ZEMQOS INCORPORATED (PVT) LTD

versus

CITY PARKING (PVT) LTD

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 5,6,7, 8, 20, 26 September, 5, 13, 17 and 19 October 2022

R. Mabwe, for the plaintiff

A. Moyo, for the defendant

TRIAL CAUSE

INTRODUCTION

CHIRAWU-MUGOMBA J: [1]. Harare the capital city of Zimbabwe has experienced an increase in the population of vehicles. More poignantly, there is a large volume of cars that goes into the central business district almost on a daily basis including weekends. This increase necessitated the introduction of a parking management system. What is astounding however is that the defendant after flighting an expression of interest for the provision of such, almost casually engaged the plaintiff and after some discussions, they entered into a verbal agreement. Although various reasons were given by both parties on why the contract was not reduced to writing, the fact that the defendant even describes it as akin to a cash sale is baffling. The parties have literally placed a sizeable chunk of evidence before the court including exhibits, leaving it to chart the maze and unravel the mysteries of what exactly was agreed between the parties.

[2]. The plaintiff's contention is that it entered into a verbal contract with the defendant for the installation of fully automated sensors on 5000 bays. That the contract was in phases with the first phase being for 555 parking bays and second phase for 4445 bays. That the defendant breached the contract thus entitling plaintiff to an order for specific

performance and damages. If specific performance is not feasible, plaintiff seeks an order of cancellation of the verbal contract and damages for breach. On the other hand, the defendant admits entering into a verbal contract with the plaintiff. It contends however that it was only for 555 parking bays. This was done and payment effected by it. There was no contract for 4445 bays. Further that it cancelled the contract for 555 bays due to a malfunctioning system. Still further that the plaintiff's claim has prescribed.

The parties identified the following issues as being for trial.

1. Whether or not the defendant cancelled the contract between the parties in January 2017?

2. Consequently, whether or not the plaintiff's claim has prescribed?

3. Whether or not the parties entered into an agreement for the allocation by defendant to plaintiff of 4 445 parking bays and the terms of such agreement?

4. Whether or not plaintiff is entitled to specific performance, to wit, the allocation of 4 445 parking bays?

5. Whether or not the plaintiff is entitled to: -

    a. Payment of US$5 536 016.25 or the ZWL equivalent at the prevailing interbank rate on the date of payment in respect of the alleged installation of fully automated sensors parking management system on the 4 445 parking bays?

    b. Payment of US$103 500.00 or the ZWL equivalent at the prevailing interbank rate on the date of payment in respect of the alleged semi -automated parking management system annual licence fees for the 4 445 parking bays for the period 1 January 2018 to December 2020?

    c. Payment of US$36 895.82 or the ZWL equivalent at the prevailing interbank rate on the date of payment in respect of the alleged installation of fully automated sensor parking management system annual license fees for the 555 parking bays for the period 1 May 2017 to 31 December 2020?

    d. Future payment in respect of alleged annual fees for the automated parking management system for the next 12 years?

6. Whether or not in the alternative, plaintiff has suffered damages and the quantum thereof?

7. In respect of the claim for US$36 895.82

    a. Whether, in January 2017, defendant cancelled the agreement between the parties pertaining to 555 parking bays?

    b. In the result, whether or not defendant is liable for parking license fees in the sum of US$36 895.82 for the year 2018?

A total of three witnesses presented evidence to the court, two for plaintiff and one for the defendant.

[3] THE EVIDENCE OF THE WITNESSES

(a) ZVAREVASHE MASVINGISE

'Masvingise', testified as follows. He is a director of the plaintiff company that specialises in supply and installation of a parking management system. The parties have engaged in three contracts, two of which are not issues before the court. The relevant one and the subject matter of the dispute is one in which the defendant engaged plaintiff to install an automated parking system covering 5000 bays in the CBD of Harare. Of these, under phase one 555 bays were to be installed with fully automated sensors. The system consists of gateways handheld devices for use by the marshalls, automated enforcement platform, touring platform, treasury platform linked to the cash office and the back-office system. The remaining 4445 were to be initially covered under a semi-automated system before being fully automated in phase 2. This system consisted of handheld devices for use by the parking marshalls. This contract was verbal and was entered into on the 5th of March 2014 after successful completion of a pilot phase on 20 bays in the CBD. The 555 bays were to be covered by 35 handheld devices whereas the other 4445 were to be covered by 165 handheld devices. Upgrading of the 4445 bays from semi to fully automated bays was to be done in phases and it would depend on the availability of funds. A letter dated the 10th of March 2014 (Exhibit 3) is a follow up to the verbal contract. It states that the plaintiff should procced and implement the installation of a street automated system on 555 bays. Another follow up letter was addressed to the plaintiff by the defendant which affirmed the agreement between the

parties (Exhibit 4). The defendant paid for the installation of a fully automated system on 555 bays as agreed including for the 20 during the pilot phase which were only payable after successful completion and satisfaction by the defendant of their feasibility. Payment was made for 200 handheld devices.

