BITUMAT LIMITED

and

VENUS INDEPENDANT PETROLEUM

SERVICES (PRIVATE) LIMITED

versus

PARAMOUNT MOTORS (PRIVATE) LIMITED

t/a BELLEVIEW SERVICE STATION

and

STEPHEN TSHUMA

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE, 1 November 2011 and 21 March 2012

**Opposed Court Application**

*J Shekede*, for the applicants

*S Mguni*, for the respondents

GOWORA J: The second applicant is a subsidiary of the first applicant. Both are companies with limited liability and are registered as such under the laws of Zimbabwe. They conduct business mainly in the supply of road construction materials and petroleum products. The first respondent is a duly incorporated company with limited liability under the laws of Zimbabwe and the second respondent is a director of the first respondent. He is cited herein as a surety and guarantor of the first respondent.

 On 23 May 2008 the applicants and the first respondent concluded an agreement for the supply of fuel by the applicants to the first respondent for retail at fuel outlets owned by the latter. A dispute has arisen between the parties as to whether or not the first respondent was obliged under the agreement to remit monies to the applicants from the proceeds of the sale of fuel by the first respondent. The applicants, having declared a dispute, sought to refer the matter to arbitration in accordance with terms of the contract. The Chairperson of the Commercial Arbitration Centre in Harare declined to appoint an arbitrator on the grounds that the commercial arbitration centre was not the entity named in the agreement as being responsible for the arbitration process. The applicant has therefore approached this court for a declarator to the effect that the body named in the contract is the commercial arbitration centre. The application is opposed.

 From the onset it is pertinent that I dispose of an issue which both sides seemed to have dwelt on. In terms of the agreement before me it is provided that disputes have to be resolved through arbitration and neither party has approached this court to determine whether or not the first respondent was duty bound to remit monies to the applicants and if such remittal has not been complied with. This court, is not, in this application seized with the parties’ obligations under the contract, but with the interpretation of the clause relating to reference to arbitration. Any remarks outside that issue would be obiter and would serve no purpose. It is also pertinent to note that the second respondent was cited as surety and co-principal debtor under the contract. The issue for determination before me does not inquire into the parties’ respective rights and obligations under the contract and clearly the second respondent ought not to have been cited. It seems however that he represents the interests of the first respondent as he deposed to the opposing affidavit as a director of the same.

 The next issue raised is that relating the alleged illegality of the contract. It is trite that courts will not give effect to illegal contracts. The allegations on the illegality of the contract are alluded to by the respondents in the following manner. It is suggested in an opposing affidavit deposed by the second respondent that whilst the applicants may have sought and obtained permission to sell fuel in foreign currency, the licence granted to them was for their specific use and did not and could be held to have extended to the first respondent. The respondents make reference to a letter from the applicants’ legal practitioners in which the statement is made that authority from the Reserve Bank of Zimbabwe to sell fuel in foreign currency had been obtained but the applicants had never exhibited the same to the respondents. The respondents also contend that the applicants have failed to file any documents in support of the averment that the authority to sell fuel in foreign currency had extended beyond the applicants to any agent appointed by them and that consequently the contract between the applicants and the first respondent was not tainted with illegality.

 There is no dispute on the papers filed that the applicants were authorised to sell fuel in foreign currency. A letter attached to the applicant’s founding affidavit emanating from National Oil Company of Zimbabwe (Pvt) Ltd (Noczim) confirms this fact. In the letter, it is confirmed that in line with national policy, oil companies had been allowed to operate special foreign currency denominated accounts which would be administered by Noczim in an effort to ensure that the country obtains fuel. The applicants were in the same letter requested to provide Noczim with the names of their representatives who were to have access to the accounts being referred to for purposes of the procurement of fuel. Attached to this letter is document apparently issued by the National Procurement Committee which details the operational modalities of the foreign currency account set up pursuant to the program.The authority to transact in foreign currency was not given to individual companies but to Noczim and its parent Ministry from the documents produced by the applicants.

The applicants have contended that the first respondent in the performance of its obligations under the agreement actually sold fuel and remitted some of the proceeds to the applicants. Tellingly, the respondents do not deny that the first respondent sold fuel in foreign currency. Very much tongue in cheek the second respondent, denies that the respondents failed to receipt all the monies due to the applicants and avers that the second applicant had collected the money through its agent and that the respondents were never at any time responsible for the collection of money from purchasers.

If indeed the contract is illegal the applicants have urged this court to relax the *in par delicto* rule in order to prevent the unjust enrichment of the one party to the prejudice of the other. In *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at 109C-110C, GUBBAY JA (as he then was) stated:

“There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. See *Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878; *YorkEstates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio possidentis*, which may be-translated as meaning ‘where the parties are equally in the wrong, he who is in possession will prevail’. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy ‘should properly take into account the doing of simple justice between man and man.”

