

DISTRIBUTABLE (48)

Judgment No. SC 50/09
Civil Appeal No. 211/03

(1) ZIMBABWE DEVELOPMENT CORPORATION
(2) TRUST MERCHANT BANK LIMITED v

MAKO PROPERTIES AND CONSTRUCTION (PRIVATE) LIMITED
t/a MSUNA SAFARIS

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GARWE JA
HARARE, MAY 12, 2009 & FEBRUARY 17, 2010

F Maxwell, for the first appellant

No appearance for the second appellant

V Majoko, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court sitting at Bulawayo which granted the respondent's application for an order declaring that the Agreement of Sale between the first appellant and the respondent, purportedly cancelled by the first appellant, remained valid.

The background facts in the matter may be tabulated conveniently as follows –

1. At the relevant time the first appellant (“ZDC”) owned all the shares in Last Hope Estate Dete Holdings (Pvt) Ltd (“Last Hope”). In February 1999 ZDC advertised the sale of all its shares in Last Hope (“the shares”) and called for bids from prospective purchasers.
2. Since the respondent (“Msuna Safaris”) was interested in purchasing the shares, it approached the second appellant (“the bank”) for financial assistance. The bank was willing to provide financial assistance in the sum of Z\$30 000 000.00 for the acquisition of the shares. As a result, Msuna Safaris submitted its bid of Z\$30 000 000.00 to ZDC on 24 February 1999.

3. On 26 April 1999 the bank wrote to ZDC as follows:

“We refer to ... the offer letter by Msuna Safaris & Travel dated 24 February 1999 and confirm that Trust Merchant Bank Limited has approved a ZWD 30 000 000 (thirty million dollars) medium term facility for Msuna Safaris & Travel for the purchase of the Last Hope Estate (Private) Limited (*sic*). The funds will be forwarded to Zimbabwe Development Corporation upon:

- Acceptance of Msuna Safaris & Travel’s bid to purchase Last Hope Estate (Private) Limited (*sic*) for ZWD 30 000 000 (thirty million dollars) by Zimbabwe Development Corporation;
- Signing of the Agreement of Sale of Last Hope Estate (Private) Limited (*sic*);
- Transfer of Last Hope Estate (Private) Limited (*sic*) share certificate from Zimbabwe Development Corporation to Msuna Safaris & Travel; and
- Confirmation by Zimbabwe Development Corporation that (the) Title Deed of Last Hope Estate will be provided upon disbursement of funds.”

4. On the same day, 26 April 1999, ZDC wrote to the bank as follows:

“We acknowledge receipt of your letter ... dated 26th April 1999 and wish to advise as follows:

1. We are assuming that your letter is a Bank Guarantee. Can you, however, please confirm that it is an irrevocable Bank Guarantee with a specified period payable to Zimbabwe Development Corporation Trust Account at Messrs Kantor & Immerman Legal Practitioners.
2. Conditions of acceptance will be in the acceptance letter.”

5. On 27 April 1999 the bank replied as follows:

“We refer to your letter of 26 April 1999 and confirm that our letter of 26 April ... is an irrevocable Bank Guarantee valid for thirty days until 26 May 1999.

Upon meeting the stated terms and conditions of the guarantee by ZDC, Trust Merchant Bank Limited will deposit funds into Zimbabwe Development Corporation Trust Account at Messrs Kantor & Immerman Legal Practitioners.”

6. On the same day, i.e. 27 April 1999, ZDC wrote two almost identical letters, one to the bank and the other to Msuna Safaris. The letter to the bank reads as follows:

- “1. We acknowledge receipt of your letter ... dated 27th April 1999, and have pleasure to advise that the Zimbabwe Development Corporation (ZDC) is pleased to accept (the) offer by Msuna Safaris and Travel to purchase Last Hope Estate Dete Holdings (Private) Limited for a minimum price of Z\$30 000 000.00 if Trust Merchant Bank Limited is prepared to deposit the full purchase price of Z\$30 000 000.00 into the ZDC Trust Account with Messrs Kantor & Immerman Legal Practitioners within seven days

from the date of receipt of this letter in order to expedite the purchase process.

