LUVIAL ENTERPRISES (PVT) LIMITED
versus
COALBRICK (PVT) LIMITED
and
ENTUBA COALFIELD (PVT) LIMITED
and
ZAMBEZI GAS ZIMBABWE (PVT) LIMITED

HIGH COURT OF HARARE
MUSHORE J
HARARE, 12, 13 October 2015 and 13 April 2016

Civil Trial : Absolution from the instance

L Madhuku, for the plaintiff
P F Mutuso, for the 1st defendant
W P Zhangazha, for the 2nd & 3rd defendants

MUSHORE J: This is an action in which the plaintiff company is suing all three defendants jointly and severally, the one paying the other to be absolved, for the sum of US$ 1,980,000-00 (One million nine hundred and eighty thousand United States Dollars). The plaintiff alleges that it was approached by the third defendant company which company owned coal deposits under a Special Grant (4084, Hwange) to source investors for the third defendant for the sole purpose of entering into a joint venture agreement with the investor so that the third defendant could thereafter exploit its coal deposits.

The plaintiff's position was that it had a right to the relief it sought, namely the payment of an 'introducer's fee" because it had identified the first defendant as a potential investor, resulting in the first and third defendant entering into an agreement to form a joint venture company to exploit the third defendant's coal deposits. It was then that the second defendant was established as the joint venture company. It is alleged by the plaintiff that upon incorporation of the joint venture company (second defendant) the plaintiff would become entitled to payment of consultancy fees in the above stated amount of US1,980,000-00, from all the three defendants, jointly and severally, the one paying and the others to be absolved. According to the plaintiff it discharged its duties in full in terms of the contract, but despite

that the defendants have failed to pay the plaintiff the sum due. Because the defendants have neglected to pay the plaintiff company, plaintiff has approached the courts for relief by way of payment for its consultancy fees, hence the current suit.

All three defendants denied being liable for payment of the consultancy fees. The various positions taken by each defendant were as follows:-

1. The first defendant denied the existence of any such agreement as alleged by the plaintiff. The first defendant pleaded that it was not even aware that any such agreement had ever existed.
2. The second and third defendants too denied having ever entered into an agreement with the plaintiff. The second defendant's response to the plaintiff's action was to outright deny that it could have ever contracted with the plaintiff because it (the second defendant) was not even in existence at the times and dates mentioned by the plaintiff. To that end the second defendant pleaded that it would have been impossible to have contracted with the plaintiff or with anyone at all for such fees.
3. The third defendant denied the existence of the agreement alleged by the plaintiff adding that it knew nothing of the contract which formed the basis of the plaintiff's case.

Pleadings were filed by all of the parties in the usual manner culminating in the joint pre-trial conference minute being filed which summarised the issues for trial as being whether or not:-

1. A contract was entered into between the plaintiff on the one hand and first second and third defendants on the other for provision of consulting services, and if so the terms of such contract.
2. The first or the second or the third defendants are liable to pay the plaintiff consulting fees in the sum of USD 1,980,000-00 jointly and severally, the one paying the others to be absolved.
3. The first, second and third defendants should pay costs at the scale of legal practitioner and own client.

In the prosecution of this matter and at trial, the plaintiff called two witnesses. At the close of the plaintiff's case, all of defendants applied for absolution from the instance on the basis that the contract, if any, was void for vagueness. The plaintiff opposed the application

on the basis that it perceived the application for absolution from the instance to be frivolous and vexatious.

To recap, the plaintiff's claim is that it had performed its obligations in terms of the agreement it had with the defendants which entitled it to payment of consultancy fees.

In evidence, the first witness for the plaintiff was a Mr Gwasira. He testified that the plaintiff company, which was established in 2004, is in the business of sourcing investors for mining companies with the objective that they partner up with other mining companies looking for investors. He related that he was approached by the third defendant who through its representative was looking for investors so that they could mine their claim. Shortly thereafter he secured the interest of the first defendant and arranged a series of meetings. According to him at the first meeting in July 2013, after introducing the individual representatives of the first and the third defendant to each other, discussions began which centred on the share structure for the proposed joint venture. He testified that the meeting having gone well, a second meeting was arranged so that the parties could thrash out the working modalities of the proposed joint venture including signing a non-disclosure clause. He also stated that he raised the issue of the plaintiff's fee which according to him was a 3% equity fee, which when numerically calculated translated to US$1,980,000-00. He said that he pegged the percentage at 3% because 3% equity is the world accepted standard. He pointed out with specificity that he applied the 3% on 'future returns' on projected income over a period of five (5) years, and that the expected income of the project was derived from a geological and economic survey of the project, which was undertaken by certain experts on behalf of the plaintiff.

Mr Gwasira explained that when he proposed the fee of US$1,980,000-00, all three defendants found the fee asked for to be excessive and reverted to the plaintiff with a counter offer which the defendants described as a 'facilitation fee' and which was US$100,000-00. It emerged from Mr Gwasira's evidence that he felt the counter-offer to be exceedingly low and that that is why the plaintiff was now suing for its initial fee of US$1,980,000-00 which it is alleged is founded in contract.

The other and final witness for the plaintiff (Mr Nkomo) by and large confirmed most of what the first witness stated alleging the indebtedness of the defendants but delving deeper into his evidence to try and explain, label or categorise the basis of the fee.

Both witnesses gave a very poor impression whilst giving their evidence. They struggled and appeared confused as they went on, and the rambling style with which they gave their evidence provided the court an insight to their growing discomfort with the state of their case.

I will now analyse the evidence in depth.

In perusing the plaintiff's declaration **paragraph 6,** thereof provides the reasons why the plaintiff believed that it had *causa* to bring the claim.

Paragraph 6 of the declaration reads as follows:

"6. Pursuant to the agreements as aforesaid:

6.1. Plaintiff performed its obligations and facilitated the agreement between First and Third Defendants,

6.2. First and Third Defendants formed the joint venture company being the Second Defendant. "

During the course of the trial and in order to factually demonstrate that these actions had indeed taken place the plaintiff produced an unsigned agreement as a part of its case. Clause 2 reads of the unsigned agreement reads as follows:-

"2.0. INTRODUCERS FEE AND COMMISSION

2.1. Commissions may be paid by the Special Vehicle formed by Zambezi Gas and Coalbrick in consideration of the introductions made.

2.2. Commissions will be outlined and agreed in advance of the Special Vehicle commencing operations.

2.3. The agreed commissions will be paid on signing of a Memorandum of Agreement between Zambezi Gas and Coalbrick subject to Zambezi Gas being in receipt of the agreed upon investment from Coalbrick.

2.4. A commission fee in the sum of $1,980, 000-00 (One million nine hundred and eighty thousand dollars) shall be paid to Luvial Enterprises. (**SUBJECT TO NEGOTIATION**).

2.5. The commission fee shall be paid in monthly instalments of $33,000-00 each for a period of 60 months (5 years) commencing from the date of initial receipt of sales revenue"

The defendants took the plaintiff's witnesses to task on the unsigned agreement and during a belaboured and intrusive cross examination of the plaintiff's witnesses by counsel for second and third defendants, the defendants demonstrated that:

a) The conditions under clause 2.1, 2.2 and 2.3 of the unsigned agreement *{supra}* had never been fulfilled, more particularly in that the Special vehicle envisioned under 2.1 was never formed; and
b) The commissions mentioned in clause 2.2 were never outlined or agreed by the parties, and
c) As *per* 2.3, no memorandum of agreement had been formalised as between the first and third defendant.

The defendants also demonstrated that even though the plaintiff had pleaded in its declaration that the second defendant in this suit was the joint venture company adverted to in clause 2.1 of the unsigned agreement *{supra}*, factually this could never have been the case because the second defendant was actually an alliance between the third defendant and another company called Coal Producers and Processors Trust (COPAZ) which was NOT a party to these proceedings. Thus second defendant in this suit was an uninterested party to the proceedings which was rather bewildering, but that was the extent of the confused state of the plaintiff's case. However eventually both plaintiffs' witnesses conceded that second defendant was incorrectly and/or mistakenly sued.

A further blow to the establishment of the plaintiff's case emanated from a letter written by the second defendant in this matter (Entuba Coalfields (Private) Limited) and addressed to the plaintiff wherein the fee issue was being thrashed out. In that letter the second defendant wrote:-

> "We are in receipt of your proposal dated 8 October 2013 and the subsequent proposal for a consultancy fee <u>for bringing together Zambezi Gas (Private) Limited and Coal Producers and Processors Trust of Zimbabwe (COPAZ)</u>
>
> The joint board believes that this amount is excessive and <u>we would like to put in a counter offer of 100,000-00 USD (One Hundred Thousand USD)</u>." (*My underlining)*

The underlined portion in the second paragraph provides irrefutable documentary evidence that the *quantum* for the fee had never been finalised because the defendants had

clearly counter offered to pay US$100,000-00. In fact, in evidence the plaintiff's witnesses conceded that there had been no further discussions by the parties after the counter-offer was made. All that the plaintiff had done thereafter was to file this current suit claiming US1, 980,000-00.

Added to that it became evident whilst Mr Nkomo for the plaintiff was being cross examined that the first defendant had been wrongly sued because the first defendant was never a party to any agreement with the plaintiff. First defendant had therefore also been unnecessarily dragged into the current suit.

Further, the amount of US$1,980,000-00 which the plaintiff was claiming emanated from an unsigned agreement with the emphasis on the word "**unsigned".** None of the parties could be bound by an unsigned agreement. Be that as it may it was established under cross examination that the fee prayed for in this suit, if any, was never cast in stone and was still being negotiated. In particular clause 2.4 of the unsigned agreement produced by the plaintiff reflects that the fee was SUBJECT TO NEGOTIATION.

It is therefore unfathomable how the plaintiff could approach this court with a prayer for specific performance of a payment obligation in specific terms when in fact the fee was still being negotiated.

In addition to the growing series of challenges to the plaintiff's *causa*, I need to reference to the documented minute of a meeting which took place at the Transtobac Complex in Msasa, Harare at which all parties were represented because the minutes provide the thoughts and representations made by the parties to the negotiations. The minutes of this meeting are not contested by any of the parties as being a true and proper record of what took place. For ease of reference I have included and bracketed the names of the parties in the litigation alongside the spokesperson's name. The typed minuted transcript reads as follows:-

> "**Bertha Zakeyo**: Luvial's role?
>
> **Mr Nherera**: [Zambezi Gas] We were to bring in the partner and when you agree on the partner then parties would agree on how much to pay Luvial.
>
> **Dzinomwa**: [chairman] Parties would have to agree whether to pay you on a once off basis. Usually this fee is paid by the buyer?
>
> **Mr Nherera**: We are proposing that the three parties agree.

> **Dzinomwa**: So it's a joint agreement between Luvial ZG and CB an amount will be agreed.
>
> **Dr Msipa**: [Coalbrick] It would be good for them to give us an idea of their expectation?
>
> **Mr Gwasira**: [Luvial] I will need your guidance as to how I come up with a figure.
>
> **Dzinomwa**: Sometimes it's related to the initial working capital, a percentage of the initial working capital.
>
> **Dr Msipa**: It's an introducer's fee. It's a professional issue. We are not putting you on the spot you can always contact Bertha and negotiate."

My reading of the statement made by the plaintiff's Mr Gwasira in his own words {*supra}* is that no fee had been calculated or put across to the defendants at the end of that very meeting, a fact which stands in stark contrast to Mr Gwasira's *viva voce* evidence that the fee had been agreed. That being the case I cannot understand how plaintiff entertained the belief that the defendants had committed themselves to paying US$1, 980, 00-00 to the plaintiff as alleged.

Thus it is my finding that because the negotiations for the proposed fee were never finalised the fee prayed for of US$1,980,000-00 is unsustainable *ab initio* and that factually any contract which the plaintiff may have imagined was binding upon the defendants is void for vagueness.

The law on the issue is clear. In cases such as the present one where the contract is vague, the following position has been arrived at. **Andrew Beck** in an article he wrote which is published in the 1985 volume of the ***South African Law Journal*** at p 660 put the position clearly:-

> "Vagueness has traditionally been regarded as arising in one of three ways: (a) where the obligation depends solely on the will of the promise; (b) where the vagueness is such that the parties were never *ad idem*; and (c) where negotiations are broken off *in medio.*
>
> As far as categories (b) and (c) are concerned, the lack of consensus prevents the existence of a valid contract."

In the instant matter it is apparent that the parties were still in negotiations and no fee had been arrived at. Also added to that is that the actual joint venture company was never joined as a party to the proceedings and as such the party from whom the plaintiff expected payment as recorded in the unsigned agreement *per* 2.1 of the unsigned agreement *(supra*) was never made a party to the suit itself thus making it impossible for this court to award any relief to the plaintiff *ab initio* this suit

The plaintiff's claim was so vague in that the fee or amount charged was described in different ways. On the one hand the plaintiff called it "an introduction fee" and then a "commission" and in another instance the plaintiff called it "a consultancy fee". Then the defendants called it a "facilitation fee" in another instance.

Clearly the parties were nowhere near *ad idem* and most certainly all that had taken place can only be described as negotiations and very confused negotiations at that.

In *Schneier* v *London, Ltd* v *Bennet 1927 T.P.D. 346* the court concluded that a contract was void for vagueness on the following facts and circumstances. The facts of that case are outlined as follows:-

> "Bennet was employed by Schneier and London, Ltd as Manager of their timber department at a salary of 40 pound sterling plus a small commission to be agreed between the parties. He was dismissed before any agreement had been reached between him and his employers as to commission. He sued the employers for commission {*inter alia}* at the rate of one-fifth percent of turnover, which rate he contended was reasonable".

In attempting to determine whether or not Bennet's claim was sustainable as regards to commission**, *De Waal JP*** relied on another case that of *Humphreys and Cassell* (1923) T.P.D 280, where it was held that:

> 'The plaintiff will not ask, demand or sue for any fees due to him at any time until such time as the defendant's mine was producing and he was on his feet again financially' were too vague to admit of a judgment by any Court of law. **Stratford J** in the *Humphreys* v *Cassell* case said; 'I think the case should be dismissed and the appeal allowed – on the ground that the agreement as specially pleaded is too vague to enforce and the evidence too vague to interpret and to relate to any plea'. (My underlining)

After considering various cases including the *Humphreys* case, **de Waal J.P**. applied these words in the *Bennet* case and determined in the *Bennet* case that the agreement was too vague to enforce.

Greenburg J elaborated on **de Waal JP's** comments in the *Bennet* case as follows:-

> "**Greenberg J**….. The evidence, as far as it goes would indicate that, by mutual consent the matter was not discussed or that appellant was pressed on more than one occasion and did not come to a discussion and agreement on the point. If that is the position it seems to me clear that no action can be based on the contract, because there is no contract at all as regards the commission. A contract (if it can be so-called)

> entered into upon terms which are to be agreed upon in the future and which is material cannot, in my opinion, be a basis for a cause of action…"

Van der Merwe, Van Huyssteen, Reineke and Lubbe in their book "***Contract General Principles***" **[4th Ed.]** at p 194 describe how contracts can be determined to be void for vagueness thus:-

> "The agreement is void for vagueness where it is incomplete because an essential or material aspect has not been agreed upon. In order to determine whether sufficient agreement has been reached, the express or tacit terms of the contract must be considered in conjunction with the supplementary effect of the *naturalia* of the agreement – including relevant trade usages – and the general principles of contract".

Having applied my mind to the above cases as against the facts in the instant matter, it is clear that the plaintiff's *causa* is non-existent and that the parties were negotiating the fee itself and had not reached agreement on it. The very fact that the agreement produced by the plaintiff is unsigned belies the fact of non-agreement as pleaded by the defendants . The label to the *quantum* had not been agreed upon but had been canvassed as being either 'a commission' or 'an introducer's fee' or 'a facilitation fee' or 'a consultancy fee'. To my mind by virtue of the various different descriptions I can infer that all four labels would not attract the exact same *quantum* because a commission cannot be likened to an introducer's fee and/or a facilitation fee or to a consultancy fee. But the single most compelling factor which has destroyed the plaintiff's claim is the unfathomable fact that the vehicle from whom the plaintiff sought payment is not even a party to these proceedings. Thus I conclude that the agreement in this case is void for vagueness *in negotio* and therefore void *ab initio*. Further the suit in this matter is fundamentally flawed because the plaintiff has not sued the correct party. How the plaintiff could have come this far with this matter boggles the mind.

The defendants have asked for absolution from the instance.

The standard barometer applicable in cases where absolution from the instant is sought is to be found in numerous cases.

In *Walker* v *Industrial Equity Limited* 1995 (1) ZLR 87 (S) **Gubbay CJ** as he then was held that:

> "An application for absolution from the instance is akin to and stands on the same footing as an application for the discharge of the accused at the end of the State case.

> In that situation, he is entitled to his discharge on any or separate charge on which there is insufficient evidence to justify his being put on his defence. Similarly in a civil action, if the court is satisfied that there is no evidence on which a reasonable judicial officer could or might find for the plaintiff upon some or the separate claims or on the main or alternate cause of action, there is no impediment to it ordering absolution upon them and refusing it in respect of the remainder".

In another case, that of *United Air Charterers* v *Jarman* 1994 (2) ZLR 341 (S), **Gubbay CJ** commented on the test to be applied by the courts when dealing with applications for absolution when he said: -

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if at the close of its case, there is evidence upon which a court directing its mind reasonably to such evidence could or might (not should or ought to) find for him"

In *Supreme Service Station 1969 (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) ALR 1 (A) case, **Beadle CJ** had this to say at p 55,

> *"*The test therefore boils down to this: is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any degree of exactitude than by saying that it is the sort of mistake ;a definition which helps not at all"

In the instant matter there is no evidence whatsoever which supports the plaintiff's claim that it is entitled to be paid US$1,980,000-00. The facts in this matter come nowhere near confirming that there ever was an agreement between the parties upon which plaintiff could found its claim. In the circumstances I find that the plaintiff has failed to make out an answerable case. I am therefore persuaded that the interests of justice would not be served by having to hear the defendants' cases in this matter. In any event the first and second defendants have no defence to put forward as they have no direct and substantial interest in these proceedings as they were not party to the contract which forms the basis of the plaintiff's claim.

In the result, the first, second and third defendants' application for absolution from the instance at the close of the plaintiff's case is granted with costs.

Mundia & Mudhara, plaintiff's legal practitioners
Mutuso, Taruvinga & Mhiribidi, 1st defendant's legal practitioners
Chinogwenya and Zhangazha, 2nd & 3rd defendant's legal practitioners