CUTHBERT CHIROMO
versus
STEADY MUNYANYI

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 23 January &12 March 2014

Civil trial

E.R Samukange, for the plaintiff
D. Kanokanga, for the defendant

MATANDA-MOYO J: The plaintiff issued summons against the defendant for payment of $35 000-00 being balance owed for the purchase of a cassette manufacturing plant. It is the plaintiff's case that he entered into an agreement for the purchase of a cassette manufacturing plant. The purchase price was agreed at $80 000-00. To date the plaintiff has paid a total of $45 000-00 leaving a balance of $35 000-00. Despite demand the plaintiff has failed or neglected to pay the $35 000-00. The plaintiff also claims interest on the amount at the prescribed rate of 5 % from date of service of summons to date of payment in full plus costs of suit.

Whilst the defendant admitted that he indeed bought a cassette manufacturing plant from the plaintiff for $80 000-00, and that to date the sum of $45 000-00 has been paid, he denies liability for payment of $35 000-00. The defendant avers that, the purchase agreement was entered into based on a material misrepresentation by the plaintiff on the state of the plant. The defendant avers that as a result of such misrepresentations he has since cancelled the agreement of sale. He also denied that the plant was complete at the time of purchase. The defendant prayed for the dismissal of the plaintiff's claim.

The defendant made a claim in reconvention wherein he claimed refund of $45 000-00 from the plaintiff. The defendant's claim is based on his averment that upon cancellation of the agreement of sale due to misrepresentations by the plaintiff, the defendant is entitled to a refund of $45 000-00. The plaintiff denied making any misrepresentations to the defendant. The plaintiff denied that the defendant was entitled to cancel the contract and that the plaintiff should

return the sum of $45 000-00 to the defendant. It is the plaintiff's case that the plant is obsolete and it's present value is around $15 000-00. It is only for that reason that the defendant wishes to resile from the agreement.

The plaintiff testified in support of his claim. It was his evidence that defendant approached him sometime in November 2009 for the purchase of a cassette manufacturing plant. They agreed at a purchase price of $80 000-00. He produced the agreement of sale which was concluded a day after the defendant had taken possession of the plant. The defendant deposited an amount of $18 000-00 by way of a motor vehicle namely a Mitsubishi Pajero. It was the plaintiff's evidence that to date a total amount of $45 000-00 had been paid, leaving a balance of $35 000-00.

The plaintiff testified that on the date of delivery the plant was in working order. Gramma records was said to have tested the plant and found it to be in working order. No documents to prove that were tendered before the court. This witness testified that he delivered the plant to the defendant's residence in Bluffhill. The defendant later transported the plant to Mufakose. He said the plant could have been damaged during the transportation. He maintained that at the time of sale the machine was in proper working condition.

The plaintiff testified that the defendant tempered with the machine in violation of clause 3 of the agreement of sale. In terms of that clause the plant was to be tested at a mutually agreed date in the presence of both parties. In breach of the above clause the defendant allowed Allan to test the plant in the plaintiff's absence. The plaintiff believes Allan could have caused the malfunctioning of the plant. He testified that Allan was not well spoken of within the industry as he was not straight forward person. The plaintiff denied suggestions by the defendant that it was him who hired Allan to test the plant. The plaintiff admitted that at the time of the sale, the plant had no shrinker, quality control and bin. He however denied that the above components were necessary for cassette manufacturing.

The plaintiff called Agrippa Chauke as a witness. He is a holder of a Diploma in Applied IT from the University of Zimbabwe and a Certificate in Electronics Servicing from City & Guilds amongst other qualifications. He came to testify as an expert. From 2005 to 2010 Agrippa was employed by Gramma Records as an electronics technician. He knew the plaintiff as a supplier of machines to Gramma Records. He testified that he had inspected the plant in question prior to its sale and found it to be in perfect working order. After the sale this witness

was called by the defendant to inspect the plant. On inspecting the plant he saw that the cards were missing. He testified that after this inspection he could not have recommended its purchase. The machine had been tempered with. He also testified that the plant requires a bin and test quality control unit to produce audio cassettes. Without those components it could only produce blank cassettes.

