REPORTABLE ZLR(15)

Judgment No. SC-21-09
Civil Appeal No. 285/05

ZIMBABWE EXPRESS SERVICES (PRIVATE) LIMITED v
NUANETSI RANCH PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, NOVEMBER 27, 2006 & MAY 19, 2009

E Matinenga with him *H Zhou*, for the appellant
R M Fitches, for the respondent

GARWE JA: This is an appeal against the decision of the High Court dismissing with costs the appellant's claim for delivery of two hundred heifers and two hundred steers.

The background to this matter is as follows. At the relevant time, Nuanetsi Ranch (Pvt) Ltd ("the respondent") was one of the largest cattle breeders in the country. During 2003, the respondent experienced acute cash flow problems as a result of which a decision was taken by management to dispose of some of the cattle in order to raise money. On or about 7 May 2003 the respondent entered into a written agreement with the appellant in terms of which the respondent sold to the appellant a total of four hundred cattle consisting of two hundred heifers and two hundred steers. The purchase price was agreed at Z$450 per kilogram for the heifers and Z$500 per kilogram for the

steers. The appellant paid the agreed deposit of Z$15 million on 8 May 2003. In terms of the agreement the balance of the purchase was payable "on Monday 12 May 2003 or after the animals have been weighed and delivered whichever occurs later". The cattle were not weighed by 12 May 2003 and consequently the balance was not paid by that date. In June 2003 the respondent then advised the appellant that it could collect one hundred and twenty steers which the respondent said was equivalent to the deposit of Z$15 million previously paid.

At the hearing of the matter before the court *a quo*, the court found that the cattle had been weighed on 16 May 2003 and that although the appellant had been advised of this fact no payment had been forthcoming despite numerous visits and telephone calls by the respondent's managing director. The court also found that the respondent had cancelled the contract and that it had done so by implication. Consequent upon these findings the court *a quo* dismissed the appellant's claim with costs. It is against this order that the appellant has appealed to this Court.

In its grounds of appeal, the appellant has raised various issues. These are that the court *a quo* erred:

(1) in finding that the cattle were weighed on 16 May 2003 and that the appellant was advised of this fact and the need to pay;

(2) in finding that the respondent cancelled the contract between the parties by implication;

(3) in not making a finding whether the respondent placed the appellant *in mora*;

(4) in declining to grant the appellant an order of specific performance.

I propose to deal with the first two grounds together as they are inter-related and arise from the same set of circumstances. There is a dearth of evidence as to what happened exactly after the payment of the deposit of Z$15 million was made. The respondent says the cattle were weighed on 16 May 2003 after which the appellant was then advised of the fact. How the appellant was advised was never clarified during the trial. The witnesses who gave evidence for the respondent told the court *a quo* that the invoice was faxed to the appellant. A copy of the fax slip was, however, not produced to confirm this. The witnesses further told the court that the invoice had been sent by fax and the original by post and that one Betty Mudenge had done so. Betty Mudenge was not called to testify to this fact. At the end of the day therefore all that was before the court *a quo* was an unsubstantiated claim that an invoice had been forwarded to the appellant on or about 16 May 2003.

On the basis of such evidence the court *a quo* had no basis for finding that the invoice was forwarded to the appellant on or about 16 May 2003 and that the appellant, having seen the invoice, failed or refused to pay. Clearly there was no such evidence before the court *a quo*.

There was evidence, however, that there were numerous visits and telephone calls by the respondent's managing director to the appellant's offices. I agree with the trial court that the cattle were in fact weighed at some stage and that as a result

the respondent's managing director then made numerous calls in order to get payment. It is unlikely that the respondent's managing director would have behaved in such a fashion if in fact the cattle had not been weighed. However, it is unclear when he made the calls or paid visits to the appellant's offices.

The evidence on record shows that what next happened was that the respondent wrote to the appellant on 12 June 2003. In that letter the respondent advised the appellant that the deposit it had paid was equivalent to one hundred and twenty steers and that an invoice to that effect was attached to that letter. The letter was received and responded to by Mr D G Lupepe, appellant's Managing Director. In his response Mr Lupepe accepted the one hundred and twenty steers but rejected the suggestion that there should be a fresh quotation in respect of the remainder of the cattle.

