

E.G. CONSTRUCTION (PRIVATE) LIMITED
versus
FARAMATSI MOTORS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 25 February & 3 June 2020

Opposed Application – Summary Judgment

Mr P Jonhera, for the applicant
Mr D K Malikwa, for the respondent

CHAREWA J: This is an application for summary judgment which I heard on 25 February 2020 and rendered an *ex tempore* judgment in favour of the applicant. The respondent having noted an appeal, hereunder are my written reasons for judgment.

Preliminary

At the commencement of the hearing, the applicant applied to amend its draft order, in paragraph 1, to delete the word “immediate” and to insert “within 5 days of this order”, which amendment the respondent consented to.

Facts

The applicant issued summons on 22 May 2019 for the “immediate delivery of the Toyota Hilux Extended Cab 2.8 4x4 Manual vehicle by the defendant to the plaintiff”. On 28 May 2019 respondent entered appearance to defend and followed this up with a request for further particulars on 13 June 2019. The particulars having been supplied on 19 August 2019, the respondent requested further and better particulars on 22 August 2019 which request applicant responded to on 30 August 2019. On 5 September 2019 applicant applied for summary judgment on the basis that respondent did not have a “genuine and sincere defence to the action”. Attached to the application was documentary evidence to support the lack of a genuine and sincere defence.

On 20 September 2019 respondent filed opposing papers denying failing to supply the vehicle in question, claiming the protection of a special condition and pleading supervening

impossibility of performance. However, it asserted that the vehicle was available but for exemptions sought from the Ministry of Finance.

The undisputed background to the matter is that on 28 September 2018, the parties entered into an oral agreement for the respondent to supply to the applicant, two vehicles, namely a Toyota Hilux Extended Cab 2.8 4x4 Manual and a Toyota Hilux Double Cab 2.8 4x4 Manual. On the same day the respondent issued a tax invoice for USD294 300 for the two vehicles. On 1 October 2018 the respondent duly issued a pro-forma invoice for USD294 300 which was valid for 2 days and which terms were that delivery would be made in two weeks. The applicant made payment for the full amount on the same day.

The respondent made delivery of the Toyota Hilux Double Cab 2.8 4x4 Manual. However, delivery of the Toyota Hilux Extended Cab 2.8 4x4 Manual remains outstanding to date. Demand for delivery was made on 24 April 2019.

Applicant's submissions

The applicant's submissions are simple and straight forward, to the effect that the agreement was that two vehicles were to be delivered within two weeks of payment. To date, only one vehicle has been delivered. Therefore respondent has no *bona fide* defence to applicant's claim. More particularly, applicant submits that the defence of supervening impossibility raised by respondent is untenable as Statutory Instrument 252A/2018 which supposedly grounds such a defence does not make performance impossible: it only makes it difficult to pay duty which must now be paid in the currency of purchase, which in this case is the United States Dollar. In any event, applicant submits, the statutory instrument was promulgated more two weeks after respondent should have delivered the vehicle within 14 days from 1 October 2018.

In addition, applicant submits that, in its letter dated 29 April 2019 at p.43 of the record, respondent claims that the vehicle is in the country and it awaits exemption to pay duty in local currency, yet as of today, more than a year later, proffers no proof of any approach to the Zimbabwe Revenue Authority. In any event, respondent was paid to deliver a vehicle which it promised to do within two weeks, and not to act as a freight and forwarding agent. Moreover paragraph 26 of respondent's heads of argument seems to suggest that respondent wants to be released from the obligation to deliver a vehicle which has been paid for and is within the country. Further, the "special condition" on the pro-forma invoice is inapplicable. For one, respondent never notified applicant of any changes to trigger the special condition until demand

for delivery was made in April 2019. In the second place, no changes occurred in the two weeks delivery period to bring the special condition into effect. In applicant's view therefore, this all goes to show lack of *bona fides* by respondent.

Respondent's submissions

Apart from abiding by its heads of argument, respondent went to town about the agreement between the parties being an oral contract supported by a pro-forma invoice with special conditions. And accordingly, respondent submits that it is not a manufacturer of vehicles and must import them which was not possible to do within two weeks. It therefore avers that the effect of SI 252A/2018 was to make it impossible to deliver the vehicle in terms of the proforma invoice and that such statutory instrument was a change in the contractual circumstances envisaged by the special conditions as it could not pay duty in USD as required by the new law.

The Law

It is trite that summary judgment is an extraordinary remedy against an unscrupulous litigant seeking to frustrate a claim.¹ In that regard, the claim must be clear and unanswerable and the defences inadequate in fact and in law.² It is further trite that not every defence will defeat an application for summary judgment. In order to succeed the defences must be clear and complete, disclosing facts upon which they are based as at the time of the claim.³ Further such defences must be sufficient to enable one to succeed on the merits or at least, place a *prima facie* case before the court to enable it to assess their *bona fides*.⁴ Thus the role of the court is to assess whether a *bona fide* defence which is plausible and could possibly succeed has been raised.

