SAM NGARA
versus
TRINITY ENGINEERING

HIGH COURT OF ZIMBABWE
TAKUVAJ
HARARE 22 NOVEMBER 2013; 4 AUGUST 2014 & 2 DECEMBER 2015

Civil Trial

F. Chimwamurombe for the plaintiff
Advocate Mhere For the defendant

TAKUVAJ: The background facts are these:

Plaintiff's claim is for specific performance. In the summons against defendant plaintiff claims *inter alia* delivery of a "flat bed tri-axle trailer comprising the tri-axle cargo deck or alternatively payment of the monetary value of the aforesaid incomplete trailer as agreed upon by the parties or as determined by an independent valuer to be appointed by the Registrar of the High Court within ten (10) days of this order."

The saga began on 21st April 2008 when plaintiff and one Gandiya allegedly walked into defendant's yard and selected a trailer that was on sale. There is some considerable divergence in the evidence as regards whether or not plaintiff was present with Mr Gandiya when this inquiry was made. Be that as it may, defendant issued a quotation to NFB Logistics and directed to the attention of Mr Gandiya and not for the plaintiff's direct attention. The quotation which is for two (2) "Tri-axle Trailers" is dated 21 April 2008 with a validity of two (2) working days from the 21st April 2008.

It is common cause that plaintiff paid three trillion five hundred and thirty six billion six hundred and eighteen million dollars (ZWD 3 536 618 000 000,00) by RTGS on 25 April 2008 that is 2 days after the due date. It was also admitted that the period of validity was a clear term of the quotation necessitated by hyper inflation. The full terms of the annotation were:

(a) full payment.
(b) prices were subject to alteration should any change occur before delivery

(c) the price of the flat bed trailer including VATwas $3 536 618 000 000,00

(d) delivery was to be effected on a date "to be advised".

(e) the validity of the quotation was 2 working days from the 21st April 2008.

Subsequently a dispute arose resulting in this action. At pre-trial conference, two issues were identified and the matter was referred to trial on those issues. They are summerised as:

"(1) what were the terms and conditions governing the parties' agreement?

(2) whether or not the plaintiff is entitled to the relief claimed?"

Both parties led evidence on these issues. What came out is that there was a dispute as to whether or not from the terms and conditions a valid contract came into existence. This is so because it is trite that specific performance is a remedy for the breach of a valid contract complete with a competent offer and clear acceptance. Further, the plaintiff must establish that he has performed his share of the obligations in respect of such a contract.

In *Savanhu and Marere N O & Ors* 2009 (1) ZLR 320 it was stated that:

> "A party to a contract has in an appropriate case a right to claim specific performance, but it is in the discretion of the court either to grant such an order or not. The right to claim specific performance of a contract by the plaintiff is premised on the principle that the plaintiff must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain or that he has been prevented from doing so by the defendant. The court will not decree specific performance where the plaintiff has himself broken the contract or made a material default in the performance."

See also *Unilever South Africa* v *Viewleen Investments (Pvt) Ltd* HH-37-07
Intercontinental Trading (Pvt) Ltd v *Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21

Defendant's argument is that on the evidence which is common cause no valid contract came into existence on 21st April or on any other date since the offer made by the defendant had lapsed at the time plaintiff purportedly accepted it. That for a contract to be established, there must be an offer and an acceptance is trite. An unaccepted offer cannot create a contract since it emanates from the offeror alone and the necessary agreement cannot be held to exist without some evidence of the state of mind of the offeree. The general rule is that no contract can come into existence unless the offer is accepted.

R.H. Christie *Business Law in Zimbabwe* 2nd Edition Juta and Co. 1998 at 33, 35 – 36

states the law as follows:

"An offer, in the specialized sense in which that word has come to be used in the law of contract, is identifiable as being accompanied by *animus contrahendi*, the intention of putting the conclusion of the negotiations out of one's further power and enabling the offeree, by mere acceptance, to create the contract."

Further, when dealing with termination of offer, the author states:

> "No agreement can arise from the acceptance of an offer that is no longer open for acceptance, so the ways in which an offer can come to an end must be considered. The most obvious way is by effluxion of time fixed by the efferor in making his offer. There is nothing to prevent an offeror specifying the period of his offer in this way and if he does so, then, in the words of INNES CJ in *Laws* v *Rutherfurd* 1924 AD 261, 262.
>
> > 'speaking generally, when the acceptance of an offer is conditioned to be made within a time … prescribed by the offeror, then the prescribed time limit … should be adhered to'.