Based on the authorities, it is the contention of the applicants that this court should exercise its discretion in their favour and relax the *par delictum* rule in order to do justice between man and man. The parties have not addressed the very important and fundamental issue as whether this court should or ought to consider the allegation of illegality at this stage of the dispute between the parties. A finding by this court that the agreement is illegal or vice versa may well have an adverse effect on the arbitrator. It is before the arbitrator that the parties have an opportunity to place their respective cases as to whether or not either party has performed its obligations under the same and what the rights and obligations of the parties amount to. Given the documents that have been produced before this court it occurs to me that the issue of whether or not the contract is illegal will have to be resolved by viva voce evidence which the arbitrator is not estopped from calling. I am persuaded from an overview of the documents presented by the applicants that on the face of it, the contract concluded between the parties herein was legal and that the retail of fuel to consumers in foreign currency had been authorised by the Reserve Bank of Zimbabwe. There is nothing placed before this court by the respondents that could legally justify my concluding the contrary. I have found therefore that on the face of it, and based on the papers placed before me the contract appears legal. This however does not preclude the arbitrator making a finding after hearing from all parties that the contract was illegal and refusing to enforce it or assist any of the parties thereto.

The proper effect to be given to clause 14.2 of the agreement is what has brought the parties to this pass. A sad pass it is. The applicants, for the period 1 July 2008 to 22 September 2008 provided the first respondent with petrol which was sold at the first respondent’s outlets. The applicants, from those supplies have recovered an amount of US$40 435-50. The amount outstanding according to the applicants, is the sum of US$5 051-50. The parties also dealt in diesel and according to the applicants an amount of US$6 311-00 is owed by the first respondent from sales of diesel.

This court is not being asked to decide if indeed the sums claimed are owed. The relief has been couched in the draft order in the form of a declaratory. In my view that is an incorrect way of framing the draft order. The substance of the applicants’ prayer is for this court to rectify the clause relating to arbitration. The parties framed the clause in this manner:

“Any dispute arising between the parties, which cannot be settled between the parties, shall be referred to arbitration by a single arbitrator appointed by the parties, or failing such agreement, by the Arbitration Forum of Zimbabwe.”

It immediately becomes clear that this contract was not drafted with the assistance of legal practitioners as there is no such body existing within our jurisdiction. If it had been drafted with the assistance of legal counsel the correct arbitration body would have been cited. The question that has been presented before me is whether or not the contract is void for vagueness and therefore not capable of enforcement. I take enforcement in this context to mean a referral by the parties to arbitration under clause 14.

In order to decide this question the whole contract should be considered as whole in order to test the alleged uncertainty of that clause. This court should also bear in mind the effect of the impugned clause upon the whole contract. In short does the inclusion of the clause render the whole contract null and void and unenforceable, or put it differently, if the clause is not capable of being enforced, does its excision have any effect on the contract as a whole.

The applicant submitted that in order to ascertain the effect of a certain clause on the contract it is imperative to have regard to the whole contract as a means of ascertaining the intention of the parties. I am in agreement with that suggestion. As OMERJEE J (as he then was) stated in *Stanmaker Mining* (*Pvt*) *Ltd* v *Metallon Corporation Ltd* 2006 (1) ZLR 306 (H)[[1]](#footnote-1):

“…Put differently, it is imperative to construe the clauses not as stand-alones but in conjunction with and in the context of one another. It is my view that the real intention of the parties can only be deduced by looking at the agreement as a whole as opposed to considering its component parts in isolation of each other.”

It is trite therefore that, words and phrases in a contract, just like words in a statute, cannot be construed in a vacuum. In this endeavour the court will give the words their ordinary and common meaning unless it is apparent that the parties used the words in a special or technical sense. If the words are used in a technical sense the court will consider how the words are used by persons in the business or profession in which the words are used in a technical sense and interpret the words in that sense unless it is apparent that the parties did not intend such an interpretation.

The parties to this agreement provided for the amicable settlement of disputes and failing such settlement a reference to arbitration. In interpreting what the parties intended the court must look at the intent of the parties at the time they entered into the contract. Thus, the mutual intention of the parties at the time of determination and if such intention is lawful.The court will not look outside the contract unless there is ambiguity in a provision of a contract. Contract provisions may be considered ambiguous if consideration of the plain meaning and context of the provision can lead to two or more reasonable constructions. Put differently, an ambiguous provision is a clause which can reasonably be read in more than one way. On the other hand, conflicting provisions exist where the provisions cannot both or all be complied with. To assist the court, parole, written or other evidence from outside may be reviewed to resolve the ambiguity or to explain the contract and its context. Courts can ascertain the parties’ intentions by reviewing their conduct relative to the clause in question. In resolving ambiguities, the court may construe the ambiguity against the party causing the ambiguity.

