PHIL HUNT

Versus

HEMP CONSOLIDATED (PVT) LTD

And

KIM BIRKETOFT

And

DEL-MARIE ARMOUR

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
1 &3 July 2024

Opposed application

A. Dracos for applicant
C.Chabvepi for the respondents

CHILIMBE J

BACKGROUND

[1] A dispute has arisen between the parties over proceeds from the sale of hemp. In that respect, applicant seeks an order directing the respondents to pay an amount of US$35,000 based principally on a document framed in the following terms; -

> "INVESTMENT AGREEMENT
>
> I, Kim Birketoft representing Hemp Consolidated (Pvt) Ltd as a Director, hereby acknowledge an investment by Phil Hunt of US115,000.00 (One Hundred & Fifteen Thousand United States Dollars) for the purpose of a 10ha hemp project to be grown at Zengea Farm, Harare South.
>
> It is hereby agreed that 100% of the total investment made by Phil Hunt will be repaid together with an equal amount subject to a net yield of 800gram/plant together with a share in profit amounting to USD 42 000.00 (Forty-Two Thousand United States

Dollars), again subject to a net yield. In the event the net crop yield is not achieved a pro rata distribution will take place.

It is further agreed that in consideration of Phil Hunt`s majority investment in the project he shall have the right to first call on the income to the total of USD 86 250.00 prior to the income disbursement to the undersigned and the grower of the crop.

It is noted that Canamedix has the sole uptake of the Hemp Crop.

In the event that I Kim Birketoft is in any way incapacitated or deceased Del-Marie Armour Director and Shareholder of Hemp Consolidated (Pvt) Ltd will ensure that the conditions laid down in this Acknowledgement of Investment will be fulfilled in full.

THE SPECTRUM OF ISSUES RAISED ON THE PAPERS

[2] Spirited adjectival disputations were raised from both sides. These in turn, merged with equally forceful contestations of the facts of the matter on the merits. This formidable array of arguments, interdicts and counter interdicts coalesced into disputes of fact that cannot, in my view, be resolved on the papers. Even after application of the established tests[1].

[3] It is for these reasons that I was rather puzzled when counsel for respondent abandoned a preliminary point dealing with the disputes of fact on the papers. Nonetheless, I set out in the succeeding paragraphs the basis of my conclusions on the existence of irreconcilable material disputes of fact.

[4] Ahead of all else, the applicant anchored his case on a request to pierce the corporate veil and revocation of attendant privileges. In opposition, the respondents based their defence firmly on the very principles and privileges of separate legal personality which applicant had attacked. Ordinarily, this stalemate would have been broken by weighing the facts borne by the

[1] See *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 236E-F and *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H),

evidence on record to cast a decision on a balance of probabilities. But yet another set of injunctions lay a-waiting on the papers.

[5] The respondents objected to the admission, in evidence, of correspondence attached to applicant`s papers on the basis that such constituted privileged "without prejudice" material. On that basis, the respondents prayed that paragraphs 19-24 of the founding affidavit, together with annexures G-H (pages 26 -29) be expunged from the record.

[6] The applicant in response, entreated the court to dismiss the respondents` prayer. He took the position that there was no cause to invoke the privilege sought. The impugned correspondence was perfectly admissible as it related to matters germane to the conflict. In the alternative, he urged the court to accept his plea for waiver in the event that the court considered the correspondence inadmissible. The correspondence was of critical relevance to the matter generally, and the application to uplift the corporate veil in particular.[2]

[7] On the merits, the main contention related to the nature of the underlying transaction recorded in the "Investment Agreement" whose terms I set out above. The questions arising, as I discerned them went thus. Was the applicant`s injection of US$115,000 a loan or debenture? Was it an investment into equity? Or possibly a contribution toward a joint venture, project or special purpose vehicle? Could it even be considered a form of derivative product?

[8] These issues pointed to both the causa and its relief on one hand, and the opposition to it on the other. Was the applicant to be treated as a shareholder or venture partner? One who, in either case, was entitled to enjoy the profits, or obliged to carry the loss? Or was he but an independent lender, insulated from the vagaries of enterprise and assured of his outlay? And against that background, what was the role and relevance of second and third respondents as directors of the transacting entity?

[9] As the parties` transaction unfolded, a number of critical events occurred and these generated further factual contestations. The respondents contend that the applicant`s investment of US$115,000 comprised of US$25,000 as cash and the balance as seed. But the

[2] In argument, no reference was made to the Civil Evidence Act [Chapter 8:01] by either side.

seed delivered was described by the respondents as defective. Even the legitimacy of the source of that seed was questionable.

[10] The respondents argued that this sub-standard poor seed was responsible for a poor-quality crop which caused the entire venture to flop. Unexplained technical specifications and reports were also attached to the papers. (Photographs attached to the affidavit did not evidently decipher the THC specifications referred to). Paragraph 22 (i) of first respondent`s opposition affidavit stated thus; -

> "Unfortunately after the grower planted, it turned out that the seed did not match the qualities it had been purported to have. It had poor germination; it was actually THC (0, 5 % to 0, and 8%) and CBD (8% to 9%)."

[11] The respondents indicated that a consignment of crop was in fact, available at first respondent`s address at 14 Boscobel Drive in Highlands, Harare. This load of crop was offered to applicant as part of the loss reduction considerations. Applicant rejected it.

[12] On the same issue of cultivation of the crop, the third-party grower and subsequent off-taker were smeared with allegations of derelict, misrepresentation and fraud. Apparently, the grower harvested and exported 4 tonnes of hemp to the Swiss offtaker under unclear circumstances. This aspect introduces performance of contract issues which later clouded the parties` positions on income sharing. Applicant alleged that the respondents became evasive and dishonest regarding the marketing of the crop.

[13] He swore in his affidavit that the respondents indicated to him that the crop had been sold and a payment expected, only for them to retreat from that position. It was argued on his behalf that this disputation formed one of the several aspects addressed by the correspondence which the respondents sought to have expunged from record.

[14] On the issue of income itself, questions were raised as to whether the amount eventually realised constituted income from the venture as originally contemplated? Or proceeds obtained after pursuit of third parties who had despoiled the project of its dues?

[15] This already congested fray received further argument. The respondents determinably cast serious aspersions on the integrity of the applicant. These allegations percolate to the very propriety or even legality of the venture inclusive of possible violations of sections 68,69 and 182 of the Companies and Other Business Entities Act [Chapter 24:31]. I refer to excerpts from first respondent`s opposing affidavit; -

> Paragraph 20: "…. For facts to be taken as they are what actually transpired is that Applicant actually made some off shore payment to the seed supplier. As the Respondents we were never furnished with any proof of such payment, neither were we advised how and where such payment was actually done. Applicant made it clear in no uncertain terms that he preferred this transaction to remain on what he termed cash basis and without any record. He indicated to us that he preferred the payments to remain off the record and his business private. We never pressed on this information because of mutual trust and considering that the seed was eventually actually delivered."
>
> Paragraph 23 (d) "…Applicant made continuous demands to have the transaction for the payments kept under Wraps and he was in control of all the payments. Which he indicated to have been made in cash."
>
> Paragraph 23 (r) "…Applicant kept asking and in fact keeps mentioning a demand for Books of Accounts of which he was supplied with despite not being entitled to them. He forgets that he was the one who directed me on behalf of First Respondent to operate this transaction off the books as he did not want any record of it. He said he operated on a cash basis, he had no bank account and this was agreed between the parties."
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> Paragraph 25 "In any event Applicant was the one who advised the Respondents to operate the project as much as possible under the radar on a cash basis as he did not want his financial affairs known by any chance. Applicant 67/107 18/40 specifically advised the Respondents not to make any record of the payment he made for the seed and or cash he provided to First Respondent. This he cannot deny, he specifically told

> me to handle the transaction in that manner hence he did not even let us know where and how he had made the payment for the seed save that it was off shore."

[16] Applicant dismissed these allegations of commercial furtiveness. His simple quip was that surely if he had intended to create no paper trail, he would not have persisted with requests for books of accounts and records? I may comment in passing that if indeed these rather alarming averments turn out to be true, then they would most likely boomerang with equal force against the respondents.

[17] In summary, a scan of the papers before me suggests that the parties` dealings can be conveniently split into three distinct phases. The commencement, the implementation and the subsequent. Each stage was characterised by engagements, correspondence as well as memoranda recording various events and terms. These events and documents cumulatively affect the interpretation of the primary "Investment Contract" upon which the causa rests. But as noted above, each phase is beset, with tenacious contestations spanning a diversity of diversity of factual issues.

[18] The respondents weighed in heavily with detail on the implementation phase. Both parties appear to be agreed that the original contract was impacted by events that occurred during this phase. First respondent alleges that the failure of the venture eroded the benefits originally envisaged as accruing to applicant. The applicant also argues that if anything, respondents made an undertaking to pay following a demand by applicant. And so on that basis alone, they ought to be ordered to do so. Paragraph 12 of the heads of argument filed on applicant`s behalf stated thus; -

> "The undertaking to pay made by respondents is material, and binds respondents. *Matake & 17 others v Minister of Local Government and National Housing & 2 others* 2007(2) ZLR 96. In the result, respondents must be ordered to pay in view of this undertaking!"

[19] This position suggests a variation of causa based on the said events that occurred against the three phases. In addition, the "subsequent" phase also includes litigation launched in this

court under case numbers HCHC 398/22 and HCHC 61/24. The effect or outcome of this litigation was not fully discussed in the papers.

