AGRICULTURE BANK OF ZIMBABWE LTD
T/A AGRIBANK
versus
DATANET TECHNOLOGY ZIMBABWE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE: 11 June 2008

Mr *J. Dondo*, the for plaintiff
Ms *R. Shongedza*, for the defendant

MTSHIYA J: The cause of action in this case arises out of an alleged breach of contract by the defendant for the supply of 20 IBM A50 desktop computers (computers) to the plaintiff.

The plaintiff is suing the defendant for specific performance or payment of damages in lieu thereof.

At the commencement of the trial the plaintiff applied to amend the damages figure or the summons to read $9 792 245 000 000-00 instead of $7 800 000 000-00. The amendment was meant to address the effect of inflation on the original figure. Counsel for the defendant did not oppose the application for amendment. I granted the application for amendment and consequently the plaintiff's claim herein is for:

"(a) An order that the defendant supply and deliver to the plaintiff a total of twenty (20) IBM A50 desktop computers forthwith alternatively an order that defendant pays to plaintiff a total of $9 792 245 000 000-00 representing the current value of the said computers.

(b) Interest on the amount representing the value of the computers from the date of summons to the date of payment; and

(c) Costs of suit".

It is common cause that on 23 February 2005 the plaintiff ordered from the defendant a total of thirty (30) computers. Each computer was quoted at a price of $9 860 400-00, bringing the total cost, including V.A.T. payment, to $340 183 800-00. This amount was then paid in full on 28 February 2008. The defendant, however, only managed to deliver ten (10) computers on 2 March 2005. This left a balance of 20 computers. It is the non-delivery of these 20 computers that has led to this court action.

The defendant explains non-delivery by citing the failure to obtain the requisite foreign currency allocation from the Reserve Bank of Zimbabwe through the auction system which was then in operation. It is the defendant's position that both parties were fully aware that the amount paid by the plaintiff would be utilised for the purchase of foreign currency in order to meet the requirements of the defendant's foreign supplier, namely a company called 'Tri-Continental Limited' (Tri-Continental). However, plaintiff's position is that delivery was to be effected soon after payment and the total amount paid represented the full payment for the 30 computers ordered.

In view of the different positions taken by the parties, it was agreed that the issues for determination in this trial would be:-

"(1) What were the terms of the Agreement between the parties?

(2) Whether it was agreed as between the parties that defendant would supply the computers upon receiving foreign currency allocation by the Reserve Bank of Zimbabwe.

(3) Whether the plaintiff is entitled to the order sought.

(4) Whether the defendant is liable to the plaintiff in damages".

The plaintiff called two witnesses to support its case and through the witnesses it submitted a total of nine (9) exhibits.

The first witness called by the plaintiff was Mr Patrick Gwara ("Mr Gwara") who said he is currently employed by the plaintiff as a Stores Supervisor with the main responsibility of taking care of the plaintiff's stocks. Mr Gwara testified that upon an evaluation of quotations the defendant was awarded the contract/tender to supply the plaintiff with thirty (30) computers. He said upon being paid the sum of $340 180 800-00 to cover the total cost of the computers, the defendant delivered ten (10) computers. The ten (10) computers were received by the plaintiff on 2 March 2005. That left a balance of 20 computers already paid for.

It was Mr Gwara's evidence that at the time of placing the order with it, the defendant had indicated that it had twenty-five (25) computers in stock and 'it would get the other five (5)'. He said, apart from paying the requisite purchase price for the computers, the plaintiff was not aware of the financial arrangements between the defendant and its suppliers. He went further to say if the plaintiff had known that the defendant would face supply problems, it (plaintiff) would not have placed the order with the defendant. This was so because the computers were needed urgently for its Harare and Bulawayo offices.

Under cross-examination Mr Gwara said he was not aware that his seniors had moved the delivery date to 1 July 2005 as indicted in the replication. He, however, maintained that as far as he was concerned delivery was to be made soon after payment. He said that although the plaintiff had in the past accepted long delivery periods with respect to other contracts, this was not the case with respect to the thirty (30) computers because they were needed urgently. The contract/tender, had been awarded to the defendant on the basis that it had the computers in stock. Mr Gwara denied knowledge of the offer by the defendant to refund the plaintiff. He said as far as he was concerned the plaintiff wanted delivery of the 20 computers.

The second witness called by the plaintiff was Mr Mischeck Chigatse ("Mr Chigatse"). He said he is employed by the plaintiff as a Procurement Officer. Mr Chigatse was, in that capacity, responsible for the procurement of goods and services for the plaintiff. He was, however, not aware of the issue of the thirty (30) computers since the contract had been entered into before he was employed by the plaintiff. The witness, however, gave evidence on current prices of computers such as those forming the subject of the dispute herein. He said the prices ranged from $300 billion to $700 billion. His evidence was based on three (3) quotations obtained by the plaintiff. He said based on the quotations, the current price of a similar computer to the one that had been ordered by the plaintiff would be $489 billion.