When the handheld devices were delivered to the defendant, there were no problems or malfunctions. The first contract between the parties related to the 555 bays, 455 bays and the equipment in the form of the devices. There was a secondary contract for the supply of software to go with the handheld devices. Software license fees was paid for the years 2015-17 for both the 555 fully automated devices and the 4555 semi-automated.

At one point the defendant wanted the plaintiff to surrender its equipment to a rival parking systems company and it refused. As a result, the defendant sabotaged the system. The defendant had no right to terminate the contract with the plaintiff.

Under cross examination the following emerged. The full scoping for the 4445 bays has been done and what remains is full automation. The bays were physically handed to the plaintiff by the defendant. To carry out the work on those days, approval by the defendant is required. An order from defendant would also be required. Such order has not been placed as yet.

The reason why the plaintiff is in court is because the defendant tempered with the system and refused to pay licensing fees. He admitted that once the defendant paid for the equipment, it became theirs. Also, that the defendant had communicated the reason for termination of the software agreement as being that the devices malfunctioned.

(b) STANSILOUS TAPIWA MUTEMA

'Mutema' is a former legal internal counsel of the plaintiff. He testified as follows. Sometime in 2014 the plaintiff and the defendant engaged each other for the purpose of entering into a parking system agreement. Such agreement was concluded on the 5th of March 2014 but was not reduced to writing. The terms were that the plaintiff was to provide a parking management system for 5000 bays in the Harare CBD. For purposes of implementation, it was agreed that the job be done in phases one and two. The first phase involved 555 bays and the second phase the remainder i.e., 4445 fully automated bays. In pursuance of the agreement, 200 handheld devices were provided, with 35 to cover 555 fully

automated bays and the remainder of 165 to cover 4445 bays under a semi-automated system. At the time of contracting, the defendant was facing financial challenges hence phase two was subject to funding. This was not a condition precedent but a phased approach to full automation. Therefore, the contract was for 5000 bays. The automation of 555 bays was preceded by a trial phase of 20 bays. The defendant was happy with the job done hence automation of remaining 535 bays to make a total of 555 bays.

SIMON MUZVIYO

'Muzviyo' testified as follows on behalf of the defendant. He is the Managing Director of the defendant. The parking management project started by the flighting of an expression of interest for automation of 5000 bays. The plaintiff participated. Initially there was a trial run of 20 bays to demonstrate capacity. The plaintiff was then contracted to supply 200 handheld devices and to install parking sensors for 555 bays. This was paid for in full. In implementing the system some challenges were experienced and a number of meetings were held to try and rectify operational deficiencies in the system. After failing to rectify these, the defendant terminated the arrangement in January 2017. However, license fees were to be paid up to September 2017. The discussions were finalised on the 5th of March 2014. In the discussions, it was agreed that it was the vision of the City to automate 5000 bays and this was depended on the capacity to pay and also on efficiency of the system. The agreement was in respect of 555 bays and not 4445 as contended by the plaintiff.

After the defendant resolved to go ahead with the contract in respect of 555 bays. There was no resolution or agreement on the 4455 parking bays. After the resolution, the plaintiff was to be provided with an order of the gadgets required and in turn they would raise an invoice. This was done and the plaintiff was paid its dues. On licensing fees, these were to be paid annually. This was not a separate agreement. It was part and parcel of the 200 gadgets because without software, these would be redundant. 35 devices were allocated for use in the 555 bays, and the 165 were for use in areas that the defendant deemed fit. The 165 devices were not specifically for use in the 4445 bays. The plaintiff made a proposal to fully automate all the 5000 bays but the defendant did not agree to this. There was no agreement on the 4445 bays that would result in the triggering of an order by the defendant. No order was ever issued for 2000 bays despite a letter to the plaintiff on the issue of funds related to these. Following the installation of the parking management system, various challenges were

brought to the attention of the plaintiff and the latter proposed to make rectifications. The deficiencies were not addressed to the defendant's satisfaction. As a result, a letter was sent to the plaintiff dated the 4th of January 2017 giving notice to terminate the software agreement. This was followed up with another letter dated the 26th of January 2017 with the added portion on pro-rata payment of licensing fees for the software. Payment of the software license fees was done up to end of December 2017 since the plaintiff indicated that this was annual payment. The cancellation of the software would result in the cancellation of the entire contract. At that time, the sensors, gateways and handsets had been already been paid for. They were therefore the assets of the defendant. Thereafter correspondence was entered into by the parties.

