

CHEMATRON PRODUCTS ZIMBABWE (PVT) LTD
versus
TENDA TRANSPORT (PVT) LTD
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIBABWE
BERE J

HARARE 16 & 18 February 2009, 20 February 2009 & 6 February 2012

Civil Trial

W. Gandanzara, for the Plaintiff
S.M Guwuriro, for the 1st Defendant

BERE J: At the conclusion of this trial I granted the following order:

“It is ordered as follows:

- a) That the first Defendant be and is hereby ordered to transfer the ownership of stand No. 4 of subdivision B of Subdivision B of Prospect to Metachem Industries (Pvt) Ltd as requested by the Plaintiff by its letter of 17 November 2006 within 14 days from the date reasons of this judgment are delivered, failing which the Sheriff of Zimbabwe or his lawful Deputy be and is hereby authorised to attend to such transfer by signing all the relevant papers which would ordinarily be signed by the 1st Defendant.
- b) That the 1st Defendant’s counterclaim be and is hereby dismissed.
- c) That the 1st Defendant pays costs of suit.”

I did indicate at the time that my elaborate reasons for judgment would follow. Here they are:

This suit has been prompted by the following facts which are largely common cause:

On 13 July 2006 the Plaintiff and the first Defendant entered into a written agreement of sale for property referred to as Stand No. 4 of subdivision B of Subdivision B, Prospect with the purchase price of the property being pegged at Z\$15 000 000,00 (fifteen million Zimbabwe dollars).

It is not in dispute that the parties, at the request of the Plaintiff who felt uncomfortable with the interest related to the mortgage bond which was supposed to be

secured through Beverley Building Society mutually agreed to vary the original agreement of sale on 4 September 2006 after they had agreed on new terms of payment.

It is also common cause that at the time the parties mutually agreed on variation of the contract agreement the agreed initial deposit and other substantial sums of money towards the purchase price had been paid by the purchaser.

It is also not in dispute that after the meeting by the parties on 4 September 2006 a new contract was drafted by the 1st Defendant's legal practitioners which the Plaintiff declined to sign for a number of reasons and further that as at the time the parties dragged each other to court no new agreement had been signed by the parties.

It is the Plaintiff's case that despite not having signed the agreement it duly completed its part of the bargain to the extent that transfer ought to have been made in its favour.

The 1st Defendant was of an entirely different view. Its position was that there was never a valid agreement between it and the Plaintiff and alternatively that if there was one, the Plaintiff had breached the terms and conditions of such an agreement justifying its cancellation and retaining any moneys paid by the Plaintiff as damages.

At the pre-trial conference held by the two parties before my brother Judge KUDYA the case was referred to trial basically on the following issues:

- “1. Whether or not there is a valid and binding agreement of sale between Plaintiff and Defendant.
2. If there is a valid Agreement of Sale, did Plaintiff breach the Agreement of Sale such as to enable Defendants to cancel?
3. Is the Plaintiff entitled to take transfer of the property into their name?
4. What order as to costs is just and equitable?”

In my assessment of the evidence led in this case I will endeavour as much as is reasonably possible to be guided by the pre-trial conference minute.

The Plaintiff's case was built around the evidence of its Managing Director, Mr Killian Kufahakurambwi. The witness explained the circumstances under which the Plaintiff and Defendant entered into the initial sale agreement on 13 July 2006 and why his company

eventually sought to re-negotiate the transaction. This part of his evidence was confirmed by the Defendant's sole witness and did not pose any challenge.

It was the witness's testimony that the meeting that was held on 4 September 2006 was attended by a representative from the Plaintiff, 1st Defendant's Legal Practitioners and a representative from the 1st Defendant. His evidence was that the purchase price of the property would remain unchanged at the old price of Z\$15 000 000,00 (fifteen million Zimbabwe dollars) but that the terms of payment would have to take into account the deposit initially made and the subsequent various payments paid by the Plaintiff towards the purchase of the property.

It was also the witness' testimony that the interest on the bond to be registered on the property would be pegged at 125 %. It was also agreed that the new agreement should contain a clause to allow the purchaser to discharge its liability much earlier if it secured the money. In view of these mutually agreed changes the Plaintiff's legal practitioners Messrs T.K Hove and Partners were tasked to draw up a new agreement of sale which would be presented to the purchaser for signing on the following day, 5 September 2006.

The witness went further to state that there was a terrible delay by the 1st Defendant's legal practitioners in drawing up the new agreement and that it was only on 17 October 2006 that the new agreement was availed to the Plaintiff. The witness testified that despite this delay he maintained communication with the 1st Defendant's legal practitioner, Mr Hove and the 1st Defendant's representative, Mr John Thompson Mungwari, both of whom advised him to keep on paying, which he gladly did.

