

REPORTABLE (127)

**ZIMBABWE POWER COMPANY
v
INTRATREK ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
MAKONI JA, CHIWESHE JA & MUSAKWA JA
HARARE: 28 JUNE 2023 & 1 DECEMBER 2023**

D. Tivadar with *C.J. Mahara*, for the appellant

L. Uriri with *S.M. Hashiti*, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, dated 11 January 2023, wherein it declared that the procurement contract entered into between the appellant and the respondent was valid and binding between them. The court *a quo* proceeded, consequently, to grant an order of specific performance of the contract. It also dismissed the appellant's counter claim and ordered that the appellant pays the respondent's costs in the claim in reconviction. **Judgment No. SC 12/23 Civil Appeal No. SC 38/23**

Aggrieved by the decision of the court *a quo*, the appellant has noted the present appeal.

THE FACTS

On 23 October 2015, the parties entered into a Public Procurement Engineering, Procurement and Construction Contract (the contract). In terms of that contract, the respondent was required to construct one solar Photovoltaic Power Station to the capacity of 100MV in Gwanda (the project). A dispute arose during the implementation of the project. The respondent issued summons in the court *a quo* seeking the following relief:

- “1. An order declaring that the procurement contract for the Engineering, Procurement and Construction (EPC) of the 100 MV Gwanda Solar Project (ZPC 304/2015) between the parties as amended is valid and binding between the parties.
2. Consequent to the declaration of the validity of the EPC contract, an order for specific performance.
Alternatively,
Damages in the sum of US\$ 25 000 000-00 (twenty five million United States dollars) for repudiatory breach of the EPC contract by the defendant.
3. Costs of suit at the attorney and client scale.”

In its declaration the respondent amplified its claim as follows: **Judgment No. SC 127/23**

The agreed contract price for the project was US\$ 172 848 597-60 exclusive of taxes. The respondent was to secure and facilitate the funding of the project as well as bear most of the risks associated with the construction of the plant up to the point of commissioning. The contractual terms were derived from the FIDIC Silver book (General Conditions of Contract for EPC/Turnkey Project) 1999, First Edition. The General Conditions were applicable to the extent that they were amended by the Particular Conditions of contract agreed to by the parties. The appellant was to borrow the funds sourced by the respondent in its name, superintend over both the construction works and facilitate payments due to the respondent. The appellant would only take over the risk and liability in the power infrastructure upon successful completion of the solar plant, that is, at the “turn of the key”. The commencement of the contract was subject to certain suspensive conditions which were to be satisfied or achieved by both parties within a period of 24 months reckoned from 23

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October 2015, the date of signature of the contract. The period within which the suspensive conditions were to be satisfied (the Conditions Precedent Satisfaction Period”) could be extended by a period of 6 months through an amendment to the contract. Such extension was to be done before the expiry of the tenure of the conditions precedent satisfaction period. Beyond the conditions precedent satisfaction period, either party became entitled to terminate the contract, provided that the party seeking to terminate the contract was not responsible for the delays in the fulfilment of the conditions precedent.

Before the expiry of the conditions precedent satisfaction period on 23 October 2017, the parties agreed to enter into an addendum to the contract, the terms of which would allow the appellant to pay some of the respondent’s subcontractors directly in order to carry out the pre-commencement works at the project site. The arrangement was in anticipation of the commencement of the contract. The addendum was executed on 21 September 2017, prior to the expiry of the conditions precedent satisfaction period set for 23 October 2017. The addendum set different timelines for the conclusion of the pre-commencement works. The appellant undertook to pay for that work. The appellant, however failed to pay for such works and as a result, these were not executed at all or were not executed timeously.

The appellant sought to extend the conditions satisfaction period by a period of six months on 29 November 2017. The extension was to be reckoned from 23 October 2017. The respondent objected to the extension which it regarded as a breach of the contract, given the new terms of the addendum to the contract and the appellant’s failure to perform its obligations under the addendum. According to the respondent, the appellant unilaterally demanded that the suspensive conditions be completed on or before 23 April 2018, a demand that respondent viewed as a material breach of the express provisions of the contract.

By way of notices dated 10 April 2018, 6 July 2018 and 31 July 2018, the appellant informed the respondent that the contract had expired by operation of law. All contractual obligations between the parties were, in terms of these notices, terminated. The appellant insisted on such termination despite its admission that it had failed to perform its obligations to pay the respondent's subcontractors. The respondent further contended that the termination was also unlawful in view of the appellant's direct liability in causing delays in the fulfilment of the conditions precedent within the agreed time frames.

It was thereafter that the respondent approached the court *a quo* by way of application seeking a declaration of validity of the contract and an order for specific performance. The application was granted on 13 December 2018 under HC 8159/18. The appellant appealed that determination to this Court under SC 39/21. In the meantime, the respondent applied for leave to execute judgment pending appeal. The court *a quo* granted that application on 19 June 2019 under HC 2425/19. **Judgment No. SC 127/23
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The respondent claims that during the two year period in which the parties awaited the outcome of the appeal at the Supreme Court, the parties implemented the contract as amended and engaged in a series of meetings that culminated in the drafting of an amended and restated contract. On 13 May 2021 this court upheld the appellant's appeal and set aside the judgment of the court *a quo*. This Court determined that the matter was replete with material disputes of fact which could not have been resolved on the papers before the court *a quo*. It was for that reason that the respondent returned to the court *a quo* and instituted action procedure, seeking the same relief.

In its plea in the court *a quo*, the appellant raised two points. Firstly, it contended that the contract never took off because the conditions precedent were not fulfilled. There was thus no basis at Law for the respondent to seek the declaration of validity. Secondly, it averred that this court had dismissed the respondent's claim. It therefore pleaded *res judicata*.

The appellant also filed a counter claim seeking an order in the following terms:

- “(a) An order that the EPC contract and the Addendum entered into by the parties did not commence due to the plaintiff's failure to meet the prescribed conditions precedent.
- (b) Damages for breach of contract and misrepresentation in the sum of US\$ 96 673 236-30 (ninety-six million six hundred and seventy-three thousand two hundred and thirty-six United States dollars thirty cents.”

The matter was referred to trial on the following agreed issues:

In respect of the main claim:

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- “(a) Is the procurement contract entered into by and between the plaintiff and the defendant dated 23 October 2015 valid and binding on the parties?
- (b) Depending on the conclusion reached on the above question, did the plaintiff suffer damages, and what is the quantum thereof?

In respect of the claim in reconvention:

- (a) Was the agreement entered into by and between the parties induced by misrepresentation on the part of the plaintiff?
- (b) If the plaintiff breached the agreement, then did the defendant suffer damages as pleaded by it or at all and what is the quantum?”

At the commencement of the trial in the court *a quo* the appellant abandoned the claim in para (b) of its prayer, that is the claim for damages for breach of contract and misrepresentation action in the sum of US \$ 96 673 236. The appellant, however, persisted

with the claim for US \$ 3 330 736 -30, being the advance payment made to the respondent in respect of the pre-commencement works.

PROCEEDINGS BEFORE THE COURT A QUO

The respondent's evidence

The respondent's sole witness was its managing Director, Wicknell Munodaani Chivhayo. His evidence was summarized by the court *a quo* as follows. He told the court that when the tender for the project was flighted, the appellant had no funds for the project. For that reason, the appellant was looking for a contractor that would also assist it in raising funds for the project. The respondent's partner, CHINT, was roped into the project to bring in the required funds. He told the court that CHINT had the required financial and technical capacity to execute the project. The contract price was US\$ 172 848 597-60.

Mr Chivhayo said that the commencement of the contract was subject to the satisfaction of the conditions precedent set out in clause 5 of the contract. These included the sourcing of the funds for the project and the completion of the feasibility studies. The appellant was responsible for funding the pre-commencement works and the respondent was required to assist with the fundraising. To that end the respondent had engaged financial consultants and financial partners such as the China Exim Bank and the Ministry of Finance and Economic Development. These engagements were done before the commencement of the project. The witness blamed the appellant for the collapse of the engagements that were intended to birth the necessary financial agreements.

China Exim Bank required that the Government of Zimbabwe guarantees the loan facility. The witness approached the Ministry of Finance on behalf of the appellant. The Ministry indicated its interest to support the project and had agreed, at the witness's

suggestion, that the project be given national status. The Ministry of Finance undertook to provide the government guarantees required by China Exim Bank and had written a letter dated 10 March 2016, addressed to the Export-Import bank of China undertaking to issue a sovereign guarantee for the project in the sum of US\$147 000 000-00.

However, the government of Zimbabwe had been blacklisted for defaulting on a loan of US\$ 400 million. For that reason, the China export and credit Insurance Corporation (China Sinosure), a state funded insurance company established to support China's foreign and trade development cooperation, refused to secure the loan.

