BOUSTEAD BEEF (PVT) LTD

Versus

TRIANGLE LIMITED

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 28 May & 2 December 2024

Special case

V. Mhungu for plaintiff
G. Gapu for defendant

CHILIMBE J

BACKGROUND

[1] The parties agreed to progress the matter as a stated case in terms of rule 4 (2) of the High Court (Commercial Division) Rules SI 123 of 2020 ("the Commercial Court Rules") and rule 52 of the High Court Rules SI 202 of 2021 ("the High Court Rules").

THE STATUS OF APPLICATION PROCEDURE IN THE COMMERCIAL DIVISION

[2] The decision by the parties to proceed on the basis of a stated case warrants a comment in passing. It appears that in the Commercial Division, the application procedure is the preferred though non- exclusive mode of commencement of proceedings. Rule 6 (1), sub-titled "commencement of proceedings" provides as follows: -

> 6. (1) Proceedings in the court **shall**, except in the case of proceedings which by these rules or under any other law are required to be instituted by any other specified mode of commencement, be instituted by way of application.

[3] This provision apparently requires plaintiffs and applicants alike to consider, as a first option, the feasibility of motion proceedings when launching claims in the Commercial Court. They should of course, be guided in that process, by the exceptions stated in rule 6(1). The

need for such reflection is further reiterated in rule 7 (1) of the Commercial Court Rules which provides that; -

> Determination of nature of proceedings
>
> 7. (1) Proceedings—
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> (a) in which the sole or principal question at issue is or is likely to be one of the interpretation of any law or of any instrument made under any law, or of any deed, contract or other document, or some other questions of law, shall be instituted by way of application;
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> (b) in which there is likely to be a substantial dispute of fact or for any other reason a person considers that the proceedings may not appropriately be instituted by way of an application, shall be instituted by way of a summons commencing action.

[4] The matters dealt with in the rules above are hardly new. Discussion on the propriety of choice between action and motion proceedings precedes the classic decision of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

[5] I will thus say no more on the issue. Apart from opining that properly administered, (and with a timely nudge from the case management options in the rules) applications basically lend themselves as a handier option to resolve commercial disputes.

THE DISPUTE BEFORE THE COURT

[6] The statement of agreed facts bears the following in abridged format; -the plaintiff ("Boustead) claimed delivery of 420 head of cattle or payment, in the alternative, of an amount of US$193,660 being the value of the cattle. The claim being based on the following background; -

[7] In 2014, defendant ("Triangle") concluded a 10-year lease agreement with the Cold Storage Company ("the CSC"). The premises were over premises CSC Chivumburu Ranch located in Mwenezi District, Masvingo Province which Triangle hired to graze its cattle. Rentals were to be paid annually in the form delivery of a certain number of cattle based on a formula fixed (not germane herein) in the lease agreement.

[8] In January 2019, the plaintiff took over the CSC as a going concern under an agreement with the Republic of Zimbabwe represented by the Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement ("MLAWCRR").

[9] The agreement was titled the "Livestock Joint Farming Concession Agreement" or JLCA. It made, by clause 7 thereof, transfer arrangements for extant lease agreements between the CSC and various tenants. Empowered by the JLCA, Boustead introduced itself, on 9 September 2020, to Triangle as the new lessor to Chivumburu Ranch. This introduction was accompanied by a number of demands and prescriptions including payment of annual rentals. Triangle did not accede to the demands, neither did it accept the status of Boustead as lessor.

[10] On 13 December 2020, the CSC was placed on corporate rescue with a Mr.N. Kudenga appointed the corporate rescue practitioner. Mr. Kudenga was replaced by Mr.V. Majoko, a legal practitioner. Mr. Majoko was involved in consultations between Boustead (via their legal practitioners of record) and defendant. In essence, these discussions sought to resolve the contest as to who, between Boustead and the CSC`s corporate rescue practitioner, was the rightful lessor to whom Triangle could remit the cattle rentals.

THE STATED CASE

[11] The discussions failed, the dispute remained unresolved and the rentals unpaid. Boustead then instituted the present proceedings. As noted above, the matter proceeded as a stated case. Thirty-three (33) items constituted the statement of agreed facts. The parties agreed, under "Parties` Contentions"; that ". The documents referred to in the statement of agreed facts shall form part of the special case here filed".

