

REPORTABLE(33)

**ECONET WIRELESS (PVT) LTD
V
(1) TRUSTCO MOBILE (PROPRIETARY) LTD (2) TRUSTCO GROUP
INTERNATIONAL (PROPRIETARY) LTD**

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GARWE JA
HARARE, JUNE 26, 2012 & SEPTEMBER 26, 2013**

A P De Bourbon SC, for the appellant

T Mpfu, for the respondents

GARWE JA: On 25 July 2011, the High Court at Harare granted an order in the following terms:

“FINAL RELIEF SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

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 such a 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”.

Dissatisfied with the order, the appellant filed a notice of appeal with this Court. In essence the appellant seeks an order setting aside the decision of the court *a quo* and substituting it with one dismissing the application with costs.

BACKGROUND

Econet Wireless (Pvt) Ltd (“the appellant”) is a mobile network operator carrying out its operations in Zimbabwe. On 17 August 2010 the appellant concluded an agreement with Trustco Mobile (Proprietary) Ltd, (“the first respondent”), a Namibian based company and subsidiary of Trustco Holdings, whose core business is micro-insurance, financial services and the provision of various wireless application services through mobile telephony. In terms of the agreement, the first respondent was to provide certain software and support services to facilitate the provision of free life cover to Zimbabwean cellular phone users and customers of the appellant against the purchase of cellular airtime from the appellant. In terms of the agreement life cover was to be underwritten by First Mutual Life Assurance Company of Zimbabwe (“First Mutual”) at no cost to the appellant’s customers but against payment of a fee by the appellant to the first respondent calculated in terms of the agreement. First Mutual was to underwrite life cover against payment of a premium which was to be subtracted from the amounts due to the first respondent by the appellant. The project came to be known in Zimbabwe as “Ecolife”

The project was to be facilitated by a transaction facilitation system, which allowed communication between users seeking insurance, their mobile service provider and insurance underwriter. The system would record all the transactions that took place. A subscriber would only be entitled to life cover if he purchased airtime in excess of three dollars over a period of a month. For life cover to be retained, further airtime of more than three dollars had to be purchased. All subscribers who spent more than three dollars would then be accepted for insurance by First Mutual.

The project was presented on the basis that it would result in a substantial increase in the appellants' airtime sales. It was a term of the agreement that the same was to endure for an initial period of eighteen months and that the appellant was to refrain from performing an act contesting, impairing any part of the rights and infringing, copying, duplicating or passing off any of the first respondent's rights. It was also a term of the agreement that in the event of a breach not remedied within fourteen days of notice of such breach, the innocent party was entitled to cancel the agreement without prejudice to any other rights it may have had.

In February 2011, a dispute arose in regard to the first respondent's entitlement to certain royalties. Whilst the appellant agreed to pay a portion of the royalty fee, it however maintained that no fees would be paid in respect of customers whose details were not completely captured. On 26 May 2011, the appellant wrote to the first respondent also expressing its concerns over what it regarded as violations of the agreement by the first respondent. What happened thereafter is what gave rise to the proceedings the subject of this appeal.

On 31 May 2011, the first respondent sent a letter to the appellant the contents of which triggered the dispute that is the subject of this matter. That letter reads, in relevant part:

“The current situation is unbearable. Econet as a registered insurance broker, is holding out to 1.85 Million subscribers that they in fact have life insurance while the true state of affairs is that the insurer is not obliged to pay any claim while its premiums are outstanding. Trustco cannot be associated with such a state of affairs.

Therefore be advised that all obligations of Trustco will be suspended 3 June 2011 at 12h00 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 agreement”.
(the underlining is for emphasis).

The appellant responded the following day, 1 June 2011, in the following terms:-

“We acknowledge receipt of your letter dated 31st 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 per month. Those subscribers who buy airtime amounting to \$3, but do not buy any additional airtime are not entitled to cover. Consequently, no royalties are payable in respect of such subscribers”. (the underlining is for emphasis)

In a letter dated 3 June 2011, the day it had threatened to suspend all obligations if all overdue payments were not received, the first respondent wrote in the last paragraph thereof:-

“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”.