Thereafter the parties mooted other sources from which to raise capital. One of these was the proposed raising of energy bond through the CBZ Bank. This proposal had the full support of the SPB (State Procurement Board). However, the appellant was not interested even after its own Ministry directed it to pursue that route. The witness further told the court that the appellant frustrated the signing of the financial arrangements, contrary to the spirit of clause 5 (a) of the contract.

The witness had this to say about the advance payment demand guarantee. During meetings with the appellant's officials, feasibility studies had been carried out and the appellant owed the respondent funds for the work done. There was no need for such guarantee once work had been completed and payment now due to plaintiff. The advance payment received was therefore in respect of the feasibility studies that had been performed. With regards the performance security the witness said it was not provided for partly because the appellant still had some outstanding amounts still to be paid and, that, at any rate, it had not been asked for. He also confirmed that the appellants had carried out its due diligence in

terms of clause 5 (f) of the contract. Both parties' representatives travelled to China for the purpose of evaluating the respondent's partner CHINT. Both parties were aware that CHINT had successfully carried out some projects in Zimbabwe.

The witness stated that the production of the Environmental Impact Assessment was the responsibility of the appellant. It was only produced through his intervention when he directly engaged the responsible Ministry. The land for the project was also acquired through his efforts when he approached the Ministry of Lands. He confirmed that both parties had secured the necessary authorizations as required by clause 5 (f) of the contract. Only one condition remained outstanding, that is, the financing agreements.

He said that the amendments of the contract through the addendum were occasioned by the loss of time. In terms of the agreement, as re-affirmed by the addendum, the total cost of the pre-commencement works was US\$ 5 111 224-50. The respondent was supposed to contribute to that amount in the sum of US\$ 1 000 000-00, with the appellant contributing the remainder. The respondent did not pay its contribution as it was only required to perform work of an equivalent value. He said that after the payment of the feasibility studies and part of the fee for the pre-commencement works, the appellant still had an outstanding liability in the sum of US\$ 1 232 322-87 for part of the pre-commencement works carried out. The respondent's sub-contractors were to be paid from that outstanding amount.

He stated that the appellant caused his arrest by ZACC officials for non-performance of the contract. He wrote to the appellant's managing director complaining about the unfounded allegations of corruption. His arrest negatively affected the execution of

some of the works by the respondent's subcontractors. He insisted that the conditions precedent satisfaction period was extended by the parties, and yet the appellant went on to raise a criminal complaint for non-performance. He made reference to clause 5 (i) of the contract which provided that if the conditions precedent were not satisfied on or before 24 months after the date of signature of the contract, the parties should meet, and, if need be, the appellant could, in its sole discretion on or at any time before the lapse of the 24 month period, elect to extend the conditions precedent satisfaction period by a further six months. He referred to a letter from the appellant to the respondent dated 29 November 2017 in terms of which the period was extended by a further 6 months from 23 October 2017 to 23 April 2018.

The witness made reference to various correspondences between the parties and other stakeholders tending to show that the appellant was responsible for the failure to sign financial agreements during the extended period. He averred that in terms of clause 5 (i) of the contract, the appellant was estopped from relying on its own breach to cancel the contract. He said that the respondent declared a dispute between the parties in terms of the contract. The dispute was declared through a letter dated 15 January 2018. In terms of the contract the dispute was to be adjudicated by the Dispute Adjudication Board which was duly constituted. The appellant's attitude was that there was no need for the constitution of the board as the parties could meet and resolve the dispute. The respondent then sought to refer the matter to arbitration, but the appellant objected saying that it was not an arbitration matter. It was then that the respondent approached the court *a quo* for an order of specific performance, alternatively, damages. It succeeded in its quest for specific performance. The appellant appealed that decision to this Court. Pending the hearing of the appeal, the

respondent applied in the court *a quo* for an order to execute the judgment of that court pending appeal. That application was granted but the appellant did not comply with it.

In the meantime, according to the witness, the Ministry of Energy directed that the parties further engage in order to give effect to the contract. The directive was contained in a letter dated 15 June 2020. As a result, the parties prepared an amended contract which they are yet to sign. That development was seen by the witness as dispelling the notion that specific performance was no longer possible. Thereafter, various engagements were initiated by the Ministry of Energy to iron out the problems bedeviling the implementation of the contract. On 6 July 2020 the Minister of Energy wrote to the Executive Chair of ZESA Holdings intimating to the Chair that his office was required “to urgently conclude the drafting of all the pertinent agreements and financial instructions necessary for the available financier to avail the funds required to implement the project.” This letter was copied to the witness. The witness asserts that the government of Zimbabwe, through the Ministry of Energy, as the shareholder in the appellant, wanted the project to be implemented without delay. It was for that reason that the Ministry had intervened calling on both parties to implement the project. However, the appellant remained defiant. The witness indicated that in July 2020 the parties arranged a joint visit to the site. The purpose of the visit was to assess the work done and that which remained to be done since both parties were negotiating a revised contract. Thereafter, the parties prepared a report comprising pictures and video evidence demonstrating their findings on the ground. The report was jointly signed by the parties’ representatives. The appellant was represented by its project manager Mr Mugwagwa and its officials Mr Fambi and Mr Chinho. On the other hand, the respondent was represented by the witness, its project manager Mr Magweza and an official called Mr Mubviri. The witness participated in both the joint visit and in the compilation of the joint

report. The witness opined that the exercise was an indication that the contract was temporarily on hold.

The witness stated that appellant's counter claim for the sum of US \$ 3 310 736-30 was devoid of merit if considered in the context of the joint report. It was made on the premise that the pre-commencement works were not carried out, yet the report showed otherwise. The report confirmed that the appellant owed the respondent some money for work done at the conclusion of the pre-commencement works. It also confirmed that the advance payment guarantee was no longer necessary. He was adamant that the objective of the pre-commencement activities as set out in the contract were satisfied. In that regard, he was of the view that the appellant was being malicious in suggesting that the contract was not implemented at all.

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The witness justified the respondent's alternative Civil Appeal No. SC 98/23 as follows. The respondent had incurred expenses to do with the tendering process as well as the due diligence exercise when the parties had to travel to countries such as China and India. That included the cost of air fares of the appellant's personnel that had to be covered by the respondent. The respondent also claimed risk, occupational damages and damages for reputational loss occasioned by the negative publicity caused by the appellant. The witness also stated that the respondent's security guards were kicked off the project site by the appellant at a time the respondent was prepared to carry on with the project.

Under cross examination, he insisted that discussions for a new contract started in earnest in 2020 after the new Minister of Energy had assumed office. He said the Minister was unhappy over the delays, in implementing the project. The Minister was displeased with the appellant's failure to comply with CHITAPI J's order granting the

respondent leave to execute the High Court judgment pending appeal. The parties met again to discuss the way forward with no positive results. He insisted that there were financiers ready to fund the project but for the obstinacy of the appellant, a fact he communicated to the Minister. He said that the execution of the Amended and Restated Contract Agreement was not an admission that respondent had failed to perform. The idea was simply to kick start the project with the respondent required to source funds for the initial phase of 10 MW with the rest of the MW coming later as provided in the contract. He said it was the EPC contract that is sought to be enforced and not the Amended Restated Contract. The respondent had even offered to reduce the price to demonstrate its commitment to the implementation of the contract. Asked whether a guarantee was provided by the respondent as required by the contract, the witness stated that CHINT wrote to the appellant advising that they had the guarantee in place but the appellant dithered. The offer was not accepted by the appellant because it had no money. However, the appellant did make payments for the feasibility and pre-commencement works without an advancement payment guarantee. This was justifiably so because the respondent had delivered those activities. He insisted that the appellant's letters of 7 and 10 April 2018 and 6 July 2018, which confirmed the non-extension of the condition satisfactions period beyond 23 April 2018 prevented the respondent from fulfilling the conditions precedent as set out in clause 5a. This was because the appellant failed to pay the respondent's subcontractors and, as a result, the pre-commencement works could not be completed. He further stated that although the actual project had not yet commenced, save for the pre-commencement works, the respondent needed only 6 months to complete the first 10MW once it secured the necessary funding. He accepted that the respondent had revised the project costs downwards in the Amended and Restated Contract because the costs of solar products had generally gone down on the international market. He dismissed the ADB integrity report on the debarment of CHINT on the basis that the respondent was not seeking

funding from ADB. In any case, the debarment was lifted as CHINT was never found guilty of any fraudulent conduct.

Asked how the project could be implemented since the appellant did not have financial resources, he responded as follows. The respondent had presented to the appellant China Exim Bank as a willing financier in 2015. The respondent could not access the funding set aside by China Exim Bank because the appellant's shareholder owed the bank's export credit insurance adviser, Sinosure and its account was in arrears, China Exim Bank said it could still lend the money using other insurers. There were alternative funders that did not even require underwriters. The respondent introduced other local financiers such as CBZ and the African Transmission Cooperation (ATC) as prospective funders. The Ministry of Energy even approved the funding proposal by ATC in June 2020. The appellant was mandated to amend and restate the terms of the contract to give effect to the new funding model but it failed to do so. The witness said he had also approached NSSA, on behalf of the appellant, requesting assistance in raising US \$ 25 927 289. The offer was also not taken up by the appellant.

