CAPITAL ENERGY (PVT) LTD T/A AGRO CONTRACTORS AND PROCESSORS

VS.

ASHELY KUMBIRAYI MUSIKAVANHU

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 11, 15, 18, 19 January 2024

T. Tandi , for the plaintiff

M.F.Chipeta, for the defendant

TRIAL CAUSE

CHIRAWU-MUGOMBA J: The plaintiff issued summons against the defendant seeking an order for specific performance or alternatively, the value of soya bean not delivered to it in terms of a growers contract. The plaintiff's case can be summarised as follows. The plaintiff and the defendant entered into a written contract for the 2017/18 growing season beginning October 2017 to September 2018. In terms of the agreement, the plaintiff undertook to provide and make available to the defendant farming inputs and cash to enable him to grow soya beans. The defendants' obligation in terms of the contract was to plant an area totalling 1440 hectares and to exclusively grow and deliver 1071 tonnes of soya beans to the plaintiff for that period. The plaintiff delivered inputs that included finance to the defendant to the value of US$228 449.74 that the defendant accepted and used to farm the soya beans. The defendant was obliged to deliver the soya beans to offset the inputs and the finance advanced. Delivery was to have been effected by the 30th of September 2018. In breach of the agreement, the defendant failed to deliver 374.5 tonnes of soya beans to the plaintiff representing the value of the inputs and the finance advanced. The plaintiff was therefore claiming delivery of the soya beans as per the contract or the value based on the Agricultural Marketing Authority or the Grain Marketing Board value at the time of the order or judgment. The plaintiff's claim was therefore one for specific performance.

The defendant's defence was very simple. The plaintiff had failed to deliver the inputs on time. As a result, this affected the crop and hence specific performance.

The parties identified the issues for trial as follows:-

1. Whether or not the defendant had an obligation to deliver the soya beans to the plaintiff ?
2. Did the defendant breach that obligation and if so to what extent?
3. What is the appropriate remedy in the circumstances?

At the trial the plaintiff led evidence from one witness and the defendant, two witnesses. The evidence for the plaintiff was led through one Maxwell Tendai who is employed as an agronomist and operations officer. He testified that the business of the plaintiff includes the financing of soya bean production. He stated that his duties included the administration of schemes such as the one entered into between the plaintiff and the defendant and also giving technical advice to farmers. The plaintiff entered into a written contract with the defendant to grow soya beans at two farms, one in Banket and another in Concession. Inputs, that is for 200 hectares for Banket and 250 hectares for Concession were distributed to the defendant. However, for the Banket farm, no planting took place and the inputs were collected. For the Concession farm, inputs were delivered to the defendant who acknowledged them.

He further testified that for Concession, the defendant grew crop under 157 hectares and was supposed to deliver the crop in tandem with that hectarage. The remaining inputs were collected since the defendant was supposed to have covered 250 hectares. The defendant only delivered 49.8 tonnes which was credited to his account leaving a balance of 374.5 tonnes. This was arrived at by taking the amount owed of US$228 000 and dividing it by US$610 per tonne being the price of soya beans at the time. The plaintiff was claiming the soya beans because it is a commodity crop and the plaintiff is not a finance institution. The current price for soya beans is US$580 per tonne. In the event that the defendant cannot deliver, the plaintiff was seeking the sum of US$580 by 374.5 tonnes, that is US$217.210.00.

Under cross examination, the attention of the witness was drawn to clause four of the contract which was blank in terms of hectarage and the area. His response was that this was captured under schedule A record pages 46-47. He also stated that the name ZIMGOLD that appeared was an error since the contracts used to be for that entity. He confirmed that the

inputs to the defendant consisted of fertilizer, soya bean blend, herbicides and cash to pay-off labour. He was not aware whether or not the crop was insured but the obligation lay with the farmer. Inputs for the Concession farm were delivered on the 18th of January 2018 . The commencement of soya bean planting season was not regulated. The period contracted for fell within the rainy season. The period of delivery of the inputs had no effect for the output. The farmer knows what is best for their farm. The defendant accepted these and proceeded to plant. If he had issues, he would have declined the inputs as per the Banket farm. Therefore it is not correct that the delay affected the soya bean produced.

The defendant gave evidence in his own defence. He stated that he is a commercial farmer and also holds a degree in construction. He got to know about the plaintiff through ZIMGOLD. The contract indicated the period for performance as October 2017 – September 2018. The initial hectarage was 1440 of soya beans. The contract was signed with ZIMGOLD initially. Schedule A to the contract linked with ZIMGOLD and that is what he believed he was signing. He only became aware of the plaintiff in November 2017. Soya beans has a planting period of mid-October because it requires daylight to thrive. The plaintiff was responsible for planting the soya bean. Planting began beginning of February 2018. The crop was supposed to be delivered around June 2018. Inputs were delivered and signed for by his manager. Under cross examination, the defendant confirmed that he signed the contract including schedule A. He admitted that even though he was under an obligation to insure the crop, he had not done so.

The second witness is one Garikayi Ashley Musikavanhu who is the defendant's brother. He is a mechanical engineer and a farmer. He has experience in farming crops such as maize, soya beans, tobacco and cotton among other crops. He set up an organization that approached ZIMGOLD to work on producing and marketing crops including soya beans. He is the one who invited the defendant to join the scheme with ZIMGOLD. Soya bean is a summer crop limited to summer months from October to April. It has a specific planting date from mid-october to mid –november for planting and harvesting is in April. It is a sensitive crop and late planting will result in low yields. Under cross examination, he stated that the planting dates for soya bean was not cast in stone and also that he does not have a degree in agriculture.

From the evidence adduced, it is common cause that the plaintiff and the defendant entered into an exclusive contract for the farming, harvesting and delivery of soya beans. The

delivery was in the form of a sale of the soya bean by the defendant to the plaintiff wherein the plaintiff would deduct from the sale, the value of inputs delivered to the defendant. This specialised contract depended on the plaintiff supplying inputs to the defendant. Without these, the defendant would not be in a position to grow soya bean and deliver it to the plaintiff. It is also common cause that the expected hectares to be covered were 1440. The inputs delivered however, did not cover this hectarage but part of it. However, the defendant did not farm at the Banket Farm and the inputs were returned to the plaintiff. At the Concession farm, the defendant planted under 157 hectares and only delivered 49.8 tonnes to the plaintiff. The issue that arises in my view is whether or not the defendant breached the contract.

As per MUZOFA and KWENDA JJ in *Norman vs. Kingdom Calls T/A Marineland Harbour*, HCC 13-22,

> "A contract binds parties who are privy to the contract. This doctrine is known as privity of contract. See *Christie' Law of Contract in South Africa*, 7th Ed. To that end, no rights or obligations accrue to a person or body that is not party to the contract. The rationale behind this doctrine is to ensure that parties are held accountable to what they have agreed on."

The analysis of the evidence therefore stems from the alleged breach of the growers contract.

The evidence of the plaintiff was given in a clear and straight forward manner. Maxwell Tendai did not exaggerate the evidence. He came across as a credible witness. His evidence as to the delivery of the inputs and the fact that the defendant grew soya bean on 157 hectares was unchallenged. His assertion that inputs for the Banket Farm were returned was also not challenged. His calculation of how the 374.5 hectares was calculated was also not challenged. The current price per tonne of USD$580 was not questioned by the defendant. As stated above, it is common cause that the inputs delivered did not cover 1440 hectares as per contract.

The evidence of the defendant was contrived. The defendant feebly attempted to distance himself from the contract and delivery of inputs by pointing out what he viewed as anomalies. He stated that he did not even know the plaintiff till late on into the contract. He also pointed out to the use of the word ZIMGOLD on the schedule as affecting the contract. In my view, this does not hold water. It is clear that the issue of ZIMGOLD appeared on the schedule. The main contract is clear as to who the parties to the contract were. The defendant is bound by the terms of the contract that he signed under the time-honoured principle of *caveat subscriptor*.

The defendant also feebly asserted that he was not present when the inputs were delivered. He did not however question the authority of his manager whom he said received and signed for them on his behalf. Even if he had done so, he still would have been estopped from denying that the inputs were received – see *Delta Beverages (pvt) Ltd vs. Blakey Investments (pvt) Ltd*, SC-59-22 for a discussion on ostensible authority and estoppel.

The defendant averred that the inputs were delivered late and hence planted late and this affected performance. In other words, the defendant invoked the doctrine of impossibility to perform, also known as the doctrine of frustration. See *Firstel Cellular (pvt) Ltd vs. Net One Cellular (pvt) ltd*, 2015 (1) ZLR 94(S). In the case of *Watergate (Pvt) Ltd v Commercial Bank of Zimbabwe* SC 78/05, at p7 of the cyclostyled judgment, SANDURA JA cited with approval the remarks of BOSHOFF JP in *Bischofberger Van Eyk* 1981 (2) SA (WLD) at 611 B –D:

> " ……. When the court has to decide on the effect of impossibility of performance on a contract the court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties the circumstances of the case and the nature of the impossibility to see whether the general rule ought the particular circumstance of the case to be applied . In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility . If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished"