2. Once the full purchase price has been paid ZDC Legal Practitioners Messrs Kantor & Immerman will draw up the Agreement of Sale together with your own lawyers.
 3. Full payment of the purchase price will enable Messrs Msuna Safaris and Travel to take over Last Hope Estate Dete Holdings (Private) Limited.
 4. Other fuller details will be contained in the Agreement of Sale which will include *inter alia* relevant contents of our letter to Msuna Safaris and Travel of even reference dated 26th February 1999.
 5. If (the) full purchase price is not paid within seven days of the date of receipt of this letter, the acceptance by ZDC of (the) offer by Msuna Safaris and Travel may be deemed null and void at the sole discretion of ZDC.”
7. The only difference between the letter written by ZDC to the bank on 27 April 1999 and the one it wrote to Msuna Safaris on the same date is that paragraph one of the letter to Msuna Safaris is worded differently from paragraph one of the letter to the bank. Paragraph one of the letter to Msuna Safaris reads as follows:

- “1. We refer to your letter dated 24th February 1999, and to a letter of Bank Guarantee from Trust Merchant Bank Limited ... dated 27th April 1999, ... and have pleasure to advise you that the Zimbabwe Development Corporation (ZDC) is pleased to accept your offer to purchase Last Hope Estate Dete Holdings (Private) Limited ... “.

The rest of the paragraphs in the two letters are exactly the same.

8. On 26 May 1999, when the irrevocable Bank Guarantee granted by the bank was due to expire, the bank wrote to ZDC as follows:

“We refer to ... the offer letter by Msuna Safaris & Travel dated 24 February 1999 and confirm that Trust Merchant Bank Limited has approved a ZWD 30 000 000.00 (thirty million dollars) medium term facility for Msuna Safaris & Travel for the purchase of the Last Hope Estate (Private) Limited (*sic*).

The funds will be forwarded to Zimbabwe Development Corporation upon:

- Signing of the Agreement of Sale of Last Hope Estate (Private) Limited (*sic*); and
- Execution of the necessary documentation and procedures for registration of transfer as outlined in the Agreement of Sale by Zimbabwe Development Corporation.

The above undertaking by Trust Merchant Bank Limited is binding and valid for thirty days until 25 June 1999.”

9. Subsequently, Messrs Kantor & Immerman drafted an Agreement of Sale in terms of which ZDC agreed to sell its entire shareholding in Last Hope to Msuna Safaris for Z\$30 000 000.00. The draft agreement was later sent to the bank which proposed certain amendments and additions to the draft. The final draft of the Agreement of Sale was then prepared.
10. On 21 June 1999 the representatives of ZDC and Msuna Safaris signed the Agreement of Sale (“the Agreement”). Clause 1.2 of the Agreement, in relevant part, reads as follows:

“... the Purchase Price shall be payable to the seller by delivery to Messrs Kantor & Immerman Legal Practitioners, 10 Selous

Avenue, McDonald House, Harare, (of) a bank guaranteed cheque or a cheque drawn by a commercial bank on itself (otherwise known as a bank cheque) for the full purchase price on or before the effective date, 30th June 1999.”

And clause 8.1 of the Agreement, in relevant part, reads as follows:

“Should any party (‘the defaulting party’) commit a breach of any of the provisions hereof, then the other party (‘the aggrieved party’) shall be entitled to give the defaulting party 14 (fourteen) days written notice to remedy the breach. If the defaulting party fails to comply with such notice, the aggrieved party shall be entitled to cancel this Agreement ...”.

11. On 21 June 1999, after the Agreement had been signed, Msuna Safaris transmitted a telefax message to the bank informing it, *inter alia*, that the Agreement had been signed and that a copy would be delivered to it shortly. On the same date the bank replied as follows:

“We have received your telefax message transmitted on 21 June 1999 and were surprised to note that the Agreement of Sale for the purchase of Last Hope Estate Dete Holdings (Private) Limited has been signed without reference to us despite our obvious interest into (*sic*) the contents of such agreement.

We would like to refer to the letter from Zimbabwe Development Corporation copied to yourselves, dated 27 April 1999, paragraph 2 of which provides that the Agreement of Sale should be drawn up by ZDC Legal Practitioners, Messrs Kantor & Immerman, and the bank’s lawyers.