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The witness stated that the annexure to the joint report prepared during the joint visit to the site dated 13 July 2020, was part of the main report prepared by the parties' representatives. He said that the report together with the annexure was actually sent to the respondent by the appellant after the joint visit.

The appellant's evidence

The appellant called one witness, Cleopas Fambi, its assistant project manager. During the period 2015-2017 his duties included the management of the project between the appellant and the respondent. He was involved in the tendering stage, contract

negotiations and the pre-commencement works. His evidence was to the following effect. Sometime in 2013 the appellant, through the State Procurement Board (SPB) floated a tender for the construction of 3 x 100 MW photovoltaic solar plants at Gwanda, Insukamini and Munyati. The respondent was awarded the tender to construct the solar plant at Gwanda. The parties concluded the contract on 23 October 2015. The contract was to commence in full force and effect after the satisfaction of the conditions precedent stipulated in the contract. The respondent failed to fulfil the conditions precedent under clause 5 of the contract and the conditions remain unfulfilled to this date. As a result, the contract did not commence because of the respondent's failure to fulfil those conditions. He stated that the addendum to the contract dealt with the pre-commencement works listed in schedule 11 of the contract. The appellant paid for the pre-commencement works in advance. The respondent however, failed to provide the bank guarantee for the advance payments. It also failed to provide its portion that it was meant to contribute to the pre-commencement works. The respondent also misrepresented its capacity to perform the contract.

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The witness said that he was part of the joint team that visited the project site on 13 July 2020. The visit took place in the context of a proposal to implement the project in phases. The works had been partially completed on the ground. No maintenance or repairs had been carried out since July 2020. With regards the documentation attached to the joint report showing the various activities of the pre-commencement works undertaken on site and the bill of quantity amounts, the witness said that he was seeing these papers for the first time in court. He said that the amount of US\$ 2 031 230, representing the value of the ground site clearing was overstated since there was still need to carry out ripping of the top soil, clearing and site levelling. He dismissed the allegation that the appellant did not wish to implement the project, saying that the appellant's conduct was consistent with a desire to see the project

completed. It was for that reason that the appellant had paid for the pre-commencement works.

Under cross examination, the witness admitted that the appellant was a state commercial entity and therefore subject to the law governing procurement by State entities. He agreed that according to the law, the appellant's accounting officer was its managing director who was wholly responsible for the administration of the project. He conceded that he could not account for the project within the contemplation of the law as he was not the appellant's accounting officer. The accounting officer was the person with the complete records of all the transactions.

Asked whether he could provide insight on the issue of financing agreements, he stated that his insight was limited. He could not comment as to why there was no financial closure because he did not have the required information. He could also not comment on whether the appellant deliberately frustrated the financial closure as alleged by the respondent. He could not deny that CHINT had procured funding from China since he was not the accounting officer. Neither could he deny that the respondent had, as an alternative, engaged domestic funders to finance the project and that its efforts had been frustrated by the appellant's ambivalence. He could also not deny that CHINT had offered a US\$ 52 Million guarantee but the appellant had not embraced it because it did not have the required funds. He said the best person to comment would be the accounting officer since all correspondence was directed to him.

The witness admitted that the parties did not refer their dispute to a consultant or engineer because there was no disagreement on the value of the pre-commencement works carried out. The witness was also part of the team that carried out a site visit in July 2020.

The parties agreed that the fence was erected and completed. He agreed that the appellant therefore received value at the conclusion of that part of the project. He also agreed that the feasibility study had been done and completed. Repairs and maintenance works had also been carried out. Although he denied the value delivered ascribed to the pre-commencement works in the sum of US\$ 3 382 697-00 as recorded in the bill of quantities report, he conceded that he could not tell the value that had been delivered to date. Further, he could not comment on how the sum of US\$ 3 310 736-30, representing the appellant's counter claim, was arrived at. It would require the accounting officer, his team and the contractor to confirm how the figure was arrived at. He also admitted that at some point the appellant had ordered the respondent's workmen off the site.

The witness could not comment on the Ministry's directive that the project be completed. His attention was drawn to the fact that on 6 July 2020 the minister had by letter of that date communicated Government's position to the chairperson of ZESA Holdings. Another letter dated 15 June 2020 had been written to the ZESA chairperson by the minister. In it the minister had reiterated Government's desire for the parties to move with speed to implement the project without delay.

The witness could not deny that the contract was still capable of performance and that the respondent could still secure funding to achieve financial closure. He also admitted that the appellant was desirous of addressing power shortages. That desire is what had given impetus for the project.

SUBMISSIONS IN THE COURT A QUO

At the end of the trial, the parties filed written closing submissions. The respondent submitted that the only issue that remained for determination was whether or not

the contract remained valid and capable of performance. As to the counter claim it submitted that the issue to be determined was whether the respondent was liable for the advance payment made for the pre-commencement works. The respondent submitted that no evidence had been adduced to support the counter claim. The respondent submitted that it was ready to perform the contract and that it had the capacity to perform the contract. It also submitted that it was able to provide the required finances. It relied on the case of *His Holiness Acharya Swami Dasji* (1996) 4 SC 526 for that contention. The respondent argued that the onus rested on the appellant to show that performance was no longer possible. It contended that at law, where one party to a contract repudiated the agreement, the innocent party could elect to claim specific performance of the contract or damages *in lieu* of specific performance. It submitted that specific performance was in the court's discretion and that its case had to be determined on its own merits. The respondent cited the case of *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) where it was held that the plaintiff had the right to elect whether to hold a defendant to his contract and claim performance by him of what he bound himself to do or claim damages for the breach. On the other hand, the defendant did not have that right of election.

According to the respondent, the appellant did not lead any evidence to show that specific performance was impossible. It contended that the appellant could not rely on evidence in prior litigation because it had not led that evidence in the present matter.

The respondent submitted that the evidence showed that it had done enough to secure the finances required for the project but the appellant failed to come to the party. It further blamed the conduct of the respondent's shareholder, the Government of Zimbabwe, as being partly to blame for the appellant's failure to perform. The respondent dismissed the

evidence given by the appellant's sole witness as ineffectual because the witness admitted that he was not competent to testify on matters which only the appellant's CEO could shed light on. This witness was, according to the respondent, unable to give evidence proving the value of the pre-commencement work done, nor could he dispute the contention that it was the appellant that actually owed the respondent. The respondent insisted that the addendum to the contract was not a separate document running parallel to the main agreement as contended by the appellant. Rather, the addendum should be interpreted as an integral part of the main agreement. Further, the respondent contended that the appellant had frustrated the financing agreements and, for that reason, the court should deem the condition precedent to have been fulfilled in line with the doctrine of fictional fulfilment. Reliance was placed on the case of *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (A) wherein the factors to be established in order to invoke the doctrine of fictional fulfilment were set out as follows:

- (i) Non fulfilment of the condition
- (ii) The defendant's breach of his duty with intent to frustrate the fulfilment, and
- (iii) A causal link between the non-fulfilment and the defendant's intentional frustration of the fulfilment of the condition.

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The respondent averred that generally the court does not have a discretion to refuse to enforce a term contained in a lawfully concluded agreement. In determining whether or not to enforce such a term, the court will be guided by the dictates of public policy. It submitted that the evidence adduced showed that the appellant had frustrated the conclusion of financial agreements. The appellant, argued the respondent, should not be allowed to benefit from its own wrongdoing. The appellant had not placed before the court the FIDIC document despite its plea that the agreement should be read in light of the

provisions thereof. For this reason the respondent contends that the FIDIC cannot be a factor in the interpretation of the agreement.

The appellant's closing remarks were to the following effect. It submitted that Mr Chivhayo's evidence was unreliable and thus the respondent had failed to discharge the onus on it to prove its claim. It accused this witness of changing his evidence when it suited him. It said that his evidence was inconsistent with contemporaneous documents and that he referred to non-existent documents. The appellant also made reference to the proceedings in case number SC 39/21 and submitted that in that case this Court made a finding that the respondent had failed to meet the conditions precedent set out in clause 5 of the contract. This Court, according to the appellant, had established that the respondent had conveniently avoided the action procedure in a bid to stay away from the truth and hoodwink the court.

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The appellant also argued that in its evidence, the respondent based its claim on contentious issues raised by the appellant in its replication and not based on its own declaration. The appellant argued that the respondent ought to have amended its declaration to incorporate the claims that were never pleaded in the declaration. The areas of evidence of concern included the China-Exim Bank financing issue, the CBZ and ATC funding and the allegation that the appellant filed fictitious and malicious charges of fraud and corruption against Mr Chivhayo. The appellant also submitted that the letters of 10 April, 6 July and 31 July 2018 which were alleged to constitute a breach of the contract in the respondent's declaration were never referred to in the examination in chief of the respondent's witness. The court *a quo* observed that the matters complained against in this regard are matters of evidence which would not ordinarily be set out in the pleadings but in the evidence.