I am prepared to find, on the evidence, that the cattle must have been weighed and the appellant notified on an unknown date but before 12 June 2003. The appellant, it is common cause, did not pay.

The question that now arises is whether the contract was properly cancelled. It was the evidence of the respondent's managing director that the cancellation was implied from the letter of 13 June 2003. In other words, it was accepted that the respondent did not explicitly cancel the contract. In its submissions, the appellant says cancellation by implication is unknown at law. The respondent disagrees.

It is clear that in its letter of 13 June 2003 the respondent was suggesting that it was prepared to let the appellant take delivery of one hundred and twenty steers against the deposit of $15 million previously paid. The remark by the respondent that "If you need more cattle, you are free to contact us and we give you a fresh quotation" suggests that the respondent considered at that stage that the contract was no longer in existence. The appellant's immediate reaction was that the contract was still in force and that the respondent should comply with that contract.

The position is now settled that:

> "Notice of cancellation must be clear and unequivocal and takes effect from the time it is communicated to the other party …".

R H Christie, *The Law of Contract in South Africa*, 3 ed at p 597. See also *Du Plessis v Government of the Republic of Namibia* 1995(1) SA 603 at 605E.

A notice of intention to cancel must be such that the other party is or ought to be aware of its nature, but it is not necessary to use the word "cancellation". The intention to cancel may be made sufficiently clear in other ways – Kerr, *The Principles of the Law of Contract*, 4 ed p 462.

On the evidence, the respondent did not cancel the agreement in clear and unequivocal terms. Indeed, this is common cause. The respondent's evidence was that the cancellation was implicit from its letter of 13 June 2003. In that letter the respondent wrote:

> "Find attached your receipt for the 120 steers which you purchased from Nuanetsi Ranch.
>
> If you need more cattle, you are free to contact us and we give you a fresh quotation."

This letter clearly implied that the contract was no longer in existence and that if the appellant required to purchase more cattle a fresh quotation would have to be provided. Indeed, the appellant understood the letter to mean that the contract was no longer in existence and for that reason wrote back to say that as far as the appellant was concerned the contract was still binding.

The question that now arises is whether in law a contract can be cancelled by conduct. Although the appellant has submitted that cancellation by implication is unknown to law, the question really is whether cancellation can be by conduct.

In *Du Plessis v Government of the Republic of Namibia* 1995(1) SA 603 at 605 C-D, the Namibian High Court accepted that a summons claiming damages was an implied notice of cancellation. The decision to cancel a contract may also be by conduct – see Kerr, *Principles of the Law of Contract*, 4 ed at p 552.

Indeed, repudiation of a contract by the defaulting party may be by words or conduct justifying cancellation by the aggrieved party – Kerr, *The Principles of The Law of Contract*, op. cit. at p 435. If the defaulting party can repudiate by words or conduct, surely the aggrieved party should be able to terminate the contract by conduct

too. Suppose that the defaulting party has evinced an intention to repudiate the contract. Suppose too that the aggrieved party accepts such repudiation and by his conduct clearly evinces his view that the contract has terminated. Would one not talk of termination in such a case? The answer in my view is in the affirmative. As in all cases, the circumstances must be such that that is the only reasonable inference that may be reached. In such a case I would have no difficulty in describing the contract as having been terminated by conduct.

Considering the circumstances of this case, I would have no difficulty in concluding that the respondent's managing director was in fact saying the contract had come to an end and that if the appellant wished to buy more cattle, then it would have to enter into a new agreement. I find therefore that the respondent did in fact cancel the agreement although it did not do so expressly.

The question that now falls for determination is whether the respondent lawfully terminated the agreement and in particular whether the appellant had been placed *in mora*.

It is clear from all the facts of the case that the respondent was in financial dire straits and required payment as a matter of urgency. Clearly therefore this was a contract in which time was of the essence. However, since the cattle were not weighed by 12 May 2003, no time had been fixed within which payment had to be made.

