PARLIAMENT OF ZIMBABWE
versus
MCT INVESTMENTS (PRIVATE) LIMITED
t/a MOTOR CITY TOYOTA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 6, 7 April, 12, 15 July & 15 September 2021

CIVIL TRIAL

A Demo with *K Tundu*, for the plaintiff
B. K. Mataruka, for the defendant

MANZUNZU J: In this civil trial the plaintiff seeks specific performance. Plaintiff claims delivery of three Toyota Hilux motor vehicles (2.5 double cab manual 4x4.) In the event of failure to deliver the motor vehicles, the plaintiff seek an order authorizing the Sheriff to recover the said motor vehicles from the defendant and hand over the same to the plaintiff.
The plaintiff's claim is based on an agreement of sale between the plaintiff, as the purchaser and the defendant, as the seller, of three new Toyota hilux motor vehicles for the sum of US$104 849.99. The agreement which was verbal is said to contain the following material terms;

a) That the defendant would sell 3 new vehicles to the plaintiff
b) That plaintiff would pay the purchase price of US$104 849.99
c) That delivery of the motor vehicles would be within 6 months.

Plaintiff also said there were implied terms of the contract which were that the plaintiff would pay the agreed purchase price and delivery of motor vehicles would be done within a reasonable time.

The plaintiff further alleges in the declaration that payment to the defendant in the sum of US$104 849.99 was done on 17 April 2017. Despite payment the defendant failed to deliver the three motor vehicles. It is on the basis of these allegations that the plaintiff has sought for specific performance.

Following an appearance to defend and a request for further particulars and reply thereto, the defendant filed a plea and has put up a defence thus; "The lack of foreign currency

allocation from the Reserve Bank of Zimbabwe and payment to defendant's supplier in South Africa is a supervening impossibility which has rendered the contract incapable of performance, to which no blame can be attributed to the defendant."

The defendant confirmed the agreement was verbal. Its understanding of the material terms somewhat differed from plaintiff's declaration. The purchase price of US$104 849.99 is agreed. While this amount is agreed to have been paid by the plaintiff, the defendant said the payment was through the real time gross settlement (RTGS) platform and not in United States dollars. Defendant also pleaded that it was agreed defendant would submit all documents to its bankers Banc ABC for allocation of foreign currency to facilitate international payment to suppliers in South Africa. And further that plaintiff would secure foreign currency allocation from Reserve Bank of Zimbabwe.

It was further pleaded by the defendant that the parties knew that vehicles were to be imported from a supplier in South Africa and that delivery of vehicles was subject to allocation of foreign currency by the Reserve Bank of Zimbabwe (RBZ). Breach of the contract by the defendant is denied. Instead, defendant alleged plaintiff breached the contract by its failure to secure foreign currency from the RBZ. Defendant prays for dismissal of plaintiff's claim with costs on a higher scale.

On 17 November 2020 during pre-trial conference and with the consent of the plaintiff, the defendant filed a special plea asserting that plaintiff was not a legal *persona*. Plaintiff disputed that and maintained plaintiff was a juristic person with the capacity to sue or be sued. The following were agreed issues for trial:

> "a) whether the plaintiff has no *locus standi in judicio*?
> b) whether in terms of the agreement between the parties, the delivery of the motor vehicles was conditional upon the defendant obtaining an allocation of foreign currency from the Reserve Bank of Zimbabwe or any other financial institution? and
> c) whether the defendant's failure to obtain foreign currency constitutes a supervening impossibility which would discharge it from its contractual obligation.?"

The onus of proof on all the three issues, it was agreed, was on the defendant. The trial then commenced with the defendant's case. The issue of *locus standi in judicio* was not pursued and I take it that the parties decided to abandon it.

The defendant called two witnesses. The first was Hillary Tafadzwa Manyenga the defendant' dealer principal and managing director. He said the defendant is in the business of importing new vehicles from South Africa and selling them to their customers. Defendant does not have a vehicle plant in Zimbabwe. The motor vehicles will be paid for in forex in South

Africa before the supplier delivers them to Zimbabwe. Following a verbal agreement between the parties, the witness said defendant issued plaintiff with a proforma invoice for US$104 850.00 for the 3 motor vehicles. The defendant was in turn invoiced the sum of ZAR1 187 614.00 for the 3 vehicles by the South African supplier.

When they received payment from the plaintiff, as per procedure, they then made a request on 18 May 2017 to their bank Banc ABC for a telegraphic transfer of the purchase price in rands to their supplier in South Africa the amount of which tallies with the supplier's proforma invoice. On the basis of this request Banc ABC was expected to get the foreign currency from the RBZ. He said it was impossible to pay for the vehicles without forex. Realising the delay, they followed up their request with the bank and on the advice of the bank, they asked plaintiff for a support letter. The request for a support letter was by email of 14 June 2017. The plaintiff had earlier written a support letter to the bank on 17 May 2017. Despite all these efforts the defendant failed to secure foreign currency to pay their supplier for the vehicles in South Africa.

This witness said the plaintiff was aware the motor vehicles were going to be imported from South Africa and that such importation required foreign currency, which was a preserve of RBZ. He said it was impossible to perform in the absence of foreign currency allocation.