The appellant further submitted that it was common cause that the conditions precedent satisfaction period expired on 23 October 2017 and that the purported extension of that period by six months after that date, though not in accordance with the contract, was not a nullity as the respondent could have accepted it. It averred that although its notice to terminate was not delivered in a letter headed “Notice of Termination”, it remained a valid notice. It contended that the issue is not about the absence of notice but, rather, whether the appellant had the right to terminate the contract, it being alleged that it (the appellant) was responsible for the delay in the satisfaction of the conditions precedent.

The appellant submitted that the respondent alleged a breach of Addendum 1, which breach would only affect Schedule 11 of the Contract but not clause 5 of the contract. It submitted that the respondent had failed to indicate when these breaches had occurred. It further contended that Addendum 1 was only executed one month before the expiry of the conditions precedent satisfaction period, or 23 months after signature of the contract. An alleged breach of Addendum 1, it is contended, could not explain the failure to complete the conditions precedent in the preceding 23 months.

The appellant argued that this was not a proper case in which the court could exercise its discretion in granting specific performance because the present position was at odds with the parties’ original position. The original intention was that the project would take four years. It is contended that the construction and hand over of the solar plant would thus have been completed by October 2019. The appellant argued that if specific performance were to be granted as requested, the project would be implemented between March 2029 to 2034, 10 to 15 years later than originally projected. In any event, argued the appellant, the project was no longer viable because the cost of constructing the plant had

decreased due to advances in solar technology. As a result the respondent stands to make an additional USD 33 million profit should specific performance be granted.

The appellant further argued that the fact that the parties negotiated a new contract after the judgment of the court *a quo* in case number HC 8159/18, was testimony to the fact that the parties had realised that the present contract was no longer viable. It was for that reason that the parties carried out a joint visit to the project site on 13 July 2020. The Minister of Energy had urged the parties to implement this amended contract. The appellant averred that the Ministerial report related to the amended contract and not the original contract. Another reason for negotiating the new contract was that the African Development Bank had debarred CHINT for fraudulent practices. Further, the appellant averred that the introduction of a new currency regime in February 2019 had implications on the funding of the project as all transactions in USD terms done before February 2019 were now valued in RTGS dollars at the rate of one to one with the USD.

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It was also the appellant's argument that the respondent had failed to plead relief relating to fictional fulfilment and the factual basis upon which the court could grant the relief of fictional fulfilment. The appellant further argued that fictional fulfilment would not make sense because the project needed to be funded and that, in any event, the appellant would not be able to pay the contractual amount. It was submitted by the appellant that its board could not authorise the commencement of the project knowing fully well that it was not going to be funded. The appellant also argued that if fictional fulfilment were granted, there would be implications on third parties in line with the definition of "financial agreements." It was for example, a requirement that the Government of Zimbabwe be a co-signatory to the financial agreements. That requires that the Government be a fictional party to the fictional

finance agreement. It was submitted that there was no basis upon which the court could exercise jurisdiction over Government when it was not cited as a party to the present proceedings.

The appellant denied that it intended to frustrate the project, citing its actions in paying the sum of USD 5.6 million to the respondent and in extending, through its letter dated 29 November 2017, the conditions precedent satisfying period. It argued that it was the one that took steps to secure funding for the project by communicating with key stakeholders such as Ministry of Finance, the procurement board and NSSA. It had also carried out all the conditions precedent which required its attention such as the feasibility studies, due diligence, getting the Environmental Impact Assessment Certificate and acquiring land for the project. On the contrary, the appellant submitted that the respondent had failed to provide an Advance Payment Guarantee and the performance security as required in terms of the contract. The appellant also blamed the respondent for the collapse of the China Exim Bank funding stating that if the respondent had done its due diligence, it would have known from the beginning that the financial institution would not be in a position to assist in view of the Government of Zimbabwe's arrears with the financial institution.

With regards the respondent's claim for the sum of US\$ 3 million for expenses incurred, the appellant submitted that no evidence had been led to prove that it was responsible for causing the damages complained of. It argued that it cannot be held liable for the expenses incurred by the respondent during the tendering process. Such expenses could be recovered through performance of the contract when profit is then earned. The appellant also denied liability for the respondent's loss of profit arguing that such a claim is only tenable where the appellant had terminated the contract. In *casu* the respondent avers that the

contract was not terminated. There is therefore no basis upon which it could raise such a claim.

Concerning its claim in reconvention, the appellant submitted that it provided the respondent with an advance of US\$5.6 million. Of this amount, the sum of US\$2.3 million went towards the feasibility studies. Its claim is for the balance in the sum of US\$3 310 736.30. The respondent was required to contribute the sum of US\$1 million towards pre-commencement works. The contribution was to be done through the carrying out of works, with no cash payments. However, the appellant avers that the pre-commencement works were not completed as indicated in the joint site visit report hence the claim for US\$3 310 736.30. Alternatively, the appellant was willing to be compensated in terms of the respondent's own computation which puts the figure at US\$2 299 563.13. It was on that basis that the appellant moved for dismissal of the respondent's claim. It also prayed that its claim in reconvention be granted with costs.

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FINDINGS OF THE COURT A QUO

The court *a quo* found in favour of the respondent and dismissed what remained of the appellant's counter claim. Its specific findings on the issues before it were as follows:

1. The Supreme Court judgment in SC 39/21

The appellant had raised the defence of *res judicata* premised on the decision of this Court in SC 39/21. That proved untenable as the papers clearly showed that the appeal was determined on a technicality, namely that the application in the court *a quo* had been replete with material disputes of fact which could not be determined without hearing *viva voce* evidence. The court *a quo* held that this Court had not delved into the merits of the

matter as alleged by the appellant. No decision on the merits had been made and therefore the appellant's claim to the contrary was rejected.

2. Whether the EPC contract remained valid and binding on the parties.

The court *a quo* noted that the appellant had abandoned its claim to the effect that the contract had been induced by fraudulent misrepresentation on the part of the respondent. That being the case, the court *a quo* noted that in the absence of the appellant's assertion to the contrary it must be presumed that the validity of the contract is no longer in contention. That being the case the court *a quo* took the view that the only issue left for determination was the status of that contract. It observed that the status of the contract was the central issue upon which the consequential reliefs sought by the respective parties would be determined. The respondent's contention was that the amended contract remained valid and binding, hence its claim for consequential relief in the form of specific performance. On the other hand, noted the court *a quo*, the appellant sought a declaratur to the effect that the contract never commenced as a result of the respondent's failure to meet the prescribed conditions precedent. The appellant also averred that it had cancelled the contract as a result of that breach on the part of the respondent. It further claimed (falsely in the opinion of the court *a quo*) that the cancellation had been confirmed by this Court under SC 39/21. The court *a quo* reiterated its earlier findings, namely that this Court had merely upheld the appellant's preliminary point to the effect that the court *a quo* should have proceeded not by application, but by action, as there were material disputes of fact which could not be resolved on the papers. It did not determine the merits of the matter, let alone confirm the appellant's cancellation of the contract.

The court *a quo* proceeded to consider the clauses of the contract which the respondent alleged had been breached. Clause 5 provided that the contract would commence in full force when the conditions listed in paras (a) to (i) were satisfied. These conditions precedent were to be satisfied within a period of 24 months after signature of the contract. It was common cause that this period would expire on 23 October 2017. The appellant could, at its sole discretion, on or at any time prior to that date, elect to extend the conditions precedent satisfaction period by a further 6 months by giving notice to the respondent. More importantly, clause 5 of the contract provided as follows:

“If the conditions precedent are not satisfied on or before the expiry of the CP satisfaction period (as may have been extended), either party may elect to terminate the contract by notice to the other provided that if a party is causing a delay to the satisfaction of any of the conditions precedent as at the date on which it seeks to terminate, such party shall not be entitled to exercise such right of termination while such cause of delay subsists.”

The court *a quo* noted the implications of the above provisions, particularly with regards the right of termination.

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Clause 5 of the contract also provided for the waiver of conditions precedent as follows:

“Each party shall use its reasonable endeavours to ensure the satisfaction of the conditions precedent set out above, provided that:

- (a) The employer may waive the contractor conditions precedent and such waived contractor condition (s) precedent will be deemed satisfied for the purposes of this Agreement.
- (b) The contractor may waive the employer conditions precedent and such waived employer conditions precedent will be deemed satisfied for the purposes of this Agreement; and
- (c) And, except where a party has failed to use its Reasonable Endeavours to ensure the satisfaction of such conditions precedent, neither party shall be liable in any damages to the other in respect of any failure to satisfy any of its conditions precedent.”

The court *a quo* analysed and took note of these provisions. Of significance to the status of the contract, the parties signed Addendum 1 to the contract.