[12] There were six (6) issues for determination. These drew one point from each party as its respective position. The issues for determination were raised as follows; -

1. Whether the plaintiff has locus standi to claim the rentals;
2. Whether the Livestock Joint Farming Concession Agreement is valid and if so, whether it is binding on the Cold Storage Company (Private) Limited;
3. Whether payment by the defendant of rentals to the corporate rescue practitioner constitutes valid payment of rentals in terms of the lease agreement;
4. Whether the contract has been discharged?

5. Whether the claim should be struck off the roll in view of the arbitration clause in the lease agreement?

6. Whether the defendant should be compelled to pay the rental cattle to the plaintiff."

[13] The parties` respective positions were framed as follows; - 32.Plaintiff contends that it was entitled to receive the rentals.

33.Defendant contends that payment of rent to the CSC and the corporate rescue practitioner was valid and that plaintiff is not entitled to claim the rentals.

[14] I have considered the parties' stated case against the guidance in *Kunonga v The Church of The Province of Central Africa* SC 25-17. The 33-paragraph statement of agreed facts suffices though I found it burdened by superfluous detail. The issues picked by the parties for determination also invite the court to make decisions on legal matters.

[15] The main observation to make relates to the documents invoked into the statement of agreed facts by the parties. GARWE JA (as he then was) noted in *Kunonga* that a stated case ought to be confined to the factual consensus circumscribed by the parties in their statement.

The Learned Judge of Appeal asked the question "…*What is a stated case or a case stated. Can a party to such stated case go outside the facts agreed*?"

[16] The court in *Kunonga* then cited the Irish decision of *Simon McGinley v The Deciding Officer – Criminal Assets Bureau* [2001] IESC 49 where it was held [at 5] that; -

"The case should set out clearly the judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings.

What is required in the case stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact, it will rarely be necessary to set out any evidence in the case stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the

> Judge which would justify him deciding as he did. … **This court should not be required to go outside the case to some other document in order to discover them.**
>
> The same principle applies to the contention of the parties, the inferences to be drawn from the primary facts, and the Tribunal's determination. **All these must be found within the case, not in documents annexed …**"

[17] My concern related to the propriety of the parties herein introducing other documents to be read into their statement of agreed facts. And further, due to the fact that the legal issues raised clearly narrowed down to interpretation of contractual clauses. How then could the exercise be conducted *sans* a reference to the contract documents?

[18] The guidance in *Kunonga* and the authorities cited therein is clear as regards the need (and rationality) of confining proceedings in a stated case to the statement of agreed facts. I note further that the dictum in *Simon McGinley* related to the stated case prepared by a judge of the lower court for the Irish Supreme Court. In that compilation, the judge had merely attached a record of another tribunal without reducing the findings therein to the required format. The court observed as follows at [3]; -

> "The stated case is quoted in full by Fennelly J in his judgment. It is most unusual to append to a case stated the transcript of the evidence as was done in this case. The transcript, covering several days of court proceedings, runs to a total of 299 pages".

[19] Given the legal issues to be determined, it is my view that an analysis of the contract documents in order to interpret the parties` respective legal rights would be consistent with rule 52 of the High Court Rules as read with the authorities such as *Kunonga, Leathout Investments (Pvt) Ltd v Muvirimi & Anor* SC 60-21 and others. Further, I may state that the issues for determination merely constitute matters to be disposed of in addressing the cause of action and defence; -whether or not Boustead Beef is owed rentals by Triangle.

THE ARBITRATION AGREEMENT

[20] Defendant argued that the dispute between the parties was subject to an arbitration agreement. Indeed, clause 28.4 of the lease agreement between Triangle and the CSC carried an arbitration clause. I do not believe that this point ought to detain us because Triangle has

steadfastly disputed that Boustead was a party to the lease agreement. In that respect, it cannot be bound by a contract between the CSC and Triangle.

ASSIGNMENT AND SUBSTITUTION OF THE RIGHTS UNDER THE LEASE AGREEMENT

[21] I now direct my attention to the contractual clauses in the lease and joint venture agreements. Boustead claimed the rentals on the basis of that it had been invested with "landlord rights". Indeed, clause 7.2 and 7.3 provided as follows; -

> "7.1 Boustead shall immediately take over the management of these leases and should any lease be found to be in default, Boustead Beef retains the right to renegotiate the terms of these leases and arrange for collection of all outstanding amounts which are owed due to default of the current lease agreements.
>
> 7.3. Should any of the tenants of the current lease agreements be in default, Boustead Beef shall have the right and authority to collect any legacy debt and to renegotiate the terms of the lease agreements should Boustead Beef find it beneficial for the LJFCA.All payments from any leases shall be for the benefit of the LJFCA."

