TIAN ZE TOBACCO COMPANY (PRIVATE) LIMITED
versus
F C CAR SALES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 23, 24, 25 and 27 March 2009 and 8 July 2009

Mr *Mpofu*, for the plaintiff
Mr *Moyo*, for the defendant

Civil Trial

BHUNU J: The defendant is in the business of selling cars. On 4 June 2008 it provided the plaintiff with a quotation for a Mazda BT50 4 x 2 double cab in the following terms:

> "VAT: Indicative of Tomorrow.
> TOTAL PRICE (Including Vat): $US 39 500-00 / $79 000 000 000 000-00
>
> Prices are subject to confirmation at the time of order
> This invoice is applicable to current stock only and prices may change as a result of Duty Tariffs or currency fluctuations".

On 5 June 2008 the plaintiff instructed its bankers to transfer the amount of $79 trillion (Zimbabwean dollars) into the plaintiff's account for the purchase of the above quoted motor vehicle. That amount was equivalent to US$39 500-00 United States dollars as at 5 June 2008.

The plaintiff's bank delayed in effecting the RTGS money electronic transfer with the effect that the amount was only received into the defendant's account on 9 June 2008. By that time the amount had seriously depreciated owing to rampant inflation to such an extent that it was no longer equivalent to the bench mark value of US$79 500-00 for the said motor vehicle.

Consistent with the parties' intention to keep the Zimbabwean dollar price equivalent to the United States dollar value of the motor vehicle, the defendant asked for a top up payment.

The parties while agreeing on the need for a top up payment were unable to agree on the quantum of such payment. As a result the plaintiff's administration manager Mr T Bwanya

wrote to the defendant on 11 June 2008 canceling the contract of sale and demanding a refund of the purchase price. The relevant portion of the letter reads:

> "On Tuesday 9 June 2008 you visited our offices to discuss a top up owing to the delay in transfer from our account into your account and subsequent adverse movement in exchange rates. Please note that this delay was only for a day, that, is Friday. We subsequently invited you for a further discussion and you came to our premises to discuss on Wednesday 10 June 2008. After our discussion we initially came to an understanding that Tian Ze would pay a top up of US$8 500-00. You then came up with an additional requirement for local content fees of between 10 000 to15 000 US$. This additional requirement was outside our initial quotation. Tian Ze cannot afford your additional requirements
>
> Given that we had not budgeted for your additional charges which had also not been indicated on your quotation, we are left with no option but to pull out of the deal. We now expect you to refund our money in full, adjusted for changes in the inter-bank rate, from the day the money was transferred into your account until the day the money is transferred out of your bank into ours. We are expecting the transfer application forms to be date stamped by your bank by close of RTGS acceptances on Thursday 12 June 2008.
>
> We hope you will accede to our request to avoid unnecessary legal action which will harm our long term business relationship." (My emphasis).

The defendant accepted the cancellation and transferred the $79 Trillion (Zimbabwean dollars) into the plaintiff's bank account by electronic transfer on 18 June 2008. On 13 June 2008 the plaintiff's lawyers wrote to the defendants threatening legal action unless their client's demands were met to which the defendant's lawyers responded on 23 June 2008 as follows:

> "We advise that through Real Time Gross Settlement, (RTGS) our client transferred the sum of $79 trillion into your client's MBCA account number 121000013244, on 18 June 2008. (A copy of the proof of payment is attached hereto).
>
> We further advise that our client was paid in Zimbabwean dollars and not in United States dollars. Consequently no payment to your client will be made based on US dollars.
>
> Consequently, any legal action contemplated on the above claim will be defended"

In paras 6, 7 and 8 of its declaration the plaintiff stated its claim as follows:

> "6. On 9 June, the defendant approached the plaintiff to inform it of a top up requirement owing to the delay in transfer of the Z$79 trillion. The plaintiff and

the defendant subsequently agreed on a top up amount of US$8 500-00. However the defendant made a further demand of a "local content" fee of between 10 000-00 to US$15 000-00 which was outside the scope of the initial agreement.