Our lawyers have not had sight of the draft Agreement of Sale.

In the circumstances, we therefore request that the condition of paragraph 2 of the letter from Zimbabwe Development Corporation, dated 27 April 1999 copied to yourselves, be complied with ...”.

12. On 22 June 1999 the bank received a copy of the Agreement and sent it to the bank's lawyers for an opinion. Two days later the lawyers informed the bank that the Agreement was defective and that the bank's interests were not adequately protected. They, therefore, suggested that the Agreement be amended in certain respects.
13. On 28 June 1999, after ZDC had become aware of the legal advice given to the bank by the bank's lawyers, ZDC wrote a letter to the bank which, in relevant part, reads as follows:

- “2. We further remind you that an Agreement of Sale for the purchase of Last Hope Estate Dete Holdings (Private) Limited for Z\$30 000 000.00 was signed between Mako Properties and Construction (Private) Limited t/a Msuna Safaris and Travel on the one hand and Zimbabwe Development Corporation (ZDC) on the other on 21st June 1999. If the purchaser ... wishes to amend the Agreement of Sale, ZDC would deem that the purchaser has unilaterally cancelled the Agreement with the result that ZDC would no longer be bound by it on the one hand while the Corporation reserves the right to seek redress on the other. Once the Agreement of Sale is deemed null and void fresh offers and negotiations would be entertained from any interested party including yourselves under new terms as the case may be.
3. The attention of the purchaser is further drawn to the need to regularise and update the Bank Guarantee which expired on the 25th June 1999.

We await your prompt payment of the full purchase price as per the existing Agreement.”

14. On 5 July 1999, when the purchase price had not been paid, Messrs Kantor & Immerman, ZDC's lawyers, wrote to Msuna Safaris as follows:

“... You will note that in terms of clause 1.2 of the Agreement you were to pay the purchase price at our offices on or before the 30th of June 1999. That date has since elapsed and we are not in receipt of the purchase price. As such we are instructed to advise you that as you are in breach of the contract, in terms of clause 8.1 of the Agreement, our client hereby gives you fourteen days' notice to remedy the breach, failing which our client will proceed to cancel the Agreement without further warning ... “.
15. On 16 July 1999 the legal practitioners acting for Msuna Safaris filed a court application in the High Court at Bulawayo against the bank, seeking an order compelling the bank to pay Z\$30 000 000 to ZDC (case no. HC 3327/99). The application was opposed by the bank on two main grounds. The first was that the two bank guarantees issued in favour of ZDC on 26 April 1999 and 26 May 1999, each valid for thirty days, lapsed before the conditions therein had been complied with. And the second ground was that the bank's lawyers had not been involved in the drafting of the Agreement, and that as a result a defective Agreement had been drafted and signed.
16. On 26 July 1999, when the breach of the Agreement had not been remedied by Msuna Safaris, ZDC wrote to Msuna Safaris informing it of the cancellation of the Agreement. Three days later, ZDC re-advertised the sale of the shares and called for bids from prospective purchasers.

17. The advertisement prompted the filing of an urgent Chamber application in the High Court at Bulawayo by Msuna Safaris for an interdict restraining ZDC from disposing of the shares until the dispute between the parties was determined by an arbitrator (case no. HC 4075/99). A provisional order was later granted on 2 September 1999.

18. Subsequently, case no. HC 3327/99 and case no. HC 4075/99 were consolidated, and both matters were heard together by the learned Judge in the court *a quo* as case no. HC 1487/00. The learned Judge declared that the Agreement purportedly cancelled by ZDC remained valid, and ordered the bank to pay the sum of Z\$30 000 000.00 to ZDC's lawyers within seven days from the date of the order. The learned Judge also directed that if ZDC received payment for the shares, or there was a satisfactory undertaking to pay for the shares, it should sign all such papers as it was required to sign in order to transfer the shares from Last Hope to Msuna Safaris.

Aggrieved by that result, ZDC appealed to this Court.

In my view, the main issue in this appeal is whether when ZDC cancelled the Agreement it was entitled to do so. I have no doubt in my mind that it was.