Under cross-examination he was not so sure whether he inspected the machine in 2007 or 2009. He confirmed he only inspected the machine and that he did not test the machine. He admitted that he could not tell whether machine was functioning at the date of sale as he did not test it then. He accepted that without a bin no audio cassettes could be produced. The plaintiff closed its case.

The defendant testified that he reside at number 6 Lavenham Drive, Bluffhill in Harare. He owns a recording label here in Zimbabwe. He is based in the U.K. On 25 October 2009 the defendant purchased an audio cassette manufacturing plant from the plaintiff for $80 000-00. He testified that he met the plaintiff who told him he was selling a cassette manufacturing plant that he imported from America. He introduced himself to the defendant as Thomas Mapfumo's Manager. The defendant took delivery of the plant the same day 24 of October 2009. The plaintiff also took delivery of the Mitshubishi Pajero as deposit the same day. On 25 October the two signed an agreement of sale. The plant could not be tested as it was incomplete. It had no bin. The voltage needed to be changed as well to the Zimbabwean voltage. The two however put in a clause in the agreement of sale that the parties would attend to the testing of the plant in the presence of both parties. In the event of malfunctioning the plaintiff in terms of the agreement was responsible to fix the plant. The purchaser reserved the right to cancel the agreement should the plant fail to function and to demand the purchase price from the plaintiff.

The defendant testified that because there was no bin, the two could not fix the exact date of testing the plant. He testified that the plaintiff referred him to a Praise Zenenga from whom the plaintiff said he could source the bin. The digital bin was received sometime in May/April 2010. The defendant engaged one Allan Blaimu to ensure the plant was ready for testing. The defendant did not consult plaintiff. On 24 May 2010 the defendant invited plaintiff to conduct the test. The plaintiff refused as he claimed defendant had already tempered with the machine. However the bin supplied was defective. The plaintiff later engaged Allan Blaimu to look at the plant. Allan did so and listed the defects of the plant. The plaintiff did not believe Allan and

engaged a Mr Makore instead. Before Makore could look at the plant the defendant through his lawyers wrote a letter of demand to the plaintiff. Upon the plaintiff's failure to meet the said demands it is the defendant's evidence that he cancelled the sale on 10 June 2011. The defendant however testified that he was still interested in the plant should the plaintiff attend to the defects.

The defendant called Allan Blaimu as a witness. His testimony was clear and straight forward. He gave his evidence very well contrary to views expressed by the plaintiff and the defendant that he was untrustworthy. This witness struck me as an honest person. He testified that he worked for Gramma Records during the period 2002-2009. His duties involved repairing machines that manufacture cassettes and recording machines. He worked with Agrippa Chauke and he was head of the technicians then. This witness knew the plaintiff as Gramma Records used to buy items relating to cassette manufacturing from him. The plaintiff used this witness to repair some of his machines. Allan testified that he was called by the defendant's manager a certain Mr Phuti to look at their cassette manufacturing plant in Mufakose. He went to Mufakose and noted that the cassette Manufacturing plant consisted of the following units;

(i) 1x shrink wrapper
(ii) 2 x vacuum pumps
(iii) Lyrec Quality Control/ Unit
(iv) 4 x Tapematic Casette Loader
(v) 6 x Lyrec Dual Casette Loader
(vi) 1 x Tapex Plate Maker
(vii) 1 x Appex on Casette Printer

He described the function of each of the above component as follows;

A shrink wrapper wraps a cassette;

A vacuum pump draws air;

Lyrec Quality Control Unit controls the quality of music recorded on a cassette;

A tapex plate maker is the item that is used to write a name on the cassette and an apex on cassette printer prints words onto the cassette.

He testified that a bin is a necessary component in the manufacture of audio cassettes. A quality control unit is not necessary in the making of blank cassettes.