The court *a quo* noted that in para 2 of the preamble to the Addendum 1 the parties expressed their wish “to amend the contract through this addendum.” More importantly, clause 4 of the Addendum provided that “the parties agree and acknowledge that with effect from the effective date of this Addendum that the contract shall be amended in accordance with this Addendum and that the provisions of the contract, except as amended by this Addendum, will remain in full force and effect.

The court *a quo* concluded that the Addendum amended the contract and that the two documents must be read together.

The court *a quo* analysed the nature and scope of the amendments to the original contract brought about by the provisions of Addendum 1. It observed as follows. At the time that the parties signed the Addendum on 21 September 2017, they were aware that in terms of the original contract, the period during which the conditions precedent were to be fulfilled was to lapse on 23 October 2017, a month after the date of signature of the Addendum. However, the addendum gave lead times of the various pre-commencement works well beyond 23 October 2017. In other words, the new lead times exceeded the effective date of 23 October 2017, when all conditions precedent should have been met and hopefully, the main works would have commenced. From the above facts, the court *a quo* concluded that by their conduct, the parties waived not only the commencement date of the contract but, by the same token, the date of the accomplishment of the conditions precedent upon which the commencement date was predicated. It was for this reason that the court *a quo* held that it would defy logic for the appellant to insist on the termination of the contract on the grounds that the respondent had failed to satisfy the conditions precedent when, only a

month before the expiry date, the parties had agreed to certain contractual obligations that further tied them.

The court *a quo* concluded, in the circumstances, that the conditions precedent satisfying period did not lapse on 23 October 2017 as submitted by the appellant. The parties must be regarded as having waived their right to enforce that date as previously provided in the original contract before the Addendum I was signed, amending it. The parties had set their eyes beyond 23 October 2017 concluded the court *a quo*. Indeed, the appellant had written to the respondent on 29 November 2017, purporting to extend the conditions precedent satisfying period by a further six months in terms of clause 5 of the main contract. The court *a quo* noted that such correspondence confirmed that the appellant did not regard that this period ended on 23 October 2017, contrary to its assertions. Secondly, the correspondence wrongly ignored the provisions of the Addendum 1, amending the contract thus disregarding the effective date, of 23 October 2017, the date originally set for the expiry of that period. Thirdly in terms of s 5 of the original contract such election by the appellant to extend such a period by a further six (6) months was to be done in terms of clause 6 of the contract, which provides that the contract may only be amended by a written document duly executed by the parties. In this case the appellant acted unilaterally there being no evidence of the parties' agreement to such an amendment. Further, any such election could only be effected on or before 23 October 2017. In *casu*, the appellant's election came on 29 November 2017, well out of time.

The court *a quo* also noted that in terms of clause 5 (i) of the contract if the conditions precedent were not satisfied within twenty-four (24) months from the date of signature of the contract, the parties were to meet and review progress towards the

satisfaction of those conditions. Thus the court *a quo* found that the election to extend the satisfaction period by a further six (6) months could only be exercised after the parties had reviewed their progress towards the satisfaction of those conditions precedent. No such meeting was proved to have taken place and accordingly no valid election to extend the period could have been exercised. For these reasons, the court *a quo* found that the purported extension of the conditions precedent satisfying period by the appellant was inconsistent with the provisions of the contract and consequently, null and void. Accordingly, the court *a quo* ruled that the contract remained valid and extant.

3. Fictional Fulfilment

Having determined that the contract was not terminated and remained extant, the court *a quo* considered the relief sought by the respondent, namely whether there was fictional fulfilment of the contract and if so, whether it was appropriate to grant the remedy of specific performance. It observed that the doctrine of fictional fulfilment was defined in case law. It relied on the definition in *MacDuff & Company Limited v Johannesburg Consolidated Investments Company Limited* 1924 AD 573 where the court stated as follows:-

“ I am therefore of the opinion that in our law a condition is deemed to have been fulfilled as against a person who would subject to its fulfilment be bound by an obligation, and who had designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part.”

RH Christie in “Business Law in Zimbabwe” at p 56 explains that *dolus* in this context does not allude to fraud or dishonesty, but a deliberate intention to prevent the fulfilment of the condition, no matter how laudable the motive.

Based on both the documentary and *viva voce* evidence before it, the court *a quo* found that the appellant purposefully prevented or frustrated the fulfilment of the condition

precedent pertaining to the signing of the financing agreements. The court *a quo* also found the appellant's conduct to have been contrary to clause 5 (i) of the contract which required each party to use its "reasonable endeavours" to ensure the satisfaction of the conditions precedent.

The court *a quo* noted that the right to terminate the contract in terms of clause 5 was not absolute because the party responsible for frustrating the fulfilment of any of the conditions precedent was estopped from seeking the termination of the contract. For that reason, having found that the appellant frustrated the fulfilment of the financing arrangements, the court *a quo* ruled that the appellant was precluded from asserting the right to terminate the contract on the grounds that the condition precedent concerned had not been met.

It was in that context that the court *a quo* held that the condition precedent pertaining to the financial arrangements had been fictionally fulfilled.

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4. Specific Performance

In determining whether it could grant the relief of specific performance as sought by the respondent, or, the alternative relief of damages, the court *a quo* relied *inter alia*, on the decision in *Grandwell Holdings (Pvt) Ltd v Zimbabwe Mining Development Corporation & 3 Ors* SC 5/20 where this Court had this to say:

“However, the right to claim specific performance is predicated on the concept that the party claiming it must first show that he or she has performed all his or her obligations under the contract or is ready, willing and able to perform his or her side of the bargain. Even then, the court has a discretion, which should be exercised judicially, to grant or refuse a decree of specific performance. It follows therefore that the court's discretion should not be exercised arbitrarily or capriciously.”

The court *a quo* also relied on the case of *Minister of Public Construction and National Housing v Zescon (Pvt) Ltd* 1989 (2) ZLR 311 (S) where at 318 G, this Court stated as follows:

“The law is clear. This is a remedy to which a party is entitled as of right. It cannot be withheld arbitrarily or capriciously.”

The court *a quo* noted that in exercising its discretion to grant an order for specific performance it must look at the circumstances of this case and on that basis map the way forward. It observed that the appellant had not placed before it any evidence to show the measures it took in order to achieve financial closure. In other words, nothing had been put forward to show that specific performance was no longer achievable. It noted that both parties had accepted that the question of funding was central to the implementation of the project.

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The court *a quo* rejected the submission by the appellant that the project was no longer viable and that it would take years to complete. It referred to clause 1.1.3.3 of the contract which gave the time of completion to be 540 days. It noted that it had ruled that the contract was still valid and not terminated, that Addendum 1 had amended the main contract and extended the conditions precedent satisfying period beyond the contemplated date. It further noted that clauses 5 (ii) and 6 oblige the parties to meet and review progress on the project and effect such appropriate measures and amendments as may from time to time be required. For that reason, the court *a quo* was of the view that any challenges arising from the effect of the changes to the currency regime can be similarly resolved by the parties in terms of clause 5 (i) and clause 6. In short, the court *a quo* dismissed the appellant’s submissions against the grant of specific performance.

The court *a quo* noted that at some point the parties could have agreed to implement the project in phases and that the respondent had obtained funds for the implementation of the initial phase. That position was captured in the draft Amended Restated Contract, which the parties are yet to sign. It concluded its observations as follows:

“The point is that the question of the unavailability of funding is clearly not an excuse going by the evidence that was placed before the court.”

It was for these reasons that the court *a quo* ordered specific performance.

5. Whether the claim in reconvention had merit

The court *a quo* held that the counter claim could only become relevant if it had held that the contract did not commence as a result of the respondent’s failure to fulfil the conditions precedent. In view of its finding that the contract remained valid and binding on the parties, the counter claim was no longer sustainable. It noted that the amount paid towards the pre-commencement works was not entirely wasted and observed that this was an issue that the parties could discuss in terms of clause 5 (i) of the Contract. This clause provided for periodical performance reviews.

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Consequently, the court *a quo* found in favour of the respondent and issued the following order:

- “1. The procurement contract for the Engendering, Procurement and Construction (EPC Contract) of the 100 MW Gwanda Solar Project (ZPC 304/2015) between the plaintiff and the defendant as amended is valid and binding between them.
2. Consequent to the declaration of the validity of the EPC contract, an order for specific performance of the said contract is hereby granted.
3. The defendant’s claim in reconvention is hereby dismissed with costs.
4. The defendant shall pay the plaintiff’s costs in the claim in convention.”

