VEGYPRO (PVT) LIMITED
versus
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 25 January 2017 & 22 February 2017

Opposed application

B Tokwe, for the applicant
J Chihuta, for the respondent

FOROMA J: This is an application in terms of which the applicant sued the respondent for relief in terms of the draft order which draft order is couched in the following terms-

> "It is ordered that
>
> 1. It be and is hereby declared that the purported cancellation and termination of the joint venture agreement is null and void, and that any such cancellation will be valid if done in terms of the following:
>   1.1 if any party wishing to resile from the joint venture gives the other party 24 months notice, in writing;
>   1.2 if any and all sums of money owed to financial institution by any of the parties has been fully paid up;
>   1.3 if the Vice Chancellor of the respondent appends his signature to a termination agreement;
>
> CONSEQUENT UPON THE ABOVE DECLARATION IT IS ORDERED THAT:
>
> 2. The respondent restores to the applicant, peaceful and undisturbed occupation of 156 Ha of arable land given to the applicant under the Joint Venture Agreement.
> 3. The respondents returns to the applicant all farming equipment, inputs and implements that is seized from the applicant.
> 4. That the respondent pays costs of suit at a legal practitioner and client scale."

The application was opposed by the respondent. The factual background to the dispute between the parties is largely common cause. It suffices to recount herein the factual background which the applicant recounted which the respondent expressly agree with and

then proceed to resolve some of the seemingly disputed facts where still constituted it is possible to do so for purposes of determining the matter.

The respondent opposed the application through an affidavit sworn to by Professor Levi Nyagura the respondent's Vice Chancellor.

In response to the substance of the applicant's complainant/claim respondent under para 4 of its opposing affidavit addresses para (s) 1-3 of the applicant's founding affidavit by indicating that no issues arose from the contents of those paragraphs. This means the factual allegations in those paragraphs are admitted. In paragraph 6 of the respondent's opposing affidavit the deponent addresses the applicant's para 5-7 and indicates that no issues arose from the contents of those paragraphs. This also means that the facts contained in those paragraphs are admitted. Paragraphs 5-7 of the applicant's founding affidavit is a substantial narrative of the background to the dispute between the parties as will be observed below. They are quoted herein below for ease of reference:

> "5. By a Memorandum of Agreement executed on the 16th of October 2009 the parties hereto entered into a joint venture agreement, ("joint venture agreement"). The material terms of the agreement are that
> 5.1. The joint venture would subsist for a period of 5 years, terminating on the 15th of October 2014;
> 5.2 The principal business activity of the joint venture would be the production of horticultural crops for export;
> 5.3 The principal place of business would be the University of Zimbabwe Farm;
> 5.4 The applicant would hold 60% of the joint venture shareholding, while the respondent holds 40%;
> 5.5 Any party wishing to resile form the joint venture would give the other party 24 months notice, in writing;
> 5.6 The joint venture would not be dissolved until any and all sums of money owed to financial institutions by any of the parties had been fully paid up;
> 5.7 For termination to be binding the Vice Chancellor of the respondent would append his signature to a termination agreement;
> 5.8 The respondent would make available 156 hectares of arable, irrigable land, as may be reviewed form time to time;
> 5.9 The respondent would provide possible accommodation on a monthly rental for the housing of the operations manager;
> 5.10 The respondent would provide any additional infrastructure as may be required to effectively deliver on the conditions of the supply agreement;
> 5.11 The applicant would make available viable supply contracts for the benefit of the joint venture;
> 5.12 The applicant would ensure that all infrastructure required to fully operate the land under the joint venture was made available;
> 5.13 The applicant would ensure that the operating capital for the operation was made available;
> 5.14 The applicant would provide overall management of the joint venture;
> 5.15 The applicant would provide all operating capital as required by the joint venture;
>
> A copy of the agreement is annexed hereto as Annexure "VS1".

> 6. Consequent upon the consummation of the joint venture agreement, and in compliance with its obligations arising therefrom, the applicant moved on to respondent's farm, and commenced the following operations-
>
> > 6.1. Implementation of 40 hectares of irrigation infrastructure, inclusive of underground irrigation pipes, hydrants, a new water boosting system, transformer, and servicing of existing boreholes;
> > 6.2 Brought in equipment on the farm, which is inclusive of planters, disc, harrows, farm trailers, tractors, irrigation pipes and other smaller farm terms.
> > 6.3 General compliance with the terms of paragraph F of the Joint Venture Agreement.
>
> 7. The respondent also perfomed its obligations by giving the joint venture unrestricted access to 156 hectares of arable land, and access to accommodation facilities for employees."