It follows therefore that in the objective to determine the mutual intent of the parties at the time of contracting, the court may disregard written provisions in the contract that through fraud, mistake, or accident cause the contract to fail to express the true mutual intention of the parties. If it is contended that there has been a mutual mistakeof the parties, the court may consider extrinsic evidence and the court may reform the contract. Such reformation, however, may not go beyond implementing the mutual intent of the parties and must avoid any prejudice to the interests of other persons if such interests were acquired in good faith and in return for consideration. Consequently a written agreement which fails to express accurately the true intention of the parties may be rectified so as make it accord with the parties’ common intention. The power by a court to reform a contract has been affirmed in our jurisdiction in *Guthrie Holdings* (*Pvt*) *Ltd* v *Arches* (*Pvt*) *Ltd* 1989 (1) ZLR 184 (SC), where DUMBUTSHENA CJ quoted with approval the dicta by DE VILLIERS JA in *Wenerlein* v *Goch Buildings Ltd* 1925 AD282 at 287-288 to the following effect:

“In the court below the argument advanced in support of the exceptions was that the courts in South Africa have adopted and applied the English doctrine of law as to rectification of written documents, and that it has been laid down by JAMES VC in *Mackenzie* v *Coulson* (1869) 8 Eq C at 375, that: ‘It is always necessary for a plaintiff to show that there was an actual contract concluded antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument.’ That this view was adopted by the Witwatersrand Local Division in *Bushy* v *Guardian Assurance Co* 1915 WLD at 71 and by this court in the appeal (1916 AD at 492); and that as s 30 makes the prior agreement null and void there is no concluded contract antecedent to the written agreement which can be invoked or rectified. This argument is disposed of by the consideration that, in order to enable the court of law to reform the writing so as to conform to the terms of an agreement in most cases antecedently arrived at by the parties, there is no necessity that the antecedent agreement should be a binding contract between the parties enforceable by action. To satisfy the rule in *Mackenzie*’s case it is sufficient if the parties have arrived at a consensus *ad idem* in shape of an agreement, the terms of which they, either of their own accord or to comply with the requirements of the law, subsequently embody in a formal instrument. It seems self-evident that, upon satisfactory proof of the terms of the agreement the instrument should, in the language of Story in his Equity-Jurisprudence 13 ed vol 1 s 152, be made to conform to the precise intention of the parties. As far back as 1749 LORD HARDWICKE laid down the following: ‘No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so thatif reduced into writing contrary to the intent of the parties, on proper proof that should be rectified: *Henkle* v *Royal Assurance Co* (1749) 1 Ves 314.”

It is important that a court has regard to the truth of matter of the contract as opposed to what has been put down in writing, especially where the circumstances of the case point to a mistake in the written instrument. It is trite that an error in computation which has been made in a contract does not prejudice the truth. Courts should therefore not permit the true agreement between the parties to be prejudiced by a slip of the pen or an inaccuracy in expression. The court can intervene and reform the contract even where the parties have omitted a word as long as the court is not writing a contract for the parties. All the court is required to do is to give effect to the intention of the parties.

What the parties herein wanted was for the amicable resolution of any dispute arising from the contract. In the event that an amicable solution could not be achieved then the parties wished for the dispute to be referred to arbitration. The agreement provides for a body to which the parties may submit to when seeking arbitration. The body named in the agreement, Commercial Arbitration Forum does not exist. I do not accept that the misnomer of the body in the agreement, which is responsible for appointing an arbitrator would negate the intention of the parties, which is that disputes have to be resolved by arbitration. There is one arbitration centre in existence in the entire country and it follows therefore that that is the body that the parties had in mind when their contract was drafted. The mistake in the name of the body tasked with appointing an arbitrator is not outside the intention of the parties and the reformation by this court would not constitute the making of a new contract by this court. In the event the contract will be rectified by the deletion of Arbitration Forum of Zimbabwe and its substitution with the Commercial Arbitration Centre in Harare.

The applicant also sought an order directing the chairperson of the arbitration centre to appoint an arbitrator to resolve the dispute. The chairperson is not a party to these proceedings and it is elementary that before an order can be granted against a party by a court such person shall have been a party before such court. I am not inclined to grant the second part of the draft order and consequently it fails.

I will issue an order as follows:

IT IS ORDERED THAT:

1. The application for the rectification of clause 14.2 of the agreement between the parties succeeds and the Arbitration Forum of Zimbabwe referred to therein be and is hereby substituted with the Commercial Arbitration Centre in Harare.
2. The first respondent shall pay the costs of this application.

*Wintertons*, applicants’ legal practitioners

*Hwalima, Moyo & Associates*, respondents’ legal practitioners

1. At 317 D [↑](#footnote-ref-1)