With regard to the second phase, although the plaintiff submitted a proposal, it was not accepted by the defendant. The claim for payment of licensing fees for 12 years has no basis since there was never such an agreement between the parties. The plaintiff's system is no longer being used as the defendant generated its own internal system. The plaintiff's software is no longer being used by the defendant. As for the 555 parking bays replacement, this lies within the defendant's discretion. Of the equipment claimed, the wear and tear was never agreed upon. Consumables are also subject to tenders.

Under cross examination, Muzviyo maintained that what was terminated was the software agreement because the gadgets would not work without it. The software was supplied by the plaintiff. The phasing aspect of the contract was influenced by the availability of resources and also the assessment of the functioning of the system in the first phase.

THE LAW

[4] In *Nicoz Diamond Insurance Ltd vs Clovegate Elevator Co (pvt) (2) Clovegate Elevator co 9pvt) Ltd vs Nicoz Diamond Insurance Ltd,* 2018(1) ZLR 50(H), D -G, HUNGWE J (as he then was) dealt with a verbal contract as follows: -

> *In my view this matter ought to be decided on the credibility of the respective witnesses of the parties. I make this observation in light of the fact that the issues revolve around the terms of a verbal contract. In deciding what the terms of that contract were, I must of necessity rely on what the witnesses say were the terms. In doing so, the court applies the same rules of construction when determining the terms of an oral contract as it does when interpreting a written contract. However, in an*

oral agreement there is no written document to guide the court. It therefore has to assess the credibility of the parties' respective witnesses carefully before making a finding on any of the issues before it.

In assessing the credibility of witnesses the court generally is guided by several factors. A range of factors must be taken into account in assessing a witness's credibility. In Hees v Nel 1994 PH F11 MAHOMED J, had this to say on the subject of assessment of credibility:

"Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony which often is a relative condition to be compared with the quality of the evidence of the conflicting witness. His consistency both within the context and structure of his own evidence and with the objective facts, his integrity, his candour, his age, his capacities and opportunities to be able to depose to the events he claims to have knowledge of. His personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively to communicate what he intends to say and the weight to be attached and the relevance of his version against the background of the pleadings."

See also *Van Hoogstraten vs. Nelomwe,* SC-4-20.

[5]. The court's role in the interpretation of contracts was enunciated in the *Kundai Magodora & Ors v Care International Zimbabwe* SC 24/14 by PATEL JA when he stated the following.

"In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H." (My emphasis).

[6]. From the evidence led, the following is common cause.

a. The plaintiff and the defendant entered into a verbal contract for the automation of 555 bays in the CBD and payment was made.

b. The plaintiff supplied 200 handheld devices to the defendant for use, with 35 being specifically for the 555 bays and payment was made.

c. The plaintiff provided software for use on the 200 devices. Software license fees were paid yearly up to December 2017.

d. The defendant terminated the contract for the software in January 2017.

[7]. Where parties differ however is whether or not the parties contracted for 5000 or 555 bays and whether or not the 165 handheld devices were to cover 4445 bays under a semi-automated system. This raises issues of what were the terms of the contract in relation to those bays; was there breach of contract and if so, what are the remedies and also whether or not the plaintiffs claim has prescribed. The position of the plaintiff is that it contracted for 5000 bays, with the 1st phase being for 555 bays. Further that under phase 2, the 4445 bays were to be fully automated. The defendant insists that there was only a contract for 555 bays, that once payment was made, ownership of the equipment passed to it, that the software was a separate issue since they needed it to operate the equipment and that the plaintiffs claim has prescribed. On the issue of 555 bays, what is in dispute is whether or not the software license fees were payable for a period of 12 years (initially 15 taking into account the period when the defendant paid yearly license fees).

