On the other hand Mr. *Debwe* contended that the issue of illegality can be raised at any stage. He was of the firm view that the plaintiff is trying to enforce an illegal contract and the court must decline to do so.

He further submitted that the documentary evidence that was produced does not prove the claim. He queried at what stage the plaintiff performed the work. He also contended that exhibit two (the deed of settlement) is binding as it was used for seeking stay of execution of the default judgment that had been secured by the plaintiff.

Mr. *Debwe* further submitted that the defendants' defence was a complete denial of performance. In that respect the plaintiff should have adduced evidence from its workers who did work on the premises. Since the second defendant admits that some work was done, liability is limited to the amount of US$4 681.

The deed of settlement dated 29 December 2009 was signed by the plaintiff's representative, the second defendant and the parties' legal representatives. Clause 1 of the deed states that-

> "An addendum to the existing oral agreement be and is hereby reduced to writing on the following terms and conditions."

There is no doubt then that the parties agreed to vary their oral agreement which was reduced to writing as evidenced by the deed of settlement. The terms of the contract appear to be clearly spelt out by the deed of settlement with the attached quotation. The document also shows that the first defendant bound itself to pay the sum of US$4 681 upon signing of the agreement. The rest of the contract was to be implemented in three phases with payment being made at a certain rate after completion of each phase.

The issue of legality of the contract is neither here nor there. The parties renegotiated their contract which they reduced to writing. As of December 2009 the multi-currency financial regime was already in operation such that the legality of the transaction was not in issue. In any event, prior to the multi-currency regime it was the second defendant's evidence that for the payments that were made to the plaintiff they first sought exchange control authority. Therefore there would have been nothing illegal about the contract as the defendants now contend.

What appears not to have been proven was the entire work that was done by the plaintiff. Although the work was to be performed in phases, it is common cause that no evidence was led

on the commissioning of each phase. The plaintiff's representative insisted that all work was done but he tendered no proof. Surely work of this nature would not have been done without some form of documentary proof. In the absence of such documentary proof the plaintiff could have led evidence from its employees who did the installations. I am not satisfied that on a balance there is proof of the performance of the entire contract.

Apart from the lack of adequate proof of performance, the total cost of the work done is unclear as well. Whilst the amount claimed in the summons is US$18 000 the quotation states US$16 013.

With the claim not having been satisfactorily proven save for the amount of US$4 681 that was admitted the question is whether to grant absolution in respect of the unproven claim. This brings into focus the issue of whether the dispute on the unproven claims should be referred for arbitration. This is because clause 1.11 of the deed of settlement sates that-

> "In the event of any party defaulting in performing its obligation then the parties hereby agree to be bound by the decision made by an Arbitrator."

It is noted that no arguments were made on this issue. This is despite the fact that the defendants specially pleaded this defence. In *Waste Management Services* v *City of Harare* 2000 (1) ZLR 172 (HC) a similar issue arose where a contract had a clause which provided for referral of disputes to arbitration. In so referring the matter to arbitration SMITH J had this to say at 177-178:

> "In *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H), it was pointed out that, although it had been held in the Independence Mining case supra that the court had a discretion as to whether or not a matter should be referred to arbitration, in so ruling CHIDYAUSIKU JP had been dealing with the provisions of s 6(1) of the Arbitration Act [*Cap 7:02*]. That Act has since been repealed by the Arbitration Act 6 of 1996 which came into operation on 13 September l996. That Act applies, with modifications, the UNCITRAL Model Law for the purpose of giving effect to domestic and international arbitration agreements".

Article 8(1) of the Model Law as modified, which is set out in the Schedule to Act No. 6 of l996, provides as follows:

> "(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first

> statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."
>
> Since the City has so requested, this court has no option but to stay proceedings under this case and refer the parties to arbitration in terms of clause 25(b) of the agreement they entered into."

See also the cases of *P.T.A. Bank* v *Elanne (Pvt) Ltd And Others* 2000 (1) ZLR 156 (HC) and *Zellco Cellular (Pvt) Ltd* v *Posts And Telecommunications Corporation* 1998 (2) ZLR 106 (H). However, a common thread that runs in these authorities is that the matters were referred to arbitration before the hearing. In the present case, although the defendants raised the issue of arbitration in their plea, they did not seek referral to arbitration before trial commenced. This is because counsel for the defendants did not ask for the referral in accordance with Article 8 (1) of the Model Law on International Commercial Arbitration.

Since the defendants acknowledge indebtedness in the sum of US$4 681, it will be so ordered. In respect of the rest of the claim, absolution from the instance will have to ordered.

In the result, it is ordered as follows-

(a) Judgment is entered for the plaintiff in the sum of US$4 681.

(b) Absolution from the instance is granted in respect of the rest of the claim

(c) Defendants shall bear plaintiff's costs in respect of the admitted claim.

Mavhunga & Sigauke, plaintiff's legal practitioners
Debwe & Partners, defendants' legal practitioners