REPORTABLE ZLR(12)

Judgment No. 20/09
Civil Appeal No. 22/06

MARK MBAYIWA v (1) ALFAS MUVAVARIGWA CHITAKUNYE
(2) DAINAH NDORO

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, MARCH 4, 2008 & MAY 18, 2009

J Sibanda, for the appellant

H Zhou, for the respondents

MALABA JA: On 18 August 2005 the appellant entered into two separate oral agreements with the first and second respondents. In terms of the agreement with the first respondent, the appellant sold and the first respondent purchased a Massey Fergusson MF 185 tractor for $180 million. The second respondent had represented the first respondent in the negotiation of the terms of the agreement of sale between the two parties. The second respondent also entered into an agreement of sale with the appellant in her personal capacity in terms of which the appellant sold and the second respondent purchased a bowser for $15 million. The respondents dealt with the appellant as if there was a single purchase price for two movables from a single source of payment.

The total purchase price for the two items of property was $195 million. The parties agreed that of this amount a deposit of $20 million be paid to the appellant on the date of the agreements. The deposit was paid on 18 August. It was not refundable if the respondents failed to pay the balance of the purchase price within the time agreed upon for the completion of the contracts.

The parties agreed that the balance of the purchase price in the sum of $175 million was to be paid within three (3) banking days reckoned from the date of the agreements. The appellant banked with AGRIBANK Bulawayo. The balance of the purchase price had to be paid into the appellant's bank account by electronic transfer before the close of banking business of his bank on 22 August 2005.

On 20 August the first respondent acting on behalf of himself and second respondent paid $150 million of the balance of the purchase price into the appellant's bank account by electronic transfer. In para 9 and 10 of the founding affidavit, the first respondent speaking for the second respondent as well averred as follows:

> "9. That on Saturday the 20th of August 2005 and through an agreed method of paying the rest of the purchase price, I caused an electronic transfer of $150 million to be effected into respondent's account held with Agribank, within the agreed three (3) banking days, as will more appear fully from Annexure "A" hereto. (the underlining is mine for emphasis)
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> 10. That on Monday the 22nd of August 2005, which was the last day of the three (3) banking days agreed for the payment of the full purchase price, arrangements were made by me and second applicant to settle the outstanding balance."

What had happened is that in the morning of 22 August 2005 the first respondent contacted the appellant by telephone. He advised the appellant of the fact that he had paid $150 million into his bank account by means of an electronic transfer as he was unable to verify the payment from his bank account as the computer at his bank was down. The first respondent sent the appellant a copy of the electronic transfer by facsimile. During the telephone conversation, the first respondent told the appellant that the balance of the purchase price in the sum of $25 million would be paid to him later that day.

Later that day the first respondent contacted the appellant telephonically and told him that they wanted to collect the tractor and bowser and pay to him the sum of $25 million. The appellant told the first respondent that he was canceling the agreements of sale because they had not paid the balance of the purchase price. He refused to accept the payment of $25 million which the first respondent had said they would give to him at the place where they were to collect the tractor and bowser.

On 7 September 2005 the respondents made an application to the High Court for an order in the following terms:

> "1. That the agreement of sale between the first applicant and the respondent on the 18th of August 2005 for the sale of a Massey Fergusson MF 185 tractor be and is hereby declared to be valid and binding on the parties;
>
> 2. That the agreement of sale between the second applicant and the respondent on 18 August 2005 for the sale of a water bowser be and is hereby declared to be valid and binding on the parties
>
> 3. That it is hereby ordered that the respondent delivers the said tractor and water bowser to the applicants against payment of the balance of the

purchase price within fourteen (14) days of this order failing which the Deputy Sheriff of Bulawayo be and is hereby directed to attach, remove and deliver the said tractor and water bowser to the applicants.

4. That the respondent pays the costs of suit on a higher scale."

The claim of an order for specific performance against the appellant was made on the basis that the payment of the sum of $150 million and a tender of payment of $25 million had been made within the time limit of three (3) banking days. The contention was that the appellant was under an obligation to accept the payment of the balance of the purchase price tendered. The respondents were said to have performed their sides of the contracts. The refusal by the appellant to accept the payment tendered was said to have constituted a breach which the respondents were entitled to reject as amounting to a repudiation releasing them from further performance of their contractual obligations. It was argued that they were entitled to hold the appellant to his side of the bargains and seek an order of specific performance against him.

It was argued on behalf of the appellant in the court *a quo* that there was no question of him having prevented performance by the respondents when he refused to accept payment of the sum of $25 million. The basis of the contention was that the payment of $25 million by the respondents to the appellant in person at a place where they were to collect the tractor and bowser was equivalent to performance of their obligations.