[8]. The issues can be crystallised as follows: -

a. Prescription

b. Terms of the verbal contract(s)

c. Breach

d. Remedies

[9]. The issue of prescription is one of the most commonly raised special pleas in our jurisdiction. The Prescription Act (Chapter 8:11) (the Act) becomes relevant. The position on onus is trite in our law. The defendant bears the onus of proving that a claim has prescribed. If in its replication, the plaintiff alleges that prescription has been waived or interrupted, there is a reverse onus on it to show that indeed this is so- see generally *Brooker vs Mudhanda and anor, Pearce v Mudhanda and anor,* 2011891) ZLR 33(S). Prescription falls in the category of a special plea that is now provided for in Rule 42 of the High Court Rules, 2021. Unlike in the *Mudhanda* case, in *casu,* parties led evidence on the special plea. It is trite that, *for purposes of calculating the relevant time when prescription begins to run in respect of a debt,*

regard must be had to the date when the cause of action arose"- Mudhanda, paragraph G @page 37. See also s16 of the Prescription Act. In *casu,* the claim by the plaintiff falls squarely within the definition of a debt as per section 2 of the Act.

[10]. In its evidence-in-chief, the plaintiff denied that the claim had prescribed. Various dates were put to Masvingise under cross examination with the contention that in all those dates, the plaintiff's claim would still have prescribed. By way of a letter dated the 4th of January 2017, (exhibit 77), the defendant advised the plaintiff that it was terminating the software agreement between the parties with effect from the 31st of January 2017. This was followed by another letter dated the 26th of January 2017 (exhibit 52) in which the defendant advised the plaintiff that it was terminating the software license agreement. Further that the defendant was not going to use the software beyond March 2017. Exhibit 53 is a letter dated the 2nd of March 2017 by plaintiff to the defendant requesting for a meeting to clarify issues regarding the termination. Exhibit 54 is a letter dated the 10th of April 2017 from the defendant to the plaintiff. The letter confirms that a meeting took place and that it was agreed that there was a need to adopt a win-win situation. Further that the plaintiff's system could still be used alongside the defendant's internally generated one. Exhibit 79 is a letter dated the 4th of July 2017, in which the defendant advised the plaintiff that their agreement was terminated on the 26th of January 2017. Further the engagements after the 26th of January 2017 letter were based on the fact that as per the defendant, *"Our subsequent engagements were based on the fact that we may not have given adequate notice of termination and therefore that a longer period of notice of termination was perhaps required".* This supports that indeed to further engagements between the parties including a proposal on phase 2 implementation as per exhibit 56(b). There was no evidence of whether or not the defendant subsequently gave the plaintiff the 'adequate' notice. The defendant kept the plaintiff hoping that the issue would be resolved. With respect to phase 2 for 4445 bays, the matter ended at the proposal stage as confirmed by the plaintiff that there was no response after the submission of the proposal and neither was there a time frame agreed by the parties. On the 16th of February 2018, the plaintiff's legal practitioners addressed a letter to the defendant (Exhibit 72) thus putting the defendant in *mora*. Summons were issued on the 4th of January 2021 and served on the 5th of January 2021. Given this state of affairs, there is no merit in the defendant's contention that the plaintiff's claim has prescribed.

[11]. Oral contracts present some difficulty in ascertaining the actual terms as stated by DUBE J (as she then was) in *Delta Beverages (pvt) Ltd vs. Pyvate Investments (pvt) Ltd and anor,* HH-135-18 as follows: -

> *"Generally, oral contracts are enforceable and do give rise to valid contractual relationships. The oral contract, sometimes referred to as the invisible contract, is one of the most difficult to prove. What makes this so is the lack of hard evidence of the existence of the contract. The essentials of a verbal contract are the same as those of a written contract. There must be offer and acceptance of the contract, existence of consideration, the parties must have the capacity to enter into the contract and the parties must intent to enter into the contract and create a binding legal relationship. The courts will not endorse an oral agreement were any of the essential elements of a valid contract have not been proved. The terms of the oral contract must be proved and there must be agreement and understanding of the terms of the contract by the parties. An oral contract that meets all the requirements of a contract is binding on the parties and gives rise to a legally enforceable relationship. There must be a meeting of the minds or a reasonable belief by the parties that there is consensus. A party who alleges the existence of an oral contract has the onus to prove the existence of the contract on a balance of probabilities".*

[13]. From the evidence led, in my view, that there was a contract was accepted by both parties. In my view, the terms were as follows.

