

INNSCOR FRANCHISING ZIMBABWE (STORES 13)
versus
ANDREW TIMBE

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 21 March 2017

Civil Appeal

Ms *F Mataba*, for the appellant
C Mandava, for the respondent

MWAYERA J: On 21 March 2017 we delivered an *ex tempore* judgment wherein we dismissed the appeal with costs. By letter dated 29 May 2017 the appellant counsel requested for written reasons for judgment, these are they.

The court *a quo* ordered the appellant to pay \$2 520 to the respondent being balance outstanding for pockets of potatoes delivered to the appellant by the respondent. The court *a quo* also ordered the defendant to pay costs of suit. Aggrieved by the decision of the court *a quo* the appellant mounted the preset appeal.

The appellant raised two grounds of appeal and expanded same by way of evidence. Suffices to just highlight the grounds of appeal as presented.

1. The court *a quo* erred in finding that the plaintiff proved his case. The issue that the court *a quo* had to decide was whether or not there was a sale between the parties in respect of 252 pockets of potatoes valued at \$2520.
2. The court *a quo* further erred by failing to take into account material evidence thereby making findings that were contrary to the evidence before it.

After reading the record of proceedings and having considered heads of argument filed by both parties and oral submissions by both counsels common cause aspects are apparent. It

is common cause that the respondent supplied 609 pockets of potatoes to the appellant in December 2014. It is further common cause that the appellant paid for 357 pockets of potatoes. A balance of 252 pockets remained at the appellant's premises and they were not paid for. It is also not in dispute that the standard operating procedure was that potatoes would be delivered to the appellant's place, inspected and weighed. Each pocket of potatoes would go for \$10.

The claim by the respondent for payment of US\$2520 was based on a sale agreement of a total of 609 pockets of potatoes of which payment was made for 357 pockets being \$3570. The remaining 252 pockets were not paid for.

The appellant argued that they did not have an obligation to pay for the 252 pockets because the appellant did not accept these potatoes since they did not meet the required standards. It is apparent from the record that this issue was only raised upon demand for the outstanding balance by the respondent. The respondent delivered 609 pockets of potatoes and the inspection carried out was not of single potatoes but general assessment as regards color and weight being 15kg per pocket and then potatoes would be sold to the appellant. The question that was central before the court a quo is if the appellant had not accepted 609 pockets of potatoes why then did the appellant take delivery of the whole consignment. The appellant argued that the remaining 252 pockets did not meet their standards and that they did not use them till they rot. They waited expecting the respondent to come and collect the potatoes which they stored in one of their rooms in the warehouse. It is also evident from the record that on the day in question the 609 pockets of potatoes were delivered both the appellant and the respondent did not strictly adhere to their usual procedure. The norm was that the respondent would raise an invoice for the goods delivered and this invoice would be signed by the respondent as seller and at least two representatives of the appellant the buyer, as receiving clerks'. Thereafter the appellant would raise a Goods received Voucher and then payment would be processed at a particular date referred in the voucher. On this day this process was not followed. 609 pockets of potatoes were delivered at the appellant's. The appellant without compiling any goods received voucher latter paid for 357 pockets at \$10 per pocket thereby paying \$3570.

The respondent's claim for the outstanding payment was based on the fact that the appellant took delivery of all the potatoes. The version by the appellant's witness that the respondent requested to leave the 252 pockets with a view to further negotiate sale is

unacceptable when viewed with the totality of the evidence of what transpired as regards the consignment. What remains unanswered is why the potatoes were included on the general inspection and why the buyer took delivery if it did not accept them since they were not meeting the expected standard. The potatoes were off loaded from a vehicle which brought them, if the appellant was not interested then the potatoes ought not to have been off loaded. The respondent in the court *a quo* had to prove on a balance of probabilities that they transacted for 609 pockets. The evidence is clear that 609 potatoes were delivered after inspection for the general agreed specification. The evidence is clear that there was a valid contract of sale. The respondent, as the seller supplied potatoes and the sale price was agreed at \$10 per pocket. The delivery of the potatoes was clearly by agreement. The respondent played its part of the contract and what was left was for payment to be effected by the appellant. The appellant made part payment for 357 pockets leaving 252 pockets unaccounted for. The respondent revealed their entitlement to the outstanding balance and the court *a quo* correctly gave an order in favour of the respondent. By conduct the 609 packets were accepted by the appellant's employees after the standard inspection. Payment for 357 pockets was done at a later stage leaving an outstanding 252 pockets. The argument that the invoice was not signed for by the respondent does not hold water given the appellant itself departed from the standard procedure. Part payment of \$3 570-00 was made without generation of goods received voucher and equally the appellant did not sign the invoice. That the potatoes were left to rot at the appellant's premises does not exonerate the appellant from the obvious contractual obligation. The essential elements of a valid sale contract is supported by evidence which was adduced before the court *a quo*. See *Warren Park Trust v Pahwaringira and Ors* 2009 ZW HH C 39. In *casu* there was clear delivery of 609 pockets of potatoes at the instance of the appellant. The going price was agreed at \$10 per pocket. Only \$3 570-00 for 357 pockets was paid thus leaving 252 pockets for \$2 520-00 not paid for.

The decision of the court *a quo* that the appellant was liable for the outstanding balance being \$2 520 for 252 pockets of potatoes was anchored on evidence adduced.

Accordingly the appeal lacks merit. The appeal is dismissed with costs.

MUNANGATI-MANONGWA J agrees