The appellant, in a letter dated 5 June 2011, stated:-

“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.
.....”

The appellant further advised that in view of the decision it had taken on the matter, it had commenced the steps necessary to discontinue the use of the Trustco Mobile Concept and would not use the system with effect from 14 June 2011.

On 5 June 2011 the appellant severed links with the first respondent’s system. By letter dated 8 June 2011, the first respondent’s lawyers, Messrs *Rudolph Bernstein & Associates* wrote to the appellant advising that the letter of 31 May 2011 indicating an intention to cancel the agreement was never intended to constitute an invitation to the appellant for the consensual termination of the agreement and that by purporting to accept such termination, the appellant’s conduct constituted an attempt to repudiate the agreement. The letter further made it clear that the first respondent would not accept such repudiation and that it had no intention of cancelling the agreement pending the resolution of the dispute between the parties. The letter further gave the appellant until 9 June 2011 to restore all links failing which urgent injunctive relief would be sought.

As a result of this impasse, the first respondent filed on 24 June 2011 an urgent chamber application in the High Court in which it sought the relief in the terms already indicated.

After hearing argument, the court *a quo* made the following findings:

- (a) That a reasonable explanation had been tendered for the delay in the filing of the application and that the matter was urgent.
- (b) That the relief sought in the interim was restoration of the status *quo ante* and on the return day a show cause why the first respondents' rights should not be preserved pending determination of the dispute by arbitration. In other words the relief sought on the return day was dissimilar to the interim relief sought.
- (c) That the requirements for an interdict had been met and in particular the balance of convenience favoured the respondents.
- (d) That the notice to terminate issued by the first respondent was in the future and not *ex nunc* and therefore invalid. In the circumstances there was no cancellation which the appellant could note and accept and consequently the agreement remained valid.

Consequent to the above findings, the court *a quo* granted an order in terms of the draft filed. That order is the subject of the present appeal.

It is perhaps pertinent to mention at this juncture that the first respondent thereafter successfully applied for an order allowing execution notwithstanding the noting of the appeal. From the submissions made by counsel, it is apparent that the parties have been engaged in arbitration proceedings pursuant to the order granted by the court *a quo*.

The appellant has attacked the decision of the court *a quo* on several bases. Since a point *in limine* has been taken in respect of the propriety of the notice of appeal itself, it becomes necessary to quote the grounds of appeal *in toto*. The appellant's grounds of appeal are:

- “1. The learned Judge in the court a quo erred in fact, and at law by finding that the matter was urgent and in so finding, failed to pay due regard to the background to the matter, the activities of respondents prior to the filing of the application, to the submissions made and numerous authorities cited by appellant and to the matters raised by appellant in its opposing papers.
3. The learned Judge in the court a quo erred in fact and at law in finding that the relief sought in the amended provisional order did not suffer from the same defect as the provisional order originally filed and erred in finding that the interim and final reliefs prayed were not the same or not substantially similar.
3. The learned judge in the court a quo erred in failing to appreciate that by granting the interim relief as amended, the order granted has the effect of a final order.
4. The learned judge in the court a quo erred in fact, and at law by failing to appreciate, and disregarding case authorities drawn to his attention that the process of arbitration to which the final relief prayed for refers relies (sic) on an arbitration clause in the agreement which does not oblige the parties to have any dispute determined by the process of arbitration and in so finding took away the appellant’s discretion to adopt other dispute resolution methods that are permissible at law, and under the agreement.
5. Having regard to the hostility between the parties that was evident on the papers, the protests by appellant’s subscribers over abuse of appellant’s system through unsolicited messages sent by the respondents, the fixed term nature of the contract between the parties, and the declaration by respondents herein that they did not wish to honour their side of the contract, the learned judge in the court a quo erred in finding that respondents had established all requirements for the grant of a temporary interdict and in particular erred in finding:
 - 5.1 that respondents fear that appellant had infringed its concept was well grounded, such finding having been erroneously arrived at in view of appellant’s averment that such infringement was not in fact possible because appellant does not have access to the source code of respondents system
 - 5.2 that the balance of convenience favoured the granting of the interdict, and
 - 5.3 that no other adequate remedy was available to the respondents.
6. Having regard to the same factors referred to in paragraph 5 above, the learned Judge in the court a quo erred in exercising his discretion to grant specific performance of the agreement in all the circumstances.
7. Generally, the learned judge in the court a quo did not apply himself to the facts of the matter before him as a result of which he made the following findings of fact that are not supported by the facts of the matter before him namely:

- 7.1 That the agreement between the parties required first respondent to procure free life cover for the appellant's subscribers from First Mutual Insurance Company when the agreement contained no such requirement at all, and the facts before the judge showed that the first respondents would not have been able to do so as it was appellant that sought and obtained approval from the Commissioner of Insurance to obtain insurance cover for its subscribers and pay for such cover on behalf of its qualifying subscribers.
- 7.2 That the "business model for the provision of free life cover as against the purchase of airtime amounts to an intellectual property" when the agreement between the parties did not so provide.
- 7.3 That "copyright and international patent had been applied for" when the agreement stipulated falsely that first respondent already was a holder of International patent over the "Trustco Mobile Concept", and the undisputed facts on record showed that such patent had been sought and declined on the basis the Trustco Mobile Concept was not novel and was thus not patentable, facts that first respondent kept hidden from appellant.
- 7.4 That "substantial revenue running into millions of US dollars was reaped from it (the system) to the benefit of the three parties to the agreement" thereby adopting first respondent's bald and disputed assertions without question and in the absence of evidence to that effect.
8. More specifically, the learned judge in the court a quo based his judgment on the letter dated 31 May 2011 written by the first respondent and found that the contents thereof was a mere expression of an intention to terminate the agreement after 14 days, which intention first respondent was entitled to withdraw on the following selective quotation of the first respondent's letter of 31 May 2011:

"Therefore be advised that all obligation of Trustco will be suspended on 3 June 2011 at 1200 hours Namibian time if all overdue amounts, of which you have been advised, are not received by thenKindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from the date hereof Trustco will deem the contract cancelled in terms of clause 17.1 of the main agreement."

Had the learned judge a quo considered the full text of the relevant part of the letter, which reads as follows:

"Therefore be advised that all obligations of Trustco will be suspended on 3 June 2011 at 1200 hours Namibian time if all overdue amounts, of which you have been advised, are not received by then."

We expect yourselves to appraise the Postal & Telecommunications Regulatory of Zimbabwe (Potraz), the Insurance and Pension Commission as well as the Reserve Bank of the status quo of Eco Life with immediate effect. On Monday 6 June 2011 Trustco will advise the Zimbabwean Press

and its shareholders via SENS of the status quo of Ecolife as required by the regulatory environment Trustco operates in.

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

he would have come to the inevitable conclusion:

- a. that the letter was an unequivocal expression by first respondent of an intention not to discharge its obligations under the agreement with effect from 3 June 2011 prior to the expiry of the 14 days, and
- b. that such conduct at law constitutes anticipatory breach of contract, or repudiation of contract from which first respondent was not entitled to approbate particularly as such repudiation was accepted and acted upon by appellant in notifying the regulatory authorities and its subscribers of the situation before the 3 June 2011, and proceeding to disconnect first respondent’s system from its network.
- c. that such repudiation had been accepted by appellant in writing, or by the appellant’s conduct in disconnecting first respondent’s system from its network.

The learned judge in the court a quo thus erred both in fact and in the application of the law.

9. The learned judge in the court a quo erred in fact, and at law by rejecting the submission that the facts of the matter before him related to repudiation of contract, or anticipatory breach and was thus distinguishable from the case of Waste Management Services (Pvt) Limited that he relied upon in his judgment.

10. The learned judge in the court a quo erred in fact and law in failing to attach weight to various threats by first respondent to suspend its obligation under the contract and by creating the impression that the Trustco Mobile Concept worked flawlessly for nine months when the facts on the record showed repeated failures that were well documented and were not disputed.