[22] The question raised in contention challenges the right of the MLAWCRR to invest Boustead with such rights. And whether that investiture was binding upon Triangle. I note the following; -firstly, Boustead implicitly acknowledges that it did not assume the corporate status and identity of the CSC under the JLCA.That position is, in any event consistent with a reading of the JLCA itself. Whilst it placed the management and control of the CSC into Boustead, the agreement did not substitute the CSC with Boustead.

[23] Noteworthy too, is the fact that the CSC was not a party to the JLCA.That bigger issue is; - what sort of agreement was the JLCA anyway? It is clear that the MLAWCRRR, as the shareholder`s representative, formed a joint venture which involved the surrender of assets and operations of the CSC as a corporate entity. But the agreement leaves many questions unanswered on the legal framework of the joint venture concerned.

[24] The JLCA does not advert to the legal or corporate framework of the venture. The recitals are silent and in fact simply delve into the commercial aspects. The CSC was not party to the JLCA.That effect is that one cannot tell whether the MAWLCRR acted as principal or agent of the CSC. Or whether Boustead was appointed an agent. A somewhat similar situation of a shareholder`s representative concluding an agreement concerning its corporate asset

engaged the Supreme Court in *Transnational Holdings Limited v ZB Financial Holdings Limited* SC 80-23.

[25] Which means that the CSC retained its status and as such, remained a party to the contracts it had executed with third parties such as Triangle. This position ushers in considerations on (i) agency, (ii) principle of privity of contract, and (iii) assignment and delegation in a contract. Agency was neither pleaded nor is it expressly stipulated or apparent from the JLCA.

[26] Under the doctrine of privity of contract, the rights accruing to the CSC under the lease agreement would not, on the facts, devolve to Boustead. See the Supreme Court authority of *TBIC (Pvt) Ltd and Anor* v *Mangenje and Ors* SC 13-18 where BHUNU JA held as follows [at page 11] regarding privity of contract and *locus standi*; -

> "That conclusion of law renders both appellants strangers to the contract between the acquiring authority and the respondent. This brings us to the doctrine of privity of contract. That doctrine restricts the enforcement of contractual rights and remedies to the contracting parties, to the exclusion of third parties. The learned author Innocent Maja in his book *The Law of Contract in Zimbabwe* at p 27 para 1.5.3 graphically explains the doctrine as follows:
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> "The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it." [Emphasis added]

[27] Similarly, Boustead cannot claim to enjoy rights under an assignment because Triangle did not assent to such. Discussing the point in *General Leasing (Private) Limited v Allied Timbers Zimbabwe (Private) Limited* HH 36-16, TSANGA-BANDA J cited the below passage

from Wille's Principles of South African Law 8 ed at 497 which explained assignment in the following terms; -

> "An assignment is the complete substitution of a third person (the assignee) for one of the parties to a contract (the assignor). The assignee steps into the shoes of the assignor, replacing him both as creditor and debtor under the contract. Outwardly, therefore assignment resembles a combined cession and delegation, but it is important to note that the rights and duties of the assignor are not transferred to the assignee, but extinguished. The original contract is terminated and replaced with a new one with the same content but different parties. Hence an assignment requires."

[28] Additionally, Mr. Majoko contested, during his tenure as corporate rescue practitioner of the CSC, the rights of Boustead to administer the affairs of the CSC.He referred to the court order of 3 December 2020 which placed the CSC under corporate rescue. The court granted the exclusive authority to oversee its affairs to the corporate rescue practitioner. This authority was asserted by section 133 of the Insolvency Act [Chapter 6:07]. Coincidentally, the applicant in the corporate rescue proceedings was non-other than the MLAWCRR to further cloud the structure of the JLCA.

DISPOSITION

[29] On the basis of the aforegoing, it is my conclusion that Boustead`s claim is unsustainable. So too do I find defendant`s prayer for costs on a higher scale. The justification is inconsistent with the established principles, (see also Car *Rental Services (Pvt) Ltd v Damofalls Investments (Pvt) Ltd* HH 583-23. The prayer in my view, merely follows the regrettable (if not in fact abominable) fashion beloved of legal practitioners these days.

Accordingly, it is hereby ordered that; -

1. The plaintiff`s claim be and is hereby dismissed with costs.

Chasi Maguwudze-plaintiff`s legal practitioners *Scanlen & Holderness* -defendant`s legal practitioners

[CHILIMBE J____2/12/24]