

AUCTION CITY (PVT) LTD
versus
EL ELION INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE and TSANGA JJ
HARARE, 1 April 2015

Civil Appeal

F. Mahere for the appellant
N. Sai for the respondent

CHITAKUNYE J: This is an appeal against the judgment of the magistrate court sitting at Harare in terms of which appellant was ordered to pay to the respondent a sum of US\$8 277.00 plus interest.

The appellant is an auctioneer. The appellant acting on behalf of Conte Shoes (Pvt) Ltd in Liquidation (represented by Theresa Grimmel) auctioned industrial shoe making equipment in June 2012.

The respondent successfully bid for the equipment at a price of US\$100 000-00.

Upon the successful bid being accepted, the appellant proceeded to call upon the respondent to pay a deposit of US\$10 000-00 being 10% of the tendered amount. The respondent paid the said deposit and in terms of the condition of the sale was to pay the balance of the purchase price within 7 days. The respondent defaulted in the payment of the balance of the purchase price despite being granted an extended time of 14 days within which to pay at its request. The appellant subsequently cancelled the agreement of sale upon realising that applicant was not forthcoming with the balance of the purchase price.

A term of the sale by auction was that any deposit paid by a tenderer would be refunded less the agent's commission (including VAT) and any expenses incurred by the liquidator or her agents in the process of conducting the sale and its aftermath. (Clause 9 of the Notes and Conditions of Sale).

After the agreement of sale had been cancelled the respondent sought the refund of its deposit. By letter dated 5 March 2013, the appellant advised the respondent that the agent's

commission and the expenses incurred in the process of conducting the sale and its aftermath exceeded the \$10 000-00 deposit that the respondent had paid and so appellant would not be refunding respondent any amount.

The respondent, being dissatisfied, sued appellant for the refund in the magistrates' court. After a contested trial the trial magistrate ordered the appellant to pay to plaintiff the sum of \$8 277-00.

The appellant has thus appealed against the trial magistrate's order. The grounds of appeal were that:-

- 1) The court *a quo* grossly erred and misdirected itself in finding that Clause 9 of the Notes and Conditions of Sale agreed to by the parties is invalid and unenforceable at law.
- 2) The court *a quo* erred and misdirected itself in finding that the Appellant could only charge Value Added Tax (VAT) and Commission after the conclusion of a sale.
- 3) The court *a quo* grossly erred and misdirected itself, which misdirection amounts to an error of law in finding that the Appellant could not deduct costs for security because the receipt was not in the appellant's name.

From the arguments presented by counsel for both parties the following issues emerge-

- a) when is a contract formed in a sale by auction;
- b) what terms and conditions govern such a contract;
- c) when does an auctioneer's commission become payable;

It is pertinent to firstly ascertain when a sale by auction is said to be formed in an auction.

Ordinary principles of contract law apply to transactions arising pursuant to a public auction. These may be stated as the principles of offer and acceptance.

When is a contract formed in a sale by auction?

In his book, *Business law in Zimbabwe 2014* (Juta) at p 35, R.H. Christie states that:-

“Calling for tenders and conducting auctions are methods of endeavouring to obtain the best contractual terms by inviting members, or selected members of the public to bid in competition with each other. It is characteristic of tenders that they are not revealed to rival tenderers, and of auctions that bids are made publicly. What concerns us here is who makes the offer, thereby putting the conclusion of the negotiations out of his further power.

The auctioneer calling for bids is inviting offers, and each bid is an offer which, so far as the bidders are concerned, he may accept or reject at his discretion.”

It is thus clear that what constitutes an offer to purchase the property is the bid at the bidden price. Once accepted by the seller or the auctioneer, a contract for the sale of the auctioned property comes into being. In other words, the bidder makes the offer and the seller or auctioneer has the option to accept the offer or reject it. The terms and conditions of such a sale will usually be as per the terms and conditions the seller or auctioneer will have put up in inviting offers. Anyone making an offer will be expected to be familiar with the terms and conditions for the intended contract once his offer is accepted.