In terms of the Agreement signed by ZDC and Msuna Safaris on 21 June 1999 the shares were sold for Z\$30 000 000.00.

In terms of clause 1.2 of the Agreement the full purchase price was to be paid to ZDC's lawyers on or before 30 June 1999. In my view, it is clear that Msuna Safaris was in breach of this clause as the purchase price was not paid by 30 June 1999.

According to clause 8.1 of the Agreement, in the event of a breach of the Agreement the aggrieved party was entitled to give the defaulting party fourteen days' written notice to remedy the breach. The clause provided that if the defaulting party failed to comply with such notice, the aggrieved party was entitled to cancel the Agreement.

There can be no doubt that ZDC complied with clause 8.1 of the Agreement. I say so because on 5 July 1999, when the purchase price had not been paid by 30 June 1999, ZDC's lawyers, Messrs Kantor & Immerman, wrote to Msuna Safaris advising it that by failing to pay the purchase price on or before 30 June 1999 Msuna Safaris was in breach of clause 1.2 of the Agreement, and that they were giving it fourteen days within which to remedy the breach, failing which ZDC was to proceed with the cancellation of the Agreement without further notice. Thereafter, when Msuna Safaris failed to pay the purchase price within fourteen days, ZDC cancelled the Agreement, as it was perfectly entitled to do.

The suggestion by Msuna Safaris that ZDC should have agreed to the amendment of the Agreement in the manner proposed by the bank's lawyers so that the

bank paid the purchase price to ZDC is totally untenable. There was no obligation whatsoever on the part of ZDC to agree to the proposed amendments.

ZDC and Msuna Safaris had signed an agreement on 21 June 1999, and it was that agreement that the parties were obliged to carry out. Any variation of that agreement, for whatever reason, could only have been effected with the consent of both parties. Neither the bank nor Msuna Safaris could have required or compelled ZDC to agree to the proposed amendments.

The further suggestion that ZDC had no reason for rejecting the proposed amendments ignores the essence of a contract. The fact of the matter is that ZDC did not need any reason for refusing to vary an agreement it had already concluded. In addition, the fact that the proposed amendments would not be prejudicial to ZDC was irrelevant.

In the circumstances, as the cancellation of the Agreement by ZDC was perfectly lawful, the learned Judge in the court *a quo* should have discharged the provisional order granted in case no. HC 4075/99 on 2 September 1999. In my view, that effectively disposes of case no. HC 3327/99 as well. It will be recalled that in that case Msuna Safaris sought an order compelling the bank to pay the purchase price of the shares in the sum of Z\$30 000 000.00 to ZDC. Such an order would be incompetent, in view of the fact that the Agreement was lawfully cancelled.

Finally, I would like to deal with the issue of costs in the court below. In case no HC 4075/99 I see no reason why ZDC, as the successful party, should be deprived of its costs. However, in case no. HC 3327/99 I do not think that the bank should be awarded costs of suit. I say so because it was the bank's insistence that the Agreement be amended in certain respects, after it had been signed, that created problems in this case.

After the Agreement had been drafted, a copy of the draft was sent to the bank and, instead of sending the draft to its lawyers, the bank proposed certain amendments and additions to the draft, which were later incorporated in the final draft by ZDC's lawyers. The Agreement signed on 21 June 1999, therefore, incorporated the bank's proposals. After the Agreement had been signed, the bank then consulted its lawyers, and the lawyers advised that the Agreement was defective.

Had the bank consulted its lawyers before the Agreement was signed, the problems which arose in this case would most probably not have arisen, and the sale of the shares would have been completed in 1999. In order to show this Court's disapproval of the bank's conduct, there will be no order as to costs in case no. HC 3327/99.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

2. The order granted by the High Court is set aside and the following substituted –

“(a) The application in case no. HC 3327/99 is dismissed, with no order as to costs.

(b) The provisional order granted in case no. HC 4075/99 on 2 September 1999 is discharged with costs.”

CHEDA JA: I agree

GARWE JA: I agree

Civil Division of the Attorney-General's Office, first appellant's legal practitioners

Majoko & Majoko, respondent's legal practitioners