TRUSTCO MOBILE (PTY) LIMITED
and
TRUSTCO GROUP INTERNATIONAL (PTY) LIMITED
versus
ECONET WIRELESS (PRIVATE) LIMITED
and
FIRST MUTUAL LIFE ASSURANCE COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 1 and 4 July, 2011

Urgent Chamber Application

T Mpofu, for the applicants
Ms *J Zindi* with her *T Nyambirai*, for the 1st respondent
J Mafusire, for the 2nd respondent

MUTEMA J: The first applicant is a subsidiary of the second applicant. Both companies are Namibian-based.

On 17 August, 2010 the first applicant and the respondents concluded a tripartite agreement in terms of which the first applicant undertook to provide the first respondent with certain software and support services to facilitate provision of free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime from the first respondent. In terms of the agreement, the first applicant would procure, for and on behalf of the first respondent, such life cover from the second respondent at no cost to the first respondent's customers against payment of a fee to the first applicant by the first respondent, prescribed and calculated in terms of that agreement. The project would be known in Zimbabwe as "Ecolife".

The business model for the provision of free life cover as against the purchase of airtime amounts to an intellectual property (whose copyright and international patent has been applied for) known as Transaction Facilitation System. This business system and software is called the Trustco Mobile Concept.

The agreement was to endure for an initial fixed duration of 18 months. There is no consensus on the papers as to the extent of the success of the implementation of the system but what can be gleaned is that substantial revenue running into millions of US dollars was

reaped from it to the benefit of the three parties to the agreement. Matters came to a head when the first applicant and first respondent could not agree on the mode of calculating the royalty fees payable to the former. Following a series of correspondence between the two parties, through its group managing director, the first applicant wrote to the first respondent on 31 May, 2011 advising that the latter was formally in breach of the agreement for non-payment of royalties to it and premiums to the second respondent. The operative part of that correspondence reads:

> "Therefore be advised that all obligations of Trustco will be suspended on 3 June 2011 at 12 00 hours Namibian time if all overdue payments are not received by then. ... Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from date hereof Trustco will deem the contract cancelled in terms of clause 17.1 of the main agreement".
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> The clause reads:
>
> "17.1 If either of the parties breaches any provision of this agreement and fails to remedy the breach within fourteen (14) days of dispatch of a written notice to do so, the Party not in default may, not withstanding any provision to the contrary in this Agreement, without prejudice to any of its other rights in law, cancel the agreement forthwith;"

On 1 June, 2011 the first respondent through its chief executive officer replied to the first applicant's letter of 31 May, 2011 in this vein:

> "We acknowledge receipt of your letter dated 31 May 2011 regarding the above. Your intention to terminate the agreement has been noted and accepted.
>
> Econet maintains that it has discharged all its obligations under our agreements with you. We repeat our averment that royalties are only payable in respect of subscribers who buy airtime of a value exceeding $3-00 per month. Those subscribers who buy airtime of a value amounting to $3-00, but do not buy any additional airtime are not entitled to cover.
>
> Consequently, no royalties are payable in respect of such subscribers. ..." (my emphasis).

On 3 June, 2011 the first applicant replied to the first respondent's letter of 1 June 2011. In the letter the dispute over payment of royalties and interpretation of the agreement raged on. The first respondent was called upon to provide three names of people from whom an arbitrator could be chosen to enable referral of the dispute to arbitration in terms of clause 19 of the agreement. The peroration of that letter reads:

"Legal advice received indicated that we are not entitled to switch off the system until 14 working days have lapsed since 31 May 2011. Hence the system will remain operative until then".

On 5 June, 2011 the first respondent's chief executive officer replied to the above letter saying *inter alia*:

"We refer to your letter of 3 June 2011 and advise that we stand by our letter of 1 June 2011 in terms of which we accepted your notice of termination of our agreement. Therefore, we consider the agreement terminated. We shall proceed to make arrangements to ensure that our subscribers are not prejudiced by the termination of the agreement that was initiated by you.. We do not owe the amounts that you claim to be outstanding.... Your request for a referral of our dispute to arbitration was made on the assumption that the agreement between us was going to remain in force.
Your assumption was misguided because you had already given us notice to terminate the agreement in your letter of 31 May 2011, and we had accepted such notice in our letter of 1 June 2011. Because you made your election to terminate the agreement, you cannot withdraw such election, more particularly as we had accepted and communicated to you our acceptance of the termination of the agreement."