In cases such as the present, the general rule is that:

> "When the contract does not fix a time for performance there can be no *mora ex re*, only *mora ex persona*, so a demand by the creditor is necessary in order to place the debtor in *mora* …".

Christie, *The Law of Contract in South Africa*, *op cit.* p 555.

The view has been expressed in several decided cases that no demand is necessary to place the debtor *in mora* when no time for performance was stipulated but it is clear that immediate performance was contemplated – Christie, *op cit,* at p 555. This view does not appear to correctly reflect the law as it currently stands.

The present position is that:

> "When no time for performance is fixed but time is of the essence, the debtor is not *in mora* and the creditor cannot cancel for non-performance unless a proper demand for performance has been made. … the concept of time of the essence relates to the consequences of a breach and not to the breach itself, so if no time is fixed there can be no breach by non-performance, whether or not time is of the essence, until the creditor has informed the debtor when he maintains performance is due." – Christie, *op cit*, p 562.

In the present case it is clear that the appellant was never placed *in mora*. The respondent proceeded to cancel the agreement but did not place the respondent *in mora*. In the circumstances the contract was not lawfully terminated and therefore continued to subsist.

Having come to the conclusion that the contract between the two parties continues to subsist, the issue that falls for determination is whether the appellant would

in the circumstances be entitled to an order of specific performance. It is not in dispute that the decision by the respondent to sell part of its herd had been triggered by a precarious financial position that the company found itself in. The stipulation in the agreement that a deposit of Z$15 million was payable immediately and the balance within five days underscored the urgency with which the respondent treated the situation. Whilst it is unclear when the cattle were weighed and the date on which the appellant was advised of this fact, there is nothing on record to suggest that the appellant itself was in a hurry to perform its side of the agreement. The appellant does not appear to have done much after the payment of the deposit. In June 2003 the respondent advised the appellant that if it wanted more cattle then a fresh quotation would be prepared. The appellant objected to this, maintaining that a valid contract was still in existence. What this meant was that the appellant wanted to buy the cattle some three months later, at the contract price of Z$450 per kilogramme for heifers and Z$500 for steers. This Court can take judicial notice of the fact that inflation has been a problem in our economy for some time including the year 2003. Indeed, on two occasions the monetary authorities have had to slash zeros from our currency to enable financial transactions to continue. A price of Z$450 or Z$500 per kilogram weight of beef in 2003 would have been a trifling sum in 2005 when the High Court was called upon to adjudicate over the dispute.

Were specific performance to be granted, the effect would be that the appellant would take delivery of 280 heifers and steers for a very small amount of money. In other words the appellant would be entitled to take possession of a herd of cattle worth

a considerable sum of money for which it would have paid virtually nothing. In these circumstances, specific performance cannot be granted.

The general rule is 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." per INNES JA in *Farmers' Cooperative Society v Ben* 1912 AD 343 at p 350.

An order of specific performance is, however, at the discretion of the court and there are circumstances in which a court may refuse to grant an order of specific performance. The discretion is:

> "[not] … completely unfettered. It remains, after all, a judicial discretion and from its very nature arises from the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling* (*supra* at 335). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant."

Per HEFER JA in *Benson v South Africa Mutual Life Assurance Society* 1986 (1) SA 776(A) at 783 C-D.

The contract that gave rise to the proceedings in the High Court was entered into in May 2003. That was more than two years before the High Court gave its decision and almost six years to the time this Court will determine the appeal. Naturally a lot has happened since the signing of the agreement. There is a somewhat unsubstantiated suggestion by the respondent in its heads that it no longer had steers of

the age and weight required by the appellant. Most importantly, however, as this Court has found, an order of specific performance would no doubt operate unduly harshly on the respondent and would undoubtedly result in the appellant being unjustly enriched at the expense of the respondent. The finding of the court *a quo* to this effect cannot be impugned. Whilst accepting that the agreement was not lawfully terminated an order of specific performance would not in these circumstances be appropriate.

In the circumstances, the appeal cannot succeed.

It is accordingly dismissed with costs.

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners