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Judgment No. SC.32/06
Civil Appeal No. 229/03

(1) POSTS & TELECOMMUNICATIONS CORPORATION (2) M L MASHUMA (3) NET ONE CELLULAR (PRIVATE) LIMITED (4) REWARD KANGAI

v

BRIGHTPOINT ZIMBABWE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, MAY 11 & 12 SEPTEMBER 2006

E T Matinenga, for the appellants

A B Chinake, for the respondent

ZIYAMBI JA: This appeal is against a judgment of the High Court declaring null and void the cancellation by the appellants (to whom I shall refer collectively as the "PTC") of an agreement between the parties.

I must comment at the outset that the judgment makes difficult reading as it contains numerous typographical errors, is in many parts illegible and appears not to have been edited by the learned Judge.

The Registrar is directed to ensure that all judgments on appeal are edited by the Judge concerned before their inclusion in the record.

The respondent brought an application in the court *a quo* seeking the following order -

(1) The purported cancellation of the principal Agreement between PTC and the Applicant be and is hereby declared null and void.

(2) Consequently, the First and Third Respondents be and are hereby ordered to enter into a written agreement with the applicant on reasonable terms and conditions as set out in the first consolidated draft agreement being annexure "11" to the application within 14 days from the date of this order.

(3) That the Second and Fourth Respondents be and are hereby ordered to take all reasonable steps to ensure compliance with paragraph "2" of this order by the First and Third Respondents.

(4) That the Respondents jointly and severally the one paying the other to be absolved shall pay the costs of this application.

It was alleged that the respondent entered into an agreement ("the contract") with the first appellant (to whom I shall refer as "the PTC") in terms of which the respondent was to provide certain services connected with a prepaid cellular communication service among which was the provision of a call platform enabling NETONE to route calls to and from pre-paid customers through the platform.

The call platform provided by the respondent failed to function properly from the outset and as early as 4 January 1999, the PTC began a series of complaints the

non resolution of which resulted in the PTC sourcing and installing its own call platform which proved to be incompatible with the respondent's equipment. Thereafter, there were negotiations between the parties to enter another agreement (the respondent claims it was an agreement to vary the contract while the PTC maintains it was to be a new agreement which would apply to the changed circumstances). Since the PTC had sourced and installed its own call platform, the new agreement was intended to reduce the obligations of the respondent to providing sim cards for the prepaid cellular service. Negotiations for the new agreement failed and on 4 January 2000 the PTC cancelled the contract.

The respondent argued in the court *a quo* that there was no breach by it of any term of the contract that went to the root thereof and that the purported cancellation of the contract was null and void since the parties had agreed to a variation thereof. In any event, the PTC, by failing to cancel the contract at the time of occurrence of the breach, had waived its rights to cancel the agreement and was now estopped from doing so.

Further, as the contract envisaged severability and the PTC's complaints referred only to the call control platform, any entitlement by the PTC ought to have been restricted to that part of the contract and not the rest of the contract.

In response, the PTC contended that the contract had been validly cancelled because of the respondent's default and that in any event, the respondent had

based its case not on the contract but on the 'new' agreement which was invalid by virtue of the fact that it was not signed by both parties.

The court *a quo* defined the issues for determination as follows:

> "Whether the agreement was validly cancelled; and, if not, whether the parties can be ordered to implement the whole or part of the contract."

It went on to find that the agreement was not validly cancelled but found itself unable to order the appellant to implement the whole or part of the contract.

Mr Matinenga, in contending on behalf of the PTC that the contract was validly cancelled, submitted that the fact that the parties entered into negotiations with a view to entering into another agreement constituted neither a variation of the terms of the contract nor a waiver of the PTC's right to cancel the contract since the alleged variation, not having been signed by the PTC, was devoid of legal effect because of its non compliance with clause 45:8 of the contract. See *The Law of Contract in South Africa*, *Christie* , 3 ed at p 117-118; *AFC v Pocock* 1986 (2) ZLR 229 (SC). In any event, so it was argued, clause 45:8 clearly prohibits any waiver not reduced to writing and signed by the parties.

Clause 45:8 provides as follows:

"VARIATION, CANCELLATION AND WAIVER

> No contract varying, adding to, deleting from or cancelling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties."

The submission that there was no waiver of the PTC's rights is, in my view, correct since the respondent has produced no waiver written and signed by the PTC and indeed it has not been the respondent's case that there was such a written waiver. Accordingly, the indulgence afforded to the respondent by the PTC cannot, by virtue of the clear provisions of this clause, be held to amount to waiver of the PTC's right of cancellation in terms of the contract.