The appellant's defence to the claim by the respondents was summarized by Mr *Sibanda* in the heads of argument before this Court. He said:

"4.5. But in the circumstances of this case, it is submitted that it would not be a defence available to the respondents to say they were prevented from paying the balance because they could simply have transferred the money into the appellant's bank account without having to obtain his permission. Had they done so within the agreed time, the appellant would not have had even a ground to oppose the application.
…..

6. The learned Judge *a quo* held that the appellant prevented the respondents from fulfilling their side of the agreement, and further held that the respondents fictionally fulfilled their obligations when the first respondent indicated to the appellant in a telephone conversation that the balance of $25 000 000 would be paid later in the day.

6.1. It is, however, submitted that the learned judge did not explain how the appellant prevented the respondents from effecting payment.

6.2. Further, it has been pointed out in para 4.5 above that the respondents could have electronically transferred the balance into the appellant's account, as they had done with the bulk of the payment.

6.2.1. No reason has been advanced by them as to why they did not utilize this mode of payment, which, with respect, seems to have been the one anticipated by the parties.

6.2.2. Such a payment method would not have required the appellant's co-operation."

The respondents as the debtors had to show that they had been able and willing to perform their obligations in terms of the contracts with the appellant. They had to show that in fact they performed their obligations as far as they were able to do so but were prevented from completely performing the contract by the refusal of the appellant to accept their performance. The effect of the contention advanced by Mr *Zhou* for the respondents was that the payment tendered by them to the appellant and refused by him

was valid performance by the respondents' of the contracts. The argument by Mr *Sibanda* was that the payment tendered was not in terms of the contracts.

It is clear from the terms of the contracts and surrounding circumstances that performance in *forma specifica* was stipulated in the contracts. The learned Judge misdirected himself in holding that the payment of the balance of the purchase price in the sum of $25 million to the appellant in person tendered by the respondents was a valid performance of their obligations under the agreements of sale. That mode of payment had not been agreed upon by the parties.

The parties had agreed that the payment of the balance of the purchase price had to be made by the respondents within three (3) banking days by electronic transfer into his bank account.

The appellant was not under any obligation to accept payment which was not in terms of the contracts he entered into with the respondents.

In *Anson's Law of Contract* 26 ed at p 425 it is pointed out that:

> "Tender of payment to be a valid performance … must observe exactly any special terms which the contract may contain as to time, place and mode of payment."

In *Halsbury's Laws of England* Vol 9 para 523 it is stated that:

> "A tender of performance which is not in accordance with the terms of the contract may be withdrawn and may not preclude the promisor from subsequently making within the time limited, a tender of performance in a proper manner; but this will not be the case where the incorrect tender is to be construed as a repudiation of the contract."

R H Christie in "*The Law of Contract In South Africa*" 3 ed at p 448 states that:

> "To be a valid tender it must comply with all the requirements of a valid performance, since the basis of the effect which the law gives to a valid tender of performance is that the debtor was correct in thinking that what he was attempting to achieve amounted to proper performance and that it was due to no fault of his own that he was unable to achieve it. Therefore, when performance has to be made at a specified time and place, a tender will not be valid unless it is made at that time and place."

The balance of the purchase price was payable to the appellant by the respondents effecting electronic transfer of the money into his bank account at a bank before close of banking business on 22 August 2005. The money had to be paid into the appellant's bank account by electronic transfer within the time limited for payment for valid performance of the contracts by the respondents to have occurred. The terms of payment were specific and it appears to me that in making the time within which payment had to be made by reference to hours of normal banking business operations the intention of the parties was that the method of payment specified had to be specifically complied with for there to be valid performance of the contracts by the respondents.

The payment of the balance of the purchase price to the appellant in person as tendered by the respondents would clearly not have constituted valid performance of the contracts. The tendered payment was not in terms of the contracts.

The parties made the time and mode of payment of the balance of the purchase price of the essence of the contracts. As the respondents failed to make a valid tender of the payment of the balance of the purchase price there was no attempt by them at effecting valid performance of their obligations. The appellant was entitled to treat the breach as repudiation of contracts by the respondent in each case releasing him from the duty to further perform his obligations under the contract.

The appeal is allowed with costs. The judgment of the court *a quo* is set aside and in its place substituted the following order -

"The application is dismissed with costs."

CHEDA JA: I agree

ZIYAMBI JA: I agree

Job Sibanda & Associates, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondents' legal practitioners