About the time this letter was written the first respondent terminated the first applicant's link to the former's mobile platform. The parties then sought the services of legal practitioners. The first applicant's legal practitioners Rudolph, Bernstein and Associates wrote to the first respondent's chief executive officer on 8 June, 2011 explaining that their client's letter of 31 May, 2011 was misconstrued because the intention to cancel the agreement should the first respondent fail to remedy the breach within the fourteen day period did not and was never intended to constitute an invitation to the first respondent for a consensual termination of the agreement which it purported to accept. In the event, the first respondent's conduct amounted to an attempt to repudiate the agreement whereas any dispute should be referred to arbitration in terms of clause 19 of the agreement. The letter gave the first respondent 9 June 2011 as deadline for restoration of the first applicant's electronic links to the former's mobile platform to facilitate resumption of service provision in terms of the agreement failing which "urgent injunctive relief" would be sought in order to restore the *status quo ante* pending institution of arbitration proceedings.

On 9 June 2011 the first respondent's legal practitioners of record responded to the first applicant's legal practitioners' letter alluded to *supra*. Therein the stance was adopted that as it was the first applicant which sought the termination of the agreement which the first respondent accepted, therefore the first applicant cannot be heard to allege that it was the first

respondent which repudiated the agreement. In the result, the first applicant cannot tender performance of an agreement which it has cancelled and

which cancellation has been accepted.

The foregoing narration culminated in the filing of the urgent chamber application on 24 June, 2011. The provisional order being sought is worded in the following terms:

"Final Relief Sought

That you show cause why the following final order must not be granted.

1. Pending the determination of the dispute between the parties by the process of Arbitration in terms of the provisions of the Arbitration Act, the first respondent shall not take any steps neither shall it act in any such manner as is inconsistent with the rights of the applicants arising from the agreement between the parties (as amended), and shall not act in any such way unless entitled to so act in terms of any Arbitral Award that may be handed down.
2. The costs of this application shall be costs in the envisaged arbitration proceedings.

Interim Relief Granted

That pending determination of this matter on the return date, applicants are granted the following relief:

1. The first respondent is directed to restore to the first applicant the internet based reporting links and all access to Trustco Mobile hardware and software, thus enabling it to monitor and process airtime purchase transactions and otherwise perform its obligations in terms of the agreement; and
2. The first respondent be directed to refrain from undertaking and implementing a competing, infringing service to that provided by the first applicant in terms of the agreement.

Service of the Provisional Order

The applicants' legal practitioners be and are hereby granted leave to effect service of this provisional order upon all respondents."

The application was vigorously opposed by the first respondent while the second respondent's response was that since no relief was being sought against it, it will abide by any decision of the court.

Mr *Nyambirai*, who took over from Mrs *Zindi* after the latter's indication that she was indisposed, opposed the application on five main planks. They are the following:

1. That the matter is not urgent;
2. That the draft order, even as amended, remains defective in that the interim relief sought is substantially the same as the final one;
3. Part of the relief sought is by way of interdict which in effect amounts to a interdict and the requirements of an interdict have not been met;
4. It is the applicants who repudiated the agreement and the case of *Waste Management Services (Pvt) Ltd* v *City of Harare* 2003 (1) ZLR 571 (S) relied upon by the applicants is distinguishable; and
5. In the event of a finding being made that the first respondent repudiated the agreement, so far as relief related to specific performance being sought is concerned, the court is urged to exercise its discretion and disallow specific performance.

I will deal with the five broad issues raised in opposition *seriatim*.

WHETHER OR NOT THE MATTER IS URGENT

The case relied upon by both sides is the often cited one of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H).

On the papers before me, the need to act arose on 5 June, 2011 when the first respondent switched of the first applicant's access to the IT platform. This prompted the first applicant to contact its attorneys in Johannesburg, South Africa on 6 June, 2011 and travelling to that country for consultations. The attorneys then wrote to the first respondent on 8 June, 2011 clarifying the first applicant's position regarding the purported cancellation of the agreement by the first respondent and threatening urgent injuctive relieve to restore the *status quo ante*.