In Christie’s *The law of Contract in South Africa*, 6th ed. 2011 (LexisNexis) at p 47, the learned author states that:

“More frequently, the terms on which the auction is to be held are drawn up by the seller or auctioneer in the form of ‘conditions of sale’. To be effective, these must be read out at the beginning of the sale, or other reasonable steps must be taken to bring them to the notice of buyers. If this is done, the conditions will be binding even on bidders who arrive late and have not read them or heard them read out, since they could have asked for information on them. These conditions may create rights and duties not only between the seller and the bidders but between the auctioneers and the successful bidder on such matters as the payment of the auctioneer’s commission.”

It is invariably the trend that the terms and conditions are put up for the bidders to know in advance the terms and conditions of the sale. Such conditions as the deposit required, the fate of the deposit in the event of a successful or failed bid, the auctioneer’s commission and other attendant details for the auction.

When does an auctioneer become entitled to its Commission

The next issue is when does an auctioneer’s commission become due? The appellant’s argument was that the commission was due upon the acceptance of the respondent’s offer as in any other contract. The respondent on the other hand contended that commission was not yet due. Both parties referred to the case of *Crusader Real Estate Consultancy (Pvt) Ltd v CABS* 1999 (2) ZLR 237(S). In that case the court held that:

“An auctioneer is employed to sell the property by auction on the conditions arranged: if he sells the property he gets his commission: if he does not sell the property he gets no commission.”

It is thus clear that once it is shown that an auctioneer has sold the property he becomes entitled to his commission.

In the *Crusader* case (*supra*) the acceptance of the bid price was subject to confirmation by the Sheriff hence when the sheriff declined to confirm the sale as the price was too low, court accepted that the sale had not been concluded and so the commission was not due.

In *casu*, it is common cause that respondent's offer was accepted, after which respondent was asked to pay the deposit which it duly did. Clearly, in my view, a contract of sale was concluded. The challenge that befell the contract was that respondent could not pay the balance of the purchase price. The respondent's contention that the contract was not concluded does not hold water. The auctioneer's duty was to ensure a contract of sale was entered into and each party to that contract was aware of their obligations. This the auctioneer did. The failure by respondent to pay the purchase price in terms of the contract should not be a bar to the auctioneer getting its commission.

Clause 9 of the Notes and Conditions of Sale provided that:

"The balance of the total amount of the invoice must be paid to Auction City within 7 days of the notification of the outcome of the tender. Should this condition not be met in its entirety, the sale may be cancelled at the sole discretion of the liquidator. In such case, any deposit will be refunded less agent's commission (including VAT) and ANY expenses incurred by the liquidator or her agents in the process of conducting the sale and its aftermath."

As aptly submitted by appellant's counsel, the appellant discharged its duties as an auctioneer because the sale, the subsequent breach notwithstanding, came about by the auction conducted by the appellant. The fact of respondent's breach does not detract from the fact that appellant rendered its services in conducting the auction which led to the sale.

The appellant's commission was pegged at 10% of the tendered price, which in this case is US\$10 000-00.

The respondent's contention that the sale was not concluded and so the appellant was not entitled to its commission is in my view misplaced. To hold that because a party to a contract has defaulted and so the auctioneer or agent is not entitled to its dues would work unduly harshly against auctioneers as they would have to wait till parties to a contract fulfilled all their obligations before getting paid; but surely it is not the auctioneers' obligation to ensure that parties fulfil their contractual obligations.

I am thus of the view that the learned trial magistrate erred in holding that there was no sale and that as such the appellant was not entitled to its commission.

The respondent's Counsel also argued that as the appellant subsequently sold the property after respondent had failed to raise the balance of the purchase price, the sale was

not complete and the appellant is not entitled to its commission. Unfortunately, as already alluded to above, the respondent's failure and the appellant's cancellation of the contract serve to confirm that the two parties had entered into a valid agreement of sale hence its cancellation. The resale was a natural consequence of the cancellation. The auctioneer had fulfilled its mandate and earned its commission.

The trial magistrate's finding that clause 9 of the 'Notes and Conditions of Sale' is illegal and cannot be enforced is, in the light of the above, not sustainable. Such a finding was based on the conclusion that there was no sale. This clause, in my view, is a key component of the terms and conditions of the agreement respondent agreed to in bidding. This included that the total amount must be paid within 7 days of the notification of the outcome of the tender, and the consequence of failure to meet that condition.