It is important to note that according to the joint venture agreement whose terms and conditions are common cause between the parties the assets that would be contributed by each of the parties to the joint venture because jointly held assets to be used for the joint benefit of the joint venture parties. Accordingly none of the parties was entitled to assert a superior claim over the said assets to the exclusion of the other during the subsistence of the joint venture. For the avoidance of doubt the 156 hectares of arable land made available in terms of the agreement was neither given to the applicant not did it remain exclusively under the control of the respondent – it was made available to the joint venture for utilisation by the joint venture parties for their joint benefit in the shares 60% to 40% as per para 5.4 above-mentioned.

Despite the respondent's admission of the factual background outlined above the respondent opposed the applicant's application. In brief the respondent opposed the applicant's application on the basis of 3 grounds indicated below:

(i) Firstly the respondent raised two points *in limine* namely:

(i) That the relief of a declaratur was misplaced as applicant was seeking a spoliation order and

(ii) Applicant erred procedurally by seeking its relief from the court by way of a court application when there are numerous disputes of fact that are not capable of resolution on the papers.

The points *in limine* raised in the notice of opposition had no merit for the reasons below.

Regarding the propriety of the relief sought the respondent submitted that in its view the correct relief that the applicant ought to have sought was a spoliation order because para 2 and 3 of the draft order seeks restoration of the assets that the respondent had despoiled the

applicant of. It is not within the respondent's right to propose the relief that best suits its adversary. The respondent's duty is to demonstrate that the relief sought is not available both on the facts and at law. It should be noted that the point *in limine* was not persisted with when the respondent addressed the applicant's application on the merits.

In regard to the second point *in limine* taken namely that the matter was riddled with numerous disputes of fact which could not be resolved on the papers i.e. without the need for viva voce evidence. The respondent did not highlight the areas where dispute of facts existed which it perceived could not be resolved without evidence. It is worth noting that this objection was not persisted with in the respondent's heads of argument nor was it raised in the oral submissions. The court shall accordingly proceed on the basis that the objection was abandoned. In any event once the factual background was conceded nothing remained contentious save the conclusions on matters of law as will be demonstrated below

The main argument that the respondent relied on to shoot the applicant's claim was that the Joint Venture Agreement was varied by agreement. In this regard the respondent referred to annexure VS2 to the founding affidavit. VS2 is a letter which was written by the Deputy Bursar Projects one F.T. Mandeya addressed to the Directors Vegypro P/L. After salutation the letter reads as follows:

> "I write to inform you that at its meeting held on the 1st of September 2010 the University Farm Business Committee resolved among other things.
>
> (i) that the current lease agreement between yourselves and the University Forum be amended as it was noted that it had been drawn up during the period of economic crisis.
>
> (ii) That the University Farm is charging a minimum of US$500 per hectare per year for land allocated to your company as per agreement.
>
> (iii) That the substance of agreement has to be improved with the improved economic outlook.
>
> Thank you.
>
> Yours sincerely".

The respondent's position as is apparent from the letter quoted above is that the respondent was proposing a variation of the lease agreement to include a rental charge of $500,00 per hectare per year. The respondent argues that the variation of the joint venture agreement to a lease agreement was accepted by the applicant in its letter dated 11 November 2010 per annexure VS3 based on the following extract therefrom – "it is for this reason that

we think USD 500 per hectares is huge given the amount of infrastructure that needs to be invested. We would like to propose a rate of USD300,00 per hectare".

The applicant's position *ex facie* the answering affidavit is unequivocally that there was never any variation of the joint venture agreement and this for the following reasons:

"(i) applicant was not party to the meeting which allegedly resolved to vary the joint venture agreement thus could not have consented to the variation of the terms of the joint venture agreement.

(ii) the response per letter dated 11 November 1010 quoted above can by no stretch of imagination be understood to be an acceptance of a variation of the joint venture agreement. The proposed amendment referred to in the respondent's letter was not accepted by applicant which made a counter proposal of $300.00

The applicant is correct when it says in its answering affidavit – Simple principles of contract entail that when an offeree makes a counter offer to an offer made by an offeror the terms that would have been proposed by the offeror are in actual essence rejected meaning a contract does not result – see *General Principles of Commercial Law* 6th ed by Peter Harenga and Michelle Harenga where at p 57 it was highlighted that:

> " If the offeree does not accept the offer exactly as it was made but makes a counter offer, the offeree by implication rejects the offer and the offer is extinguished. The counter-offer is also the making of a new offer."

R H Christie's *The Law of Contract in South Africa* 2nd ed p 69 under the heading <u>Acceptance Must Correspond with offer</u> has the following to say:

> "One aspect of the rule that acceptance must be clear and unequivocal or unambiguous is that the acceptance must exactly correspond with the offer. Yes but ….. does not signify agreement, so any attempt to vary the terms of an offer while purporting to accept it will destroy the validity of the acceptance which will normally best be interpreted as a counter-offer." See *Joubert* v *Enslin* 1910 AD 6 at 29.

It is clear therefore that the suggestion that the joint venture agreement was varied and converted into a lease agreement is not legally tenable. Besides the manner of termination of the joint venture was made a term of the agreement – it was subject to 24 calendar months' notice in writing. The respondent did not comply with the notice provision for purposes of termination of the joint venture agreement.