The defendant called only one witness to support its case. It called Mrs Doreen Nyamusara ("Mrs Nyamusara"). She said she joined the employ of the defendant in April 2005 as a Finance Manager but was, as from January 2008 promoted to the position of General Manager. She told the court that she was unaware of the details of the contract in issue since she joined the employ of the defendant when the contract had already been concluded. She was, however, involved in negotiations with the defendant's suppliers for the delivery of the remaining twenty (20) computers.

Mrs Nyamusara testified that at one stage the defendant had asked the plaintiff to participate in the auctions(s) for foreign currency. The plaintiff had refused to do so. She said after all efforts to obtain foreign currency had failed to produce results, the defendant had offered to refund the plaintiff. The plaintiff had, however, declined the offer, insisting that it wanted delivery of the computers.

Mrs Nyamusara also stated that the parties failed to resolve the matter amicably largely due to differences in the calculation(s) of interest. As a result of the differences the matter was never resolved amicably. This was notwithstanding the fact that the defendant made a payment

of $1 392 000-00 through the plaintiff's legal practitioners – which payment was still being held by the plaintiff's legal practitioners. Under cross-examination, she agreed that the sum of $1 392 000-00 was too little to pay for the twenty (20) computers.

Also admitting that the type of computers originally ordered by the plaintiff had been phased out, Mrs Myamusara said a similar computer (ie A55 Lenovo) would, as per exhibit 24, cost $143 750 000 000-00.

Mr *Dondo* for the plaintiff, submitted that there was no doubt that delivery was to be effected immediately upon payment of the full purchase price. He said the issue of foreign exchange was only brought up in an effort to justify a clear breach of contract by the defendant. He said that in concluding the contract the issue of foreign exchange was never raised. He said the quotations which resulted in the award of the contract were in local currency – with the foreign exchange element having been taken into account. It was his view that if indeed the issue of foreign exchange had been a factor, the parties would have said so upon executing the contract. He urged the court to dismiss the defendant's defence based on the shortage of foreign currency because it came as an afterthought. Relying on RH Christie's The Law of Contract in South Africa 3 ed, Mr *Dondo* submitted that 'an impossibility to perform must be absolute'. He argued that *in casu*, that defence was not available and as such the defendant was clearly in breach and was liable for the prejudice suffered by the plaintiff. To that end Mr *Dondo* prayed either for the delivery of the twenty (20) computers or payment of damages representing the current market value of the computers.

Mr *Dondo* submitted hat if payment of damages were to be ordered, the sum of $9 792 245 000 000-00 would be reasonable because it would enable the plaintiff to procure the computers on its own. That value, he argued, had not been challenged. The primary aim in asking for damages was to put the plaintiff to where it should have been were it not for the breach of contract by the defendant.

Mr Dondo further submitted that the issue of money paid to the plaintiff's legal practitioners should not be allowed to cloud the issues before the court. That money could still be recovered.

Ms *Shongedza* for the defendant submitted that the dispute was mainly on the issue of the delivery dates. She said that the parties were not agreed on what was the delivery date. She, however, agreed that the defendant's only witness could not testify to the terms of the contract since it was concluded before she joined the defendant's employ.

Ms *Shongedza* submitted that as per the plaintiff's replication, the delivery date in terms of the contract should have been 1 July 2005. That, according to her, meant there was no question of immediate delivery in line with the parties' conduct on previous supply contracts. She went further to suggest that the failure by Mr Gwara to explain the averment in the replication referring to 1 July 2005 supported the defendant's case in the sense that a delay of some four months after payment meant that the computers would be delivered only after the defendant had paid its supplier, namely Tri-Continental. Payment involved foreign currency.

It was therefore Ms *Shongedza's* submission that the plaintiff, despite denial, was aware from inception that delivery of the computers would only be effected after the procurement of foreign exchange by the defendant. Accordingly, when that became impossible, it meant the defendant could no longer deliver as had been agreed. The failure to obtain foreign currency was, in her view, a supervening impossibility which served to extinguish the defendant's obligations under the contract. She said according to Joubert's General Principles of the Law of Contract, the defence of a supervening impossibility was available to the defendant. To that end she quoted Joubert at page 293 where he states:-

> "Performance may become either absolutely or relatively impossible after the conclusion of the contract. In the case of absolute or objective impossibility of performance the rule is undoubtedly that the duty of the debtor to perform is extinguished …"

On the basis of the above, Ms *Shongedza* submitted that it was improper for the plaintiff to insist on specific performance. In so doing, she argued, the plaintiff had contributed to its own loss. She said the loss would have been mitigated if the plaintiff had accepted the refund offered in May 2005. The defendant had, all the same, gone ahead to refund the plaintiff with a sum of $1 362 980-32. That money was still being held in trust by the plaintiff's legal practitioners. The amount, it was argued, had been calculated properly and therefore the defendant's view was that the plaintiff had been refunded in full. There was therefore no basis for this action.

