RAWFERT OFFSHORE SAL (PVT) LTD
versus
APPLE BRIDGE INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 12 October 2022 & 01 March 2024

**Opposed Court Application**

*E T Moyo,* for the applicant
*V R Muzambi,* for the respondent

**CHITAPI J**: The applicant and the respondent are duly incorporated companies, the applicant according to the laws of Lebanon, and the respondent according to the laws of Zimbabwe. The applicant avers that the respondent is a wholly owned subsidiary of the Mineral Marketing Corporation of Zimbabwe (MMCZ) a body corporate created by a statute of the same name, [*Chapter 21:04*]. The respondent averred on the contrary that it is wholly owned by the Ministry of Mines and not MMCZ. Nothing turns on the ownership of the respondent because of the nature of the relief sought. Suffice that there is no dispute regarding the powers of the respondent to litigate and defend itself in this application.

As can be gleaned from the heading, this application is cross referenced to other cases as cited thereon. I will however not deal with the specifics of those cases as I do not consider it necessary to do so in any depth in determining this application. Two of the cases which require brief examination are HC 1801/20 and HC 7470/19.

In case number HC 1801/20 the parties were the applicant *in casu* as applicant and one Egness Taru as respondent. On 10 June 2020. FOROMA J granted a default judgement in favour of the applicant wherein the respondent was ordered to deliver to the applicant 162.10 metric tonnes of chrome ore with a chrome content of not less than 40%, failing which the respondent should

pay for any undelivered chrome at the rate of US$65 per tonne with interest thereon at the prescribed rate and costs on the legal practitioner and client scale.

In case number HC 7470/19 the applicant was the same as herein. The respondent was Miti Mangemba. In that case FOROMA J on 30 March 2021 granted a default judgement in favour of the applicant against the respondent for payment of US$289 683.95 as the value of a chrome delivery due to the applicant which the respondent failed to deliver in breach of their agreement.

The applicant has since failed to realise the relief granted to it in both cases. The applicant filed this application in a quest to have the respondent joined in the two cases as a defendant liable on the judgements. The applicant seeks an order with costs which it couched as follows for the court to grant:-

> "IT IS ORDERED THAT:
> 1) The application succeeds with costs.
> 2) In the result it be and is hereby declared that the respondent is jointly and severally liable *in solidium* the one paying the other to be absolved, with the respective respondents under case references HC 1801/20 and HC 7470/19 for payment of the amounts granted therein.
> 3) Consequently the respondent shall pay to the plaintiff in accordance with paragraph 2 above, the amounts awarded therein respectively in sums of US$10 536.50 and US$289 633.95."

A brief background is therefore necessary to understand the relationship between the applicant and the respondent and their further relationship with the judgment debtors Egnes Taru in case number HC 1801/20 and Miti Mangemba in case number HC 7470/19.

The judgement debtors as aforesaid are small scale chrome miners. As with all minerals, save for those excluded by other legislation, for example gold, chrome ore is marketed through the agency and control of MMCZ. On 28 August 2016 the MMCZ described as selling agent and the respondent as chrome ore producer and the applicant as the purchaser in that order executed a written agreement in terms of which the respondent through the agency of MMCZ agreed to supply the applicant with ten thousand (10 000 metric) tonnes of chrome ore lumpy and concentrate produced in Zimbabwe. In reality, the respondent company was not itself a producer of the chrome ore but would source the ore from miners and this is how the judgement debtors involved in this application came into the lime light.

It is common cause that the respondent failed to deliver the chrome ore in terms of the agreement as the small miners whom it contracted like the judgement debtors in HC 1801/20 and HC 7470/19 failed to deliver the quantities of ore which they had undertaken to supply in terms of contracts between them and the respondent. The applicant then sued the judgement debtors directly and obtained judgement against each of them as already noted. Execution on the judgements did not yield a positive outcome. The applicant set out its basis of action as follows in para 11 of the founding affidavit:

> "11. The applicant has struggled to recover the said amounts from the small scale miners concerned despite having obtained against them the said orders of court and writs of execution which remain unsatisfied, outstanding, due and owing. In accordance with the agreement between the applicant and the respondent in Annexure "A", the respondent is principally liable to the applicant for failure by the above mentioned small scale farmers to deliver the quantities it sub contracted them to supply to the applicant."