It is that order that the appellant appeals against on no less than 17 grounds as follows:

“GROUNDS OF APPEAL

1. The court *a quo* erred in law in that it failed to consider the respondent’s case as pleaded in its declaration and proceeded, instead, to determine the matter on the basis of issues not pleaded in the declaration.
2. The court *a quo* erred in law by finding that the appellant had waived the conditions precedent satisfaction period and/or the requirements to fulfil the conditions precedent, when such a waiver was not pleaded by the respondent in its declaration.
3. The court *a quo* erred in fact by finding that the appellant had waived the conditions precedent satisfaction period and/or the requirements to fulfil the conditions precedent when the factual basis of such a waiver was not made out on the evidence.
4. The court *a quo* erred in law and fact by holding that the appellant had effectively waived the fulfilment of the conditions precedent by allowing some pre-commencement work to be carried out before the fulfilment of the conditions precedent.
5. The court *a quo* erred in law and fact by holding that when the parties entered into addendum 1, they only had one month before the contract lapsed, in circumstances where the contract expressly provided that the parties could extend the conditions precedent satisfaction period.
6. The court *a quo* erred in law and fact by holding ‘*mero motu*’ that the activities set out in addendum 1 “would certainly outlive the contract” in circumstances where neither party asserted this to be the case, nor introduced any evidence to that effect.

7. The court *a quo* erred in law and in fact by holding that the appellant had waived the application of the conditions precedent satisfaction period by attempting to extend that same satisfaction period.
8. The court *a quo* erred in law by relying on the appellant's purported extension as amounting to or evidencing a waiver, having found that the same purported extension was a nullity.
9. The court *a quo*, having correctly found that addendum 1 obliged the respondent to provide an advance payment guarantee, erred in law and in fact by finding that the appellant had waived that condition precedent by entering into addendum 1.
10. The court *a quo* erred in law by holding that the abandonment of the appellant's misrepresentation claim meant that the continued existence of the contract was no longer in issue and, as a result, failed to consider the appellant's case relating to termination by notice.
11. The court *a quo* erred in law by finding that the conditions precedent (or some of them) were fictionally fulfilled, in circumstances where fictional fulfilment was not pleaded by the respondent in its declaration.
12. The court *a quo* erred in law by addressing only one particular condition precedent - relating to funding - and ignoring the other conditions precedent which the parties had expressly agreed.
13. The court *a quo* erred in law by finding that the conditions precedent, or some of them, were fictionally fulfilled, in circumstances where the respondent had admitted before the Supreme Court that the respondent had failed to meet the prescribed conditions precedent.
14. The court *a quo* erred in law by finding that the conditions precedent had first been waived and then subsequently fulfilled.

15. The court *a quo* erred in law by considering the actions and attitudes of third parties as relevant on the basis that those third parties were shareholders or ultimate shareholders of the appellant.
16. The court *a quo* erred in law and fact by granting specific performance of the contract in circumstances where the project had not been funded. Its performance would result in undue hardships and the respondent was not able of performing in accordance with the express terms of the contract.
17. The court *a quo* erred in law and fact by rejecting the appellant’s claim in reconvention in circumstances where it received unchallenged evidence that the appellant had received no benefit from the pre-commencement works.”

RELIEF SOUGHT

The appellant seeks the following relief:

“1. The appeal succeeds with costs and:

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2. The judgment of the court *a quo* be set aside and substituted with the following:

- (a) The plaintiff’s claim be and is hereby dismissed with costs.
- (b) The defendant (read plaintiff) be and is hereby ordered to pay damages in the sum of USD 3310 736-30 with costs, being advance payment towards the pre-commencement works with costs.” (Own brackets)

Rule 44 (1) of the Supreme Court Rules 2018, requires that an appellant’s grounds of appeal be set out clearly, specifically and concisely. The grounds of appeal in *casu* appear not to have been drafted accordingly. They are repetitive, inconcise and seem to be aimed at every decision of fact or law made by the court *a quo*. Mr *Tivadar*, for the appellant, was, at the hearing of this appeal, asked to justify the state of the appellant’s grounds of appeal, and explain why the appeal should not be struck off the roll for defective grounds of appeal. Mr *Uriri* for the respondent, was not keen to go that route, preferring

instead to have the matter decided on the merits. Indeed, he did not persist with the objection he had lodged in the respondent's papers. He was of the view that the grounds of appeal may be distilled to only four issues, namely:

- (1) Was the judgment predicated on the pleaded case.
- (2) Were the findings of fictional fulfillment predicated on the facts and evidence.
- (3) Were the findings of waiver of the conditions precedent founded on the evidence.
- (4) Was the counterclaim properly dismissed.

On his part, Mr *Tivadar*, for the appellant, summarized the import of the grounds of appeal to be as follows:

1. That the court *a quo* erred by making a finding that was contrary to the position of the respondent in SC 39/21 where the respondent admitted that it had not met the conditions precedent.
2. The court *a quo* incorrectly found that the appellant had waived its right to cancel the contract on the basis of unfulfilled conditions precedent.
3. The court *a quo* wrongly found that there had been fictional fulfilment of the terms of the contract.
4. The court *a quo* erred when it ordered specific performance of the contract.

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Although both parties' perceived grounds of appeal are largely similar, it is noted that Mr *Tavadar* has not included, in his summary of the grounds of appeal, ground 1 as proposed by Mr *Uriri* which relates to the question whether the judgment was predicated on the pleaded case. Further, Mr *Tivadar* did not include in that summary ground 4 as proposed by Mr *Uriri*, namely, whether the counter claim was properly dismissed. As it is not clear whether, by doing so, Mr *Tivadar* was abandoning the grounds in question, this

Court shall assume, as appears on the papers, that the issues raised therein are alive, requiring determination on the part of this Court.

This Court identifies the following, arising from the parties' submissions, to be the grounds of this appeal.

1. That the court *a quo* erred by making a finding that was contrary to the position of the respondent in SC 39/21 where the respondent admitted that it had not met the conditions precedent.
2. The court *a quo* incorrectly found that the appellant had waived its right to cancel the contract on the basis of unfulfilled conditions precedent.
3. The court *a quo* wrongly found that there had been fictional fulfilment of the terms of the contract.
4. The court *a quo* erred when it ordered specific performance of the contract.
5. That the judgment was not predicated on the pleaded case.
6. That the counter claim should not have been dismissed.

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The issues for determination arise from the above grounds of appeal.

ISSUES FOR DETERMINATION

The grounds of appeal raise six issues, namely,

- (1) Whether the court *a quo* made a finding which was contrary to the position of the respondent in SC 39/21
- (2) Whether the court *a quo* erred in finding that the conditions precedent had been waived.
- (3) Whether the court *a quo* erred when it held that fictional fulfilment of the contract had occurred

- (4) Whether the court *a quo* erred in ordering specific performance of the contract.
- (5) Whether the judgment of the court *a quo* was predicated on the pleaded case.
- (6) Whether the counter claim was properly dismissed.

SUBMISSIONS BEFORE THIS COURT

The parties' submissions before this Court were largely similar to the submissions they made in the court *a quo*.

Submissions by the appellant

Mr *Tivadar*, for the appellant, submitted that the court *a quo* erred when it failed to consider the respondent's case as was pleaded in its declaration and instead proceeded to determine the matter on the basis of issues not pleaded in the declaration.

Mr *Tivadar* also submitted that the court *a quo* erred in law by finding that the appellant had waived the conditions precedent satisfying period, or the requirement to fulfil the same when such a waiver was not pleaded by the respondent in its declaration. He submitted that, in any event, the actual basis of such waiver had not been made out in the evidence. He also criticised the court *a quo* for concluding that by allowing some pre-commencement works to be carried out before the fulfilment of the conditions precedent, the appellant had waived the fulfilment of those conditions. He submitted that this conclusion runs foul to the provisions of the contract wherein it is provided that pre-commencement works could be undertaken prior to the satisfaction of the conditions precedent. He cited clause 8 of the contract which provides that the respondent was to carry out pre-commencement works as set out in schedule 11 of the contract. He said that the parties had agreed that pre-commencement works could be carried out prior to the satisfaction of the conditions precedent satisfying period. This was meant to shorten the contract period. It cannot be the basis for the inference of waiver of the conditions precedent satisfying period. Further, it was submitted that the fact that the Addendum 1 was signed a month before the

anticipated date of completion of the conditions precedent did not have a bearing on the contract. This is so because the parties could extend the conditions satisfaction period by a further six months.

Mr *Tivadar* also attacked the court *a quo* for holding that the abandonment of the appellant's claim of misrepresentation meant that the continued existence of the contract was no longer in issue, and, as a result failed to consider the appellant's case relating to termination by notice. For that reason he maintained that the contract was terminated by operation of law, thereby effectively terminating the contractual obligations between the parties.

It was further submitted that the court *a quo*'s finding of fictional fulfilment of the conditions precedent was without legal or factual basis. It was observed that in its declaration the respondent had not sought any declaration as to fictional fulfilment of the conditions precedent. For that reason, Mr *Tivadar* argued that the court *a quo* ought not to have entertained the argument that there was fictional fulfilment of any of the conditions precedent. Further he argued that the respondent had failed to plead the relevant factual assertions to merit a finding of fictional fulfilment. In particular, he argued that the respondent did not plead that the appellant intended to frustrate the fulfilment of any of the conditions precedent. Counsel further submitted that no evidence was led to prove that the appellant had intentionally frustrated, the fulfilment of any condition precedent. Fictional fulfilment implies fictional funding. The appellant did not have the funds to pay out the contractor and therefore fictional fulfilment was an exercise in futility. Besides, fictional fulfilment would bind third parties, such as the Government of Zimbabwe which, in terms of the contract, was to be a co-signatory to the financing agreements. In any event, the appellant never intended to frustrate the project and had wished to deliver in terms of the contract.