11. In any event, the learned judge in the court a quo erred in granting relief to the second respondent in the absence of a finding that second respondent has a substantial interest in the matter particularly as the second respondent was not a party to the agreements between the parties in this matter.”

In their heads of arguments the respondents also took a number of points *in*

limine. Most were not persisted in save for two. These are:

- (1) Whether the grounds of appeal are concise and if not whether the appeal is fatally defective for that reason.
- (2) That the appeal is not directed at the order but the reasoning of the court *a quo*.

I turn to deal with the above issues as well as the others that arise from the papers.

WHETHER THE NOTICE OF APPEAL IS LACKING IN PRECISION AND THEREFORE NULL AND VOID.

Rule 32 of the Rules of the Supreme Court, 1964 requires that the notice of appeal shall state the grounds of appeal concisely.

The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not, it is a nullity and cannot be condoned or amended. See *Jensen v Acavalos* 1993 (1) ZLR 216 (S).

I have, earlier in this judgment, cited verbatim the grounds of appeal filed by the appellant. Whilst one must accept, as I do, that some of the grounds are sufficiently clear to enable the respondent to appreciate the basis upon which the order of the court *a quo* is sought to be impugned, there can be no doubt that grounds 7 and 8 in particular offend against the requirement that these must be clear and concise. I am inclined to agree with remarks by the respondent that:

“There is nothing concise about these grounds of appeal..... The grounds stretch over five pages and contain in certain instances quotations from letters exchanged between the parties.

..... There is indeed a difference between the grounds of appeal and the heads filed for this appellant, the difference being that the heads are a lot more concise than the grounds of appeal.”

Indeed Mr *De Bourbon* for the appellant, conceded that it was unnecessary to quote in the grounds of appeal passages from the correspondence exchanged between the parties.

I am satisfied that grounds seven and eight are not clear and concise. In this regard I can do no better than to quote the remarks of KORSAH JA in *The Master of the High Court v Lilian Grace Turner* SC 77/93 in which the learned Judge of Appeal stated at p 1 of the cyclostyled judgment:

“... the prolixity of each ground of appeal offended Rule 32 of the Rules of the Supreme Court, which requires that “the grounds of appeal shall be set forth concisely” in separate numbered paragraphs. For example, the first ground in the notice of appeal scans two foolscap pages and, as well as being unnumbered, is argumentative.

.....It goes without saying that by concise is meant brief, but comprehensive in expression.....”

Attention is also drawn to the decision of this Court in *River Ranch v Delta* SC 38/10.

Whilst ground 1 is somewhat vague one can discern that what is attacked is the decision by the court *a quo* to decide to hear the matter on the basis of urgency. I would give the appellant the benefit of the doubt in so far as this ground of appeal is concerned.

In so far as ground 7 is concerned, as there has been no compliance with the Rules, it becomes inevitable that it be struck off from the notice of appeal. The first two

paragraphs of ground 8 sound like heads of argument. That portion of ground 8 must also be struck off with the result that that ground will read:

“more specifically, the learned judge should have found:-

- (a) that the letter was an unequivocal expression by the first respondent.....”

WHETHER THE APPEAL IS DIRECTED AT THE REASONS RATHER THAN THE ORDER.

That an appeal must be directed at the order made and not the reasons thereof is now well established. The authority for this proposition, if any is required, is The Civil Practice of the Supreme Court of South Africa by Herstein & Van Winsen, 4th ed at p 868-9; *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (S) 124C.

In the *Chidyausiku & Nyakabambo* case (*supra*) what was sought to be challenged was not the order but the reasoning that led to the order. There was no request that the order made consequent to that reasoning should be set aside. I am satisfied that the principle enunciated in the above case is in general correct although recently I had occasion to suggest in *Alterm Enterprises (Pvt) Ltd t/a Ruwa Furnishers v John Sisk and Son (Pvt) Ltd* SC 4/13 that there may well be instances, such as where a cross appeal is noted, where it might be necessary to attack the reasoning itself rather than the order.

