ASTRA STEEL AND ENGINEERING SUPPLIES

(PRIVATE) LIMITED

versus

P M MANUFACTURING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 1 and 2 December, 2011 and

14 March 2012 and 11 June, 2012

**Civil Action**

*T Bhatasara*, for the plaintiff

*L Uriri*, for the defendant

MUTEMA J: The plaintiff’s claim against the defendant is for specific performance in the form of delivery of 2000 x 195 R 14 inch tyres within fourteen days of date of judgment, alternatively payment of US$2000 000-00 being the estimated value of the tyres at US$100-00 each. Interest on the above sum and costs of suit are also claimed.

The claim is based on a memorandum of agreement exh 1 concluded by the parties on 4 March, 2008. In that agreement the plaintiff is referred to as “the customer” while the defendant is “the supplier.” In clause 1 of the document, the plaintiff agreed to make an advance payment of Z$2 750 000 000 000-000 (two trillion seven hundred and fifty billion dollars) as payment for 2 200 x 195 R 14 new tyres. In clause 2, the defendant pledged to “utilize the prepayment for the sole purpose of securing the aforementioned goods and to deliver in seventeen days time i.e. (21 March, 2008).” Clause 4 stipulates that in the event of the supplier failing to deliver the goods in full and by the cut-off date, the plaintiff reserved the right to take all measures at its disposal including instituting “legal proceedings to recover its prepayment, including interest and loss of earnings.”

The plaintiff led evidence from one witness, Richard Ziyavaya. He told the court that he used to be employed by the plaintiff as its finance manager. He represented the plaintiff in concluding exh 1, though he signed it as a witness while Mr Marozva, the general manager, signed on behalf of the plaintiff.

On 3 March, 2008 Patrick Makava, the defendant’s representative in the agreement, visited the plaintiff’s offices. The two parties were at the time both involved in the Reserve Bank of Zimbabwe farm mechanisation project of manufacturing ox-drawn scotch carts. During a discussion about the project the plaintiff’s representatives told Makava that they were looking for tyres for the project. Makava told them that he had recently purchased tyres for his project and could buy them on the plaintiff’s behalf from the same source. He did not disclose that source. Exhibit 1 was then concluded and the plaintiff paid the defendant the money for the tyres. However, the defendant failed to deliver the tyres by the due date of 21 March, 2008.

On 23 April, 2008 he wrote exh 2 demanding delivery of the tyres within seven days. The defendant responded via exh 3 dated 15 May, 2008 assuring the plaintiff that the tyres would be delivered in a few weeks time. No delivery was effected.

In June, 2008 the plaintiff came to learn about Solution Motors for the first time through a letter (exh 4), written by that company saying they were defendant’s suppliers of the tyres. They promised to deliver 200 tyres on 10 July, 2008.Since the plaintiff had no privity of contract with Solution Motors, it ignored exh 4.

On 10 July, 2008 the promised tyres were not delivered and Solution Motors wrote exh 5, this time promising delivery of the 200 tyres by 30 July, 2008. On 14 July, 2008 the plaintiff wrote exh 6 to the defendant attaching exh(s) 4 and 5, telling the defendant to deal directly with its suppliers. The defendant responded on 4 September, 2008 via exh 7 wherein the defendant advised that its legal practitioners would talk to Solution Motors and map the way forward. Still in September, the plaintiff received exhibit 8 comprising a letter from the defendant’s legal practitioners Scanlen & Holderness, an acknowledgement of debt by Solution Motors to the defendant in respect of the 2 200 tyres and a schedule showing when the tyres would be delivered. Two weeks thereafter, Solution Motors delivered 200 tyres to the plaintiff. The delivery dates in the schedule were never fulfilled and on pointing this out to the defendant, it would only say it was trying to enforce the contract with its suppliers. The plaintiff was later sent a copy of the summons wherein the defendant was suing Solution Motors for the tyres.

In August, 2009 the plaintiff’s board resolved to sue the defendant hence this suit. He produced three quotations – exh(s) 9A, 9B and 9C – in support of the $100 average price for each tyre. Although the plaintiff paid the defendant Z$2 750 000 000 000-00 for the tyres, the defendant paid Solution Motors only Z$1 895 500 000 000-00 according to exh 10 – the defendant’s summons against Solution Motors. The plaintiff still owes the Reserve Bank what it failed to deliver due to the defendant’s breach of the agreement. With that evidence the plaintiff closed its case. The defendant applied for absolution from the instance which application I dismissed in case number HH 112-2012.