The applicant preceded the launching of these proceedings with a letter of demand generated by its legal practitioners dated 12 July 2021 conveyed by e-mail of that date and sent at 3:19 p.m. The contents of the letter read as follows:

> " **RE: MITI/TARU DEED OF SETTLEMENT**
>
> Dear Mr Chandavengerwa
>
> 1. We represent Rawfert s.a.I. at whose instance we write, kindly note our interest.
> 2. We have been copied in several correspondence between you and our client in which our client informed you of the difficulties they were having in getting product from two artisanal miners in particular named Miti Mangemba and Egness Taru. They at your special instance kept you informed of legal proceedings to recover from the miners and you made several undertakings to assist in the recover (sic) process.
> 3. Our client as well as ourselves note with concern that there still has been no progress with recovery neither have you provided them with any meaningful assistance.
> 4. We draw your attention as we have done before to the fact that our client had an agreement with Applebridge a company wholly owned by MMCZ, as the producer. Under that agreement it was Applebridge that had obligations to produce and deliver product which was agreed upon and with respect to which it received payment. It is Applebridge assisted by yourselves that subcontracted various artisanal miners to provide product and specifically awaited the two miners in question. Given that the two miners have not delivered product which they were paid through MMCZ to deliver, it is the producer Applebridge that is in fact in breach of the agreement and which is liable in *extenso* jointly and severally with the relevant miners.

5. We urge you to take the matter with the seriousness it deserves and provide the assistance you promised in recovering the amounts in question. We are further instructed that we consider pursuing Applebridge for recovery of what our client is owed if it remains unrecovered.
6. Kindly let us have your urgent response to the foregoing and please advise how you shall intervene in the circumstances."

The applicant also attached e-mail correspondence between it and MMCZ notably dated 11 December 2020 in which MMCZ having been requested by the applicant to assist to have producers Miti and Taru deliver what they owed, promised to push those producers to meet their obligations. The e-mail to which the response related was also attached by the applicant to the founding affidavit. The e-mail was dated 10 December 2020. The applicant thanked the respondent for assisting it to resolve the issue of the non-delivery by defaulting artisanal miners who had been paid in advance of delivery in 2016 through the respondent. The e-mail noted that the applicant had instituted proceedings against the individual small scale miners resulting in a deed of settlement which they had failed to honour. Significantly the applicant wrote as follows in part in the e-mail:

"……I would like to seek your immediate assistance by:
1. Sending a representative from your side to camp on both miners mining claims and notify us when we can collect our chrome.
2. That you firmly engage both miners to fulfil their contractual obligations towards us.
3. That you notify the PS of the case so that additional pressure is existed upon them.
4. In the event that the miners are unable to mine and deliver the product to us; to engage Mr Peter Mahwendu to mine on their behalf on their claims and deliver the product to us without delay – while he can be paid in chrome from Miti/Taru.

Please find attached the respective Deed of Settlement of Miti signed on 16 June 2019 and the Acknowledgement of indebtedness of Taru signed on 30 May 2018 ……"

The applicant therefore out of the failure by the artisanal miners against whom it holds judgement to deliver despite the involvement of the respondent, now claims the relief of the joinder of the respondent as co-judgment debtor liable to the applicant in the same amounts of the judgements granted in its favour in case numbers HC 1801/20 and HC 7470/19 against the artisanal miners. The applicant argues that it is the respondent which is principally responsible or liable to

the applicant in accordance with the agreement between the parties executed on 28 August 2021. The applicant attached a copy of the agreement as Annexure 'A' to the founding affidavit.

The respondent in opposing the application averred that it could not be properly held to be liable on the judgements in case numbers HC 1801/20 and HC 7470/19 as they were not party to the litigation and were not granted an opportunity to be heard in answer to the applicants claims made therein. Secondly the respondent averred that if the applicant intended to seek redress against the respondent, it ought to have recourse to clause 16 of the agreement which on my perusal provided for dispute settlement to be mutually resolved, failing mutual resolution, by compulsory arbitration presided over by a mutually agreed arbitrator, failing agreement on the arbitrator's appointment, an arbitrator appointed by the Director of the Harare Commercial Arbitration Centre, with the arbitrator's award being final and binding on the parties.