Analysis

It is not disputed that the contract between the parties is oral. Or that its terms are supported by the proforma invoice which both parties rely on to ground their submissions. This proforma invoice has five material requirements:

- i. that its validity is only for two days from the date of issuance which is 1 October 2018;

¹ See *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 @ 265/272B

² See *Chrismar (Pvt) v Stutchbury & Anor* 1973 (1) RLR 277

³ See *Mbayiwa v Eastern Highlands Motel* SC/139/86

⁴ See *Jena v Nechipote* 1986 (1) ZLR 29 (S). See also *National Railways of Zimbabwe v Verigy Enterprises (Pvt) Ltd & 3 Ors* HB13/17

- ii. that the purchase price for the two vehicles is USD294 300 of which USD144 500 is for the vehicle in issue;
- iii. that delivery shall be within two weeks of payment;
- iv. that the package includes licensing and registration;
- v. And finally that taxes and duty are subject to change without notice and that such changes will be for the customer's account.

The applicant paid for the vehicles the same day that the proforma invoice was issued. It thus complied with the first and second requirements of the agreement thus shifting the onus to respondent to comply with requirement iii. and iv.; to deliver the vehicle in two weeks from 1 October 2018 after duly attending to licensing and registration.

The proforma invoice was issued by the respondent, and to me, this presupposes that respondent was sure and did undertake to comply with the third and fourth requirements according to its own stipulation. It is not alleged by both parties that part of the terms of the oral agreement was that respondent had to import the vehicles first. Nor is it alleged by respondent that there was any suspensive condition that the two weeks delivery deadline was subject to any importation challenges. This therefore raises the presumption that it was understood that the vehicles were readily available. I am not convinced by respondent's weak riposte that it was agreed by the parties that it is not a manufacturer and therefore needed to import the vehicles after receipt of payment, which importation process could not be done in two weeks. I say so because, apart from claiming that the invoice is not a contract, nowhere does respondent explain why it undertook to do what it considers impossible. Besides, respondent cannot approbate and reprobate, for in one breath it disowns the contractual nature of the proforma invoice, and in another breath, relies on the "special conditions" in that proforma as binding.

As it turns out, respondent failed to deliver both vehicles within two weeks as undertaken. However, applicant accepted late delivery of the Toyota Hilux Double Cab. But when the Toyota Hilux Extended Cab vehicle remained undelivered in April 2019, applicant then caused a letter of demand claiming its delivery. To date that vehicle remains undelivered despite that as at 29 April 2019, respondent claimed that the vehicle was in the country and only awaited payment of duty in the exempted local currency. Respondent divulges no information to the court as to the outcome of the application for exemption nor has it proffered any proof as to the alleged "strides in engaging the Zimbabwe Revenue Authority (Zimra) and

the Ministry of Finance” as suggested in paragraph 3.5 of respondent’s heads of argument. Neither has respondent been forthcoming about when it actually purchased the vehicles or imported them into Zimbabwe. Nor has it produced any evidence that there was any notification given to applicant to pay the new duty in terms of the “special condition” it relies on to claim impossibility or performance.

All this, to me, suggests that respondent might easily fit into the bracket of the recalcitrant litigant bent on frustrating a claim. I cannot therefore find that respondent has raised any defences which place a *prima facie* case before me, and which defences are sufficient to enable it to succeed on the merits. In particular, I note that as at 15 October 2018, when the applicant’s claim for delivery arose, SI 252A/2018 did not even exist and could not have been disclosed as a matter of fact at the time the claim arose.

Further, I must agree with applicant that that ZIMRA requires duty to be paid in United States dollars does not suggest impossibility. Rather, it merely creates a challenge which could have been easily overcome by resorting to the proforma invoice: with the respondent making a demand that applicant should pay duty in terms of the special condition. However, even this avenue is not, in my view, open to the respondent, by reason of the fact that the challenge arising from the new duty regime is an outcome of respondent’s own failure to process the delivery of the vehicle within the agreed time frame. Besides, this change in the duty regime only arose after respondent was already in breach and cannot therefore be material. In this regard, I particularly take note that SI 252A/2018 was promulgated and came into force on 23 November 2018, fully thirty eight (38) days after the vehicles ought to have been delivered. I am therefore of the view that respondent is the author of its own misfortune and cannot seek to benefit from its own lack of diligence in adhering to contractual terms.

In that regard, I must therefore agree with applicant that the claimed impossibility is thus self-created. I can only conclude that respondent is hoist by its own petard: it made an undertaking which it failed to keep and got itself caught in the dragnet of SI 252A/2018.

In reaching this conclusion, I am especially mindful of the fact that not every defence can defeat summary judgment, and, in my view, the defence raised herein is such a defence which falls short of the required standard. Further, I take note of the alleged terms of the oral agreement averred by the respondent and am of the view that they are evident from the proforma invoice and thus take the matter no further. In particular, I find that, in any event, those terms are overridden by respondent’s undertaking to deliver the vehicles within two

weeks of payment, it having, within that time, used the payment by applicant to procure the vehicles, pay statutory duties, and comply with exchange control laws and regulations applicable during the agreed period of performance of the contract.

The parties make no submissions with regard to costs. Consequently, I find that the application for summary judgment must be granted with costs on the ordinary scale.

Disposition

It be and is hereby ordered that:

- a. Summary judgment be and is hereby entered against the respondent for the delivery of motor vehicle Toyota Hilux Extended Cab 2.8 4x4 Manual by respondent to the applicant within five days of the grant of this order.
- b. The respondent pays the cost of suit.

Messrs AB & David, applicant's legal practitioners

Messrs Mutamangira & Associates, respondent's legal practitioners