The defendant also led evidence from one witness Patrick Makava and closed its case. This was his evidence:

He is a director of the defendant. Prior to concluding exh 1, the defendant and the plaintiff had had dealings spanning over seven years. However, the two had never dealt in tyres. On 3 March, 2008 he visited the plaintiff’s offices at the invitation of the general manager Mr Marozva. Marozva asked him where he had obtained the tyres for the Reserve Bank scotch carts from. He told him that he got them from Solution Motors. Marozva asked him to assist the plaintiff get the tyres. He told Marozva to deal with Solution Motors directly but Marozva said it would be easier to use the defendant since it had dealt with Solution Motors before.

He confirmed that exh 1 is the agreement concluded by the parties. He never spoke to Ziyavaya at all about the tyres. Ziyavaya only signed exh 1 as the plaintiff’s witness. Exhibit 1 was meant to help the plaintiff procure tyres, not that the defendant was selling them tyres. The plaintiff knew that the defendant was not into tyre business. Page 2 of exh 1 clearly says the money was solely for securing tyres and Marozva and himself agreed that the tyres would be sourced from a third party.

He confirmed writing exh 7 to the plaintiff, explaining that when the plaintiff placed the order for the tyres, it was made clear to it that the tyres would be sourced from a third party. He said he delivered the letter to Marozva and thereafter they helped each other in tracing Solution Motors. Exhibit 4 is a letter written to the plaintiff by Solution Motors promising to deliver the tyres. Exhibit 5 was again written by Solution Motors to the plaintiff explaining difficulties the former were experiencing regarding delivery of the tyres.

He confirmed existence of exh 8 and said it was only after Solution Motors had failed to deliver the balance of the tyres that the plaintiff demanded the tyres from the defendant.

Regarding the allegation that the defendant paid Solution Motors only part of the money it was given by the plaintiff, he explained that if money is deposited into a company account depositor pays 15% tax. He explained this to Marozva who said had no problem with it and he even showed Marozva a copy of the deposit slip showing the exact amount paid to Solution Motors.

He concluded by explaining that at the time of the agreement, the question of what would happen in the event of breach was never discussed. It was not reasonably foreseeable then that loss would be in a different currency. The defendant did not benefit from the money received from the plaintiff, it was Solution Motors that benefitted from it. The defendant does not have the 2000 tyres. The plaintiff incurred no loss. It was the Reserve Bank that suffered the loss but it never sued the plaintiff for that loss more than three years after the expected delivery date. If the defendant were to be ordered to pay US$200 000-00, undue hardship would be wrought on it because did not utilise United States dollars while the Zimbabwe dollars benefitted Solution Motors. The defendant then closed its case.

The four issues that were referred to trial for resolution are the following:

1. Whether or not the defendant is liable to the plaintiff for the delivery of the 2000 tyres in the circumstances,
2. Whether or not the plaintiff knew that the defendant was reliant upon a third party for the delivery of the tyres;
3. Whether or not specific performance would be an appropriate remedy;
4. If specific performance is not possible, whether or not the defendant is liable for the payment of damages and the quantum of such damages.

However, for the sake of brevity and clarity, I am

constrained to condense the stated issues and deal with them as follows:

* Issues 1 and 2 will be dealt with *pari passu* for the simple reason that they are interwoven, and
* Issue 3, in the event that the defendant is found liable, will be resolved next and if resolved in the affirmative, there will be no need to bother with the resolution of issue 4.

WHETHER OR NOT THE DEFENDANT IS LIABLE TO PLAINITFF FOR THE DELIVERY OF THE 2000 TYRES IN THE CIRCUMSTANCES AND WHETHER OR NOT PLAINTIFF KNEW THAT DEFENDANT WAS RELIANT UPON A THIRD PARTY FOR THE DELIVERY OF THE TYRES\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Regarding the defendant’s liability the plaintiff relies on exh 1 – the memorandum of agreement signed by the parties. The plaintiff contends that the agreement has all the hallmarks of a sale. The defendant on the other hand argues that it is not liable. The defendant’s defence is premised on a number of legal principles, viz:

1. Tacit contract: the plaintiff entered into a tacit contract with Solution Motors as evinced by the following:-

- plaintiff knew that the defendant was not in the tyre business

- plaintiff knew that the defendant would only facilitate procurement of tyres from the defendant’s supplier who was known to the plaintiff (*stipulatio alteri*)

- plaintiff accepted and received 200 tyres from the supplier

- plaintiff directly corresponded with the supplier thereby discharging the defendant from any liability under the original contract, thus leading to a novation of the same.