a. The total number of bays to be automated were 5000.
b. The plaintiff was to provide the defendant with a parking system for 555 automated parking bays for consideration.
c. The plaintiff was to provide the defendant with a semi-automated parking system for 4455 bays. In this regard, I find the evidence of the plaintiff more credible than that of the defendant.
d. The plaintiff was to provide the defendant with 200 handheld devices,
e. Of the hand -held devices, 35 were for the 555 bays and 165 for the 4455 bays.
f. The plaintiff was to provide software for 35 devices covering 555 bays under a fully automated system and 165 devices covering 4445 semi-automated bays.
g. The full automation of the 4455 bays was to depend on the availability of funds. In other words, that aspect of the contract was conditional on the availability of funds hence it can be classified as a conditional term.
h. The automation would be done in phases 1 and 2. The latter specifically depended on availability of funds.

Those were the terms as agreed or as understood by the parties based on the evidence led.

[14]. Of the above, terms a-e and f, are common cause whilst g. needs to be put in context. This is based on the strength of the plaintiff's documentary evidence. Exhibit 3 is a letter from defendant to the plaintiff. Paragraph 2 states unequivocally that, "***As agreed**, the upgrading will be in phases as determined by City Parking. Phase one of on-street upgrading will consist of 555 bays"*. The letter further requests that the defendant provides an action plan. In the last paragraph of a letter dated the 22nd of August 2014 from the plaintiff to the defendant, it is stated that the defendant will continue to look for funding to ensure that the whole CBD (5000) bays has sensors. (Exhibit 4). A letter dated the 5th of May 2015 from the plaintiff to the defendant (Exhibit 35a) informed the former that the latter was in the process of engaging a funding partner to fund the installation of 2000 bay sensors and asked of the plaintiff to provide it with an indicative time frame so that it could negotiate with the prospective funding partner from an informed position. If the issue of the number of bays had not been agreed upon, there would not have been any reason why the defendant would make such inquiry. Indeed, the plaintiff responded in exhibit 35 being a letter dated the 13th of May 2015 giving the time line.

[15]. The charges for the software license in my view is not a second contract as contended by the plaintiff but very much part of the agreed terms for the first phase. Exhibits 21, 22, 23, 24, 26, 27, 28 being invoices for the software licenses are consistent with that aspect being part of the agreed terms. I find the evidence of the defendant more credible on this aspect than that of the plaintiff.

[16]. Having determined the terms of the contracts, the next issue to determine is that of breach. The plaintiff's contention is that the defendant breached the contracts thus entitling it to either specific performance or damages. I will deal with the breach in relation to the first phase, i.e., cancellation of the contract for the 555 bays. As rightly contended by the defendant and grudgingly accepted by the plaintiff, once the equipment was paid for, it became theirs to keep. The plaintiff presented evidence showing that it was involved in the day- to -day operations of the systems and that some training was provided to the defendant's personnel. However, when asked about the terms of the contract, I did not hear any evidence to support the allegation that the contract was supposed to run for 15 years and what this

meant practically. The plaintiff supported the other terms of the agreement through documentary evidence but none was forthcoming in relation to the time frame. Indeed, the termination related to the provision of software. As per the defendant's witness, the 200 hand held gadgets would be useless without software hence the agreement with the plaintiff to provide software. Given that the other conditions on the 555 bays were fulfilled, i.e., delivery and payment, there was nothing to terminate in that regard. There was no evidence put before the court by the plaintiff to show that the licensing fees for the software for the 555 bays operated through the 35 handheld devices was to extend beyond 2017. Infact, all dues for 2017 were paid. The evidence supports the defendant's contention that the license fees were paid annually. The defendant documented well the challenges it met in using the plaintiff's system. There was also no evidence presented to the court to show that it was a term of the oral agreement that the plaintiff would continue to offer its licencing software to the defendant for another 12 years after 2020. There was no evidence of the life span of the handheld devices to justify the plaintiffs claim for replacement and evidence of a long-term contract. Therefore, if the devices were the defendant's, they could do with them as they pleased. That is why the termination related solely to software. Even in the hand written minutes generated by the plaintiff (Exhibit 60) the subject matter was payment of license fees for 2018. There was no evidence presented that it can be implied into the contract that it required a long -term commitment between the parties. This could be through trade usage in the parking management system industry. As stated by Christie in *Business law in Zimbabwe,* (Juta and co, 1998) at page 59, *"The evidence to prove a trade usage must be clear, convincing and consistent, must amount to no more than an opinion and must provide instances of the usage having been acted upon: Branch v Vic Diamond"* – Full citation *Branch v Vic Diamond and Son (pvt) Ltd, 1957 R and N 11, 1957(1) SA 331*. No such evidence was placed before the court.

