ZIMBABWE MUSIC RIGHTS ASSOCIATION
versus
ZIMBABWE BROADCASTING
CORPORATION (PVT) LTD

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 7, 8 November 2012

OPPOSED APPLICATION

W.P. Zhangazha, for the applicant
J Samukange, for the respondent

BERE J: It never ceases to amaze me how parties who on their own initiatives enter into contractual agreements end up creating unnecessary complications in the interpretation and implementation of such agreements. This is one such an agreement.

The applicant is a body corporate capable of suing and being sued in its name by virtue of being a limited company duly registered in accordance with the laws of this country.

The respondent is also a body corporate capable of suing and being sued in its own name as it is also duly registered in accordance with the laws of this country.

The applicant's main mandate in this case is to collect royalties from the respondent and then distribute same to its members who are the owners of the musical works which is aired or broadcast by the respondent.

In order to rationalise their relationship the applicant and the respondent entered into a 5 year contractual relationship which was reduced to writing on 5 July 2007. It would seem that despite the date of the signature of the agreement the agreement was to commence on 1 January 2007 and endure for a fixed period of 5 years.

It was a specific term of the contract between the parties that during the tenure of the agreement the respondent would pay to the applicant in respect of each quarter terminating on 31 December a licence equivalent to 10% of the net advertising revenue accruing to the respondent during each and every quarter.

The computation of the revenue due to the applicant was the prerogative of the respondent who came up with its own checks and balances to ensure transparency.

Annexures D to J cover the computation that is relevant to this case showing the total outstanding balance due to the applicant as $607 253-46.

It is this long outstanding payment which has prompted the applicant to issue process in this court seeking to compel the respondent to owner its obligation in terms of the contractual agreement between the parties.

From its notice of opposition filed through its secretary, one Norman Hahori, it is extremely difficult to decipher the nature of the exact defence to the applicant's claim.

What is apparent in that affidavit is an attempt by the respondent to re-negotiate an already sealed agreement because of what appears to be economic or financial challenges faced by the respondent.

There is an attempt to bring in the issue of inflation and dollarization as factors having influenced the position now desired by the respondent.

I am in total agreement with the view expressed by the applicant through its answering affidavit deposed to by one Polisile Ncube when the applicant categorically states that:

> "The agreement in issue was not based in a Zimbabwe Dollar currency or any currency for that matter. The amount due to the applicant is simply 10% of what respondent gets as "net advertising revenue" as defined in the schedule to the agreement. A percentage has nothing to do with inflation for it is a fraction of a value. The value may change due to increased business, inflation or change of currency but the applicable percentage does not change.
>
> This Agreement was drafted with foresight so that it could remain relevant for the entire envisaged 5 year period. There was never an intention that this Agreement shall become null and void when circumstances changed." [1]

It is not a sustainable argument that the 10% agreed upon by the parties is no longer economically viable. I say so because if in a better quarter the respondent records a deficit or a negative balance, what this simply means is that the applicant would have nothing to clamour for as to borrow from the wise words of Lord Denning.[2]

"You cannot put something on nothing....."

There has also been an allegation by the respondent that the formula which was agreed upon by the parties at the time of the signing of the agreement in 2007 was skewed in the sense that comparatively the respondent would end up paying the highest rates within the SADC region and even on the African Continent as a whole.

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[1] Taken from para(s) 6 and 7 of the answering affidavit on p 41 of consolidated index.
[2] *Macfoy* v *United Africa Co. Ltd* [1961] 3 ALLER 1169(PC) at 1172.

I am not persuaded by this argument which has no relevance at all to the agreement under scrutiny. It is not the function of this court to rewrite the agreement for the parties. If the parties wanted to align their agreement with similar agreements operating in the SADC region or the other African countries, that is what they ought to have discussed and agreed upon before signing their agreement. It reflects serious *mala fides* on the part of the respondent to try and change the agreement midstream.

The position of the respondent is further compounded by the letters of undertaking to pay the computed figures forming part of the applicant's claim.

In one such letter dated 26 May 2009 this is what the respondent stated to the applicant:

"We refer to your letter of 20 May 2009 in connection with the above matter."

We attach a copy of the computations for the first quarter for 2009. We are making arrangements to make disbursements for the months of January and February 2009. We will make the disbursements for March 2009, at a later date."[3]

In yet another letter the respondent wrote to the applicant as follows:

"We refer to your letter of 6 October 2009."

We regret that our payment efforts have not been to your expectations. We are making efforts to clear the arrears for the first quarter of 2009.

Meanwhile we enclose the computations for the second quarter. We have noted your anticipation to distribute royalties to the artists before Christmas. We will endeavour to do our best to fulfil our obligations to ZIMRA (for Zimbabwe Music Rights Association.) (My addition and emphasis).[4]

The respondent's commitment to pay the applicant what was due to it in terms of the agreement now under scrutiny did not end with the two letters referred to above.

On 5 July 2010 the respondent reaffirmed its commitment to pay to the applicant and wrote as follows:

"MUSIC ROYALITY PAYMENT."

Reference is made to the above subject.

Please find attached a copy of the computations for the third and fourth quarter for 2009. The disbursements will be made in due course."[5]

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[3] Letter from the respondent dated 26 May 2009 on p 45 of consolidated index.
[4] Letter from the respondent dated 23 October 2009 and on p 46 of consolidated index.
[5] Letter from the respondents dated 5 July 2010 and on p 47 of the consolidated index.

In the light of all these unsolicited and unequivocal acceptance of liability the respondent still has the guts and audacity to say that there is a material dispute of facts warranting further interrogation in a fully fledged adversarial proceedings. The answer must be an emphatic "No"

Alleged material disputes of facts must be real and not imaginary. GUBBAY JA could not have put it in any better way when he commended as follows:

> ".... Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact."[6] (my emphasis.)

There can be no doubt in my mind that the alleged disputes of facts alluded to by Counsel for the respondent in his address to the court are not *bona fide* but merely illusory calculated to delay the inevitable.

In conclusion of this matter, I prefer the position taken by the applicant's counsel that there is no lawful cause in fact nor law pleaded by the respondent or otherwise showing why the respondent should not render the due and owing specific performance as dictated by the parties contract.

I am of the firm view that it was both mischievous and an act of adventurism on the part of the respondent to oppose the applicant's application. It was certainly indulging in a futile exercise.

Perhaps, in passing, I must emphasise that it is not advisable for a party to try and engage counsel when it is already staring a crisis like in this case. Counsel should be engaged from the very beginning to avoid unnecessary litigation.

I have agonised on the question of costs in this matter. This was a proper case for me to award costs on attorney – client scale. The respondent's only salvation is that for some reason the applicant has not asked for such costs.

Consequently it is ordered as follows:

1. That judgment in the sum of US$607 253,46 be and is hereby entered against the respondent in favour of the applicant with interest on this sum at the prescribed rate from 31 December 2009 for the amount of US$160 715,36 and from 31 December 2010 for the amount of US$446 538,10 up to the date of payment in full.
2. That the respondent pays the cost of suit.

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[6] *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (SC)

Messrs Chinogwenya & Zhangazha, legal practitioners for the applicant
Messrs Venturas & Samkange, legal practitioners for the respondents