The circumstances of the present case are in my view different. As Mr *De Bourbon* correctly pointed out, it is the order that is challenged but in order to do so the reasoning of the learned judge is challenged as the basis of the challenge to the order. At the end of the day the appellant would want to have the order set aside.

It seems to me that the principle that comes out in the case of *Chidyausiku v Nyakabambo* is not always fully appreciated, even amongst lawyers. That case is not

authority for the proposition that in an appeal one should not attack the reasons for the order. What that case says is that an appeal should be directed at the order and not simply the reasons. Quite clearly if the intention is not to have the order interfered with in any way, then no purpose would be achieved by attacking the reasons thereof. It goes without saying that in order to attack the order made one must attack the reasoning process leading to the order. In other words in order to attack the order made, one must attack the findings made that justify the order made.

I am satisfied in the present case that the appeal has sought to attack the order given but in order to do so has attacked the reasons thereof. There is nothing wrong with such an approach.

This point *in limine* must therefore fail

THE QUESTION OF URGENCY

It is common cause on the papers that the urgent application filed by the respondents was only filed on 22 June 2011, almost three weeks after the events giving rise to the dispute had occurred.

It is the appellant's contention that the delay in filing the application was inordinate and that the court *a quo* therefore erred in deciding to hear the matter on the basis of urgency.

In deciding to hear the matter on the basis of urgency, the court *a quo* considered a number of factors. It considered the fact that the respondents, who are

Namibian-based Companies, had had to brief their lawyers on the highly technical aspects of the Trustco mobile system, that the services of a South African advocate experienced in intellectual property-related issues had to be sought, that there was need to obtain advice across three jurisdictions and in particular on the procedural and substantive issues applicable to the law in Zimbabwe, that thereafter trips had to be undertaken by the first respondents' managing director and a South African lawyer to Zimbabwe to consult with Zimbabwean-based lawyers. The court *a quo* was of the view that the explanation given for the delay was not only reasonable but was also understandable. The court further found that the matter was urgent.

It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of a discretion. It follows from this that this Court has very limited grounds upon which it can interfere with the exercise of such a discretion. Various decisions of this Court have stressed the point that unless the inferior court makes a mistake on the law or the facts, acts upon a wrong principle, allows extraneous considerations to influence its decision, fails to take into account relevant facts or more generally makes a decision that is irrational, an appellate court would have no basis for interfering with the exercise of discretion in such a situation.

The position is now settled that what constitutes urgency is not only the imminent arrival of the day of reckoning but also, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the Rules.

It is the submission by the appellant that it being common cause that the respondents had taken three weeks to file the urgent application, the court *a quo* erred in deciding to hear the matter on the basis of urgency. It is not suggested that the court misdirected itself in any other way or that its decision is irrational.

It seems to me that on the facts the matter was urgent. The delay in filing the explanation was explained satisfactorily. I find no basis upon which the decision by the court *a quo* to relate to this matter on the basis of urgency can be impugned.

This ground of appeal must also fail.

WHETHER THE INTERIM AND FINAL RELIEF SOUGHT ARE THE SAME

It is important at this stage to highlight the fact that the appeal to this Court is against the provisional order sought and granted by the court *a quo*. The agreement between the parties has since run its course and therefore the order sought on the return day no longer arises.

It is the appellants' submission that the court *a quo* erred in finding that the relief sought in the amended provisional order did not suffer from the same defect as the provisional order originally filed and further erred in finding that the interim and final reliefs sought were not the same or substantially the same. In particular the appellant has submitted that the court *a quo* erred in granting a provisional order which is final in effect and that consequently the respondents lost the incentive to have the provisional order so granted confirmed as it gave them final relief.

It is correct that in general terms a court should not grant interim which is similar to or has the same effect as the final relief prayed for. The reason for this is obvious. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be, on the return date. Indeed in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H), the High Court slammed the tendency by some litigants to seek the same relief both as a provisional and final order. The court stated at p 193A-C:

“The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it another way. If, by way of interim relief, the applicant had asked for a postponement of the election pending the discharge or confirmation of the provisional order she would not in that event gain an advantage over the respondents, because the point she wanted decided would have been resolved before the election was held. But, if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election will be conducted on the basis that is unlawful to wear T-shirts emblazoned with party symbols and slogans. Thereafter it would be fruitless for the respondents to establish their entitlements to wear such T-shirts. Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities”.