[17]. While the defendant presented evidence of malfunctioning of the system generally with the plaintiff laying the blame on the defendant, the explanation of the defendant that the plaintiff were the owners of the software is credible.

[18]. As already stated, phase 2 of the oral agreement related to the full automation of 4445 bays. This depended on the availability of funds. Christie (*supra),* page 52 states as follows:

> *"Ideally, a contract should be described as conditional only if the condition governs the whole contract and is not a term of the contract which one of the parties is obliged to perform, but it has long been accepted that a contract can properly be described as conditional if part only (e.g. the passing of ownership) is subject to a condition (e.g. payment of the last instalment). As a result, the distinction between conditions and terms has tended to become blurred…"*

The contract as it relates to the 4445 bays was clearly conditional. In my view, the condition as it related to the full automation of 4445 bays constitutes a condition precedent. It all depended on availability of funds. Christie *(supra)* at page 54 states as follows:

> *'A condition precedent or suspensive condition is an agreement to suspend the operation of the contract or some part of it until the fulfilment of the condition. The* ***fulfilment*** *of the condition must therefore be* ***pleaded and proved*** *by a party seeking to enforce the contract'.* (my emphasis).

The plaintiff testified to the fact that they were requested to submit a proposal which in itself is not a contract and that the defendant never communicated further on it. The plaintiff never pleaded not testified that the condition had been fulfilled. The plaintiff's assertion that just because the defendant made payment of a large sum of money to another entity, shows that it had the funds does not hold water. The defendant being a business entity could not be expected to cease contracting with other parties just because it had a verbal contract for a parking management system. There is no evidence placed before the court as to when exactly the money was supposed to be secured. The plaintiff located its claim on an aspect of a contract that that was *perfecta,* when it was clearly not. The defendant cannot therefore be liable for specific performance based on a term of the contract that was never fulfilled or pleaded. Neither can it also be held liable for any damages because again the claim was located in a condition that had been fulfilled. The defendant's counsel actually put a pertinent question to the plaintiffs first witness that why were parties in court for the simple reason that the condition had not been met.

[19]. In any event, specific performance is discretionary – see (See *Farmer's Coop Society (Reg) v Berry* 1912 AD 343 and *Haynes v Kingswilliamtown Municipality* 1951 (2) SA 371 (A) at 378- 379 C). The evidence by the defendant that it is no longer using the system provided by the plaintiff including its software was actually corroborated by the plaintiff.

[20]. Similarly, the claim by the plaintiff for licensing fees for the period 1 January 2018 to December 2020 and thereafter for a period of 12 years for the 4445 bays is not

sustainable. It is based on a claim for specific performance of a contract based on a condition precedent that was never fulfilled.

[21]. Weighing the evidence between the parties, the plaintiff has failed to prove its claim on a balance of probabilities. I find the evidence of the defendant to be more credible than that of the plaintiff. The plaintiff infact wanted to use its own resources to fully automate the 4455 bays, which was never pleaded nor proved as a term of the verbal contract. The evidence of Mutema adds no value to the plaintiff's claim since it confirmed what had already been said by Masvingise. It did not deal with the critical aspects of the funds being available for the 4445 bays and the number of years that the contract was to run for.

[22]. The plaintiff has claimed in the alternative cancellation of the contract with the plaintiff in relation to the 4445 bays. As stated above, the condition precedent was never fulfilled and hence the claim is incompetent. The contract in relation to the condition never became *perfecta.* Similarly, with respect to breach, this can only be based on a condition precedent that is fulfilled. As already stated, it is trite that courts do not create terms for the parties more so in an oral contract. There is therefore no contract to cancel or to breach as claimed in the alternative by the plaintiff on a contract that was never *perfecta.*

[23]. Accordingly, the plaintiff's claim has no merit. I find nothing to justify a departure from the trite legal position that costs follow the cause and I also find nothing to justify an award of costs on a higher scale. The plaintiff therefore shall pay costs on the ordinary scale.

DISPOSITION

1. The plaintiff's claim in the main and in the alternative be and is hereby dismissed.
2. The plaintiff shall pay the costs.

Farai and Farai, plaintiffs' legal practitioners

Kantor and Immerman, defendant's legal practitioners