On the possibility of the court finding in favour of the plaintiff and ordering payment of damages, Ms *Shongedza* submitted that the figures quoted by the plaintiff were excessive and did not accurately reflect the current prices for the originally ordered computers. She said although there was no case for damages, the defendant's own quotation of $143 750 000-00, would represent a reasonable figure. The fact that the plaintiff's loss would have been mitigated if it had participated in foreign currency auctions or had accepted the refund as

offered in May 2005 could not be ignored. Accordingly damages payable, if any, should be reduced, she argued.

Ms *Shongedza* also urged the court to be cautious when evaluating Mr Gwara's evidence. She said this was so because Mr Gwara had denied knowledge of the refund issue yet there was evidence that correspondence on the issue was copied to him.

I shall, taking into account evidence from both parties' witnesses and submissions by their legal practitioners, now deal with the agreed issues for determination. The issues are enumerated in the second paragraph at page 2 herein.

In dealing with this matter, I believe that a finding of whether or not delivery of the computers was subject to the availability of foreign currency to meet the defendant's suppliers' financial requirements will greatly narrow issues for consideration. In order for that argument to succeed the court has to be convinced that in paying the sum of $340 183 800-00 the plaintiff was fully aware that this was merely part payment which would go towards the purchase of foreign currency. There must be evidence that the defendant made it clear to the plaintiff that delivery would be dictated by the availability of foreign currency to meet the requirement of Tri-Continental, its supplier. This is clearly so because apart from quotations and payment confirmations, the contract terms were not reduced to writing.

In *casu* the evidence from papers and that lead in court leads me to the conclusion that the defendant cannot avail itself to the defence of a supervening impossibility. This is so because it is clear to me that the plaintiff gave the contract/tender to the defendant on the understanding that the computers were in stock and readily available. All what the plaintiff was required to do was to effect full payment and then delivery would follow immediately. The defendant had indeed indicated to the plaintiff that it had the computers in stock, at least 25 of them. The plaintiff effected full payment on 28 February 2008. Payment was in accordance with the defendant's quotation for the delivery of 30 computers.

Contrary to the defendant's legal practitioner's perception of Mr Gwara, I found him to be a credible witness who knew exactly what took place when the contract was entered into between the two parties. His failure to know subsequent details of discussions between the plaintiff's senior management and the defendant's representatives on the issue of delivery times and the refund, should not be allowed to carve a dent into his evidence.

The witness, Mr Gwara, was adamant that the issue of foreign currency was never raised when the contract was granted to the defendant. He pointed out that if at all the plaintiff

knew there would be problems of foreign currency the contract would not have been granted to the defendant. The plaintiff needed the computers urgently and the defendant had indicated that it had twenty-five (25) in stock and would look for the other five (5). That evidence was never satisfactorily challenged in court. All the defendant could say was that the computers were in stock at Tri-Continental. Clearly, if that detail was necessary the defendant could have revealed it to the plaintiff at the time of concluding the contract. That was not done and as submitted by the plaintiff's legal practitioner, I hold the view that the price quoted in Zimbabwean dollars included the foreign exchange component. Indeed, even upon the speedy delivery of ten (10) computers, there was no mention of a possible top up to cater for the foreign currency element required for the remaining twenty (20) computers. It is also significant to note that full payment was made on 28 February 2005 and within a few days (ie. 2 March 2005) ten (10) computers were delivered. That reinforces the issue of immediate delivery upon full payment and the availability of computers in stock in Zimbabwe.

As already indicated the defendant has also argued that failure to procure foreign currency rendered performance impossible and hence the defence of a supervening impossibility. As correctly argued by the plaintiff's legal practitioner, that defence is not available to the defendant. Right from the inception of the contract the defendant made the plaintiff believe the computers were in stock in Zimbabwe. That is why within 3 days the defendant was able to deliver 10 computers. The issue of foreign currency only came up as an excuse for failure to deliver.

I am therefore, on a balance of probabilities, satisfied that upon making full payment on 28 February 2005 the plaintiff had fully discharged its obligation under the contract. That means the issue of foreign currency was never raised when the contract was concluded and did not therefore form part of the contract terms.

