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Judgment No. S.C. 2/2001
Civil Appeal No. 52/99

KWARATE RANCH (PRIVATE) LIMITED v

(1) MIDDELBURG STEEL AND ALLOYS (PTY) LIMITED

(2) NESONDO NESONDO (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, JANUARY 8 & 25, 2001

J C Andersen SC, for the appellant

R M Fitches, for the first respondent

No appearance for the second respondent

McNALLY JA: This is a dispute about whether or not the first respondent, which I will call "MSA", orally sold certain mining claims to the appellant ("Kwarate"). MSA says it did not sell the claims. It has since sold them (at a better price) to the second respondent, which is content to abide the judgment of the Court.

In the trial court in Bulawayo in February 1999 the learned judge decided the matter against Kwarate. He ruled that there was never an oral agreement of sale on 28 July 1997. Kwarate appeals against this ruling.

It contends –

1. The weight of evidence did support the contention that there was an oral contract of sale.

2. The trial judge confused the making of the contract with the performance of the contract. In particular the question whether or not security was furnished by Kwarate was a question about whether the contract was performed, not whether it was formed.

3. The trial judge wrongly drew an adverse inference against Kwarate.

4. In any event, at worst for Kwarate, there were irreconcilable disputes of fact and the matter should not have been dismissed but should have been referred to trial.

Henry Ford is supposed to have said that an oral contract is not worth the paper it is written on. He was using the technique of absurdity to make the point that an oral contract is usually harder to prove than a written one.

In the present case, the alleged oral contract was allegedly entered into over the telephone. There were no witnesses. It seems to me very unsatisfactory that such a case should be brought before the court by way of application rather than by action. After all, the procedure by application is commonly described as approaching the court "on the papers". What papers support an oral contract? Are we not back to the absurdity of Henry Ford's aphorism?

I will return to this line of thinking when considering the fourth ground of appeal in due course.

THE FACTS

Kwarate was represented throughout by its director, Mr Mugara ("Mugara"). MSA, by its Chief Mining Rights Adviser, Mr Hager ("Hager"). MSA owned twenty mining claims in the Lalapanzi area (they are really three blocks of claims numbering 1 285 base mineral claims in twenty groups). Kwarate was hoping initially to become a tributor of those claims, but then MSA decided to sell them. Mugara says the sale was agreed in a telephone conversation on 28 July 1997. Hager denies it, and says a draft agreement in writing was under consideration but was never finalised.

We are left then to look at the correspondence between the two men, and some contemporaneous notes made by Hager on various telephone calls between them, in order to determine whether Mugara has proved his oral contract or not.

THE RELEVANT CORRESPONDENCE

The correspondence about the proposed tribute agreement which never materialised is not relevant. The relevant correspondence opens with a fax, Hager to Mugara, authorising the latter to sell an estimated one hundred and thirty tonnes of chrome, illegally mined at the MSA claims by a third party, for a consideration of 5% of the value to be paid to MSA. It is dated 17 July 1997.

Next is a fax, Mugara to Hager, dated 1 August 1997. This says:

> "With ref. to our telecon. of 28th July 1997 we hereby confirm that we have paid the initial deposit of $3 000 (three thousand dollars) at the Deloitte & Touche Bulawayo Offices after discussion with Mr K.J. Langley's secretary.
>
> Please kindly therefore fax us a letter to the effect of the purchase agreement which we can lodge with the Mining Commissioner while waiting for the detailed agreement of sale. Also kindly attach the letter of authority for recovery of 103.73 tonnes illegally mined and sold to Zimasco by Mokomborwe Co-op."

This fax certainly indicated, without exactly saying so, that Mugara believed, or perhaps wanted to believe, that he had a contract of sale.

Hager replied by fax on 5 August 1997. He made no reference at all to the alleged sale agreement. Mr *Andersen* makes the point that he did not deny it. True, but he also did not admit it. Nor did he comply with the request to "fax us a letter to the effect of the purchase agreement which we can lodge with the Mining Commissioner". This omission is significant because Mugara needed such a written authority to register the transfer of the claims with the Mining Commissioner.

What Hager dealt with in his fax was merely the request in the last sentence of Mugara's fax. Surprisingly, he did not say "But I have already on 17 July faxed you the authority to recover and sell the illegally mined chrome". He simply repeated, almost verbatim, what he said on that earlier date.

Then, on 7 August 1997, Hager faxed to Mugara the "draft sale of chrome claims agreement for your comment pse". There was no reference to a pre-existing agreement, or to the fact that this document was merely to be a record of what had already been agreed.

On 12 August 1997 Hager has a note of a telephone conversation with Mugara. He recorded that Mugara had problems with the draft agreement. Most important – "Bank guarantee – banks won't give". This refers to the clause in the draft agreement requiring a bank guarantee for the balance ($117 000) of the purchase price ($120 000). A deposit of $3 000 had been paid on 1 August 1997.

On 24 November 1997 Hager received a better offer from the second respondent. He made a note to wait until "the Kwarate Ranch deal has either been canned or signed". This indicates two things –

1. He did not believe he had a binding agreement with Kwarate.

2. He considered himself at least morally obliged to await a decision by Kwarate before accepting the better offer from the second respondent.

On 27 November 1997 Hager, no doubt wishing to push Mugara to a final decision, wrote to him saying:

> "In order to finalise the sale of our chrome claims at Lalapanzi to yourselves we have to point out that (MSA) insist on a bank guarantee or other satisfactory collateral to serve as security for the rights being disposed of. Kindly revert to us as soon as possible."