- plaintiff’s director attended the pre-trial conference in which the defendant was suing the supplier.

(ii) *Contra proferentem* rule

Regarding the alleged tacit contract, a number of authorities were cited by the defendant. In *Alfred McAlpine & Son* (*Pty*) *Ltd* v *Transvaal Provincial Administration* 1974(3) SA 506 (A) at 531-533 CORBETT AJA (as he then was) described this implied contract as follows:-

“In legal parlance the expression …. ‘implied term’ is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the court implies not only terms which the parties must actually have had in mind but did not trouble to express, but also terms which the parties whether or not would have expressed if the question or the situation requiring the term, had been drawn to their attention”.

The practical test to be applied is that of the notorious by stander as formulated by SCRUTTON

LJ in the case of *Reigate* v *Union Manufacturing Co* (*Ramsbttom*) Ltd [1918] KB 592 (CA) at 605:

“A term can only be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: ‘what will happen in such a case?’ they would both have replied: ‘Of course so and so will happen; we did not trouble to say that; it is too clear’”.

The notorious bystander test was also recognised in *Pan American World Airways Inc* v *SA Fire & Accident Ins Co Ltd* 1963(3) SA 150(A) at 175 where RUMPFF JA said, “when dealing with the problem of an implied term the first enquiry of course, is whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term”.

Now, regard being had to the express terms of the agreement (exh 1), is there room for

importing the alleged implied term contended for by the defendant? In other words, in keeping with the concept that courts should not make contracts for the parties, can it be said *in casu* that the alleged unexpressed provision of the contract derives from the common intention of the parties? In proferring an answer to the foregoing enquiries the answer must certainly be in the negative.

Exhibit 1 has all the hallmarks of a sale agreement despite the fact that it does not spell out the word “sale”. It is trite that the requirements for a valid contract of sale are the price (*pretium*), the thing to be sold (*merx*) and the agreement or meeting of the minds. In *casu* exh 1 stipulates that the plaintiff as customer agreed to pay Z$2 750 000 000 000 as payment for 2 200 x 195 R14 tyres (new), defendant as supplier pledged to utilize the prepayment for the sole purpose of securing the mentioned tyres and to deliver them in 17 days time i.e. by 21st March, 2008. Thus the price and the goods are clearly present and the parties signified their agreement by appending their respective signatures to the covenant.

In the pleadings defendant admitted that the agreement (exh 1) was one of sale. In para(s) 4 and 6 of its summary of evidence the defendant referred to exh 1 as an “agreement of sale”. Also, when being cross-examined the defendant’s witness Patrick Makava conceded that he regarded the agreement as one of sale, This is the same person who represented the defendant when exh 1 was entered into!

Having found that the agreement was one of sale and it being common cause that the plaintiff fulfilled its part of the contract while the defendant breach its contractual obligation by failing to deliver the tyres, it necessarily follows that the defendant is liable. It is idle and groundless for the defendant to urge the court to find a tacit contract between the plaintiff and Solution Motors.

The authorities cited above regarding tacit contract do not salvage the defendant’s cause for having regard to the express terms of the agreement, there is no room for importing the alleged implied term. To this end, the words of VAN WINSEN JA in *SA Mutual Aid Society* v *Cape Town Chamber of* *Commerce* 1962(1) SA 598(A) at 615 are apposite to the facts of the instant case, namely, “where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement”.

It is neither here nor there to argue that the plaintiff knew that the defendant was not in the business of tyres therefore the former entered into a tacit contract with Solution Motors. Ziyavaya’s evidence was clear that at the relevant period both parties were engaged in the Reserve Bank of Zimbabwe’s farm mechanisation programme of scotch-cart and wheel borrow making. Companies, were engaging in activities outside their core-business for survival. When Marozva told Makava that they were looking for tyres Makava said he had recently bought tyres for his project and could buy them on the plaintiff’s behalf from the same source. This culminated in drafting exh 1. He denied that Makava revealed the identity of Solution Motors. Solution Motors was therefore not known to the plaintiff. In the event, the averment of a *stipulatio alteri* is unfounded. Makava in his evidence in chief alleged that he agreed with Marozva that the tyres would be sourced from a third party. But without Marozva’s testimony to that effect the available evidence does not support the averment. The stipulator and the promiser must intend to create a right for the third party to adopt and became a party to the contract. Until acceptance of the benefit by the third party takes place, the contract remains one between the actual parties.

