

DISTRIBUTABLE (36)

TELECONTRACT (PRIVATE) LIMITED t/a TELCO
v
SPORROW HAULIER (PRIVATE) LIMITED t/a
J & J TRANSPORT

SUPREME COURT OF ZIMBABWE
PATEL JA, GUVAVA JA & UCHENA JA
HARARE, NOVEMBER 1, 2016 & JUNE 22, 2017

T Magwaliba for the appellant

No Appearance for the respondent

UCHENA JA: This is an appeal against the decision of the High Court upholding the judgment of the Magistrates' Court. The case revolves around the difference between two computer terms "megabytes" and "megabits". On 12 April 2012, the respondent sought fibre internet services for its two premises being No. 34 Martin Drive, Msasa, and No. 19 Manyonga Close, Glen Lorne Harare, from the appellant who is an internet service provider. The parties entered into some form of agreement that was both verbal and written. The written contract was not signed by both parties as there were some terms which needed to be clarified.

It is common cause that the parties agreed on the following:

1. That the appellant would install and provide internet service at No 34 Martin Drive Masasa and No 19 Manyonga Glen Lorne.
2. That the respondent would pay the installation costs and service fees.

Believing the above mentioned terms and conditions to be valid, the respondent paid the appellant installation costs and service fees. The appellant installed internet services at the first premises (No. 34 Martin Drive) on or about 23 April 2012 and began digging trenches at the second premises (No. 19 Manyonga Close, Glen Lorne) in preparation for laying fibre optic cables.

When internet service was installed at No. 34 Martin Drive, the service speed of 5 megabytes per second was not achieved. The respondent complained that in getting into the agreement it wanted the appellant to provide internet services with a speed of 5 megabytes per second. The appellant argued in return that it had made it clear that the internet service it was providing had a speed of 5 megabits per second. Emails were exchanged but the parties failed to agree. The respondent cancelled the agreement and issued summons in the Magistrates' Court to recover part of the deposit it had paid in respect of installation of internet services at No 19 Manyonga which was stopped due to the cancellation of the contract before the installation of internet services. It also claimed a proportionate share of the deposit for internet services which was not used at No 34 Martin Drive due to the cancellation of the agreement.

The respondent argued that the appellant failed to adhere to its obligation under the agreement by providing internet service with a speed of less than 5 megabytes per second. The appellant entered appearance to defend and pleaded that it fulfilled all its obligations in terms of the agreement by providing internet service at a speed of 5 megabits per second as per the contract. The appellant went further and argued that in the event that respondent wanted to terminate the contract, it was supposed to give the appellant three months' notice in terms of the contract. The matter went for trial before the Magistrates' Court.

The Magistrate's Court found that the parties' minds were not *ad idem* when they purported to have entered into the contract. It found the contract was void *ab initio*. It came to this conclusion on the basis that there was confusion over the terms "megabytes" and "megabits" and as such there was no valid contract between the parties. The magistrate therefore found in favour of the respondent and granted its claim.

The appellant was aggrieved by that decision. It appealed to the High Court, which dismissed the appeal. The High Court found that the magistrate had correctly found that there had been no *consensus ad idem* between the parties. Aggrieved by that decision, the appellant appealed to this court.

The appeal is premised on the following grounds:

- “1. The High Court, like the Magistrates Court before it, erred in finding that the Appellant and the Respondent did not conclude a valid and binding contract when both parties in their pleadings admitted to a valid and binding contract.
2. The High Court further erred in failing to find that the Respondent's unilateral mistake in believing that the (sic) 5 megabits were the same as 5 megabytes, could not in law justify the cancellation of the contract at the instance of the Respondent.
3. The High Court further erred in failing to find that the Respondent admitted into entering (sic) a contract for the Appellant to supply internet services at the speed of 5 megabits per second which was achieved. Accordingly, therefore the Respondent was not entitled to have cancelled the contract.
4. Consequently, the High Court erred in upholding the judgment of the Magistrates Court finding the Appellant liable to the Respondent for the sum of **US\$4 987-00.**”

ISSUES TO BE DETERMINED

Even though the notice of appeal is premised on four grounds of appeal, the sole issue for determination in this appeal is the question whether or not there was a valid contract between the parties.

It is trite that for a contract to be valid there must be a meeting of the minds of the parties. In short, the parties must have the same mental conception of what they are agreeing to. That is called *consensus ad idem*. In the absence of *consensus ad idem* there can be no valid contract. In the case of *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, THESIGER LJ said:

“Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, **that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts**”. (emphasis added)

In *Smith v Hughes* (1871) LR 6 QB 597, BLACKBURN J put it as follows:

“I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, **if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other**”. (emphasis added)

Applying the above principles to the facts, I find that there can be no serious doubt that there was no meeting of minds in this matter. Although Mr *Magwaliba*, counsel for the appellant, sought to argue that there was a unilateral mistake on the part of the respondent, that argument is flawed. The evidence led by the parties does not prove unilateral mistake. The parties were clearly miles apart in their minds from the beginning. From the evidence, I find that there was confusion between the respondent’s representatives and the appellant’s sales representatives headed by one Cleopatra Tshuma, the Sales and Marketing Officer. The testimony of Cleopatra herself in the Magistrates’ Court makes that patently obvious. At p 43 of the record, when she was being cross examined, the following exchange took place between her and the respondent’s counsel in the Magistrates’ Court:

Q: Can you confirm this is the email my client wrote to you. Exhibit 5”

A: Yes

Q: You will note the Plaintiff's representatives referred to **megabytes**.