Thirdly, the respondent denied liability for the obligation to deliver the chrome which it claimed delivery of from the two artisanal miners on the basis that the original agreement between the applicant and the respondent (Annexure 'A' to the founding affidavit) had been varied by an addendum (Annexure 'C' to the founding affidavit) in terms of which the obligation to deliver the coal was transferred to the two artisanal miners in their personal capacities. The respondent further attached as Annexure 'J' to the opposing affidavit a Deed of Settlement entered into between the applicant and one artisanal minor, Miti Mangemba. It resolved he applicant's claim against the artisanal miner in case number HC 5509/18.

In relation to the prayer for joint and several liability with the miners, the respondent averred that it was unprocedural and grossly unfair to join the respondent as liable as a judgement debtor as this was sought to be done *ex post facto* the judgement. Further the respondent denied that it breached the agreement as claimed by the applicant and averred that it did not have to remedy any breach as it no longer owed any obligations to deliver chrome to the applicant.

In answer to the opposing affidavit, the applicant averred that the court judgements against the two artisanal miners were *prima facie* evidence against the respondent that there had been a failure of delivery of the chrome by persons subcontracted to deliver the same. It averred that the

respondent was not only privy to the judgements but that the respondent could still defend itself in relation to its failure to fulfil its obligations as claimed in the application.

In relation to the objection to jurisdiction of the court on the basis that there existed an arbitration clause to which recourse must had to resolved the dispute, the applicant averred that clause 16 of the agreement applied to disputes which fell within the ambit of the arbitration clause. It was averred that there was no real dispute that persons subcontracted by the respondent to supply the coal failed to do so and writs of execution were issued against. The respondent had however averred that the dispute of non-performance fell within the ambit of the arbitration clause.

It is convenient to dispose of the arbitration issue at this juncture. Clause 16 of the agreement provided as follows:-

> "16. **Dispute Resolution**
> Any dispute or differences that arise as a result of interpretation and application of this agreement that cannot be amicably resolved shall be referred to arbitration in terms of Arbitration Act [*Chapter 7:15*] of the laws of Zimbabwe ……"

The dispute between the parties clearly arises from the alleged failure of the respondent to deliver the amount of chrome which the applicant went to various lengths to recover including by directly suing artisanal miners who were subcontracted by the respondent to supply the chrome. The applicant obtained default judgements against the artisanal miners. Writs of execution issued pursuant to those agreements yielded nothing. The applicant then filed this application seeking a declaration that the respondent be held liable jointly and severally *in solidum* with the artisanal miners on the judgements granted in favour of the applicant against the artisanal miners. In seeking relief, the applicant averred that the principal agreement which provided for chrome delivery placed the obligation for delivery upon the respondent.

The respondent in response averred that the agreement relied upon by the applicant had been varied mutually by the parties to substitute the respondent with the artisanal minors concerned who became obliged to deliver the chrome, hence, freeing the respondent from the obligation to make delivery of the coal. What in effect the respondent pleaded was that the proper interpretation

of the agreement was that the party with the obligation to deliver was not the correct respondent to sue because there had been a variation of the agreement.

In relation to the application of the agreement, there can be no other sensible explanation of the term than that it relates to its implementation. Parties conclude an agreement which provides for rights and obligations. These are then implemented. That in my view amounts to the application of the agreement or its performance. The applicant in para 16 of heads of argument argued that questions of performance of the agreement are not covered by the agreement by what counsel termed "the narrow ambit of the arbitration clause which applies only to questions of interpretation and application of the agreement. Disputations regarding variation of the agreement fall outside the scope of the memorandum of agreement which contains the arbitration clause in so far as the respondent must rely on evidence outside the four corners of the agreement to sustain the allegation of variation.

The quoted argument by counsel for the applicant is hairsplitting a quibbling. It is difficult to follow or make sense of. It becomes necessary again to simply the facts as I have already done. The agreement placed an obligation upon the respondent to deliver the chrome. The respondent avers that the clause which obliged it to deliver was varied. In other words the terms of the agreement were altered. The applicant avers that they were not. If that issue does not become an issue of interpretation and the refusal by the respondent to deliver on the basis of that variation an issue of how the terms of the agreement are to be construed, an issue of application, then one asks what it could be.

The agreement that the issue of variation falls outside the ambit of the arbitration clause is therefore without merit. To argue that this is so because the issue of variation is a matter that falls outside the agreement evidentially is without merit because in the interpretation and application of the agreement, where a party to the agreement challenges the agreement on the basis that it is not the authentic agreement and that the correct one is as varied, then that issue has to be determined first and a decision made on which is the correct agreement. The dispute between the parties is clearly arbitratable. The applicant has relied on the same agreement to found liability against the

respondent. It says that the agreement obliges when you apply it, the respondent to pay. The respondent refuses to pay. The applicant argues that the refusal is nor a dispute falling for arbitration because it is not to do with interpretation or application of the agreement. The argument as already stated is meritless.