Mr *Tivadar* also made reference to SC 39/21 alleging that in that case the respondent made an admission with regards the non-fulfilment of the conditions precedent and that this Court noted that the respondent had failed to meet the prescribed conditions precedent under clause 5 (a) of the contract. He argued that in light of that finding by this Court, the court *a quo* could not have found that the conditions precedent had been fictionally fulfilled. It was further submitted that having ruled that the conditions precedent had been waived, the same court *a quo* could not have found that the conditions precedent had been fictionally fulfilled. The appellant was of the view that the court *a quo* should not have considered the actions of third parties in determining the issues before it. It was argued that although Government is a shareholder of the appellant, its actions and attitude cannot be visited on the appellant because the appellant is a different legal persona, separate from its shareholder.

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Mr *Tivadar* submitted that specific performance of the contract should not have been granted. He cited authorities such as the case of *Grandwell Holdings Private Limited v Zimbabwe Mining Development Corporation & 3 Ors* SC 05/2020 which outline the factors to be considered in granting the remedy of specific performance. Firstly, specific performance is a discretionary remedy and in determining its grant, the court must look at all the relevant facts. The remedy will not be granted if compliance with the order is impossible or would cause undue hardship or where the plaintiff is not ready to carry out its own obligation under the contract.

Mr *Tivadar* submitted that the project had not been funded and that its performance would result in undue hardship to the appellant. Further the respondent was not

able to perform in terms of the contract. For these reasons he submitted that specific performance should not have been granted.

RESPONDENT`S SUBMISSIONS

Mr *Uriri* for the respondent, submitted that the appellant`s case, as presented in its heads of argument, is based on general principles of law which principles the appellant failed to connect to the facts and the evidence. He further submitted that the assertion by the appellant that the respondent`s case was predicated on matters not raised in its declaration, but on matters only raised in its replication, was ill informed. In making that assertion, the appellant had identified the following issues as arising only in the respondent`s replication; the China Exim Bank issue, the CBZ and ATC funding and the question of the malicious allegations against the respondent`s Managing Director. Mr *Uriri* submitted that in doing so, the appellant had failed to recognise the distinction between the cause of action, the facts giving rise to the cause of action and the issues as joined in the pleadings. In particular he submitted that the law requires that a party pleads the facts giving rise to the cause of action not the evidence by which the facts are to be proved. Thus the evidence is not a matter for the summons and declaration but for discovery and trial. The court *a quo* did relate to the pleadings, the issues and the evidence and made a determination. Mr *Uriri* was adamant that such determination could not be faulted. He also dismissed the submission by the appellant that the claim was expanded in the replication and that the expansion is immaterial without an amendment to the declaration. In that regard Mr *Uriri* relied, *inter alia* on the case of *Shah v Kingdom Merchant Bank SC 4/2017*, wherein this Court held that parties can extend their issues and that once an issue was before the court, the court has the prerogative to consider it. Mr *Uriri* also relied on the case of *British Diesels Ltd v Jeram & Sons 1958 (3) SA 605 (N)* where it was held that the importance of pleadings should not be unduly magnified for “if it

should appear that any substantial issue was duly canvassed in the court below, then in my opinion, we ought to regard it as an issue to be decided between the parties, whether it has been formally pleaded or not.” Similar sentiments were also expressed in *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A).

With regards the question of whether or not the appellant had waived its right to rely on the non-fulfilment of the conditions precedent as a basis for termination of the contract, Mr *Uriri* submitted that waiver is a legal principle which can be derived from the facts of the case. In the instant case he argued that the court *a quo* based its decision on the facts as presented to it. That finding of fact cannot be lightly interfered with in the absence of gross misdirection or irrationality. There being no allegation of such irregularity, the finding of fact by the court *a quo* was unassailable. He relied in that regard on the case of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 250 (S).

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Similarly, Mr *Uriri* argued that the grounds of appeal lack merit as the appellant failed to appreciate that the “*ratio decidendi*” was predicated primarily on the issues and findings of fact. It was for that reason that the agreement was found to be extant and specific performance found to be possible.

With regards the evidence adduced in the court *a quo*, Mr *Uriri* noted that the court *a quo* made a finding of credibility in favour of the respondent’s sole witness, Mr Chivhayo. He submitted that the evidence adduced by Mr Fambi, on behalf of the appellant, left a lot to be desired. He chronicled Mr Chivhayo’s evidence and noted that it was upon the respondent to raise the necessary funding for the project. He submitted that the evidence given by Mr Chivhayo shows how the appellant had frustrated the respondent’s efforts aimed at financial closure for the project. Mr Chivhayo also told the court *a quo* that the respondent

wished to conclude the project. Mr *Uriri* submitted that it was not shown that it was not possible to do so. For that reason it was appropriate for the court *a quo* to grant the remedy of specific performance.

He further submitted that any evidence elicited from Mr Chivhayo under cross examination as to the meaning of the contractual documents does not bind the court. As regards the relationship between the appellant and the Government of Zimbabwe, Mr *Uriri* submitted that the distinction that the appellant sought to make between the two was not tenable at law, as the Government exercises control over the appellant as its shareholder. He said it is common cause that the appellant is a State commercial entity. He relied on the decision in *Transnet Ltd v Goodman Brothers Pty Ltd* 2001 (1) SA 853 (SCA) at 870F where SHULTZ JA, said:

“I do not think that anything can be made of the fact that Transnet is now a limited company. The government still owns all the shares in it, and thus has ultimate control.”

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Reliance was also placed on *Grandwell Holdings Limited & Ors v Minister of Mines & Ors* HH 193/16 (a judgment upheld by this Court on appeal) wherein MAFUSIRE J concluded that the Minister of Mines, the Zimbabwe Mining Development Company and companies in which the State had an economic interest, were a single economic unit. Thus the positive or negative control of the shareholder cannot be divorced from the company. In short, therefore, the appellant cannot escape the negative conduct of its shareholder.

Mr *Uriri* submitted that the appellant’s sole witness admitted that he was not involved in the process of financial closure as this was the preserve of the appellant’s managing director. He was thus not in a position to challenge the evidence proffered by the

respondent and its witness. Further, while disputing the value of the pre-commencement works, neither the witness nor the appellant placed evidence of the value of the works that were carried out. On the contrary, the witness conceded that there was value in the works done and that same had been completed. He also confirmed that the respondent had been barred from site and thus could not do repair work. He could not dispute that the appellant in fact owed the respondent. Mr *Uriri* said that notice of this computation had been given in the respondent's plea to the appellant's counterclaim. The appellant's replication did not address specifically this allegation. Not having addressed this allegation, the appellant must be presumed to have admitted it. Mr *Uriri* submitted that the court *a quo* correctly entered judgment for the respondent.

Mr *Uriri* further argued that fictional fulfilment of the financial conditions precedent flowed from the conduct of the appellant in frustrating the financial closure. This condition was for that reason presumed fictionally fulfilled. The following cases were cited in support of that assertion: *Mia v Verimark Holdings Pty Ltd* 2010 (1) ALL SA 280 (SCA) and *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389

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ANALYSIS

APPLYING THE LAW TO THE FACTS

(1) Whether the court *a quo* made a finding which was contrary to the position of the respondent in SC 39/21

The first issue is based on a ground that has no merit whatsoever. As properly observed by the court *a quo*, this Court allowed the appeal in SC 39/21 on the basis of a technicality. It held, on a preliminary point raised by the appellant that the respondent should not have proceeded by way of application in the court *a quo* because the matter was replete with disputes of fact which could not be determined on the papers before the court *a quo*. In

short, the respondent should have proceeded by way of action. That is precisely what the respondent did in the matter presently before this Court on appeal. No issues on the merits were touched on by this Court under SC 39/21. This ground of appeal has absolutely no merit. Even if it were to be accepted that the respondent, in papers filed under SC 39/21, agreed that conditions precedent had not been met, such admission does not take either party's case further. The real dispute is whether, the conditions precedent not having been met at some point, the parties took remedial action. The parties could have left the contract to terminate by operation of law, the conditions precedent not having been met. Neither party took that route, both parties preferring to enter into an Addendum to the contract, a month before the conditions precedent satisfying period expired. The parties differ as to the effect of that Addendum on the terms of the main contract.

(2) Whether the court *a quo* erred in finding that the conditions precedent had been waived.