I would certainly agree with the above remarks. Although the learned judge in that case did not suggest that such a defect renders an application a nullity, it seems to me that, whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the application is not therefore urgent and that it should be dealt with as an ordinary court application. There may also be cases where the court itself, as it is empowered to do, may amend the relief sought in order to make it clear that what is granted is interim protection whilst the final order sought would be the subject of argument on the return date. Rule 240 of the High Court Rules permits a court,

after hearing argument, to vary an order sought. It is this power to grant an order that is consistent with the facts which a court can use in order to obviate a situation where final relief is granted by way of a provisional order.

The order granted in the interim was to restore the internet links and to ensure the protection of the respondents' rights in the concept. The order obliges the parties during that limited time to perform in terms of the contract. In other words the provisional order merely restored the *status quo ante*.

On the other hand the order to be confirmed or discharged on the return date was to operate in contemplation of and pending the process of arbitration. It also sought to cast a broad obligation on the appellant not to conduct itself in a manner inconsistent with the agreement. In other words, on the return date, the respondent would have been required to show not only why the *status quo ante* should be confirmed but also that it was entitled to interdict the appellant from acting in a manner which might interfere with the broader demands of the agreement.

In my view the situation can be described in a more succinct manner. In the interim the *status quo ante* was to be restored. On the return day, and only if the respondent proved that there was a binding agreement still in force and consequently that the parties were obliged to go for arbitration, would the order be confirmed. In other words if on the return day the appellant proved that the agreement had terminated or that the dispute was not subject to arbitration, the provisional order would be discharged. The mere restoration of the links was not to be panacea for the respondents' problems. At the end of the day the agreement was about the payment of money and this was not going to happen if the appellant

sat back in the hope that it had achieved through the provisional order what it required by way of final order, the very situation which *Kuvarega v Registrar General & Anor* (supra) cautions against.

In all the circumstances therefore, I am of the view that the interim relief prayed for did not have the same effect as the final order sought.

Accordingly this ground of appeal must fail.

WHO BETWEEN THE PARTIES REPUDIATED THE AGREEMENT AND WHETHER THE APPELLANT LAWFULLY TERMINATED IT

As correctly found by the court *a quo*, this is the axis of the matter between the two parties.

In his submission Mr *De Bourbon* contended that on a proper reading of the letters of 31 May 2011 and 3 June 2011 from the first respondent's group managing director, it is clear that the first respondent intended to resile from its obligations in terms of the agreement. That anticipatory or actual breach required the appellant to make an election either to accept the termination or to enforce the agreement. The appellant could have said "we do not accept your suspension of the contract and we hold you to it". Instead the appellant, firm in its conviction that it would not pay the disputed amounts, accepted the termination. Whether or not the termination by the respondent was valid or not was not relevant. Once the appellant accepted the repudiation this brought the agreement to an end. There would have been no further continuing obligations and the order made by the court *a quo* would therefore have been wrong. Whether or not the notice was to terminate the contract in future was irrelevant.

Mr *Mpofu*, in his submissions, argued that it was the appellant that sought to repudiate the agreement. He accepted that repudiation is a species of anticipatory breach and that the innocent party has an election either to resist and sue for specific performance or alternatively accept the repudiation which then brings the contract to an end. It was the appellant in this case which sought to repudiate. The respondent did not accept the repudiation. Further he submitted that as the threat to terminate the agreement by the respondent was not *ex nunc* but was to take place at a later date, and as the issue before the court was whether a *prima facie* case had been established, the court correctly granted the provisional order.