The trial magistrate alluded to the fact that the VAT referred to in the clause pertained to when the goods have been sold. In that regard she referred to s 6(1) (d) of the Value Added Tax Act [*Chapter 23:12*] and concluded that such VAT was not yet due.

The appellants' argument was to the effect that the VAT in issue pertains to the service provided by the auctioneer for which a commission is due. In that regard, the relevant section is 6(1) (a) and not 6(1) (d). Section 6(1) (a) states that:

"6. Value Added Tax

(1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of..

(a) the supply by any registered operator of goods and services supplied by him on or after the 1st January, 2004, in the course or furtherance of any trade carried on by him."

The VAT in question is on the value of the auctioneer's services which in this case is \$10 000-00 and not on the purchase price.

Counsel for the appellant thus argued that the trial magistrate erred in referring to s 6(1) (d) as the applicable s for the VAT being claimed by appellant. Section 6 (1) (d) relates to value added tax on goods sold and would be calculated on the purchase price.

Section 6(1) (d) which the trial magistrate alluded to states that:

"Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of goods and services sold through an auctioneer(as defined in section 56(6)) by persons who are not registered operators."

An analysis of the two subsections confirms that they relate to two deferent scenarios. Subsection (a) relates to supply of services whilst (d) relates to goods and services sold through an auction.

The term service is defined in section 2 as –

“Services means anything done or to be done, involving the granting, assignment, cession or surrender of any right or the making of any facility or advantage but excludes the supply of goods, money or any stamp, as contemplated in paragraph(c) of the definition of goods.”

From the above I am of the view that the appellant provided a service as per s 6(1)(a).

I am inclined to agree with the appellant’s Counsel that the appellant did provide a service for which a commission was due and so was the VAT in relation to that commission. That service comprised conducting a successful auction sale in which a buyer was secured and an agreement of sale entered into.

Whether or not security costs were due.

The appellant’s Counsel argued that the trial magistrate erred in not accepting the evidence pertaining to the provision of security services in the sum of \$8000. The relevant part of the learned magistrate’s judgment on this issue reads as follows:

“The defendant relied on a receipt written under Groovemark Security in the name of one Mrs Grimmel. During the leading of the evidence the witnesses for the plaintiff confirmed that the premises were manned not by a uniformed security guard. Such piece of evidence [sic] was not rebutted by the defendant and the witness for the defendant refused to shed more light on that issue. The receipt is not in the defendant’s name Auction City and this court cannot use it as a piece of evidence.”

The above reasoning was attacked on the basis that it seeks to ignore the clear provision of clause 9. Clause 9 of the conditions of sale allowed for the deduction of ‘any expenses incurred by the liquidator or her agents in the process of conducting the sale and its aftermath.’ It is common cause that the receipt was in the name of Mrs Grimmel who from the record of proceedings was the liquidator. The fact that the receipt was not in the appellant’s name should not have been the deciding factor as the condition clearly provided for costs incurred by the liquidator as well. The issue the trial magistrate ought to have exercised his mind on is whether the security costs were incurred in the process of the sale and its aftermath. I am of the view that whether the receipt for security services was in the name of either the auctioneer or the liquidator did not make a difference as long as the costs were incurred in the process of the sale and its aftermath.

The trial magistrate seemed to take issue with the fact that the security guard was not in uniform. That in my view is of no consequence as it was not part of the condition that those providing security services must be in uniform. All that was required of the appellant is to show that the security services were provided leading to costs being incurred.

In conclusion therefore, it is apparent that the trial magistrate misdirected himself when he held that the appellant had not earned its commission as the sale was not completed but had been cancelled. He also erred in concluding that clause 9 of the 'Notes and Conditions of Sale' was illegal and not enforceable.

In the circumstances the appeal is hereby allowed with costs. The judgment of the court *a quo* be and is hereby set aside and is substituted by the following-

The plaintiff's claim be and is hereby dismissed with costs.

Coghlan welsh & Guest, appellant's legal practitioners
Mundia and Mudhara, respondent's legal practitioners