It was this witness' testimony that when he got to Mufakose he recognized the plant as it had come through Gramma. The power source was American which is different from what is used here. American products use less voltage than the voltage used in Zimbabwe. This witness communicated his findings with Phuti. Thereafter this witness testified that he was telephoned by the plaintiff to change the power source on the machines. He was given the part for that purpose by the plaintiff. He changed the power source and switched on the plant. The machine then showed defects therein. This witness wrote down the defects which appear on item 2 of exhibit 2. This witness never fixed the machine.

Under cross examination this witness denied that Gramma Records was interested in buying the plant. It was his testimony that when they went to the plaintiff's place from Gramma where they were looking for a quality control unit which Gramma Records thereafter bought. It was his evidence under cross – examination that the plant was for the manufacture of audio tapes. To manufacture blank cassettes the plant would only consist of winders. Since it consisted of quality control unit and duplicators it was for audio cassettes manufacturing.

Form the evidence led before me it is clear that at the time of sale nobody knew whether the cassette manufacturing plant was working or not. The power supply had not been changed and it was not possible to clearly state the condition of the plant. When the agreement of sale was concluded the plaintiff had not tested the plant. Paragraph 3 of the agreement is quite instructive. It portrays the parties' state of mind.

> "3.1 the parties shall attend to the testing of the plant at a mutually agreed date in the presence of both parties.
> 3.2 in the event that there is any malfunction, the responsibility to ensure the function of the plant shall be of the seller.
> 3.3 in the event that the plant fails to function at all, the purchaser may elect to cancel the agreement and demand the purchase price paid".

From the above it is clear that the condition of the plant was going to be known on the date of testing. The warrant by the plaintiff that the plant was suitable for the manufacture of cassettes and that it had no defect or malfunction should be interpreted in conjunction with the rest of clause 3 above. The plaintiff could not have given such a warranty in view of the fact that the plant had not been tested for a long time. From the evidence adduced in court the plant was already at the plaintiff's place in 2007 and the sale was only concluded on 24 and 25 October 2007, some 2 years later.

It is also my finding that the plant was an audio cassette manufacturing plant as opposed to a blank cassette manufacturing plant. The components forming the plant are only required for audio cassette manufacturing. It is common cause that without a bin, the plant could not manufacture audio cassettes. The defendant's testimony becomes the more probable one that the plant could not be tested before the arrival of the bin. That position is consistent with the other evidence that it was only after the arrival of the bin that the defendant invited the plaintiff to test the machine.

It was a term of the agreement that the plant would only be tested at a mutually agreed date in the presence of both parties. The plaintiff alleged that the defendant tempered with the machine. As proof that the machine was tempered with the plaintiff called Agrippa Chauke who testified that the cards were missing from the plant. The allegations were that Allan was so crooked that he intended to steal the cards and resell same to the defendant. However the evidence showed that the cards were there but not inside the machine. It is possible that they were removed during transportation of the machine and were never replaced into their position. There was no evidence led linking Allan to the missing cards. What is evident though is that the defendant engaged Allan to prepare the plant for testing. This court should determine whether that inspection violated clause 3.1. of the agreement of sale. Paragraph 3.1. required the presence of both parties during the testing of the plant. The paragraph was to ensure that the machine was not switched on during the absence of either party. Testing involves switching on the machine. It is more than a visual inspection of the machine. It is my finding that the defendant did not attend to testing of the plant in the absence of the plaintiff. The defendant engaged Allan to ensure that everything that was required for testing was available. That is when Allan advised that the power source needed to be changed. The plant could not be tested without changing the power source. From the evidence it was the plaintiff who engaged Allan to change the power source. When Allan identified the defects on the plant he was working for the plaintiff.

From the evidence led before me, the plant was never tested. It was only switched on and it was upon switching on that the plant identified the defects on it. Allan changed the power source and switched on the machine. That can never be term "testing" the plant.