On 9 June, 2011 the first respondent's attorneys wrote a letter to the first applicant's attorneys indicating that the agreement was considered cancelled. Between then and 24 June,

2011 when this application was filed the first applicant explained the reason for the delay as follows:

- It briefed its South African attorneys in respect of the highly technical aspects of its Trustco Mobile System in relation to the copyright, patent and other intellectual property related issues;
- Had to seek the input of a further South African advocate experienced in intellectual property-related issues;
- Had to secure and appoint and obtain advice from local attorneys and counsel relating to various procedural and substantive aspects of Zimbabwean law in order to draft and finalise the application papers;
- The first draft of the application papers was received by it on 13 June, 2011 for consideration, comment and review. This was done over the next three days since various versions were exchanged and the first applicant's Namibian based technical development employees had to be roped in; various amendments were effected;
- After briefing Messrs Bhana SC and Puckrin SC who previously were admitted to practise in Zimbabwe, it was realised following advice from Messrs Gill, Godlonton and Gerrans – the local correspondent attorneys – that the briefed South African counsels would need to apply for a residency exemption to be allowed audience in Zimbabwean courts and its granting was not guaranteed and its application would further prolong the delay;
- On 16 June, 2011 Advocate Erik Morris (local counsel) was briefed and on 17 June, 2011 (a Friday) Advocate Morris indicated that he needed the weekend to consider a few technical issues he had reservations about;
- On the same Friday the first applicant's group managing director Quinton van Rooyen and Jan Jones came to Zimbabwe to consult with Advocate Morris. Their South African attorney also came and consulted with the same advocate and the local correspondent attorneys on 20 and 21 June, 2011;
- The papers were ultimately finalised on 22 June, 2011 and the application filed on 24 June, 2011. Given the logistical difficulties encountered in the preparation, drafting and issuing the application over three different jurisdictions, the delay did not defeat the urgency of the matter.

The *orbiter* in the *Kuvarega* case *supra* is that where there has been a delay in bringing the application to court, either the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action. Law, unlike mathematics, is not an exact science. Whatever the length of the delay, if a reasonable or credible explanation for the delay is tendered, that delay should not detract from the urgency of the matter. In *casu* I consider that the explanation tendered for the delay is not only reasonable but understandable. In the event, the delay should not detract from the urgency of the matter.

DEFECT OF THE DRAFT ORDER IN THAT THE INTERIM RELIEF SOUGHT IS SUBSTNTIALLY THE SAME AS THE FINAL ONE

The argument advanced in this connection is that paragraphs 1 and 2 of the interim relief sought when compared with para 1 of the final order sought amount to the same relief. The danger here, so the argument went, is that the applicants will be allowed to get away with proving their case on a *prima facie* basis and get a relief of a final nature.

Article 9 of the Arbitration Act, [*Cap 7:15*] empowers the High Court via ss 1, 2, and 3 to grant, upon request, an interim measure of protection in the form of an interdict or other interim measure to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual where the arbitral tribunal has not yet been appointed and the matter is urgent.

In *casu* the matter is urgent, the arbitration tribunal has not yet been appointed and the relief being sought is designed to ensure that any award which may be made in the arbitral proceedings in favour of the applicants will not be rendered ineffectual.

The interim relief sought is merely to have the *status quo* in terms of the agreement between the feuding parties restored while the final relief is to show cause, on the return date, why the applicants' rights arising from the agreement should not be preserved pending the determination of the dispute between the parties by way of arbitration in terms of the Arbitration Act. One cannot seriously contend that the two reliefs being sought amount to the same relief as contended for by Mr *Nyambirai* who, in endeavouring the elucidate the alleged similarity, said the interim relief's substance is "get us connected and do not use another competing system" while The final relief means "once connected remain so". While language can never be accurate the two reliefs are clearly not the same.

THAT REQUIREMENTS FOR AN INTERDICT HAVE NOT BEEN MET

The requirements for a temporary interdict are trite and there exists a plethora of case law authorities on this subject. They are these:

1. a *prima facie* right, even though open to some doubt;
2. a well-grounded apprehension of injury;
3. the absence of some other adequate and ordinary remedy; and
4. the balance of convenience.

It is common ground that the parties entered into an agreement whose terms are spelt out in the agreement document. The first applicant's mobile concept was to be used for the purpose of providing life cover insurance to first respondent's mobile cellular phone subscribers. That agreement was to endure for 18 months with the first applicant receiving royalties. Only 9 months have gone. This clearly constitutes a *prima facie* right accruing to the first applicant. It is not even open to some doubt. First applicant, via being connected to first respondent's IT platform, used to monitor the number of subscribers to ecolife so as to be able to determine the amount of royalties it was entitled to. The first respondent, due to some dispute between the parties, which dispute should go for arbitration, has switched off the first applicant's access to the platform. Over and above that the first respondent contends that the agreement has since been terminated/cancelled at the instance of the first applicant but the first applicant contends that the agreement still subsists. First applicant apprehends the injury that it can no longer monitor the amount of subscription to ecolife and it has also been weaned off its dues in the form of royalties before the agreement has run its full life or has been lawfully terminated. It also fears that by moving to an alternative system five days after "terminating" the agreement, first respondent has infringed on its concept. I find this to constitute a well grounded apprehension of injury. It is idle for the first respondent to argue that it is not infringing on applicants' mobile concept which it alleges has defects and that it is not subject to intellectual property rights because the application to patent it was refused. While the applicants attached documentation of the application to ARIPO (African Regional Intellectual Property Organisation) including acknowledgment of receipt thereof, the first respondent simply averred in its opposing affidavit that such application was not successful without any attachment from ARIPO to that effect. If applicants' system was defective why take 9 months to terminate? Why agree to use the system in the first place if the first respondent had its own mobile concept and why the capability now to move to an alternative

