FREMUS ENTERPRISES (PRIVATE) LIMITED
versus
ZIMBABWE NATIONAL ROAD ADMINISTRATION

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 10 September, 2018, 3 October 2018 and 27 June 2019

Trial

J. Dondo, for the plaintiff
I. Ndudzo, for the defendant

CHIKOWERO J: At the end of oral submissions on 20 June 2019 I entered judgment for the plaintiff in the following terms:

"1. Defendant shall pay the plaintiff the sum of US$628 130-38 together with interest thereon at the rate of 5% per annum from 26 August 2015 to the date of full payment.
2. Defendant shall pay the costs of suit."

I gave brief oral reasons for the judgment. I undertook to avail detail reasons in due course.

These are those reasons.

The material facts of this matter are common cause.

The plaintiff "Fremus" entered into an agreement with defendant "Zinara" to rehabilitate certain roads situate in Buhera, Gutu and Zaka Rural District Councils.

The evidence also suggested that the contract was not between the parties to this suit. Instead, it suggested that the contracts to rehabilitate the roads was between Fremus and each of the three local authorities.

In defendant's summary of evidence, however, the following was stated:

"The defendant will lead its evidence as follows:

1. That the defendant subcontracted plaintiff for the rehabilitation of roads in Buhera, Gutu and Zaka during a period between 2011 and 2013.
2. That plaintiff sent invoices to the defendant for all the work done.
3. That no Value Added Tax was charged by the plaintiff in its invoices."

The issue as to whether the rehabilitation contract(s) was/were between Zinara and Fremus or Fremus and each of the three local authorities is, in my view, not one that is necessary to resolve for the purposes of this judgment.

That is so because it was common cause that payment for work done would be made directly to Fremus by Zinara.

And this is what happened.

Zinara was the party funding the work done.

On the councils and Zinara being satisfied that the work had indeed been performed, Fremus send its invoices direct to Zinara for payment.

The initial invoice included Value Added Tax "VAT" when in fact Fremus was not registered to collect such tax.

Zinara objected to this and indicated to Fremus to remove the VAT component to facilitate payment for work done.

The VAT component was accordingly removed.

Fremus then submitted a total of six invoices, without the VAT. component to Zinara for payment.

This was in respect of road rehabilitation works effected within the jurisdictions of the three local authorities.

Payment was duly effected.

This was direct payment from Zinara to Fremus.

The six invoices were produced as exhibit number 1.

Through its investigations, the Zimbabwe Revenue Authority "Zimra" then discovered that Fremus had not paid Value Added Tax to the former on payments received from Zinara.

It assessed such VAT as US$628 130-38.

It was common cause that the duty to collect the VAT and to pay it to Zimra lay on Fremus.

Fremus advised Zimra that it had not collected the VAT from Zinara because Fremus was not registered to collect VAT at the time of issuance of the invoices.

Understandably, Zimra insisted that Fremus discharges its tax liabilities in terms of the law.

Fremus advised Zinara of its predicament.

The latter in turn advised the former to obtain confirmation from the local authorities that the invoice excluded VAT.

Such confirmation was obtained.

Pertinent correspondence between the parties include exhibits 3 and 4.

Exhibit 3 is letter dated 16 April 2013 addressed to the Managing Director of Fremus by Zinara, through its Chief Executive Officer, Mr F Chitukutuku.

It reads in relevant part:

"RE: VAT PAYMENTS TO ZIMRA
We acknowledge receipt of your letter dated 15 April 2013, and take note of the claimable V.A.T from us.

However, we wish to advise that the amounts that you were supposed to charge V.A.T are going to be paid direct to ZIMRA on your behalf.

May you therefore provide us with your BP number by end of day today to allow us to make these payments on your behalf within 30 days.

(signed)
F Chitukutuku
CHIEF EXECUTIVE OFFICER

CC Commissioner Investigations – ZIMRA"

Another letter was addressed to Fremus by ZINARA.

That letter, dated 21 May 2013 reads as follows:

"RE: VAT REFUNDS

We make reference to our earlier letter dated 16 April 2013, were we acknowledged owing you the V.A.T. component and had promised to pay it on your behalf direct to Zimra.

Please be advised that in order to make it simple, you can proceed to make such payments to Zimra and we undertake to pay you directly for those amounts that you will have paid to Zimra. This will simply the issue since we also have tax issues that we are fighting with Zimra and would not want to mix them up.

I hope you will find this arrangement favourable.

(signed)
F. Chitukutuku
CHIEF EXECUTIVE OFFICER"

Clearly, Zinara undertook to pay the V.A.T which had not been claimed from it, and therefore not paid to Fremus, directly to Zimra.

Slightly more than a month later it altered its position.

While still acknowledging liability to Fremus for the V.A.T components, whose ultimate beneficiary was Zimra, it requested Fremus to pay the amount to Zimra.

On its part, Zinara undertook to reimburse Fremus the sum paid to Zimra.

The amount itself was common cause.

It was the principal sum granted to Fremus at the close of submission by counsel.

Indeed, on April 10th 2018 Zimra wrote to Zinara confirming not only the quantum of the V.A.T but also that Fremus had paid the same to Zimra.