It was the Plaintiff's further evidence that when the agreement was eventually availed to it a substantial amount of money had been paid towards the acquisition of the property as evidenced by exhibits 2, 4, 5, 6 and 7 tendered in these proceedings. It was his uncontroverted evidence that the bulk of the payments were made directly to the 1st Defendant's company. The exhibits tendered confirm these payments.

The witness stated that when the varied agreement was presented to the Plaintiff for signing he noted a number of discrepancies and quickly engaged Mr T.K. Hove, the 1st Defendant's legal practitioner who advised him to pay the remaining outstanding balance of

three billion Zimbabwe dollars directly to the 1st Defendant's company which he again did. Exhibit 9 confirms such payments.

It was the witness's testimony that on 17 November 2006 he discussed the question of interest with 1st Defendant's legal practitioner who advised him to go back and do the computation of interest and pay the amount to pave way for the transfer of the property in question which he did. Exhibit 10 confirms the discussion in question and also the payment of a sum of Z\$650 000 as interest and how it was computed.

According to the witness, this last payment was followed by a pro forma invoice of transfer fees from the 1st Defendant's legal practitioners which put the transfer fees for the purchased property at Z\$1 210 002,00 (revalued) which amount the Plaintiff paid into the trust amount of the lawyers as advised by 1st Defendant's legal practitioners.

The witness said that when his company demanded transfer of the property the case took a dramatic turn when he was advised that the 1st Defendant was now claiming interest on the whole purchase price at a rate of 600% per annum compounded interest, the argument being that the 1st Defendant had borrowed money from its own bankers, NMB Bank, and sought to pass on the cost of borrowing that money to the Plaintiff. The Plaintiff naturally objected to this approach as it signified a complete departure from the mutual discussion of 4 September 2006. Under cross-examination the Plaintiff's representative stuck to his story and maintained that as far as his company was concerned it had fulfilled the terms of the agreement and reasonably awaited transfer of the purchased property.

The witness explained that there was no need to sign the second agreement because it had come into the picture late and had been superceded by various payments made by the Plaintiff and accepted by both the 1st Defendant and his legal practitioners.

To counter the evidence of the Plaintiff was the evidence of Mr John Thomson Mungwari the Managing Director of 1st Defendant.

The witness agreed that the original agreement of sale was cancelled because of non-performance on the party of the Plaintiff.

He said he reluctantly acceded to the second agreement which he said was again cancelled due to non-performance by the Plaintiff.

When his attention was drawn to exhibits 6, 7 and 9 which confirm that various payments were made to his company by the Plaintiff he retorted as follows:

“The payments were made to the reception. I am sure they received them and receipted them in line with our system. They would have been banked. I do not work in the accounts department sometimes it takes a long time for me to know a payment has been made. I travel outside the country quite often. My place is a busy place. There will be cheques coming in for rentals, bus hire or truck hire. These cheques would have gone to the accounts department without my knowledge.”

He went on to suggest that he expected the Plaintiff to have arranged for a mortgage cheque as opposed to private cheques from the Plaintiff's company.

The witness confirmed the meeting of the parties to the contract on 4 September 2006 and the fact that interest was to be pegged at 125% per annum, and that this interest was to be paid immediately. The witness further stated that after 4 September 2006, to try and salvage the sale there was a suggestion that if the Plaintiff was prepared to pay interest at 600%, the second agreement would be resuscitated and that NMB Bank Limited was tasked to draw up an interest schedule on the purchase price of Z\$15 000 000 000. He said the Plaintiff did not agree to this and this signalled the end of the agreement. The witness sought to have the new Agreement of 4 September 2006 cancelled as prayed for in the counter claim.

The witness went on to say that the staggered payments by the Plaintiff meant that the 1st Defendant never got the value for money from the property and that the company lost the machine it intended to buy because of hyper-inflation, which gripped the country at the time.

Through his testimony and contrary to its counter claim, the witness proposed that the payments made be returned to the Plaintiff and that his company was prepared to negotiate a new agreement of sale.

Under cross-examination the witness acknowledged that on 4 September 2006 and as part of the negotiations leading to the drafting of a new agreement he personally was paid a cheque of Z\$2 000 000 000 by the Plaintiff's representative and that the purchase price was to remain at Z\$15 000 000 000, and further that any payments were to be made in terms of the new agreement. The witness further confirmed that his counsel's letter of 2 February

2007 (page 35 of Plaintiff's index) suggests interest was supposed to be paid as agreed on 4 September 2006. Compare this with the 1st Defendant's subsequent attempt to change interest from 125% per annum with 600% per annum.