A purported acceptance out of time does not bring the parties into agreement but the offeror may, of course, waive the time limit he has set, treating the late acceptance as a counter offer and accepting it. See also *Antonio* vs *Ashanti GoldFields Zimbabwe Ltd* 2009 (2) ZLR (H) at 383. *Nkomo and Ors* v *ZESA* 2004 (1) ZLR 345 (H).

The law put simply is that an offer terminates after expiry of fixed time. Another way of putting the same legal principle is that acceptance should not be qualified and it must exactly correspond with the terms of the offer. *Orion Investments (Pvt) Ltd* v *Ujamaa Investments (Pvt) Ltd and Ors* 1987 (1) ZLR 141 (5) it was held that the general rule with regard to the formation of contracts is that a contract is not concluded until the offeree has not only decided in his own mind to accept the offer made, but has communicated his acceptance to the offeror. It is competent for the offeror to dispense with such notification either expressly or impliedly, and to indicate the manner in which acceptance may be manifested. Compliance with the method of acceptance, even though not brought to the knowledge of the offerror, will create a *vinculum juris* between the parties.

It was submitted on plaintiff's behalf that the quotation by defendant did not constitute an offer but a mere invitation to treat. Reliance was placed on the following two cases.

(1) *Benchill Investments (Pvt) Ltd* v *Battery World (Pvt) Ltd* HH 277-10

(2) Westing House Brake and Equipment (Pvt) Ltd vs *Bilger Engineering (Pvt) Ltd 1986 (2)*

SA 555 (A) at 569 E

What these cases show is that whether or not a quotation amounts to an offer is a question of fact.

Christie's *The Law of Contract in South Africa* 3rd ed at page 42 states that:

> "There seems no good reason for a member of the public, or the court, to conclude that a shopkeeper's action in exposing goods for sale should be interpreted as an offer (as suggested by Wessels) or as a conditional offer (as suggested by Kalm) or as a mere declaration of intent (as suggested by Winfield) to the exclusion of other possibilities. Tacit or implied contracts and tacit or implied terms in contracts are not inferred unless it is necessary and not merely reasonable to do so, and the best conclusion seems to be that the attachment of a price ticket to goods exposed for sale, without more, creates no necessary inference of a firm offer of those goods for sale." (my emphasis)

Indeed in the *Benchill* case *supra* KUDYA J found that "the quotation that was supplied to Dingwiza by Chakupa fell into the category of an invitation to treat." He relied on the *Bilger Engineering* case *supra* where CORBETT JA considered a written quotation for the supply of brake equipment. The quotation itself had numerous clauses constituting "general conditions of tender or of sale." The learned Judge of Appeal held at p 569 E – F that; "I agree that the appellant's quotation of 29 June 1981 constituted an invitation to treat or do business and respondent's order of 29 July 1981 a contractual offer."

As I understand it the plaintiff's case at best is that the payment he made through an RTGS form dated 25 April 2008 constituted an offer to purchase the trailer. According to him, the defendant "accepted" this offer by failing to "refund" him. Therefore, so the argument goes, the defendant should deliver the trailer or alternatively pay damages equivalent to the current market value of the trailer.

Assuming for a moment that this argument is valid, it does not take the plaintiff's case any further in that on the evidence that "offer" was never accepted by the defendant. It was argued on plaintiff's behalf that it "boggles the mind to note that the defendant is denying liability on the basis that the money was paid two days out of the quotation timeframe but in its plea, paragraph 5.2 it states that the manufacture was already underway and it needed a top up from the plaintiff." (my emphasis)

Paragraph 5.2 of the defendant's plea states:

"5.2 Defendant consequent to the receipt of payment to commence manufacture of the trailer notified unavailability of certain materials. The plaintiff despite request advised defendant that he was unable or unwilling to provide further monetary amounts for the purpose of manufacturing a trailer. On a date no longer within defendant's recollection but in or about October/November 2009, plaintiff entered into and concluded an agreement with defendant to refund the money paid and that plaintiff was no longer interested in the trailer. Accordingly, plaintiff's claim that defendant has failed, neglected, and/or refused to deliver such trailer to the plaintiff despite demand is false and is denied.