Then, on 26 January 1998, in a letter marked "by hand", Hager wrote to Mugara:

> "We refer to our telefaxes dated 17 July 1997 and 5 August 1997 as well as our letter dated 27 November 1997, all in respect of which we have thus far had no reply, and wish to serve notice herewith that we are holding you in breach of our verbal agreement in terms of which (MSA) have allowed you to commence mining on Jonathan 2 (a block of 200 of the 1 285 claims in issue)

> pending the outcome of our negotiations regarding the sale of the rest of the claims. (my emphasis).
>
> We are demanding, as we hereby do, that you cease mining immediately on the Jonathan 2 claims and that you provide either the cash amount of Z$170 000 required in terms of our latest draft sale agreement or provide an acceptable bank guarantee for same within fourteen days hereof, failing which further legal action will be taken.
>
> We have been unable to communicate with you telephonically since October 1997 and you are also not answering our faxes or letters.
>
> Kindly view this letter of demand in an urgent light."

In reply to this letter there is a fax of 30 January 1998 from Mugara, speaking of a conversation between them and referring to some discussion with Scotfin Limited about "ceding to (sic) notarial bonds or cancelling Scotfin bond in favour of yours". He was clearly having difficulty providing either a bank guarantee or an alternative security.

Finally there is a fax of 10 February 1998, Hager to Mugara, saying:

> "… The proposals contained in your said faxes have been rejected by the management of Samoncor Limited and we hereby wish to notify you that we regard the verbal agreement dated 4 August 1997 as terminated with effect from 10 February 1998."

In March 1998 Kwarate lodged an urgent application for a provisional order confirming the sale, including an interim interdict against the sale of the claims to anyone else *pendente lite*. This was apparently granted, but confirmation was refused in February 1998. It is against this refusal that the appeal is directed.

THE LEGAL APPROACH TO INTERPRETATION OF THE DOCUMENTS

As so often happens, neither party expressed itself with that degree of clarity which would render judicial intervention unnecessary. Thus Mugara did not complain when Hager failed to "fax a letter to the effect of the purchase agreement" (itself an ambiguous phrase) as requested on 1 August 1997. Hager did not reply "We haven't got a purchase agreement yet". Later, when Mugara received Hager's letter of 26 January 1998, he made no objection to Hager's contention that the oral agreement was not an agreement of sale at all, but merely an interim agreement allowing Kwarate to mine some of the claims pending the finalisation of the sale agreement. On that interpretation the $3 000 was in fact a consideration for the interim right to mine, but was to be treated as a deposit on the purchase price if a sale eventuated.

Strictly speaking, therefore, we are not dealing with the kind of situation referred to in Christie on *Contract* 3 ed p 116. There, it is common cause that an informal or oral agreement exists. The question is whether that agreement is binding or whether the parties intended that there would be no binding contract until the informal agreement was reduced to writing.

Here, on the other hand, it is not common cause that there was an informal agreement of sale. The one party says there was. The other party says that the informal agreement was merely a preliminary one, concerning the right to mine Jonathan 2 pending an agreement of sale.

Clearly in such a case the *onus* is on him who alleges the contract of sale, to prove it.

THE REASONING OF THE TRIAL JUDGE

The learned judge took the view that the letters of 27 November 1997 and 26 January 1998 made it clear that Hager did not think there was a binding oral agreement of sale. Mugara should have contradicted him and asserted the "correct" position at that stage. Without actually saying that he disbelieved Mugara, the learned judge clearly did so. He preferred the version of Hager.

THE APPELLANT'S CONTENTIONS

Mr *Andersen* argued that the learned judge erred in so doing. There was an agreement of sale, he claimed, and the subsequent dispute was not about the existence of that agreement but about its implementation, and in particular about the requirement of a bank guarantee. He referred to *Lincoln Investments (Pvt) Ltd v Sarbah* S-106-200 (not yet reported).

CONCLUSION

There might have been something in this latter contention, but only if it had already been established that there was in existence an oral and informal agreement of sale. In passing, I may say that Mugara dated that oral agreement at 28 July 1997, while Hager said it was on 4 August 1997. Hager may well be wrong, but nothing turns on that. The evidence, although not wholly conclusive, supports the probability, as the learned judge found, that there was no such informal agreement of sale. Hager's contentions, to my mind, make more sense. Nothing that he wrote was

inconsistent with those contentions. He wanted a bank guarantee to be in place before he signed a binding agreement, despite the fact that the draft agreement provided that that guarantee or alternative security should be in place within fourteen days after signature. I find nothing to confirm the existence of an oral agreement of sale, and strong indications that there was no such agreement.

That deals with the first two grounds of appeal. The third ground related to an adverse inference drawn against Mugara. I do not think it necessary to deal with this point in view of the conclusion already reached.

The final point relates to the alternative prayer that the matter should have been, and should now be, referred to trial.

In my view, this is a matter which should never have been approached by way of application for a final order. It was obvious from the beginning that the application relied on an alleged oral agreement, unwitnessed, unconfirmed, and disputed. The credibility of the two parties to the alleged oral agreement was clearly the main issue. Had the documents been crystal clear, there might have been justification for an application "on the papers". But they are not. Indeed they tend to support the opposite side. The court *a quo* went further than perhaps strictly required in the light of the *onus*, and found in favour of Hager's version. This Court does not differ from that finding. See *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 236C.

The appeal is dismissed with costs. For the sake of clarity, I would add that, insofar as it was not expressly so stated by the learned judge *a quo*, the provisional order and interim interdict are discharged with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

James, Moyo-Majwabu & Nyoni, appellant's legal practitioners

Coghlan, Welsh & Guest, first respondent's legal practitioners

Dube, Manikai & Hwacha, second respondent's legal practitioners