ASSESSMENT OF THE EVIDENCE

The story told by the Plaintiff's sole witness struck me as a credible one because of the following reasons:

Firstly, every payment that the plaintiff claimed to have paid was supported by documentary proof and confirmed by the 1st Defendant's representative.

Secondly, the witness was candid enough to advise the court that he declined to sign the second agreement basically because of two reasons, viz, the delay in dispatching that agreement which meant that the agreement per se had been superceded by other developments since the bulk of the purchase price had already been paid. This delay was entirely caused by 1st Defendant's legal practitioners who instead of sending the agreement on 5 September 2006, waited until 17 October 2006.

Thirdly, the agreement contained minor changes which were a departure from what the parties had agreed on at the meeting of 4 September 2006. These issues needed to be addressed but in essence the parties were already in agreement, otherwise the 1st Defendant's legal practitioners and the 1st Defendant would not have continued to receive payments from the Plaintiff's representative.

The Plaintiff's representative maintained that when the second agreement was negotiated, there was never reference to interest being computed at 600% per annum but at 125% per annum. This position was confirmed by Mr Mungwari for the 1st Defendant as well as exhibit 8 which is a copy of the agreement in issue. When the Plaintiff calculated interest due to the 1st Defendant, it simply used the agreed rate as per the unsigned agreement which both parties accepted was the basis of the new payment arrangements.

If anyone doubted the credibility of the story told by the Plaintiff, the invitation by the 1st Defendant's counsel for the Plaintiff to pay transfer fees should put an end to that doubt. It is my view that, this invitation was confirmation that the Plaintiff had complied with the terms of the contract to the extent that only the payment of transfer fees would have triggered

transfer of the property. The Plaintiff, having paid such fees was entitled to have the property transferred.

The Defendant's representative did not portray himself in good light in this case.

Firstly, he attempted to deny that there was no agreement between the parties yet documentary evidence clearly show that both himself and his company continued to receive payments from the Plaintiff without objecting to such payments. The 1st Defendant's representative must not be believed when he purports not to have been aware of payments made to his company. The alleged bureaucracy or lack of transmission to him of information regarding payments made to him by the Plaintiff cannot disadvantage the Plaintiff.

It is difficult to follow what exactly the 1st Defendant's position is in this case. The ambivalence nature of paragraph two of its plea casts doubt on the *bona fides* of its plea. In one breadth it makes an averment that there was no agreement and in another it then says if such an agreement existed, it must have been breached by the plaintiff.

Mr Mungwari for the 1st Defendant alleged in his evidence that if payments were made to his company he was not aware yet in the plea he alleged that all the payments that were made by the Plaintiff were made and received "on a without prejudice basis".

The witness did not state this when he gave evidence. It is not accidental that in the various correspondences exchanged between his counsel and other law firms, this issue was never raised. The issue of payments having been made on "a without prejudice basis" must clearly be an after- thought on the part of the 1st Defendant.

It is clear to me that the only problem that has kept the parties apart in this case is the issue of interest. This issue must be resolved by simply making reference to the draft agreement which formed the basis of the parties' agreement which followed the events of 4 September 2006. That agreement and as testified by both the Plaintiff and the Defendant's representatives put the rate at 125% and not the extortionous rate of 600% as suggested by the 1st Defendant's representative.

It is clear from the evidence led that the Plaintiff never agreed to the interest as demanded by the 1st Defendant. What the 1st Defendant has attempted to do is to recover interest that it was allegedly charged by its bankers NMB Bank Limited on an entirely

different transaction to the Plaintiff. This becomes very clear if reference is made to the letter of 15 March 2007 written to Messrs Scanlen and Holderness (Plaintiff's erstwhile legal practitioners) by the 1st Defendant's legal practitioners which stated *inter alia*:

“Our client's position is that they were charged interest by the bank, which interest they were simply passing over to your clients, on the basis that your clients had initially breached the signed Agreement of Sale”.

I accept the position of the Plaintiff's counsel that the 1st Defendant having quietly accepted the various payments made by the Plaintiff must be taken to have waived any alleged breach of the agreement. The first Defendant must not be allowed to approbate and reprobate at the same time.

Finally, I have no doubt in my mind that computing interest at the rate of 600% per annum on the 11th hour of the operation of the agreement, the 1st Defendant was acting *mala fide* and perhaps actuated by greed and or the desire to avoid transferring the property to the Plaintiff.

It was for these reasons that Judgment was entered in favour of the Plaintiff.

Messrs Nyikadzino, Kaworera and Associates, Plaintiff's legal practitioners
Messrs T.K. Hove and Partners, 1st Defendant's legal practitioners