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As already stated, the effect of the Addendum to the contract was that certain works by their nature and scope could not be completed by 23 October 2017 when the conditions precedent satisfaction period was due to lapse. By signing this Addendum, the appellant must have waived or at least extended that period beyond 23 October 2017. The decision of the court *a quo* cannot be faulted.

(3) Whether Fictional Fulfilment occurred

Fictional fulfilment is a doctrine that may be invoked under circumstances where a party to a contract deliberately frustrates the fulfilment of a condition stipulated in the contract. In *casu*, the respondent submits that the appellant was guilty of such conduct with regards the financing arrangements. It invited the court *a quo* to deem the conditions to have

been fulfilled in line with the doctrine of fictional fulfilment. The invitation was accepted and correctly so.

The respondent's sole witness gave evidence to the effect that various proposals for the financing of the project were brought to the table but the respondent showed disinterest and declined to engage the various would-be financiers, both local and foreign. The appellant's witness, one Fambi, confessed that he had no knowledge of the financing arrangements and how they had been handled. He told the court *a quo* that such arrangements were the preserve of the appellant's Chief Executive Officer. The Chief Executive Officer was not called to give evidence. For that reason, the evidence of the respondent's witness, one Chivhayo, was virtually uncontroverted. It was on the basis of that witness's uncontested testimony that the court *a quo* found that the appellant had frustrated the implementation of the contract and invoked the doctrine of fictional fulfilment. The appellant, in other words, could not be allowed to benefit from its wrong doing. See the *dicta* in *Standard Chartered Bank Zimbabwe Limited v Matsika, supra* at 389 H.

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The case of *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 sets out the factors to be established in order to invoke the doctrine of fictional fulfilment. The factors are, non-fulfilment of the condition, the defendant's breach of his duty with an intention to frustrate the fulfilment and a causal link between the non-fulfilment and the defendant's intentional frustration of the fulfilment of the conditions. The court *a quo*, in line with case law and the uncontroverted evidence of Chivhayo, found this an appropriate case in which the doctrine of fictional fulfilment should be invoked. Its decision in this regard cannot be impugned.

(4) Whether specific performance should have been granted

The fourth issue is to do with the propriety of the decision of the court *a quo* in ordering specific performance. The law on specific performance is well traversed. In the case of *Grandwell Holdings Pvt Ltd v Zimbabwe Mining Development Corporation & 3 Ors* SC 5/20, this Court remarked as follows:

“However, the right to claim specific performance is predicated on the concept that the party claiming it must first show that he or she has performed all his or her obligations under the contract or is ready, willing and able to perform his side of the bargain. Even then, the court has a discretion, which should be exercised judicially, to grant or refuse a decree of specific performance. It follows therefore that the court’s discretion should not be exercised arbitrarily or capriciously. See *Minister of Public Construction and National Housing v Zescon (Pvt) Ltd* 1989 (2) ZLR 311 (s), where at 318G, this Court stated:

‘The law is clear. This is a remedy to which a party is entitled to as of right. It cannot be withheld arbitrarily or capriciously.’”

In dealing with the question of specific performance, the court *a quo* was alive to the principles governing the grant or refusal of that relief. It correctly noted that each case must be determined according to its own circumstances and that the court *a quo* must exercise its discretion judicially, without appearing to be making a contract for the parties. In *casu*, it noted that the appellant had not placed any evidence before it showing the measures it took in its attempt to achieve financial closure. Its sole witness, Mr Fambi, was unable to shed any light on this crucial issue. Resultantly, the court *a quo* correctly concluded that there was nothing to show that specific performance was unachievable. On the contrary, Mr Chivhayo, respondent’s sole witness, had shown that the respondent could secure funding for the project, the procurement of funding being central to the implementation of the project.

The court *a quo* dismissed the appellant’s assertions that the project is no longer viable. It held that any issues pertaining to the viability of the project and the effect of the changes in the currency regime (as alleged by the appellant) must be left to the parties to take care of in terms of clause 5 (i) of the contract. In any event, clause 6 of the contract allows

the parties to amend the contract should they so wish. The court *a quo* made reference to an “Amended and Restated Contract” which would have seen the project being implemented in phases. The respondent had funding for the initial phase of 10 MW. This contract was never signed but its existence shows that funding could be obtained. At p 47 of its cyclostyled judgment, the court *a quo* makes the following finding of fact:

“The point is that the question of the unavailability of funding is clearly not an excuse going by the evidence that was placed before the court.”

That finding of fact cannot be impugned. See *Hama v National Railways* 1996 (1) ZLR 66.

Mr *Tivadar*, for the appellant, submitted that an order for specific performance would bring intolerable hardships on the appellant as the appellant has no funds to implement the project. We note, however, that Mr *Fambi*, appellant’s sole witness, did not say so in his evidence before the court *a quo*. Secondly, it is the duty of the respondent to source funding. If there is any hardship to be borne at this stage, it has to be borne by the respondent and not the appellant. The respondent has indicated that it is able to source funding for the project. That being the case, there was no reason for the court *a quo* to deny the respondent the remedy of specific performance.

5. Whether the judgment of the court *a quo* was based on the pleaded case.

The appellant’s contention is that in its evidence, the respondent based its claim on matters canvassed in the replication to the appellant’s plea instead of its own declaration. In order to competently do so, the respondent should have amended its declaration to include those matters hitherto not so covered by its declaration. For that reason, argued the appellant, the court *a quo*’s judgment was not based on the pleaded case and ought to be vacated. The matters allegedly not covered by the respondent’s declaration

include the China-Exim Bank financing issue, the CBZ and ATC funding and the filing of malicious and fictitious charges of corruption against the respondent's CEO, Mr Chivhayo.

The court *a quo* was of the view that the matters referred to by the appellant were matters of evidence that should not be pleaded in the pleadings but set out in the evidence. In any event, the issues referred to are covered in the papers and were presented in the court *a quo* for determination. The court *a quo* was duty bound to determine all the issues brought before it. Indeed, this Court in *Shah v Kingdom Merchant Bank* SC 4/2017 held that parties can extend their issues and once an issue was before the court, it had the prerogative to consider it. Accordingly, this ground of appeal has no merit.

6. Whether the counterclaim was properly dismissed.

The residue of the counter claim (after the abandonment of that part of it imputing misrepresentation to the respondent) relates to a refund of the sum of USD 3 000 000.00. The amount had been advanced to the respondent to carry out pre-commencement works. Through the testimony of Mr Chivhayo, the respondent resisted this claim on the basis that the pre-commencement works to that value, if not much more, was in fact carried out. For that reason, the respondent did not owe the appellant any money. Mr Chivhayo relied primarily on the report of the joint visit to the project site which showed that substantial progress had been achieved on the pre-commencement work.

On the other hand, Mr Fambi, the appellant's sole witness, was unable to substantiate the counter claim because he did not have the material to do so as such matters were the preserve of the appellant's CEO. The CEO was not called to testify. In the circumstances the appellant failed to prove its counterclaim. The court *a quo*'s decision to dismiss the counter claim cannot be faulted.

DISPOSITION

Despite Mr *Tivada*'s spirited efforts, the appellant's case is weak in three cardinal respects. Firstly, Mr Chivhayo gave detailed factual evidence in support of the respondent's case. On the other hand, Mr Fambi, who gave evidence on behalf of the appellant, was literally at sea as he admitted that he had no useful information regarding the issues before the court. He referred all material issues to the respondent's CEO who was, surprisingly, not called to give evidence. In essence therefore, Mr Chivhayo's evidence was not controverted.

Secondly, the court *a quo* made a finding of credibility in favour of Mr Chivhayo. To all intents and purposes therefore the court *a quo* accepted the veracity of the evidence as given by Mr Chivhayo and rejected any evidence to the contrary. It is trite that an appeal court will not lightly interfere with the findings of credibility of a trial court.

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Thirdly, following from the above, the court *a quo* made findings of fact in favour of the respondent. There is no basis to interfere with those findings.

We are satisfied that the court *a quo* properly held that the contract between the parties was valid and extant and that same was properly amended by the Addendum to it which extended the period within which the conditions precedent should be fulfilled. It correctly found that its purported termination by the appellant was of no legal force or effect as such termination did not meet the requirements of the termination clause of the contract.

The court *a quo* exercised its discretion judiciously in ordering specific performance of the contract, having found that the respondent was willing and able to source funding for the project.

In any event, no meaningful evidence was presented by the witness led by the appellant. The witness was unable to lead satisfactory evidence with regards the appellant's counter claim in the sum of US \$ 3 million. The court *a quo* correctly found that the counter claim had not been proved and proceeded to dismiss it.

In the circumstances the appeal stands to fail. Costs shall follow the cause.

Accordingly, it is ordered that:

- (1) The appeal be and is hereby dismissed.
- (2) The appellant shall pay the costs of suit.

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MAKONI JA : I agree

MUSAKWA JA : I agree

Mvingi Mugadza, appellant's legal practitioners

Manase & Manase Legal Practitioner, respondent's legal practitioners

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