THE LEGAL CONSIDERATIONS

[20] The court is seized with a dispute whose cause of action arises from contract. In that respect, the court`s duty becomes clear. It must, from the facts placed before it, identify the terms and conditions thereof and give effect to the wishes of the parties based on their respective rights and obligations. But in doing so it must heed the guidance in *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) [at 404 C-D], where it was held that; -

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy."

[21] This duty is presently impeded by the assemblage of patently irreconcilable disputes of fact noted above. The resultant consideration being; - how then to proceed in the light of that stalemate? The options open to the court are to either refer the matter for resolution via action proceedings where evidence will be heard, or to dismiss it. In either instance, the guiding principle is that the court must seek to attain the justice emanating from the dictates of the case.

[22] That guiding principle is not so much a matter considering the costs and convenience to parties or for that matter, the court. It is a question of (i) extending a reprieve where such is deserved or (ii) holding the parties, especially the applicant, to account for the stagnation caused by irreconcilable disputes of fact. In the case of the latter, if the applicant is found to have incorrectly proceeded by way of motion rather than action, then his suit will fall.

[23] It is an established fact that motion proceedings offer an opportunity for what may be termed the quick and painless resolution of disputes. In fact, motion proceedings lend themselves especially favourable for the prosecution of "commercial disputes" as defined by rule 3 of the High Court of Zimbabwe (Commercial Division) Rules SI 123/20. But that

convenience comes at a price. For that reason, a caution needs to be sounded and I can do no more than refer to the remarks of this court in *Jirira v Zimcor Trustees Ltd & Anor* 2010 (1) ZLR 375 (H) per MAKARAU JP (as she then was) where she held at 376 B that; -

> "Whether to bring proceedings by way of application or by way of summons is an issue that must be uppermost in the mind of each and every legal practitioner who is given instructions to approach the court for relief. While application procedure is the more expedient manner of resolving disputes, it is not always suitable."

[24] In the present dispute, the question is; -was applicant`s case afflicted by disputes of fact so entrenched that they ought to have been apparent to him from inception? Disputes so inherent, obvious, predictable and identifiable as to render the conclusion that applicant knew that his canoe would inevitably run aground? This was the court`s conclusion in *Jirira v Zimcor Trustees Ltd & Anor* (supra) where it observed, at 378 D-E, that; -

> "Firstly, the dispute of fact in this matter did not arise from the nature of the defence proffered by the respondent in the opposing affidavit. It is part of the applicant's case. The applicant deposed to facts in her affidavit that were neither common cause nor capable of proving by way of affidavits. Her allegations needed viva voce evidence to explain and she proceeded by way of application notwithstanding, but at her own peril. Secondly, the nature of the case that the applicant sought to portray is one that clearly cannot be proved on paper and by way of affidavits. It requires the parties to give oral evidence and to be examined on their evidence to find out where the truth lies. <u>It is a case, in my view, that will ultimately turn on the credibility of the witnesses and affidavits have no colour save the colour of the paper on which they are typed</u>. There is no proven way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other."

[25] To the herein applicant`s credit (and reprieve), his case is not blighted with the deficiencies identified in the above decision, other than the part underlined. I take note that the parties before me had a series of written records and memoranda. It was not unreasonable, I think, for applicant to presume that on the raft of papers available, the court would be in a position to establish whether the primary transaction was a loan, investment or other arrangement. The

disputes of fact confluence from the diverse contestations noted and aggregated as how to interpret the terms and conditions bearing the parties` rights and obligations.

[26] I also take note of the elaborate defence mounted by the respondents. The applicant could not have anticipated and addressed each and every intricate link in the chain mail of the respondents` defence.

DISPOSITION

[27] It is my view that the justice of the case demands that the matter be referred to trial for evidence to be led and examined before the court can resolve the trial issues. Accordingly, it is hereby ordered; -

1. That the matter be and is hereby referred to trial subject to the following directions; -
    a) Applicant to stand as plaintiff, with first, second and third respondents as first, second and third defendants respectively.
    b) The application, founding and answering affidavit to stand as the plaintiff`s summons, declaration and replication.
    c) The respondents` notice of opposition and opposing affidavit to stand as the defendant`s appearance to defend and plea.
    d) Plaintiff to file his summary of evidence and bundle of documents within ten (10) days from the date of this Order
    e) The respondents to file their respective summaries of evidence and bundle of documents within twenty (20) days of the date of this Order
    f) The parties to thereafter progress the matter in terms of the rules with leave being granted to approach the Registrar to obtain any further directions on any procedural step or matter deemed necessary for the progression of the matter.
    g) The point *in limine* raised by the respondents be deferred for determination with the trial cause.
2. That costs be in the cause.

Gollop and Blank- applicant`s legal practitioners
*Cyprian`s Law*-respondents` legal practitioners

[CHILIMBE J___3/6/24]