In the instant case, there is no indication from the plaintiff’s evidence that either the defendant undertook to enter into a contract with Solution Motors for the benefit of the plaintiff or that the plaintiff, when Solution Motors emerged onto the scene, accepted the benefit in such a manner warranting either *stipulatio* *alteri* or novation as contended for by the defendant. On the contrary, the evidence reveals that the plaintiff wrote exh 6 to the defendant attaching exh(s) 4 and 5 (letters by Solution Motors to the plaintiff respectively announcing that they were the defendant’s suppliers and would deliver 200 tyres by 30 July, 2008) directing that the defendant deal directly with its suppliers. This conduct is far from acceptance of any benefit accruing from the contract between the defendant and Solution Motors. This conduct by the plaintiff is also not in sync with the defendant’s false averment that the plaintiff directly corresponded with the supplier thereby discharging the defendant from any liability under the original contract, thus leading to a novation. If a party directly corresponded with another, it denotes a two way process. *In casu* the plaintiff only received the two letters (exh(s) 4 and 5) from Solution Motors which the plaintiff never responded to but sent to the defendant. There was therefore no correspondence between the two, let alone direct correspondence, neither was there any novation.

The receipt of 200 tyres by the plaintiff from Solution Motors is of no moment. Solution Motors effected this delivery to the plaintiff in fulfilment of its obligation pursuant to exh 8 an acknowledgement of debt by it to the defendant – undertaking to deliver the 2 200 tyres. There is no legal principle that disallows a debtor from directing a third party to pay the debtor’s creditor on its behalf. Also, the fact of the plaintiff’s director attending the pre-trial conference in which the defendant was suing Solution Motors can never be an event warranting the conclusion that the plaintiff entered into a tacit contract with Solution Motors. It is simply irrelevant.

Also, exh 3 is a letter written by the defendant to the plaintiff to “assure you that we will deliver your tyres” It does not say Solution Motors will deliver your tyres. There is therefore no room for *stipulation* or tacit contract as alleged.

The fact that the defendant sued Solution Motors *inter alia* for delivery of 2000 in case number HC 6016/08 wherein the defendant in para 3 of its declaration states:-

“CAUSE OF ACTION

3. This action arises from the failure by the defendant to fulfil its obligations in terms of an Agreement of Sale of tyres between itself and the plaintiff (the defendant *in casu*) and the subsequent acknowledgment of debt signed by the defendant,” puts paid to the defendant’s contention that exh 1 was not a sale agreement, that there was a tacit contract between the plaintiff and Solution Motors, and that there was *stipulatio* or novation.

Makava, under cross-examination admitted that when the defendant sued Solution Motors, the defendant did not sue on the plaintiff’s behalf neither did it get power of attorney from the plaintiff to institute that suit. Why would the defendant sue in its personal capacity if the debt was owed to the plaintiff?

The *contra proferentem* rule alleged by the defendant which requires a written document to be construed against the drafter on the ground that it was for him to express himself in plain terms is invoked only where there is ambiguity in the use of a word or choice of expression leaving one unable to decide which of two meanings is correct. In *Cole* v *Accident Assurance Co Ltd* (1889) 5 TLR 736 at 737 LINDLEY LJ said,

“…. One must not use the rule to create the ambiguity – one must find the ambiguity first”.

In *casu* I would say that by trying to invoke the rule, the defendant was trying to use

the rule to create the ambiguity following failure to find the ambiguity first. The rule is accordingly inapplicable in the instant case for exh 1 supported by the rest of the indicia alluded to *supra* admits of no ambiguity.

In the result I find that the plaintiff did not know that the defendant was reliant upon a third party for the delivery of the tyres – the parties concluded an agreement of sale which the defendant breached. The defendant is therefore liable to the plaintiff for the delivery of the 2000 tyres in the circumstances.

WHETHER OR NOT SPECIFIC PERFORMANCE WOULD BE AN APPROPRIATE REMEDY

The defendant contended that the remedy of specific performance is non-suited in the instant case. In its plea, it contended that an order for specific performance will operate harshly against it. Alternatively, given the current value of the tyres, specific performance would do an injustice to the defendant and result in an inordinate loss; and further that the unforeseen dollarization of the economy constitutes a supervening impossibility thereby making performance impossible.

In *Intercontinental Trading* (*Pvt*) *Ltd* v *Nestle Zimbabwe* (*Pvt*) *Ltd* 1993(1) ZLR 21 (HC) ROBINSON J had occasion to trace the historical legal journey of the remedy of specific performance, finding its origin in the Roman-Dutch law. The learned judge, in arriving at his decision relied on the classic exposition of the rule on specific performance as expounded by INNES JA at p 350 in the case of *Farmers’ Co-operative Society (Reg)* v *Berry*  1912 AD 343 where it was held that,

“*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson* v *Pullinger* (1 OR p. 301), ‘the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt”.