Upon failure to reach an out of court settlement, the plaintiff remained ready to accept delivery. This remained the plaintiff's position up to the hearing of this matter. To that end I would reject the defence of a supervening impossibility because my finding is that when the contract was made the defendant assured the plaintiff of immediate delivery upon payment, as evidenced by the delivery of the first ten (10) computers. There was no basis for the plaintiff to ever think or imagine that the remaining twenty (20) computers were not in stock. The contract was not subject to the defendant being availed foreign currency by the Reserve Bank of Zimbabwe. If indeed that were the case, the contract would have said so. As was submitted

by the plaintiff's legal practitioner, the issue of an agreement becoming impossible of performance is fully covered by R.H. Christie in his book 'The Law of Contract In South Africa 3 ed, at pages 101-102 where he writes:-

> "The Roman law principle that a contract is a nullity if at the time it was made it was impossible of performance forms part of our law.
> 'By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossiblium nulla obligation* (D50.17.185).'
> But the principle thus stated may easily be misunderstood and requires immediate qualification in four respects. First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when a seller expressly represents or promises that the *merx* exists. If it is found not to have been in existence at the time the contract was made, he will be liable for damages for breach of his promises or for his false representation if fraudulent or negligent. Or the common intention of the parties may be implied, as in the case of the sale or lease of a *res aliena*. The seller or lessor impliedly undertakes to deliver the property or to pay damages if he is unable to do so".

In *casu*, there is nothing to suggest impossibility at the time of contracting or to suggest any conditionalities. There is also nothing to suggest that the issue of foreign currency led to a complete paralysis of the defendant's business. To date it is still in the business of selling computers.

As already stated, it is my finding that the defendant clearly represented to the plaintiff that he had the computers in stock and since the plaintiff needed them urgently he gave the contract/tender to the defendant. In breach of contract and without any fault on the part of the plaintiff the defendant delivered ten (10) computers only, leaving a balance of twenty (20) computers. Clearly therefore and in line with the principles of law enunciated by R.H. Christie in the above quoted passage, the defendant is liable for specific performance or damages. (See *Lupu v Lupu* 2000(1) ZLR 120 (S)).

The plaintiff still insists on specific performance or payments of damages to cover the cost of similar computers at today's prices. I also did not hear the defendant to say it cannot perform. The defendant is still in the business of selling computers. Quotations were produced to indicate current prices for similar computers. The defendant produced one quotation and

argued that the plaintiff's prices were for superior machines. The defendant said that a computer similar to the one originally ordered would cost $143 750 000 000-00.

The plaintiff, however, believes that, in order for it to be put back to where it would have been had the twenty computers been delivered, a sum of $9 792 245 000 000-00 should be payable in the event of failure by the defendant to deliver. That amount is based on quotations for each similar computer on exhibits 8 ($382 455 561 600-00), 9 ($489 622 500 000-00) and 10 ($776 250 000-00). Given the effects of inflation the plaintiff recommended the midway price of $489 622 500 000-00. The defendant, on its part and despite denying liability, insisted that it was possible to procure similar computers at the price it quoted (ie. $143 750 000 000-00).

Counsel for the plaintiff submitted that the matter of a refund should not be allowed to cloud the real issues before the court. I agree. I believe the payment of $1 392 000-00 through the plaintiff legal practitioners only serves to confirm a failed attempt to settle the matter out court. In any case Mrs Nyamusara who testified for the defendant agreed that the money was too little to cover the cost of twenty (20) computers.

I hold the view that a party that is in clear breach should not be allowed to dictate the amount of damages that should be paid to the party that is not at fault and more so an innocent party that will have fully met its obligations under a contract. To allow that would be to encourage parties to pull out of contracts on the strength of their capacity to pay damages. In *International Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd*,1993(1) ZLR 21 (H), addressing the issue of specific performance, the late ROBINSON J, as he then was, had this to say:

> "I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is: businessmen beware. If you fail to honour your contracts, then don't start crying if because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value at the time of breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them…"

I fully endorse the above sentiments.

In view of the foregoing and having determined all the issues raised at page 2 in favour of the plaintiff, I believe that, *in casu* the circumstances demand that the relief prayed for by the wronged party, the plaintiff should be given favour by this court.

Accordingly, I order as follows:-

1. That the defendant be and is hereby ordered to supply and deliver to the Plaintiff twenty (20) IBM A55 (Lenovo) desktop computers forthwith.

2. That in the event of failure to deliver as indicated in 1 above, the defendant be and is hereby ordered to pay the plaintiff damages in the sum of $9 792 245 000 000-00 forthwith.

3. That the amount referred to in 2 above shall be payable with interest at the prescribed rate from the date of summons to the date of payment; and

4. That the defendant shall bear the costs of this suit.

Chinamasa, Mudimu, Chinogwenya & Dondo, plaintiff's legal practitioner
Wintertons, defendant's legal practitioners