Defendant denied that it has an obligation to complete the manufacture of a tri-axle trailer and to deliver the same in respect of the payment referred to in paragraph 3 of the plaintiff's particulars of claim and that such sum of money now in redundant currency constitutes completed performance in terms of a sale agreement."

Elsewhere in that plea, the defendant specifically denied that the payment constituted the full purchase price as it was made two days after the quotation had expired.

Plaintiff's evidence on what transpired when he presented the RTGS form to Mr Luka Charles is materially different from the defendant's version. In paragraph 4 of the plaintiff's particulars of claim, he misrepresented facts by stating that he made payment on the 21st of April 2008. He repeated this misrepresentation in his letter of 26 July 2010. Again, in another letter dated 1st of April 2010 plaintiff lied that he made payment "as per the quotation". In paragraph 5 of his particulars of claim plaintiff stated that it was agreed that defendant would deliver the trailer "within a reasonable period." Yet in the summary of evidence he said delivery was to be effected "within a few months". In his evidence in chief plaintiff stated that Luka Charles gave him an "extra week" within which to pay and delivery was to be done "within weeks".

Further plaintiff stated that the endorsement "including VAT $3 536 618 000,00" on Exhibit 1 (the quotation) shows that defendant acknowledged receipt of the money. He conceded that no formal receipt was issued. Mr Luka Charles for the defendant gave evidence to the effect that plaintiff came to the defendant on the 25th of April 2008 with the RTGS form (Exhibit 2). He said upon being presented with the purported proof of payment he indicated that the payment was out of time. He then approached his superior, Mr Rose to ask for directions. Mr Rose then instructed him not to accept the payment after which he returned it to the plaintiff who went away. This version was corroborated by Mr Rose. According to these two witnesses, the reason

for rejecting the payment was because it was out of time and prices had gone up due to hyper-inflation.

Mr Luka Charles further stated that plaintiff was not issued with a receipt or an invoice because the payment was not accepted and defendant refused to manufacture the trailer on the defective payment. This was confirmed by Mr Georgias and Mr Rose. As regards the endorsement on the quotation it was Mr Charles' evidence that this was done on the 21st of April 2008 pursuant to an inquiry by plaintiff's friend Mr Gandiya of what the cost of a trailer would be including VAT. He then signed to confirm that he was the one who had calculated VAT. In respect of the extra week to pay, Mr Charles denied granting plaintiff any such further time to pay arguing that he in fact did not possess such authority.

Analysis

In my view, the plaintiff's version that the defendant accepted payment two days out of time is manifestly improbable in view of the fact that prices quoted were only valid for 2 days because of hyper inflation. Prices were soaring on a daily if not hourly basis and this explains why the quotation indicated that the prices were "subject to alteration". Surely no astute business person would in those circumstances accept a late payment.

Similarly, plaintiff's claim that Mr Charles gave him an extra week to pay is highly improbable in that such a long extension would certainly not have made business sense given the hyper inflationary environment which would have meant that the cost of manufacture would have gone up exponentially by the time the late payment was presented.

As regards the endorsement, I find plaintiff's evidence unconvincing because while conceding that he was not given a receipt or invoice, he failed to explain satisfactorily why he did not insist on being issued with such crucial documents. Defendant's evidence was that the invoice would have contained a job card with a job number and a chassis number to help the customer identify his trailer when checking on its progress.

For these reasons, I find as follows:

1. The plaintiff and his witness Leo Gandiya are incredible witnesses
2. Defendant's witnesses were credible witnesses
3. Plaintiff's late and defective payment was never accepted by the defendant

4. The endorsement "including VAT $3 536 618 00,00" was not an acknowledgement of receipt
5. The plaintiff was never granted an extra week within which to pay the purchase price.
6. The evidence by the plaintiff of follow-ups, meetings with Mr Georgias and subsequent letters simple prove that the parties were never *ad idem* from the beginning.
7. Accepting that the payment of the purchase price constituted an offer by plaintiff, the defendant did not unequivocally accept this offer as required by law. Therefore, no contract came into existence.

Accordingly, on a balance of probabilities, the plaintiff has failed to prove that a valid contract was created between the parties. Therefore, the plaintiff's case is dismissed with costs.

Danziger & Partners, plaintiff's legal practitioners
Gollop & Blank, defendant's legal practitioners