system five days following "cancellation?" Where, such as in this case, a clear right is established which is not open to doubt, it is not necessary for an applicant to prove irreparable injury: *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000(1) ZLR 85 (SC).

Regarding absence of other adequate remedy available, none other is available to the applicants to achieve the preservation of the *status quo* pending determination of the dispute by way of arbitration.

The balance of convenience clearly favours the applicants as the prejudice to them would be very much greater than to the first respondent. Damages will be difficult to prove on the part of the applicants.

WHO REPUDIATED THE AGREEMENT

This seems to be the crux of the matter. The first respondent's argument is that it was the first applicant which repudiated the agreement via its letter of 31 May, 2011 whose "intention to terminate the agreement" the former "noted and accepted" via its letter dated 1 June, 2011.

In Jackson v Unity Insurance Co. Ltd 1999(1) ZLR 381(S) GUBBAY CJ ,relying on the ratio in *Ganief v Hoosen* 1977 (4) SA 458(C) held that a valid notice of cancellation must clearly inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. What the landlord purported to do was to declare that the contract was to terminate at some future date and hold the tenant bound until that date arrived. Since this was not a valid notice of cancellation, ejectment could not be ordered.

The case which laid to rest the notion that a notice of cancellation which takes effect in the future is invalid only applies to contracts of lease is the one of *Waste Management Services (Pvt) Ltd v City of Harare* 2003 (1) ZLR 571 (S) at p 573 G-H where SANDURA JA with the concurrence of CHEDA JA said:

> "It is pertinent to note that De KOCK J (in Ganief *supra)* referred to the right to resile from a contract, and not the right to resile from a contract of lease. Had the intention been to restrict the principle to leases he would have said: 'In my view, the right to resile from a contract of lease is one that must be exercised *ex nunc.* ' In any event, I cannot see any logical basis for restricting the principle to a contract of lease. In

addition, it is clear from the judgment of this court in *Jackson v Unity Insurance Co. Ltd* 1999 (1) ZLR 381(S) that the court was of the view that the principle in *Ganief v Hoosen supra* applied to the cancellation of any contract".

A close look at the first applicant's letter of 31 May, 2011, the basis upon which the first respondent purported to "note and accept" the intention to terminate the agreement by its letter of 1 June, 2011, clearly shows that the notice to terminate the agreement was in the future. The pertinent paragraphs in the first applicant's letter of 31 May, 2011 are 4 and the last one. Paragraph 4 reads:-

> "Therefore be advised that all obligations of Trustco will be suspended 3 June, 2011 at 12hoo Namibian time if all overdue payments are not received by then".

The penultimate paragraph reads:

> "Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from date hereof Trustco will deem the contract cancelled in terms of Clause 17.1 of the main agreement".

In the result, on the weight of the authorities cited above, the first applicant's notice of cancellation was in the future. The right to resile from the agreement was not exercised *ex nunc* therefore since the notice was not valid, there was no cancellation which the first respondent could note and or accept. In the event the agreement still subsists, and by extension, the first respondent's 5th plank of opposition, viz that in the event of the court finding that it was the first respondent who repudiated the agreement, the specific performance being sought by the applicants is in the court's discretion and the court should decline that relief, should not detain me. Having found that there was no valid cancellation of the agreement and that the agreement is still alive, specific performance ought to be ordered to restore the *status quo ante*.

The application is accordingly granted in terms of the amended draft order.

Quaere: whether Mr Tawanda Nyambirai being the chairman of the first respondent, can represent the latter without staining some ethical considerations.

Gill, Godlonton and Gerrans, applicants' legal practitioners
Mtetwa and Nyambirai, 1st respondent's legal practitioners
Scanlen & Holderness, 2nd respondent's legal practitioners