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Judgment No. SC 49/05
Civil Appeal No. 46/04

NYIKA INVESTMENTS vs (1) ZIMASCO HOLDINGS (2) ZIMASCO CONSOLIDATED ENTERPRISES LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ,ZIYAMBI JA & MALABA JA
HARARE, MAY 23 & OCTOBER 24, 2005

E T Matinenga, for the appellant

J C Andersen, for the respondents

ZIYAMBI JA: On 4 January 2002, the appellant issued summons out of the High Court against the respondents claiming, *inter alia*, specific performance of an agreement allegedly concluded between the parties on 26 February, 2001. It was alleged that the agreement was contained in two documents annexed to the declaration as "A" and "B".

Prior to that, on 6 December, 1999 the appellant had sought an order in the High Court interdicting the respondents from disposing of their shares to a company called Zim Alloys or any other person. CHATIKOBO J, who heard the application, dismissed it on the basis that the appellant had failed to prove the existence of the

agreement they sought to rely on, both agreements being inchoate. Thus it was held that the appellant had failed to prove a *prima facie* right deserving of protection by an interdict.

On March 12, 2002, the respondents excepted to the summons and declaration on the grounds that it disclosed no cause of action. It was alleged that Annexures "A" and "B" to the declaration constitute inchoate agreements not capable of enforcement more particularly in that:

> "Plaintiff's summons and declaration constitute an abuse of process having regard to judgment HH 53/01 in Case No. HC. 17919/99 between the parties against which no appeal was noted".

The High Court upheld the exception and dismissed the appellant's claims with costs on a legal practitioner and client scale. Aggrieved by the order of the High Court, the appellant has appealed to this Court.

The issue to be determined in this appeal is whether the two documents annexures "A" and "B" on which the appellant's claim is based, constitute a binding agreement between the parties. If the documents constitute binding agreements then the learned Judge was, of course, wrong in upholding the exception.

It was the appellant's contention that looking at the agreements one cannot find that they are inchoate without hearing evidence. However, as Mr *Andersen* contended on behalf of the respondent, the appellant faces the difficulty that the parole

evidence rule does not permit evidence to be led of the agreement. See *Johnston v Leal* 1980 (3) SA 927 A at 943 B where the rule was expressed by CORBETT JA as follows:-

> "It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.
>
> To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered".

Thus, the appellant can only establish a cause of action by pleading a binding agreement. If the agreement pleaded is inchoate, then there is no cause of action.

I turn to examine the agreement Annexure "A" which the appellant alleges is complete. (Annexure "B", so it was submitted by Mr *Matinenga*, relies on Annexure "A" for its completeness).

Annexure "A" is a document headed "Heads of Agreement". It commences as follows:

> "The following represent the main points of agreement reached between (the parties)".

Paragraph 1 of the agreement provides:

> "The purpose of this agreement is to set out heads of agreement. The agreement given on behalf of Nyika is subject to Nyika having received a signed copy of the

> audited accounts for the year ended 30 September 1996 and being satisfied that the information contained therein does not prejudice its decision to invest in Zimasco".

Clearly the receipt of the audited accounts by Nyika and his satisfaction therewith was a condition precedent to the agreement coming into effect.

Paragraph 2 provides:

> "The intention of the parties is to incorporate these terms and conditions in a legally drafted agreement which *inter alia* will incorporate the following warranty by Zimasco."

The term *inter alia* on its own indicates that there were terms, other than those stated in the agreement, which were to be incorporated in the legally drafted agreement. This is another indication that the agreement under discussion was not yet complete.

Paragraphs 3, **4 and 5** of the agreement provide:

> "3. Zimasco Consolidated Enterprises Limited (ZCE), the sole shareholder of Zimasco has communicated its wish that the Board of Directors of Zimasco proceed with the localisation and indigenisation of 50% of the Company as set out in 5 below.
>
> 4. In pursuance of this, it is the intention of the Board to achieve this goal by issuing additional shares in Zimasco to Zimbabwean indigenous individuals, Zimbabwean indigenous institutions and on to the Zimbabwe Stock Exchange, thus diluting the ZCE shareholding.
> No payment will be made or accrue to ZCE as a result of this localisation process other than through normal dividend payments.
>
> 5. On completion of the exercise, the percentage shareholding relative to the Company's enlarged share capital will be as follows:-

Shareholding	Percentage	Comment
ZCE	50	Diluted Shareholding
Nyika Group Tributors, Co-operatives and Organised Indigenous business	27 5	Private placing at terms advantageous to the indigenous investors
Nyika	22	
Workers Trust	5	Donation by ZCE – no payment
Management Share		
Options	3	Payment into Zimasco at market value
Stock Exchange Issue	15	Payment into Zimasco at market value (with preference given to indigenous individuals and institutions)
	--- 100"	

The intention expressed herein to issue additional shares to Zimbabwean indigenous individuals and institutions had clearly not been fulfilled. That much is confirmed by paragraph 5 which sets out what the percentage shareholding would be upon completion of the exercise.

The learned Judge in the court *a quo* commented on clause 4 as follows:

> "What seems to be quite clear from the above clause is that the goal of localization was yet to be achieved. The issuing of additional shares in Zimasco to Zimbabwean indigenous individuals, Zimbabwean indigenous institutions and

> on the Zimbabwean Stock Exchange, and thus diluting the ZCE shareholding, was a process yet to be done and completed.
>
> It therefore admits of no doubt the identification of shareholders was another process which was yet to be done.
>
> Moreover government's seal of approval had not yet been granted since the plaintiff had to agree to a process of indigenisation acceptable to government or else Zimasco would be taken over by government".

Clearly, the agreements are incomplete. The following statement of the law taken from the Law of Contract in South Africa 3rd Edition by R H Christie at p 36 is applicable here.

> "Especially in complicated or protracted negotiations it is not uncommon for the parties to record the progress they have made in a partial agreement, thus clearing the points on which they are agreed out of the way and facilitating discussion on the points that remain outstanding. If agreement is eventually reached on the outstanding points and a complete contract drawn up and signed, the prior partial agreement is usually forgotten, but if for one reason or another the intended contract is never concluded one party will sometimes seek to hold the other to the partial agreement. Obviously he cannot be permitted to do so, because although the partial agreement may have taken the form of an accepted offer it lacked *animus contrahendi*, being designedly incomplete or provisional".

See also *Printing & Packaging (Private) Limited & Ors v Lavin & Anor* 1996(1) ZLR 82 (S).

It is not surprising, then, that the respondents asserted in the court *a quo*, as now before this Court, that the continuation of the proceedings by the appellant constituted an abuse of court process in the light of the clear findings in the judgment of CHATIKOBO J, against which there was no appeal by the appellant, to the effect that, firstly, the two documents represented inchoate agreements which were subject to further

negotiations hence the appellant could not claim to have concluded a binding agreement prior to the processes mentioned being complete; and secondly, the facts advanced by the respondents in contradiction of the appellant's case cast such a serious doubt on the existence of a binding agreement that it could not be said that a *prima f*acie right, though open to doubt, had been established and it was doubtful whether the appellant would succeed at the trial.

On the question of costs, no misdirection has been alleged and there is none. In the result I conclude that the judgment of the court *a quo* is unassailable and the appeal is accordingly dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Dube Manikai & Hwacha, applicant legal practitioners

Mark Stonier, respondents' legal practitioners