There was evidence that the plant was transported from Bluffhill to Mufakose by the defendant in the absence of the plaintiff. The plaintiff submitted that the plant could have been

damaged during the transportation and also in the manner it was stored. However there was no evidence on a balance of probabilities submitted that showed that the plant was damaged during transportation to Mufakose or through the manner of storage.

I am thus satisfied that at the time of the sale the plant had not been tested. The parties therefore did not know the state of the plant when the machine was sold. It was a term of the agreement that the plaintiff would attend to any defects to be found on the plant upon testing. Indeed defects were found on switching on the machine. The responsibility to attend to the defects lied with the plaintiff. Indeed the plaintiff attempted to do so but stopped midway. The plaintiff is thus in breach of the agreement of sale. Once I make that finding it follows that the plaintiff's claim for the balance of the plant fails. The plaintiff failed to perform the terms of the agreement and his claim for the balance of $35 000-00 is therefore dismissed.

The defendant made a counter claim for an order that the agreement of sale between the parties was validly cancelled and for a refund for the sum of $45 000-00 representing the amount paid by defendant to date for the plant.

I have already found that the plant had not been tested at the date of the agreement. Clause 3 of the agreement of sale reflects that. However the plaintiff made representations to the defendant that the plant was in good working order. When he made those representation plaintiff knew that he had not tested the plant in Zimbabwe. The plant still had its American source of power of 110 volts. However plaintiff at the same time undertook to attend to any malfunctions that could be found on the machinery upon testing. The plant had defects upon the initial switching on and in breach of the agreement the plaintiff has failed to rectify the defects. The plaintiff has refused to attend to the defect thus the defendant became entitled to exercise the option of cancelling the agreement of sale and demanding repayment of the purchase price. On 27 April 2011 the defendant gave the plaintiff two weeks notice to cancel the agreement should plaintiff fail to fix the defects. On 10 May 2011 the plaintiff replied denying liability to fix the plant. He alleged the defendants had been using the plant for a year and any defects on the plant had been caused by the defendant. He also alleged that the defendant was in breach of the agreement as he had failed to honour the $5 000-00 monthly instalments. He then counter demanded the balance of the purchase price. On 10 June 2011 the defendant cancelled the agreement and demanded refund of $52 677-00.

It is my finding that since the plaintiff has failed to rectify the defects, the defendant is entitled to his refund of $45 000-00 as claimed in the summons. The plaintiff referred me to the case of *Chikoma* v *Mukweza* 1998 (1) ZLR 542 (S) at 543 D-E where GUBBAY CJ stated as follows;

> "Against this scenario, the approach to be adopted to the issue of vagueness must be that expressed by PRICE J in *Hoffman & Carvanlo* v *Minister of Agriculture* 1947 (2) SA 855 T at 860, namely;
> "Where the parties intend to conclude a contract, think they have concluded a contract and proceed to act as if the contract were binding and complete, I think the court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended -------."

The parties herein continued communicating on the bin and the balance from $80 000-00 as per their agreement. To the parties defendant was to pay $80 000-00 whilst any defects found on testing were to be attended to by the plaintiff. This court must therefore try as much as possible to give effect to the agreement by the parties. Even the plaintiff bought the parts for the conversion of the power source – a clear indication that he was binding himself to the terms of the contract.

I am of the opinion that this is a matter requiring simple interpretation of the agreement. The agreement is clear and unambiguous and need only be given its literal meaning. The plaintiff failed to do all that he was required to do under the agreement. The defendant was at law entitled to cancel the agreement as he did. Upon cancellation the amount paid to the plaintiff became due and payable.

Accordingly it is ordered as follows;

1) The plaintiff's claim for payment of balance of purchase in the sum of $35 000-00 fails and is hereby dismissed.
2) The defendant's counter – claim succeeds and the plaintiff is ordered to pay to the defendant the sum of $45 000-00 being the refund for amounts paid to date against the return of the cassette manufacturing plant.
3) The plaintiff to pay costs of suit.

Samkange & Venturas, plaintiff's legal practitioners
Messrs Kanokanga and Partners, defendant's legal practitioners