The gravamen of applicant's complaint as filed with the court is that the respondent wrongfully and unlawfully unilaterally terminated the joint venture agreement contrary to the

express provisions of the agreement. Although the respondent attempted to suggest that the joint venture agreement was varied by mutual consent it dismally failed to prove so. An attempt by a party to unilaterally vary a term of a contract without the consent of the other party is impermissible and would be a clear breach of the agreement.

In *Kundai Magodora and others* v *Care International Zimbabwe* SC 24/14 the Supreme Court stated the position quite categorically when it held that – "in principle it is not open to the court to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted even if they are shown to be onerous or oppressive".

The applicant's claim is articulated well in its heads of argument where the applicant reiterates that the respondent should be obliged to carry out its obligations under the contract and that the applicant has a right to demand that the respondent perform its undertaking in compliance with the general rule on specific performance as stated by INNES JA in *Farmers Co-op Society* v *Berry* 1912 AD 343 at 350 where the learned judge stated as follows:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party so far as it is possible a performance of his undertaking in terms of the contract." See also *Benson* v *SA Mutual Life Assurance Society* 1986 (1) SA 7 (A) *Haynes* v *King Williamstown Municipality* 1951 (2) SA 371, *Mohr* v *Kriek* 1953 (3) SA 600 (SR), *Ncube* v *Mpofu & Others* HB 69-06 and *Dube* v *Bopse Land Developers (Pvt) Ltd* HB 135/06.

It is settled law that parties who have covenanted that their agreement should only be terminated in a particular manner are bound by their agreement on how to terminate their agreement. Any other way will not be good enough and unless condoned will be null and void – *see Minister of Public Construction and National Housing* v *ZESCO P/L* 1989 (2) ZLR 311 at 9 316 where KORSAH JA had the following to say –

> "where parties have agreed upon a procedure for terminating an agreement they are bound by the provision spelling out those procedures as if they have been imposed on them by law, and a departure from the agreed procedure will not result in an effective termination of the contract."

See also *Warren Park Trust* v *Pahwaringira and Others* HC 159/06 where the following is highlighted-

> "On the papers before me, I am satisfied beyond question that the respondents' purported cancelation of the written contract was a nullity and off no force or effect in so far as they failed to observe the cancellation procedure laid down in the contract. More particularly in that they failed to give the requisite 14 days' notice to cancel the contract on account of the alleged breach."

Indeed where a termination of an agreement which is required to be achieved by following specific stipulated procedures is sought to be achieved contrary to such prescribed procedures such termination is null and void and consequently of no force or effect. See *MacFoy* v *United Africa Co Ltd* 1961 2 ALLER 169 PC at 1172.

In casu the respondents accept unreservedly that the Joint Venture Agreement provided the procedure for its pre-mature termination i.e. that 24 calendar months' notice in writing must be given to the other party by the party seeking to terminate the agreement among other things. The respondent did not give any such notice neither did it observe the other conditions as prescribed in the agreement as indicated herein above. This much is not in dispute. The attempt by the respondent to suggest that the joint venture agreement was varied by mutual agreement is not sincere neither is it supportable on the facts or at law. The respondent's conduct is clearly a wrongfully breach of the agreement which the applicant has not accepted. The applicant rejected the breach and has elected to bind the respondent to the agreement by suing for specific performance which election is available to it at law – see WATERMEYER AJ in *Segal* v *Mazzur* 1920 CPD 634 at 644 – 5.

When on 24 September 2010 the respondent purported to unilaterally vary the terms of the joint venture by purporting to convert the joint venture to a lease agreement the applicant rejected the respondent's breach and sued for specific performance. During the hearing and as a result of an exchange with the court the applicant's counsel applied to amend its draft order which the court granted as there was no prejudice that the court considered respondent stood to suffer.

Re: Costs of suit on the higher scale

The applicant has prayed for costs on a higher scale of legal practitioner and client. There is every justification for this level of costs. The opposition to the applicant's relief was not supportable both on the facts and at law. The respondent knew well that it unilaterally sought to terminate the agreement without following the procedures agreed upon and instead put up lame excuse for resiling from an otherwise binding agreement. The respondent's conduct was totally oblivious of the consequences on the applicant despite the fact that the respondent knew well that the applicant had borrowed money to finance the joint venture (which amount remained outstanding) and despite a clear provision in the joint venture agreement that the agreement shall not be dissolved until all sums of money owed to financial institutions by any of the parties had been fully paid up.

It was on the basis of the foregoing reasons that at the end of argument I delivered an ex-tempore judgement granting the applicant an order in terms of the draft as amended with costs on the higher scale of legal practitioner and client.

Bruce Tokwe Commercial Law Chambers, applicant's legal practitioners
Ziumbe & Partners, respondent's legal practitioners