After dealing with several authorities reaffirming the right, the learned judge, having

found on the facts that there was a binding agreement between the parties, held as follows:-

* Whilst the court retained a wide discretion to withhold the grant of specific performance, a wronged party to a contract had a right to select his remedy, and the court would enforce that right unless there were compelling circumstances to refuse the remedy and award damages only;
* The onus was on the party seeking to avoid specific performance to establish the facts and circumstances which the court should consider in the exercise of its discretion to refuse specific performance;
* In the present circumstances it would not be a proper exercise of discretion to refuse specific performance and thus allow the defendant to avoid its contractual obligations.

It must be noted with pertinence that in the *Inter-continental Trading* case *supra* the

plaintiff had not yet paid the purchase price of the ordered milk though it was willing

and ready to pay it within the agreed period in terms of the contract. *In casu* the

plaintiff has paid the price in full and the defendant benefitted from the contract when

it paid part of the purchase price to Solution Motors and retained Z$852 500 000 000-

00 as its profit.

The case of *Zimbabwe Express Services* (*Pvt*) *Ltd* v *Nuanetsi Ranch* (*Pvt*) *Ltd 2009 (1) ZLR 326 (SC)* which the defendant sought to rely upon on grounds of undue hardship and unjust enrichment is distinguishable. In that case the appellant wanted to buy the cattle some three months later at the contract price of Z$450 per kilogramme of heifers and Z$500 for steers. Those prices in 2003 would have amounted to a trifling in 2005 when the High Court was called upon to enforce specific performance in a highly inflationary economic environment.

On the facts of the instant case, I have not been persuaded that there exist compelling circumstances to refuse the chosen remedy of specific performance. The circumstances are such that it would be an improper exercise of discretion to refuse specific performance thereby allowing the defendant to eschew its contractual obligations. These findings are premised upon the following circumstances:

1. The defendant benefitted Z$852 500 000 000 from the contract;
2. An order of specific performance would not – even given the passage of time – operate unduly harshly on the defendant because in HC 6016/08 the defendant obtained a default judgment against Solution Motors for the delivery of the outstanding 2000 tyres within seven days of the court order alternatively an award of damages representing the price of the tyres as at the date of judgment. This is more or less the exact relief the plaintiff seeks from the defendant *in casu*. If the defendant executes its judgment against Solution Motors and fulfil its contractual obligations to the plaintiff – a scenario akin to “robbing” Peter to pay Paul – the defendant will not feel any loss and specific performance will not operate unduly harshly on it at all. This will also be the case even where the defendant performs to the plaintiff using its own resources and later recovers its “loss” from Solution Motors.

Regarding unjust enrichment the plaintiff will not be so enriched. It paid for the number of tyres whose delivery it is claiming which the defendant failed to deliver thereby causing the plaintiff to also fail to fulfill its contractual obligations to the Reserve Bank of Zimbabwe. However, the loss was suffered by the plaintiff and not the Reserve Bank of Zimbabwe. Even assuming that the money the plaintiff paid belonged to the Reserve Bank (a shareholder in the plaintiff) the defendant has no legal ground to allege that if specific performance is ordered then the plaintiff will be unjustly enriched. The argument is sound that if the plaintiff recovers the tyres this will benefit the Reserve Bank - a shareholder of the plaintiff and owner of the money used. In any event it has not been proven – only assumed – that the money paid belonged to the Reserve Bank.

On the contrary, it is the defendant that stands to be unjustly enriched if specific performance is not ordered.

Regarding the plea of supervening impossibility due to dollarization of the economy, I find it idle. Firstly Patrick Makava under cross-examination, confessed regarding the alleged impossibility that it is not that the money is not there but simply that it is Solution Motors that must deliver the tyres to the plaintiff. So the defendant has the means and capacity to discharge specific performance of the contract. Secondly it would be unconscionable to allow a party to benefit from its own breach when if it had performed timeously it was not going to use US$ to buy the tyres.

On the totality of the foregoing the defendant has not established existence of compelling circumstances persuading the court to refuse the remedy of specific performance. In the result I make the following order:-

1. The defendant be and is hereby ordered to deliver to the plaintiff 2000 x 195 R14 new tyres within 14 days of this order.
2. The defendant pay costs of suit.

*Kantor & Immerman,* plaintiff’s legal practitioners

*Scanlen & Holderness*, defendant’s legal practitioners