7. The plaintiff objected to the unilateral variation of the sale agreement. It then wrote the defendant on 11 June 2008 demanding a refund of the Zimbabwean dollar equivalent of US$39 500-00 calculated at the inter-bank rate applicable on the date of payment to be deposited into its bank account by close of RTGS acceptances on 12 June 2008.

8. The defendant did not refund the plaintiff's money within the time of demand, whereupon the plaintiff demanded delivery of the Mazda BT50 double cab or payment of the equivalent value of US$39 500-00".

There is no material dispute of fact such that this is a case which falls for determination on the undisputed documentary evidence rather than the eloquence or credibility of witnesses.

What emerges quite clearly from the above documentary evidence is that the parties concluded a contract for the purchase of a motor vehicle valued at US$39 500-00 equivalent to Z$79 trillion dollars as at 5 June 2008.

It was a material term of the contract that in the event of the defendant failing to effect payment on 5 June 2008 the price in Zimbabwean dollars was to be adjusted to equate the stable price of the motor vehicle pegged in United States dollars.

Through the fault of the plaintiff's agent or messenger, that is to say, its bankers there was delay in effecting payment with the result that by the time payment was effected in Zimbabwean dollars on 9 June 2008 the amount had depreciated and no longer equivalent to the price or value of the motor vehicle pegged in United States dollars. Upon failure to pay the purchase price on due date in terms of the quotation, the original contract lapsed but was subject to novation upon agreement on a new purchase price.

There was no agreement on the new purchase price. Thus a new contract did not come into existence. The original contract having lapsed and it not having been novated there is no basis upon which the plaintiff can claim delivery of the motor for which there is no sale agreement and it is common cause that the amount paid is inadequate to meet the new purchase price which was never agreed upon.

In the original contract time was of the essence and a material term of the contract. Failure to effect payment on due date therefore, amounted to a material breach of the contract. The inadequate amount tendered for the purchase of the motor vehicle on 9 June 2008

amounted to defective performance. It is trite at law that defective performance is no performance at all. The plaintiff was therefore, in fundamental breach of contract when it failed to pay the full purchase price on 5 June 2008.

The plaintiff cannot insist on specific performance where it has rendered defective performance. That being the case, the defendant was within its rights to reject the defective performance and refund the inadequate purchase price which fell short of the purchase price of the motor vehicle pegged in United States dollars but payable in equivalent Zimbabwean dollars at any given time.

By the same token the plaintiff was within its rights to pull out of the deal following failure to agree on the adjusted new purchase price and claim a refund of the partial purchase price paid to the defendant.

It is correct to say that the defendant was obliged to refund the amount paid into its account. There was however, no agreement as to when the refund was to be made. For that reason I consider that time was not of the essence. The defendant was therefore only obliged to refund the purchase price within a reasonable time.

The letter of demand was written on 11 June 2008 and the defendant refunded the money on 18 June 2008. In the circumstances of this case I do not consider the delay of seven days to be unreasonable having regard to the fact that it was the plaintiff who was at fault. The plaintiff having been in breach of contract it was not within its power to arbitrarily set the date of refund.

The plaintiff having breached the contract and paid an amount not enough to purchase a new BT50 Mazda double cab motor vehicle it now seeks to benefit from its breach of contract at the expense of the innocent party. It is however, a fundamental principle of our law that there is no liability without fault. The plaintiff cannot penalize the innocent defendant for its own faults or breach of contract.

The defendant discharged its obligation on 18 June 2008 when it transferred the amount of Z$79 trillion into the plaintiff's account. What the plaintiff chose to do with that money thereafter, is its own business and not a subject of this litigation.

For the foregoing reasons the plaintiff's claim cannot succeed. In the result it is accordingly ordered that the plaintiff's claim be and is hereby dismissed with costs.

Gula-Ndebele & Partners, plaintiff's legal practitioners
Chikumbirike & Associates, defendant's legal practitioners