The general approach of the courts is to uphold arbitration agreements. Where a valid arbitration agreement exists as in this case, the onus to avoid arbitration where the agreement provides for it rests on the party which seeks to avoid the arbitration. The onus is not easily discharged. There has to be shown that arbitration proceedings will *inter alia* be unfair to the party that seeks to avoid the arbitration. Whilst the court has inherent jurisdiction over all matters except where its jurisdiction is precluded by law, it nonetheless defers to the principle of subsidiarity wherein domestic remedies available to parties be first exhausted unless the remedies will not provide adequate effective and/or competent relief. See *Zimbabwe Tobacco Growing Company (Pvt) Ltd* v *George Maniwa* HH 227/15; *Conplant Technology (Pvt) Ltd* v *Wentsprung Investments (Pvt) Ltd* HH 965/15.

The general view is that where parties conclude an agreement that contains an arbitration clause, their intention is that their relationship is governed by and disputes are determined through arbitration rather than the courts. Arbitration is provided for under statute and is internationally recognized. For commercial transactions, arbitration is usually provided for in agreements as the preferred method of dispute settlement because it is usually quicker and more lucid that the rule ridden and longer process of instituting proceedings in court and going through various processes before a hearing is convened and the delays caused by a congested court roll as courts are open to all persons as opposed to arbitration which is a process convened to deal with a specific matter only. Arbitration does not exclude the court save that the courts involvement is limited where for example, the validity of the agreement or its applicability to a dispute arises. Otherwise courts come in to register the arbitral awards or review them on limited grounds provided for in the Arbitration Act. In *casu* the applicant has not in my view discharged the onus to establish that the dispute between parties falls outside the ambit and contemplation of the arbitration clause. The applicant incompetently approached the court for relief. The court is not inclined even if it may be argued that its jurisdiction is not ousted by the arbitration clause, to deal with the issue as in its view there has been no plea made to the court to use its inherent jurisdiction and there is nothing

to show that any prejudice will be suffered by the applicant were the matter to be subjected to arbitration.

Before I conclude, I need to relate very briefly to two issues of a procedural nature which arose in the proceedings. The first one related to the challenge to the authority of the deponent to depose to the applicant's affidavit. This dilatory objection was resolved and not persisted in after the applicant presented the resolution of the applicant to authorize the deponent as the authorized representative.

The second issue was one of the manner in which the hearing was conducted. The parties adopted what is commonly referred to as the rolled up approach in terms of which the court heard arguments on both *in limine* points and in substance. It was left to the court to then deal with its determination by considering the points *in limine* first and then proceeding to deal with the merits if the points *in limine* determination did not resolve the matter.

In *casu,* the point *in limine* that the court should decline its jurisdiction on account that the dispute is arbitratable was upheld. Its effect is to terminate the proceedings without determining the merits. It is up to the applicant how it intends to proceed as the court cannot order that the matter is referred for arbitration. The court was not asked for a stay pending arbitration and for that reason the appropriate order in this matter is one that does not compromise further proceedings which the applicant may lawfully and competently pursue.

Lastly, the issue of costs need to be determined. The applicant in the founding affidavit prayed for the application to succeed with costs. In the answering affidavit, the deponent then stated, "WHEREFORE the Applicant persists with its prayer that the Application succeeds with costs albeit on the higher scale of attorney and own client. The change of position in the answering affidavit must be ignored. No basis was laid for it nor was there application to amend the draft order made. Nothing really turns on this because the applicant is the looser. Although a losing party may be awarded costs that cannot apply to this case.

Costs generally follow the event subject however to the rule that they are always in the discretion of the court. In *casu*, the costs must follow the event. The respondent asked for costs

on the ordinary sale. It must be awarded its costs as it succeeded in its objection that the matter is subject to arbitration. The following order disposes of its case.

**IT IS ORDERED THAT**:-

1. Jurisdiction is declined.
2. The application is struck off the roll.
3. The applicant pays the respondent's costs.

*Scanlen & Holderness*, applicant's legal practitioners
*V Nyemba & Associates*, respondent's legal practitioners