SEARCHILL INVESTMENTS (PVT) LTD

Versus

DOMCLAIR INVETMENTS (PVT) LTD

And

MICHAEL NYABADZA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 OCTOBER & 23 FEBRUARY 2012

Advocate L.W.W. Morris, for applicant
Advocate L. Nkomo for respondents

Judgment

NDOU J: The applicant seeks an order in the following terms:

"It is ordered that:

1. The respondents be and are hereby held to be in willful contempt of an order of this court granted on the 11th October 2007 under Bulawayo case number HC 805/05.
2. The respondents be and are hereby ordered, jointly and severally, the one acting the others to be absolved, to forthwith purge their contempt by complying with the said court order.
3. If the respondents fail to comply within forty-eight hours after the granting of this order, the Deputy Sheriff and members of the Zimbabwe Republic Police wherever second respondent is found, be and are hereby empowered and ordered to arrest or attach the person of second respondent and commit him to prison for contempt of court until he purges his contempt.
4. The first and second respondents are fined the sum of US$ …… for contempt of court.
5. The respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the costs of this application on an attorney and client scale."

The background facts of this case are the following. On 29 April 2001 the applicant and the 1st respondent represented by the 2nd respondent, [one of its directors] entered into a written agreement in terms of which applicant sold the entire issued share capital of two shares of a

nominal value on one Zimbabwe dollar each to the 1st respondent subject to suspensive conditions which were not complied with as a result of which applicant sought to recover its shares. The parties referred the resultant dispute to arbitration in terms of Clause 15 of the said agreement. Clause 15 enjoined the parties to use their best endeavours to settle amicably any dispute arising out of or in connection with the agreement. The Arbitrator was appointed by the President of Law Society of Zimbabwe. The arbitral award was handed down by the Arbitrator, Legal Practitioner Mordecai Mahlangu, on 11 April 2005. The 1st respondent, represented by the 2nd respondent appealed to the High Court in Bulawayo. On 11 October 2007, BERE J made the arbitral award an order of this court holding that:

(1) 1st respondent was to transfer its shareholding in Metallurgical Supplies (Pvt) Ltd to applicant;
(2) 1st respondent was to hold meetings of the directors of Metallurgical Supplies (Pvt) Ltd in which its nominees were to resign as directors, secretary and public officer and were to appoint in their place the nominees of the applicant;
(3) 1st respondent was to take all necessary steps to return the control of Metallurgical Supplies (Pvt) Ltd to the applicant;
(4) 1st respondent was to arrange at its expense for the preparation and delivery of an audited account of the income and expenditure and balance sheets of Metallurgical Supplies (Pvt) Ltd from 1 April 2001 to the date of handover.
(5) 1st respondent was to account for and pay to the applicant any monies it had received which were in excess of its entitlement to any monies due by applicant to 1st respondent in terms of Clause 9:4 (ii) of the agreement of sale between the parties on 29th May 2001 subject to the right of the parties to return to the Arbitrator in respect of any unresolved financial issues arising from the award; and
(6) 1st respondent was to pay the costs of the application.

1st respondent appealed to the Supreme Court in SC case number 50/08 which appeal was not pursued by the 1st respondent as a result of which the applicant applied for the dismissal of 1st respondent's appeal. The Supreme Court appeal was dismissed with costs on 12 May 2010. The 2nd respondent is Managing Director of 1st respondent. Not only did he sign the original agreement for the 1st respondent but also consistently been the person who represented the 1st respondent throughout the litigation before the arbitrator and this court. He is therefore the person who is best placed to ensure that 1st respondent obeys the order of this court. On 11 June 2010 the applicant's legal practitioners wrote to 1st respondent's legal practitioners requesting 1st respondent to comply with the court order failing which an application would be made to this court for committal to prison of 2nd respondent and for the imposition of a fine against 1st respondent. Respondents' legal practitioners replied on 22 June

2010 stating that their client wished to implement the order but was unable to do so as the terms of the order were not clear and that its understanding was that it could continue to operate the company until such time as it had been reimbursed the monies due to it pursuant of sub-clause 9(4) of the agreement of sale.

Applicant's legal practitioners responded on 25 June 2010 pointing out that with the massive devaluation of the Zimbabwe dollar any monies owed by one party to the other in Zimbabwe dollars was worthless and anyhow pointing out in a letter to respondents' legal practitioners dated 1 July 2010 that the preparation of accounts was no basis for not complying with High Court order. This position was repeated again in a letter dated 8 July 2010.

The respondents have now requested the arbitrator to resolve the financial issues between the parties arising out of the setting aside of the abortive sale agreement. The respondents have now filed a counter-claim in which they seek to compel applicant to return to arbitration. The applicant is opposed to the counter-claim. There are various issues raised in this application. I propose to deal with them in turn:

Were the respondents in contempt?

The above-mentioned court order gives each party a right to demand both parties to return to arbitration in respect of any unresolved financial issues arising from the award. The 1st respondent decided to exercise the right and the applicant has refused to go for arbitration. This refusal resulted in an impasse. The applicant holds the view that any monies expended in 2001 in Zimbabwe dollars are now valueless and reliance on paragraph 1(v) of order is just an exercise in futility. Applicant's case is that reliance on this paragraph amounts to introduction of a purely fictitious dispute. The 1st respondent holds an opposite view hence the reference of the matter to arbitration once more to deal with this issue. The respondents' *bona fide* believe they have a right to arbitration. They believe that the court order cannot be properly enforced until this is exercised. That belief may be found to be wrong in the end but that does not make their conduct contemptuous of the court. The proof of contempt is a very demanding one, being pitched at a level normally associated with criminal proceedings. The breach of the order and clarity of its terms must be proved beyond reasonable doubt – *Minister of Lands & Ors* v *Commercial farmers Union* 2001 (2) ZLR 457 (S) at 466G – 467F; *Re Bramblevale Ltd* [1970] Ch 128 (ChD); [1969] 3 ALL ER 1062; *Hadkinson* v *Hadkinson* [1952] 2 ALL ER 567 at 574; *Minister of Home Affairs* v *Bickle* 1983 (1) ZLR 99 (S) and *Sabawu* v *Harare West Rural Council* 1989 (1) ZLR 47 (H).

Whether the monies expended in 2001 in Zimbabwe dollar are valueless is debatable and the issue should rightly be considered by arbitrator. The issue here is whether these monies are now completely valueless or merely worth substantially less. This is the issue that the parties will debate before the arbitrator. Confident as the applicant is, its opinion still turn out to be wrong. In the result, on this point alone, I am satisfied that the respondents are not in contempt. Accordingly, I dismiss the application with costs.

Coghlan, Welsh & Guest c/o Webb Low & Barry, applicant's legal practitioners
Dube Manikai & Hwacha c/o Calderwood Bryce Hendrie & Partners, respondents' legal practitioners