That letter, produced as exhibit 5, is in these words:

"10 April 2018
The Public Officer
Zimbabwe Noational (sic) Road Administration
Stand 489 Runiville
Glenroy Shopping Centre
Highlands
Harare
Dear Sir/Madam
RE: CONFIRMATION OF PAYMENTS MADE FOR VAT BY FREMUS ENTERPRISES (PVT) LTD BPN 200113465
This letter serves to confirm and notify you of the following information with respect to the referenced client:

1. The client had VAT obligations to Zimra amounting to $628 130.38 resulting from operations carried out in Buhera RDC, Zaka RDC and Gutu RDC for the period from 2011 to 2013.
2. The total obligation above arose from the contracts done by Fremus Enterprises Pvt Ltd having been contracted by the said Councils and specifically paid by ZINARA. This was unearthed by ZIMRA during an investigation as Fremus Enterprises Pvt Ltd was not registered for VAT back then.
3. Fremus was consequently registered for VAT and the referenced amount was posted onto their VAT account.

A total amount of $628 130.38 has been paid to date by way of Garnish order and deposits by Fremus Enterprises Pvt Ltd. The total amount was paid and receipted as shown in the table below;

Receipt Number	Amount $
51122756	14 617.98
51122783	20 000.00
51123721	10 000.00
53005991	313 500.00
55005820	50 640.00
55005820	7 768.00
55005820	21 999.61
55005820	97 262.09
55005820	92 169.75
55005820	172.95
Total	628 130.38

Should you require any clarification or additional information do not hesitate to contact the undersigned on the contact information shown above.

Yours faithfully

(signed)

Mr L Manjoro
FOR: REGIONAL MANAGER REGION 1 DOMESTIC TAXES"

This letter was necessary because Zinara wanted confirmation of payment from Zimra before it could reimburse Fremus.

However, Zinara later made an about turn and denied liability to pay the sum of US$628 130.38 to Fremus.

In doing so, it sought refuge in the provisions of the Value Added Tax Act [*Chapter 23:12*] in particular the definition of a "registered operator." in section 2 as well as s 6 (2) (a), 8 (1) (a), 23 (1) (a) and 69.

I was also referred to *AT International Limited* v *Zimbabwe Revenue Authority* HH 823/15.

I state only that those provisions of the Act are inapplicable to the facts of this matter.

Similarly, the Fiscal Appeals Court decision referred to is not germane to my determination of the present matter.

This case turns on the acknowledgment by Zinara that it owed Fremus the sum of US$628 130.38. That was an acknowledgment of debt.

I agree with Mr Dondo that there was nothing illegal about the payment arrangements made between Fremus and Zinara.

The bottom line is that Fremus did not initially have a BP number to enable it to collect and remit VAT to Zimra.

All concerned parties were aware of that. I am referring to the litigants and the councils.

That is why Fremus and Zinara had to come up with modalities of payment of the VAT when ZINARA demanded its dues from Fremus.

I was not impressed with Mr Simon Mudzingwa Tararike's attempt to distance Zinara from the binding effect of exhibits 3 and 4. He was not working for Zinara when those letters were written. He is not the author of those letters. The author did not testify. It is no good for Mr Tararike to claim that the letters were unique and seek to use that as a basis to disown the clear position taken by Zinara in those letters.

It must not be forgotten that exhibits 3 and 4 are not the only pieces of evidence reflecting direct contact between Fremus and Zinara. The invoices were drawn up by the former and, after certification, transmitted directly to Zinara by Fremus. So were the payments. Zinara paid directly to Fremus.

Even if I were to find that the arrangement between the parties in terms whereof Fremus retreated from charging VAT on the six invoices was illegal, the present is a suitable case to relax the par delictum rule. This is to avoid a situation where Fremus would be unjustly impoverished with Zinara being correspondingly unjustly enriched.

All things being equal, the VAT ought to have been part and parcel of the amount reflected on each invoice. This means it properly should have come from the coffers of Zinara, as did the principal amounts. When Zimra stepped in to demand its dues this position was admitted by both parties as shown by exhibits 3 and 4.

Justice would turn on its head if Zinara were now to be allowed to have its cake and eat it. See *Chioza* v *Siziba* 2015 (1) ZLR 262 (S).

Quoting GUBBAY JA (as he then was) in *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) ZIYAMBI JA said in *Chioza* v *Siziba (supra*) at 264 D:

"In the *Dube* v *Khumalo* case *supr*a it was said at 109 F that:

> '… in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy "should properly take into account the doing of simple justice between man and man."'

It is eminently clear that Fremus' case hinged on the following portions of its declaration:

"8. In May 2013, defendant undertook in writing to refund plaintiff the total VAT it would have paid to Zimra.

9. In the result, plaintiff paid the total sum of US$893 000.00 (amended to US$628 130.83 at the beginning of the trial) to Zimra being 15% VAT on all its claims for the work it had performed in the aforesaid local authorities thereby suffering great financial prejudice.

10. Despite repeated demands and full compliance by plaintiff of defendant's conditions for a refund of the said VAT, defendant has failed and neglected to pay either the said VAT or any part thereof."

These allegations were proved.

These constitute the reasons why, at the close of submissions, I granted judgment in favour of the plaintiff in the following terms:

1. Defendant shall pay the plaintiff the sum of US$628 130.38 together with interest thereon at the rate of 5% *per* annum from 26 August 2015 to the date of full payment.
2. Defendant shall pay the costs of suit.

Dondo & Partners, plaintiff's legal practitioners
Mutamangira & Partners, defendant's legal practitioners