It is correct that in determining whether a party has repudiated a contract, the test to be applied is whether the party has acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. It is also correct that repudiation is a species of anticipatory breach. See *Chinyerere v Fraser* No 1994 (2) ZLR 234 (H). Repudiation may manifest itself in a variety of ways. As stated by R.H Christie, the Law of Contract in South Africa, 3rd ed, at p 572-3,

“If it takes place before performance is due it is sometimes described as anticipatory breach and may take the form of a statement that the party concerned is not going to carry out the contract, or an unequivocal tender to perform less than is due, or an unwarranted but unequivocal refusal by a buyer to pay the full purchase price, irrespective of his true intention and the amount of any reduction that may be claimed, or the taking of some action inconsistent with the intention to perform, or by his own conduct putting it out of his power to perform ...”.

In his letter of 31 May 2011, the respondents’ group managing director wrote, *inter alia*:

“Therefore be advised that all obligations of Trustco will be suspended on 3 June 2011 at 12h00 Namibian time if all overdue payments are not received by then”.

In my view this was a clear intimation that the respondent, for the reasons given in the letter, was going to suspend all its obligations towards the appellant. The letter further made it clear that if all outstanding amounts were not paid within fourteen days of the date of the letter, the respondent was to deem the contract cancelled.

That this was an anticipatory breach there can be no doubt. The procedure to be followed by either party in the event that it was believed that a breach had occurred at the instance of the other was clearly provided for in the agreement entered into and signed by both parties. Nowhere in the agreement was the respondent entitled to suspend all its obligations within three days of giving notice to that effect. Such conduct suggested that the respondent no longer believed it was bound by the agreement previously entered into by the parties.

The position is now settled that a party in the appellant's position has an election to make. The appellant could have refused or resisted such repudiation and insisted on specific performance. The appellant, in holding the respondent to the agreement, could have *inter alia* argued that the notice of termination was not *ex nunc* and therefore invalid. Alternatively the appellant could have accepted the repudiation, such acceptance having the effect of terminating the agreement between the parties.

In its response the appellant "noted the intention to terminate the agreement and accepted" it. It is apparent from the appellant's response that it accepted the repudiation. In my view that brought the contract to an end. There were no further obligations as the contract had come an end. Therefore when the first respondent wrote on 3 June 2011 advising that on legal advice received it was not entitled to switch off the system

until fourteen working days had lapsed and that the system would remain operational until then, it was too late as there no longer was any contract in existence between the two parties, a position the appellant stressed in its letter of 5 June 2011.

The court *a quo* found that the notice to terminate the agreement was in the future and not *ex nunc*. The court also found that in the circumstances there was no valid cancellation of the agreement and that the agreement therefore remained in existence.

The court erred in coming to the above conclusion. It failed to consider the implications in our law of contract of the respondents' letter of 31 May 2011 and the response by the appellant of 1 June 2011 in which it accepted what it termed the termination of the agreement but which in fact was a repudiation of the agreement. Clearly therefore whilst *Jackson v Limly Insurance Company Ltd* 1999 (1) ZLR 381 (S) correctly stated the law when it held that a valid notice of cancellation must be exercised *ex nunc*, the issue that arises in this case is different.

I am satisfied therefore that the contract ceased to exist once the appellant accepted the first respondent's repudiation. In the circumstances the order of specific performance granted by the court was improper and ought therefore to be set aside.

Two other issues were the subject of much debate. These were whether the requirements on an interdict were met and whether the appellant could appeal against the interim order granted in favour of the respondents regard being had to the provisions of article 9 of the Model Law. In the course of the preparation of this judgment these issues exercised my mind for quite some time.

In the light of the conclusion that I have reached that the contract came to an end once the appellant accepted the repudiation, it becomes unnecessary to consider these issues.

The appeal must therefore succeed.

In the result, it is ordered as follows:-

1. The appeal is allowed with costs.
2. The judgment of the court a quo is set aside and in its place the following substituted:-
“The application be and is hereby dismissed with costs”.

MALABA DCJ: **I agree**

ZIYAMBI JA: **I agree**

Mtewa & Nyambirai, appellant’s legal practitioners

Messrs Gill, Godlonton & Gerrans, respondents’ legal practitioners.