Once a defendant raises such defence, the onus shifts to them to prove that indeed, they could not fulfil the contract. The defendant in my view fell short of convincing the court that his defence is valid. He did not show in terms of when the inputs were supposed to be delivered so as to get a good yield as per the inputs. The contract signed between the parties states in clause 3 that the duration was supposed to be for the 2017/18 soya bean season. The meaning of season is stated in clause 2.3 to be the period from 31 October 2017 to 30 September 2018. The implications are that as long as performance was between those dates it would be valid. In any event taking the totality of the circumstances, the defendant even if delivery was late, waived his rights by accepting the inputs and planting –see *Matimba* v *Salisbury Municipality* 1965(3) SA 513 (SR AD) at p 515E-F; *The Mud-Man Empire (Pvt) Ltd* v *H Nechironga and Ors* HH-128-03 at p 6 and *Buitendag* v *Buys* AD 24-73. For the Banket farm, the defendant specifically did not plant and the inputs were returned. There is no reason why he did not do the same for the Concession Farm. He even also made part

delivery of soya beans to the plaintiff. The evidence of both the defendant and his witness on the implications of late delivery does not add anything to the defendant's case. The second witness is a farmer and a mechanical engineer. The expert evidence of a person who is knowledgeable on an issue or subject is admissible in terms of s22 of the Civil Evidence Act , [Chapter *8:01*]. See also *Mudukuti vs. FCM Motors (pvt) Ltd*, HH-14-2007 wherein PATEL J (as he then was) postulated as follows;

> "It is trite that in order for the evidence of an expert witness to be admissible it must be given by a person with special knowledge and skill. Moreover, it must render material assistance to the trial court. See Hoffmann & Zeffertt: *South African Law of Evidence* (4th ed.) at pp. 100-104".

The defendant's witness did not tell the court the special knowledge he possesses on soya bean farming. The court was not told what experience he has of growing soya bean, how many years, hectarage, yield and other pertinent information. He even admitted that the planting season for soya bean is not cast in stone. The defence of impossibility therefore remained largely unsupported.

From the evidence led, it is clear that the plaintiff did not deliver inputs in full as per the contract to cover 1440 hectares. However, the defendant also accepted part inputs and as a result also waived its rights. The basis of the defendant's plea is not that of incomplete inputs but late delivery.

The plaintiff claimed an order for delivery of 374.5 tonnes of soya bean or alternatively the value per tonne as at the time of judgment. I take a cue from PATEL J (as he then was) from the *Mudukuti* matter, wherein he stated as follows:

> The general rule is that damages for breach of contract are to be assessed at the time of the breach of contract, the time of performance or the time of cancellation. See *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 388, citing Visser & Potgieter: *Law of Damages*, at pp. 76-7. I apprehend, however, that there will be instances where it becomes necessary to assess the quantum of damages as at the time of trial in order to achieve justice between the parties. This is particularly so in an hyperinflationary environment where the replacement value of the thing in dispute will vary quite substantially from the time of the alleged breach to the time of trial. Be that as it may, it is not necessary for me to delve into or decide this aspect for the purpose of determining the matter at hand.

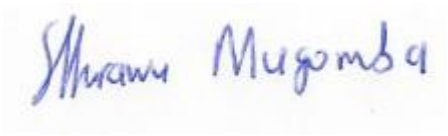
In my view, the plaintiff has made its case for the delivery of the 374.5 tonnes of soya beans or the equivalent value. As already stated, the value of US$580 per tonne stated by the plaintiff was not challenged. This brings the figure claimed to US$217,210.

On costs, I note that none of the parties had an appetite for prosecuting this matter to completion since 2021. Granted there was a long period of COVID that affected the

prosecution of cases, but it did not stop parties after restrictions were lifted to pursue finalisation with more vigour. The appropriate order for costs is one on the ordinary scale. I am not bound by the costs in the contract being pegged at a higher scale.

DISPOSITION

1. The defendant is directed within seven (7) days from the date of service of this order on Antonio and Dzvetero Legal Practitioners, to deliver at his own expense, 374.5 tonnes of soya beans to the plaintiff.
2. Should the defendant fail, refuse or neglect to act as aforesaid in paragraph one above, he shall pay to the plaintiff the sum of US$217 210 (Two Hundred and Seventeen Thousand, Two hundred and Ten United States Dollars) or the Zimbabwe dollars equivalent calculated at the official rate prevailing at the time of payment with interest at the prescribed rate calculated from the date of summons to date of payment in full.
3. The defendant shall pay costs of suit.



Kantor and Immerman, plaintiff's legal practitioners.

Antonio and Dzvetero, defendant's legal practitioners.