That notwithstanding, the High Court found in favour of the respondent. The learned Judge at p 9 of the cyclostyled judgment said:

> "… in the present case with the history of the complaints by the respondent of the problems related to the Call Control Platform and the specific reference by the respondent to cancellation in its letters to the applicant, it cannot seriously be argued that the respondent was not aware of its rights in terms of the agreement to cancel or the legal consequence of failure to (blank space) this right.
>
> By its own conduct as reflected in the correspondences, respondent is estopped from now seeking to rely on breaches that it had apparently been aware of."

At p 10 of the judgment the learned Judge continued, rather curiously in my view, as follows:

> "Having come to the conclusion that the respondent waived its right to cancel the contract, it is my view that the subsequent negotiations which resulted on (sic) the 2 drafts were in fact variations to that agreement. These variations were necessitated by the fact of the respondent having

installed its own platform, the agreement as it stood could not be proceeded with …"

In arriving at the above conclusions the learned Judge ignored the clear provisions of s45.8 of the contract which render invalid any waiver or variation of the contract which is not reduced to writing and signed by the parties as well as the provisions of s45.9.2 which militate against estoppel.

Section 45.9 provides as follows:

"45.9 **INDULGENCES**

If either party at any time breaches any of that party's obligations under this agreement, the other party ('the aggrieved party'):

45.9.1 …

45.9.2 shall not be estopped (i.e. precluded) from exercising the aggrieved party's rights arising out of that breach, despite the fact that the aggrieved party may have elected or agreed on one or more previous occasions not to exercise the rights arising out of any similar breach or breaches."

The final contention advanced on behalf of the respondent, and accepted by the court *a quo,* is that even accepting that the respondent was in breach of its obligation in part A of the contract to provide the PTC with a call control platform, the contract is severable by virtue of the provisions of s 45.10 thereof and was, therefore, wrongfully cancelled by the PTC because parts B & C thereof were still capable of implementation by the respondent.

The learned Judge was of the view that the contract provided for a situation where the PTC would install its own call platform. However the PTC argued that the circumstances in which it set up its own call platform are not those envisaged in the contract. Further, it was now impossible for the respondent to provide the services set out in parts B & C of the contract because the platform installed by the PTC is not compatible with the respondent's equipment.

The following clauses of the contract are relevant to the determination of this issue:

> "3.2. To the extent of that part of this agreement that relates to the maintenance and support of the Call Platform more fully outlined in clause 7 hereof, those terms of this agreement shall terminate on the date on which NETONE's migration to an integrated node platform is completed. …
>
> 7.10. … In the event of NETONE requiring the assistance of BRIGHTPOINT to migrate from the Call Platform to the integrated node, then in that event NETONE shall be liable to pay to BRIGHTPOINT an agreed fixed fee of US$2,00 (TWO THOUSAND U.D. DOLLARS) per day or part thereof, but not exceeding the total sum of US$50,00 (FIFTY THOUSAND U.S. DOLLARS) notwithstanding that BRIGHTPOINT shall be liable to render such assistance for a total period of 30 (THIRTY) days.
>
> 18.3 … The gross revenue allocated to each party shall be apportioned as to 55% to NETONE and 45% as BRIGHTPOINT."

It seems to me that the provisions of clause 3.2 envisaged a situation where NETONE would eventually migrate to "*an integrated node platform*" and not a situation like this where the respondent failed from the start to perform its part of the contract by providing a call platform which functioned properly. The remaining parts of

the contract were then to remain in force until the expiry of 5 years from the date of commencement of the contract. However the respondent, on its own admission, failed from the very beginning in its obligation in terms of the agreement to provide a call platform which functioned properly. Its malperformance drove the PTC to install its own call platform. That was a substantial breach of the terms of the contract entitling the PTC to cancel it. Compare *Southern Rhodesia Government Irrigation Department v. Hein* 1956 R & N 573.

Further, as submitted on behalf of the PTC, although the contract contained a clause that it was severable, this clause was incapable of implementation as the consideration specified in clause 18.3, *supra*, was for 45% of the gross revenue for the respondent in respect of all the services provided for with no breakdown as to the revenue to be paid in the event of the installation of a new call platform by the PTC.

Accordingly, the appeal is allowed with costs. The order of the Court *a quo* is set aside and substituted with the following:

"The application is dismissed with costs".

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Coghlan Welsh & Guest, appellants' legal practitioners

Kantor & Immerman, respondent's legal practitioners