The defendant's second witness was Hebert Takawira the director of the holding company of the defendant then. He confirmed the existence of the verbal agreement between the parties. He said plaintiff was aware the vehicles were to be imported from South Africa and that foreign currency was needed. Delivery of vehicles was depended upon the availability of foreign currency. They did not anticipate any challenges in securing foreign currency through their bank BancABC given their previous dealings in that regard. He said the plaintiff paid the purchase price in RTGS. He too said it was impossible to perform without foreign currency which could only be secured at the discretion of RBZ.

Both these witnesses were subjected to lengthy cross examination but they maintained the simple story that the plaintiff knew at the time of entering into the agreement that the motor vehicles were to be imported from South Africa which process required foreign currency allocation from the banks. That there was a common understanding between the parties that in the absence of such foreign currency the contract was impossible to perform.

The plaintiff led evidence from its Principle Director Finance Mr Bernard Zvamada. His evidence also confirmed largely on common cause issues. He confirmed the existence of the verbal agreement whose terms he said could be derived from documents such as the

invitation to tender, quotation, purchase order and pro-forma invoice. He said plaintiff was not aware that the vehicles were to be imported by the defendant. Upon payment of US$104 850 to the defendant the plaintiff expected delivery of vehicles within 4 – 6 weeks. He denied any condition precedent in the contract. The witness admitted that he wrote support letters to the bank at the request of the defendant.

Analysis of Evidence:

a) whether in terms of the agreement between the parties, the delivery of the motor vehicles was conditional upon the defendant obtaining an allocation of foreign currency from the Reserve Bank of Zimbabwe or any other financial institution?

The parties, according to the evidence, took different positions. The plaintiff says there was no condition precedent in the contract as it believed the defendant to have the vehicles in stock. The defendant says the plaintiff was aware the vehicles were to be imported and that foreign currency was to facilitate the importation process. It is common cause payment of US$104 850 by the plaintiff to the defendant was on 17 April 2017 before the defendant applied with BancABC on 18 May 2017 for foreign currency to pay their South African supplier for the three motor vehicles. That application was supported by a letter by the plaintiff dated 17 May 2017. The letter by the plaintiff to BancABC reads in part: "This letter serves to inform you that Parliament purchased three Hilux 2KD 4x4 D/Cabs from Motor City Toyota which we confirm that we have paid in full…..It is in this context that we appeal for your good office to assist Motor City Toyota to pay their South African distributor the forex component for the three vehicles. Delivery of these vehicles will alleviate our transport challenges as our current fleet is now dysfunctional. …"

At all material times the defendant communicated to the plaintiff their efforts to secure foreign currency with the banks. For example on 14 June 2017 there was an email to plaintiff informing them that a request was made with the defendant's bankers for telegraphic transfer of funds to their supplier of vehicles in South Africa.

Having received no joy from the bank, the defendant repeated the process for telegraphic transfer on 30 January 2018. On 18 September 2018 the defendant again in a letter to the plaintiff requested if plaintiff could assist with another support letter to the bank. Indeed on 20 September 2018 another support letter was written to the bank by the plaintiff. The letter reads;

> "RE: REMITTANCE OF FUNDING FOR THREE (3) PARLIAMENT VEHICLES: Reference is made to our support letter of 17 May 2017 on the subject matter (copy attached). Once again we appeal for your bank to assist Motor City Toyota to pay their South African distributor the forex

component for the three (3) vehicles. We are currently facing serious transport challenges as our fleet is now dysfunctional…"

Given this background it is highly probable that the parties were aware at the time the contract was concluded that the purchased motor vehicles were to be imported and that it would only be possible to do so when the RBZ avails foreign currency through the defendant's bankers BancABC. This is so because right at the inception of the payment of purchase price by the plaintiff, the plaintiff engaged itself with a support letter to the bank. This is certainly not the behaviour expected of a party who says it thought the defendant was in possession of the three vehicles when the contract was concluded. If plaintiff genuinely believed that defendant had the vehicles at the time the agreement was concluded, why would it expect delivery in as late as 6 months or even in 4 to 6 weeks as per invoice. One would expect the moment the plaintiff got to know defendant did not have the vehicles in stock, to cancel the agreement or better still put the defendant *in mora* after the 6 week promised delivery period. The plaintiff's behaviour as per evidence is consistent with a party aware of the pre-condition as alleged by the defendant.

b) whether the defendant's failure to obtain foreign currency constitutes a supervening impossibility which would discharge it from its contractual obligation?

The parties seem to share a common view that had the defendant been favoured with foreign currency to pay its distributor in South Africa, no dispute would have existed between the parties. Failure to secure foreign currency by the defendant cannot be faulted on it. The defendant did what was expected and plaintiff supported the efforts.

The non - payment of foreign currency cannot be attributed to the defendant. In the absence of foreign currency it becomes impossible for the defendant to perform. This position was confirmed by all the witnesses although the plaintiff has now chosen to keep a blind eye to it.

I am satisfied on a balance of probabilities that the defendant successfully discharged the onus upon it. To that end, the plaintiff's claim must fail. The plaintiff has not prayed for any alternative and the court cannot formulate one for it.

Disposition

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

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
Gill Godlton & Gerrans, defendant's legal practitioners