A: Yes

Q: Have a look at Exhibit 6. You agreed to the terms that were raised by the Plaintiff

A: Yes

Q: Its common cause that the plaintiff is a layman, should you not have raised an issue with the plaintiff to clarify the position.

Q: As we had earlier discussed, **I thought he also meant megabits not megabytes** (emphasis)

The confusion is obvious. As if that was not enough, the testimony goes on at p 45 of the record where the following appears:

Q: The Plaintiff was acting on the assumption that he was buying megabytes?

A: **Probably, I do not know what they were thinking.**

(my emphasis)

If the appellant's representative did not know what the other party was agreeing to then it cannot be said there was a meeting of minds of the parties. In fact, appellant's representative agrees that the respondent was most likely thinking that it would get "megabytes" while "megabits" were what the appellant was offering.

An examination of the emails which were referred to in cross examination proves the absence of *consensus ad idem* between the parties. Exhibit 9, which appears on p 186 of the record, contains the following email exchanges. The first is an email from the respondent's representative, Mr Vikram Singh, stating what the respondent required as the speed for the internet service.

"Dear Cleopatra

I have taken a look at your Service Level Agreement. There are quite a few things I would like to change about it.

.....
.....

Minimum speeds at both sites should be **5MB** and the cost for both packages to be USD5,000.”

Note the use of “MB” as opposed to “Mb”. According to the evidence on record “MB” stands for megabytes while “Mb” stands for megabits.

Later, when problems had arisen and the respondent was complaining about internet speed, Cleopatra wrote back to the respondent’s representative, Mr Vikram Singh, as follows:

“Good day

How are you? I would like to clarify this. While we note that he wrote **5MB**, we assumed an error on his part. I confirm that I meant the SLA.

Regards”

Indeed, Cleopatra made it clear that while they noted that the respondent had written **MB**, the appellant had assumed it was an error and Mr Singh had intended to write **Mb**. Mr Vikram Singh responded as follows:

“Dear Cleo

There is no point at clarifying at this stage. We understood **5MB** all along and hence went ahead with the contract. Besides the SLA was verbally discussed on several occasions with you and Chris.

Regards”

It is clear that the parties were miles apart as to what they thought they had agreed on. The respondent thought it had agreed to acquire an internet speed of 5 megabytes per second. The appellant noted this but chose to keep quiet, writing it off as a typographic

mistake when it was clearly not. The appellant did not bother to clarify to the respondent the terminology used. The result was that both parties proceeded with a contract on diametrically opposite terms from what the other was thinking. This resulted in the confusion between the parties which is apparent on the record. There was therefore no meeting of the minds and a contract could not have come into existence.

I am aware that the test for the meeting of the parties' minds should involve the effect of their conduct on whether or not a contract came into existence. *Consensus ad idem* does not only take into account the subjective mental state of the parties, which has been discussed above. It also takes into consideration the actions of the parties to determine whether or not there was *consensus ad idem*. BLACKBURN J in *Smith v Hughes* (1871) LR 6 QB 597, set out his classic statement on the objective interpretation of people's conduct when entering into a contract. Rejecting that one should merely look at what people subjectively intended, he said:

“If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms”.

The same sentiments were expressed by WESSELS, J.A., in *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at pp 715 – 716 where he said:

“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract”.

Now, keeping in mind the above *dicta*, the question remains: Did the parties in this case, in particular the respondent, conduct itself in a manner that indicated that it had accepted the terms of the contract? The answer is in the negative. The respondent's conduct was clearly not to accept any speed of less than 5 megabytes.

When the Service Level Agreement was sent to the respondent for its signature, it did not sign because it did not state that an internet speed of 5 megabytes per second would be installed at each site. That conduct proves that the respondent's mind was set on acquiring an internet service speed of 5 megabytes per second at each site.

The moment the internet service was installed at No 34 Martin Drive, the respondent immediately complained that it was not getting the speed of 5 megabytes per second it had contracted for. It cannot be said that this is the conduct of a party who had accepted to be bound by the contract. It in fact proves the opposite.

It is therefore established that there was no *consensus ad idem* between the parties.

The court *a quo* therefore correctly upheld the decision of the Magistrates' Court. Its decision is unassailable.

In the result, the appeal is dismissed with costs.

PATEL JA:

I agree

GUVAVA JA:

I agree

Mawere Sibanda, appellant's legal practitioner