REPORTABLE (74)

ZEMQOS INCORPORATED (PRIVATE) LIMITED
v
CITY PARKING (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MUSAKWA JA
HARARE: 2 JUNE 2023 & 25 JULY 2024

Ms *Mabwe*, for the appellant

A. Moyo with *S. Bhebhe*, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court ("the court *a quo*") sitting at Harare, dated 19 October 2022 dismissing the appellant's claim for specific performance of a verbal contract it had entered into with the respondent, alternatively, if specific performance is no longer feasible, cancellation of the contract and an award of damages for breach of contract.

The respondent filed a cross-appeal against that part of the judgment of the court *a quo* dismissing its special plea to the effect that the appellant's claim had prescribed.

THE FACTS

The appellant and the respondent are companies duly incorporated in terms of the laws of Zimbabwe. In 2014, the parties entered into a verbal agreement wherein the respondent engaged the appellant for the supply and installation of a fully automated parking management system in the city of Harare. The appellant alleges that in terms of the agreement

the respondent undertook to allocate to it 5 000 bays for purposes of installation of a fully automated sensors enabled parking management system. The installation was to be done in phases. The contract was to run for 15 years representing the life span of the core equipment. The appellant duly installed the system on the initial 500 bays. It further supplied 200 hand held devices. The appellant avers that the respondent paid for this initial stage and continued to pay its licence fees for the remaining semi-automated bays numbering 4 445 and licence fees for the initial 500 bays. It did so until 2017. The appellant further avers that, in breach of the agreement, the respondent has to date neglected, refused and failed to allocate the remaining 4 445 bays in order for the appellant to complete the installation of the fully automated parking management system. The appellant averred that the respondent has nonetheless continued using its automated parking system without paying licence fees. It was for these reasons that the appellant issued summons in the court *a quo* for specific performance to compel the respondent to allocate to it the remaining 4 445 bays for the installation of the fully automated system. The appellant says that it was willing and ready to tender its services against payment of the contract sum. It alleges that as a result of the respondent's breach, it suffered damages in the sum of US$10 660 916.25.

On its part, the respondent states that it entered into a verbal agreement with the appellant in respect of only 555 bays. The agreement was not fully honoured by the appellant as the equipment installed and the hand-held devices malfunctioned and, for that reason, did not meet the respondent's operational needs. Further, the respondent denies entering into any agreement regarding the 4 445 bays as alleged by the appellant. It further states that it terminated the agreement between it and the appellant on 26 January 2017 because the functional specification as represented by the appellant did not meet its purpose. The respondent also raised the special plea of prescription. It argued that the appellant had served

summons on 4 January 2021, more than 3 years after 26 January 2017, the date on which the respondent had cancelled the agreement. On that basis the respondent averred that the appellant's claim had prescribed in terms of s 15 (1) of the Prescription Act [*Chapter 8:11*] and ought to be dismissed.

PROCEEDINGS IN THE COURT *A QUO*

The following were the issues for determination before the court *a quo*:

1. Whether the respondent cancelled the contract between the parties on 26 January 2017.
2. Consequently, whether the appellant's claim had prescribed.
3. Whether or not the parties entered into an agreement for the allocation by the respondent to the appellant of 4 445 parking bays and the terms of such agreement.
4. Whether or not the appellant is entitled to specific performance, to wit, the allocation of 4 445 parking bays.
5. Whether or not the appellant is entitled to the amount claimed for damages.

At the trial of the matter, the appellant led evidence from two witnesses and the respondent called one witness. The court *a quo* made a finding of credibility in favour of the respondent's witness. On the evidence adduced before it, the court *a quo* came to the conclusion that it was common cause that there was a verbal contract between the parties on the following terms:

(a) The total number of bays to be automated was 5 000.
(b) The appellant was to provide the respondent with a parking system for 555 bays (phase 1 of the project).
(c) The appellant was to provide the respondent with a semi-automated parking system for 4 455 bays (phase 2 of the project).

(d) The appellant was to provide the respondent with 200 hand held devices.

(e) Of the hand-held devices, 35 were for the 555 bays and 165 for the 4 455 bays.

(f) The appellant was to provide software for 35 devices covering the 555 bays under a fully automated system and for 165 devices covering 4 455 semi-automated bays.

(g) The full automation of the 4 455 bays was to depend on the availability of funds. Thus, the second phase of the contract was conditional on the availability of funds.

The court *a quo* found no evidence to support the appellant's claim for breach of contract entitling it to either specific performance or damages. It found that all the equipment supplied by the appellant for the initial 555 bays was fully paid for. That part of the contract, having been fulfilled by both parties, was no longer in issue. There was no contract to be cancelled or to be specifically performed. For that reason, the appellant's claim with regards phase (1) of the project was without merit. It rejected the appellant's assertions that the contract would run for 15 years on the grounds that no evidence had been adduced to support that contention. It ruled that once the equipment in phase (1) was paid for, as agreed by the parties, such equipment became the property of the respondent. It found as a matter of fact that same had been paid for by the respondent and the matter could not therefore be resurrected.

With regards the second phase involving 4 455 bays, the court *a quo* observed that the automation of these bays was conditional upon the availability of funds on the part of the respondent. That term of the contract was not fulfilled and therefore the contract remained suspended by the non-fulfilment of the condition precedent. The court *a quo* concluded that the appellant could not sue on a contract that was not "perfecta".

In the result, the court *a quo* dismissed the appellant's claim in the main and in the alternative with costs.

Aggrieved by that decision, the appellant noted the present appeal on the following grounds.

GROUNDS OF APPEAL

"1. The court *a quo* grossly misdirected itself in adjudging that there was no breach of contract in respect of the installation of a fully automated parking management system on the 4 455 bays contrary to its finding that the contract was for the automation of all 5 000 bays.

2. The court *a quo* grossly misdirected itself in finding that the contract for the automation of the 4 455 bays was conditional when the respondent did not plead or prove lack of financial capacity to meet the conditional terms.

3. The court *a quo* grossly misdirected itself in exercising its discretion against the grant of specific performance without the legal basis for refusing relief especially where defendant (respondent) had not pleaded or proved undue hardship in meeting the claim for specific performance.

4. The court *a quo* grossly misdirected itself in finding that from the evidence led, the defendant (respondent) terminated the contract for the software in January 2017 contrary to the evidence presented before it.

5. Having found that the contract for the installation of 4 455 bays was conditional, the court *a quo* erred in failing to grant alternative relief as prayed by the appellant in circumstances:

(i) where it had acceded that the contract was for installation of a full system on the 5 000 bays.

(ii) the contract was not terminated.

6. The court *a quo* grossly misdirected itself in failing to grant the appellant contractual damages that it managed to prove on a preponderance of probabilities."

RELIEF SOUGHT

The appellant seeks the following relief:-

1. That the appeal be and is hereby allowed with costs,
2. That the judgment of the High Court HC 10/21 (handed down as HH 725/22) be and is hereby set aside and in its stead substituted with the following:

"(a) The plaintiff's main claim be and is hereby granted.

(b) Defendant be and is hereby ordered to allocate the plaintiff 4445 parking bays for the installation of fully automated sensors and parking management system in terms of the contract between the parties.

(c) Defendant be and is hereby ordered to pay the plaintiff the sum of US$5 536 016.25 (or the ZWL equivalent at the prevailing interbank rate on the date of payment) being the amount due for the installation of fully automated sensors and parking management system on 4 445 parking bays within seven days of this court order.

(d) Defendant be and is hereby ordered to pay the plaintiff the sum of US$103 500.00 (or the ZWL equivalent at the prevailing interbank rate on the date of payment) being the amount due and owing for the semi-automated parking and management system annual licence fees for the 4 445 parking bays for the period 1 January 2018 to 31 December 2020, within seven days of this court order.

(e) The defendant be and is hereby ordered to pay to the plaintiff the sum of US$36 895.82 (or the ZWL equivalent at the prevailing interbank rate on the date of payment) being the amount due and owing for the fully automated sensor parking management system annual licence fees for the period of 1 may 2017 to 31 December 2020, within seven days of this court order.

(f) The defendant be and is hereby ordered to pay annual license fees for the automated parking management system to the plaintiff whenever it is due for the remaining part of the agreement, 12 years at the rate of US$250-50 per each marshall and enforcer precinct.

(g) Defendant be and is hereby ordered to pay interest at the prescribed rate on the sum in (d) and (e).

(h) Defendant be and is hereby ordered to pay interest at the prescribed rate on the sum in (d) and (e).

Alternatively, if specific performance is no longer feasible:-

(a) The contract between the parties wherein defendant was liable to allocate 4 445 parking bays for the installation of a fully automated sensor parking management system in the central business district of Harare be and is hereby cancelled.

(b) Defendant be and is hereby ordered to pay the plaintiff the sum of US$10 660 916.25 (or the ZWL equivalent at the prevailing interbank rate on the date of payment) being damages for breach of contract within seven days of this order.

(c) Payment of interest at the prescribed rate on the sum in (b) and;

(d) Costs of suit on an attorney-client scale."

THE CROSS APPEAL

In its cross appeal, the respondent raised the following grounds of appeal.

"**GROUNDS OF APPEAL**

1. The court *a quo* erred and misdirected itself in fact and in law in finding, as it did or must be taken to have done, that the appellant's cause of action arose on 16 February 2018.
2. The court *a quo* thus erred and misdirected itself in failing to find that the appellant's claim had been extinguished by prescription in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*]."

RELIEF SOUGHT

The cross appellant (respondent) seeks the following relief:

"1. The cross appeal be and is hereby allowed with costs.

Part of the judgment of the High Court of Zimbabwe, being judgment number HH 725/22 dated 19 October 2022 in case number HC 10/21 which dismissed the respondent's special plea of prescription be and is hereby set aside and the order of the court *a quo* is accordingly substituted with the following:

'1. The defendant's special plea of prescription be and is hereby upheld.
2. The plaintiff's claim in the main and alternative is accordingly dismissed with costs.'"

ISSUES FOR DETERMINATION

The grounds of appeal in the appeal and cross appeal raise the following issues:

1. Whether the appellant's claim had prescribed in terms of the Prescription Act [*Chapter 8:11*] ("the Act").
2. Whether the court *a quo* erred in exercising its discretion against the grant of specific performance.
3. Whether the court *a quo* erred in dismissing the alternative prayer for damages.

SUBMISSIONS BEFORE THIS COURT

Preliminary point

The respondent raised a point *in limine* to the effect that the appellant's notice of appeal is fatally defective in that it does not comply with the peremptory provisions of r 37(1) (c) and (e) of the Supreme Rules, 2018. However, the respondent after consultation with the appellant's legal practitioner, abandoned the point *in limine*. The matter then proceeded to argument on the merits.

(1) Whether the appellant's claim had prescribed.

The respondent asserts that it gave notice to terminate the agreement on 26 January 2017 when it addressed a letter to the appellant under the heading "Notice of Termination of Software Licence Agreement." The operative paragraph of that letter reads:

> "City Parking hereby gives you 15 working days' notice that it shall not be able to continue using the software licence beyond 31 March 2017."

The respondent contends that the cause of action arose on 26 January 2017 by reason of its termination of the lease of agreement in terms of its above quoted letter. The appellant having served its summons on 5 January 2021, well after the three-year prescriptive period had lapsed, it is contended by the respondent that the appellant's cause of action had been extinguished by prescription.

On the other hand, Ms *Mabwe*, for the appellant, submitted that the respondent's letter of 26 January 2017 did not constitute valid termination of the agreement between the parties. Rather, it was a mere notice that the respondent intended to effect termination by or on 31 March 2017. No such termination was subsequently made on that date. In any event, the parties had subsequently engaged each other and by letter dated 10 April 2017, the respondent indicated that the parties had agreed that "there is need to have another look at the issues in order to achieve a win-win situation for both parties. Accordingly, our position is that your system can still be used alongside our own internally generated system." Thereafter the respondent proceeded to pay license fees for the period April to December 2017.

Ms *Mabwe* contended that given the respondent's conduct, it cannot be said that the agreement was at law validly terminated on 26 January 2017. She argued that for a notice of cancellation to be valid or effective, it must convey an unqualified, immediate

and final decision to bring the agreement to an end. The respondent's notice of termination did not meet that criterion. It was therefore invalid, null and void. For that reason, Ms *Mabwe* submitted that the date of such defective notice could not be used as a basis upon which to calculate the three-year prescriptive period.

(2) Whether the appellant was entitled to specific performance or, alternatively, damages for breach of contract.

Ms *Mabwe* submitted that the court *a quo* was correct in finding that there was a valid contract between the parties involving the automation of a total of 5 500 parking bays. The contract was to be performed in two phases. The first phase involved the automation of 555 bays. The first phase was performed to the satisfaction of both parties. Ms *Mabwe* agreed with the finding of the court *a quo* that the agreement with regards the 4 445 bays had a condition, namely the availability of funds. However, while the court *a quo* found that the question of funding created a condition precedent for the performance of that part of the contract, Ms *Mabwe* takes a different view, namely that funding was a resolutive condition and not a condition precedent or suspensive condition as it is sometimes called. In furtherance of that position, Ms *Mabwe* submitted that when the respondent flighted the tender leading to the agreement, availability of funds was not the basis upon which the appellant's bid was accepted. The contract was complete on that basis, without condition. It did have a condition but such condition was not on the contract itself but on the terms of the contract. For that reason, such condition did not take away the rights and obligations created by the contract. The condition was resolutive and not precedent to the contract. Accordingly, the appellant could rightly sue in the event of breach. In other words, contended Ms *Mabwe*, the contract consummated in 2014, did not become binding upon the availability of funds. It became binding upon signature. It remained so and would only

terminate upon the availability of funds and the performance of the second phase of the agreement. In support of these submissions Ms *Mabwe* relied on a passage quoted from p 126 of "*The Law of Contract in South Africa*" by R. H Christie, which reads:

> "A condition precedent suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolutive condition terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event."

Reliance was also placed on the case of *Odendaals Trust Municipality* v *New Nigel Estate Gold Mining Ltd* 1948 G (2) SA 656 (0) at 666-7. The argument made by Ms *Mabwe* boils down to this; that despite the condition to do with availability of funds, the contract itself is valid and enforceable because the condition is not on the contract itself but on a term of the contract. It is on that basis that specific performance was sought and, alternatively, damages for breach of contract.

On the other hand, Mr *Moyo*, for the respondent, submitted that the cause of action arose on 26 January 2017 when the respondent gave notice that it was cancelling the agreement between the parties. Prescription began to run from that date. Mr *Moyo* did concede that the parties had engaged each other after that date but submitted that such engagements did not interrupt the running of prescription. As of 5 January 2021 when summons were served, the three year prescriptive period had lapsed. It was on that basis that Mr *Moyo* urged this Court to uphold the special plea of prescription arguing that the respondent's cross appeal has merit.

On the merits, Mr *Moyo* submitted that the appellant's case was based on an inchoate agreement which at law cannot sustain a cause of action. That is so, because the agreement was subject to a suspensive condition, namely availability of funds. That condition

not having been met, there was no contract which could be enforced. It was for that reason that Mr *Moyo* supported the decision of the court *a quo* when it stated as follows:

> "The defendant cannot therefore be liable for specific performance on a term of the contract that was never fulfilled or pleaded. Neither can it also be held liable for any damages because the claim was located in a condition that had not been fulfilled."

APPLYING THE LAW TO THE FACTS

Whether the appellant`s claim had prescribed.

The respondent`s special plea of prescription is based on its assertion that it terminated the agreement by letter dated 26 January 2017 and that therefore the appellant ought to have served its summons within three years of that date. It failed to do so and for that reason its claim must be deemed to have prescribed in terms of s 15(d) of the Prescription Act [*Chapter 8:11*]. In order to succeed in this regard, the respondent must show that the cause of action arose at the time it terminated the agreement. The court *a quo* correctly found that the respondent had not properly terminated the agreement. It is trite that termination must be unequivocal and *ex nunc*. In *casu*, the respondent issued a notice to terminate but did not proceed to do so at the end of the notice period. Instead, it advised the appellant that it had not given adequate notice and proceeded to suggest that the parties meet to discuss a win-win way forward. Thus, instead of proceeding with termination, the respondent prevaricated and to all intents and purposes, its actions were consistent with those of a party undecided whether to terminate and on what terms. As a result, no valid termination was effected. The respondent could not therefore seek to reckon the period of prescription from the date of a termination that never was. In the case of *Ganiev* v *Hoosen* 1977 (4) SA 458 (C) it was stated thus:

> "The basis of the argument is that a notice of cancellation to be effective must clearly and unambiguously convey to the guilty party the innocent party`s election to bring the contract to an end. It must embody an unqualified, immediate and final decision to treat the agreement as at an end. It cannot stipulate for a termination at a future time …. Such a notice, it is argued, which purports to terminate an agreement as from a future date and which by necessary implication therefore keeps the agreement alive in

> the interim, cannot in law amount to an effective notice of termination. It seems to me the defendant's contention is sound and must be upheld…I do not think that a lessor who has the right of election to cancel, and who wishes to cancel, is entitled to declare the contract cancelled as from some date in the future and to hold the tenant bound by the lease until the arrival of that date. In my view the right to resile from a contract is one that must be exercised *ex nunc.* Support for the views here expressed are to be found in the case of *Alpha Properties (Pty) Ltd* v *Export Import Union (Pty) Ltd* 1946 WLD 486."

See also *Jackson* v *Unity Insurance Company Ltd* 1999 (1) ZLR 381(S) at 383 B-C where this Court aligned itself to the decision in the *Ganief* case *supra.*

In the circumstances, the respondent`s special plea of prescription cannot be upheld.

(2) Whether the court *a quo* erred in exercising its discretion against the grant of specific performance and whether it erred in dismissing the alternative prayer for damages.

The court *a quo* found that the agreement with regards the automation of the balance of 4 445 bays was subject to a condition precedent which was yet to be met, namely the availability of funds. For that reason, it came to the conclusion that the appellant could not seek the remedy of specific performance of a contract that was not "perfecta". The court *a quo`s* reasoning in that regard cannot be faulted. A claim for specific performance requires that there be a contract between the parties and that the party claiming specific performance has performed its obligations in terms of the contract. Where the performance of the contract is subject of a condition precedent which is yet to be fulfilled, there is no basis upon which a party may seek to enforce performance of the contract. It can only do so where it can show that the condition precedent has been fulfilled and that there has been a breach of contract by the other party. Only then can specific performance be sought and granted or, alternatively, damages in *lieu* thereof.

Ms *Mabwe*, for the appellant, argued that the question of availability of funds was not a condition precedent but instead a resolutive condition. The fact however, and this is common cause, was that the agreement was subject to the condition that it would be performed when the respondent acquired the necessary funding. No time limits were prescribed as to when the respondent should secure such funding. There was evidence *a quo* that the respondent had sought the appellant`s technical assistance in order to lure a would-be investor. That arrangement did not bear any fruit. The bottom line remains that in the absence of funding, the contract could not be performed.

In our view the court *a quo* exercised its discretion judiciously in dismissing the claim for specific performance. It must be borne in mind that the court *a quo* was dealing with a verbal agreement. Its terms and conditions were to be ascertained through the testimony of the witnesses who appeared before it. It had the privilege of assessing the witnesses and weighing their evidence. It found the respondent`s witness credible and determined the matter accordingly. It found, as a matter of fact, that the performance was subject to availability of funds and that there was no evidence that such funds were available. Such findings cannot be lightly interfered with in the absence of gross irregularity. See *IDBZ* v *Engen Petroleum Zimbabwe (Pvt) Ltd* SC 16/20, *Hama* v *NRZ* 1996 (1) ZLR 664 (S) and *Reserve Bank of Zimbabwe* v *Corrine Granger & Anor* SC 34/07.

Ms *Mabwe*, for the appellant, submitted that the respondent had not averred that it would suffer undue hardship in the event of an order for specific performance nor that it did not have the necessary funds required to perform the contract. We also observe that the appellant had not pleaded that the funds were available. In a claim for specific performance, the onus is on the plaintiff to prove that the requirements for specific performance have been met. The appellant`s feeble attempt in this regard was to assert that the respondent sought to

engage other players to perform the same contract. That in itself does not prove that funds had been secured. In any event, the appellant was not privy to the discussions between the respondent and any other players. Either way the court *a quo* was prudent not to grant specific performance where availability of funds had not been proved in fulfilment of the suspensive condition. Such an order would have been a '*brutum fulmen*'.

Ms *Mabwe's* submission that availability of funding was not a condition stipulated in the tender floated by the respondent does not take the appellant's case any further. Firstly, it is common practice that tender documents on their own do not constitute the contract governing the parties' obligations. Thus, after the award of the tender the parties must engage each other and conclude a binding contract. In *casu* the parties entered into a verbal agreement after the award of the tender. That is the agreement that binds them and not the tender documents. It is therefore not correct to argue, as Ms *Mabwe* did, that there was a contract by way of tender documents and that such contract did not have availability of funds as a condition of its performance. In any event, it is common cause that the parties entered into a verbal agreement. Counsel cannot argue outside that parameter.

DISPOSITION

The appeal has no merit. The appellant cannot seek to enforce an agreement, the performance of which depended on a future condition which had not yet occurred. For that reason, the claim for specific performance was bound to fail. The alternative claim for damages was similarly without merit.

The respondent`s cross appeal is equally devoid of merit. The plea of prescription was premised on the date of a defective notice of termination. The alleged termination was correctly adjudged to be invalid and of no legal force or effect. The cross appeal ought to be dismissed.

The general rule is that costs follow the cause. No reason has been advanced to depart from that general rule.

In the result, it is ordered as follows:

(1) The appeal be and is hereby dismissed with costs.
(2) The cross appeal be and is hereby dismissed with costs.

BHUNU JA : I agree

MUSAKWA JA : I agree

Farai & Farai Attorneys, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners