JEFT MARKETING (PVT) LTD
versus
REDAN ENERGY PETROLEUM (PVT) LTD
and
SAKUNDA PETROLEUM (PVT) LTD
(Both Respondents t/a Puma Energy)

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 9 February 2017 and 24 March 2017

Urgent Chamber Application

A Makoni, for the applicant
H Dumbutshena, for the respondent

NDEWERE J: The parties concluded a license agreement as Licensor and Licensee which was effective from 1 August, 2016. On 23 August, 2016, after the applicant failed to secure funding, the parties concluded an Interim Funding Arrangement.

Clause 12.2 of the License Agreement provided as follows:

> "12.2. Where the Licensee purchase on credit the terms shall be strictly seven (7) days from date of invoice and failure to meet the terms shall result in the account being suspended and the outstanding amount becoming immediately due and payable."

Paragraph 2 (c) of the Interim Funding Arrangement provided that "all cash sales must be banked in full into the Puma account …."

On 16 December, 2016, there was a meeting between the applicant's and respondents' representatives to discuss a shortfall of $12 983.00 which had been observed on the Westgate Service Station account. At the meeting, the respondents through their representatives, expressed concern about the shortfall given that the expectation of the respondents was that all sale proceeds should be accounted for in full at any particular time in terms of clause 2 (c) of the Interim Funding Arrangement above.

In response, the applicant admitted liability for the shortfalls of September and October totaling $10 628.00 but queried the November, 2016 shortfall, saying the figure was different from what he was previously told. The respondents' representatives were tasked to look at the November figures and update all stakeholders while the applicant was asked to present a payment plan by the end of the day, 16 December, 2016 in writing. He was also advised to tighten controls at the site to avoid a repeat of the situation.

It appears the parties did not agree on a payment plan by the end of that day and on 21 December, 2016 when the respondents gave the applicant's representative a draft acknowledgement of debt to sign, he refused to sign it.

On 11 January, 2017, the respondent delivered a termination letter to the applicant. The applicant responded the same day, refusing to accept the termination.

On 13 January, 2017, the applicant then filed an urgent chamber application for spoliation and interdict. The respondents opposed the application and said the application was not urgent.

It was agreed by the parties during the hearing of the application that if my determination is that the application is not urgent, there is no need for me to proceed to the merits of the spoliation and interdict application.

After going through the application, its opposition and annexures, I have come to the conclusion that this application does not warrant treatment as an urgent chamber application which should be considered ahead of other court matters.

The dispute between the parties is a contractual dispute. When the respondents cancelled the license agreement, they were acting in terms of clause 25 of the Licence Agreement which provided as follows:

> "25.1 should the Licensee fail to pay any amount due by it in terms of the license on due date and fail to remedy such breach within a period of 7 days after the giving of written notice by the Licensor calling for such payment; or….
>
> 25.4 Fail to account for any stock delivered to the service station;
>
> 25.5 Commit any breach or permit the commission of any breach of any other term of the license and fail to remedy that breach within (14) fourteen days after the giving of written notice to that effect by the Licensor……
>
> 25.7 Then and in any such event the Licensor shall without prejudice to its rights to damages or any other claims, be entitled to cancel the license; or be entitled to remedy such breach

> and immediately recover the total costs incurred by the Licensor in so doing from the Licensee ……
>
> 25.8 The Licensor shall notwithstanding whether the licence is cancelled or not, be entitled to demand immediate payment of all amounts owing by the Licensee in respect of any obligation under the license, whether they are payable or not; and/or……..”

All the above sub clauses of Clause 25 emphasise the point that in terms of the parties' contract, the respondents were allowed to demand immediate payment and immediate remedy, failing which they could cancel. A party who is exercising his contractual rights cannot be faulted. In this regard, I agree with the respondents' submission that the court should be slow to interfere with the parties freedom to contract as held in *Chikwavira* v *Mutonhora and Another*, HC 859/10. Similarly, a party who freely signed a contract with the provisions such as in Clause 25 of the License Agreement above should not cry foul when the other party invokes the contractual provisions.

The applicant sought to dwell much on the placement of a day guard at the service station to bolster its application. Suffice it to say that once a party cancels a contract, it cannot be business as usual for the other party as the aggrieved and cancelling party prepares to mitigate its losses. Still, if the applicant was aggrieved, then the remedy lay in the provisions provided in the contract.

In my view, one cannot sign a contract which permits cancellation in case of breach, and then when there is that cancellation, one rushes to court and say hear me, its urgent. The contract itself provided for mediation within 7 days in the first instance.

Clause 27 provided as follows;

> “Any dispute, question or differences arising any time between the parties to this agreement out of or in regard to any matter arising out of, or the rights and duties of the parties hereto, or the interpretation of or the rectification of this agreement shall in the first instance be submitted to and decided by mediation on notice given by either party to the other in terms of this clause.”

This was an in built mechanism to assist the parties in case of misunderstandings. In my view, the applicant ought to have exhausted all those domestic remedies agreed to by the parties in the contract before approaching the court on an urgent basis. Why rush to court when the parties agreed on mediation of any dispute or difference within 7 days?

As correctly pointed out by the respondents, this is a case of self-created urgency. It is not the type of urgency which was envisaged by the rules. The sentiments expressed in *Makaraudze* v *Bungu and Others* HH 8/15 are relevant to this case. In that case, the judge said:

> "……..a litigant should be discouraged from rushing to the courts before he has exhausted such domestic procedures or remedies as may be available to his situation in any given case. He is expected to obtain relief through available domestic remedies unless there are good reasons for not doing so."

In the present case, the parties in their own wisdom, included 7 day mediation and arbitration which would be concluded within a month after submission of arguments. Why not exhaust such provisions first? Clearly, there was no need for the applicant to approach the court on an urgent basis at this stage.

Consequently, the ruling on the preliminary point is that the application is not urgent.

The applicant shall pay the respondents' costs on the higher scale.

Makoni Legal Practice, applicant's legal practitioners
Dumbutshena & Co Attorneys, respondents' legal practitioners