ZIMBABWE ELECTRICITY TRANSMISSION
AND DISTRIBUTION COMPANY
versus
TECPAL CREATIVE INTERNATIONAL (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 14 January 2011

Opposed Court Application

S A Tawona, for the applicant
C Damiso, for the respondent

GOWORA J: On 18 December 2009 the applicant herein issued a purchase order in favour of the respondent for the supply by the latter of 2500 diaries at the total price of US$25 242-50. The diaries were for the year 2010 and it is common cause that the respondent has delivered to the applicant a total of 566 diaries valued at US$4 213-83. The respondent has not delivered the balance and the applicant has cancelled the contract and has now approached this court for an order for restitution of the balance of the purchase price paid to the respondent for the outstanding balance on the diaries. The respondent opposes the granting of the application and contends that it is not in breach and that further it has offered to deliver diaries to the applicant for the year 2011 which offer the applicant has rejected.

The crux of the matter to the resolution of this dispute therefore hinges on what constitutes serious breach as alleged by the applicant and whether or not the conduct of the respondent in delivering only a portion of the order would justify the applicant cancelling the contract on the basis of serious breach on the part of the respondent. The respondent, in opposing the application, has denied that it was in breach and that it is still in a position to perform its obligations in terms of the contract.

A contract may contain a forfeiture clause expressly stating that if one of the parties fails to perform a particular obligation by a certain date or period the other party would be entitled to cancel the contract. However, the contract may not contain a forfeiture clause, in which event it becomes pertinent to determine whether or not the breach is of such a nature as

to entitle the other party to the contract to cancel the contract or whether some other relief other than cancellation is the appropriate remedy.

It is generally accepted that the serious breach of a 'sufficiently' important term of the contract will justify cancellation at the instance of the wronged party without the need to prove an intention to repudiate the contract on the part of the defaulter. It is therefore trite that the breach of a material term of the contract, or a breach that goes to the root of the contract, or a fundamental breach, or breach of a vital or essential term of the contract justifies cancellation. In *Oatorian Properties* (*Pty*) *Ltd* v *Maroun* 1973 (3) SA 799 POTGIETER JA enunciated the principle justifying cancellation based on breach in the following terms:

> "According to the well-known principles there enunciated rescission of a contract is only permissible if a breach occurred of a term which goes to the root of the contract and the materiality of the breach is according to those authorities also a relevant factor in the determination of whether rescission should be ordered or not (*c.f. Spies* v *Lombard* 1950 (3) SA 469 (A.D) at p 488."

In *casu*, the applicant has not only contended that the respondent failed to deliver the diaries but that it failed to do so within an agreed time frame. The respondent however, argues that according to the agreement between the parties time was not of the essence and that it is willing to deliver diaries to the applicant for the year 2011. According to the applicant, ordering specific performance in this instance would not be appropriate as time for performance on the part of the respondent was of the essence.

In order to succeed in its claim based on cancellation of the contract based on alleged breach of a material term the applicant has to establish that the breach is of a vital term but for which it would not have entered into the agreement in the first place. The court may also have to consider whether the failure by the respondent to perform its obligations in terms of the particular term would render the performance of the rest of the contract a thing different in substance from what had been stipulated for.

A debtor can in fact commit a breach of contract by delaying or retarding performance of his duties under the contract, in which case the debtor is held to be in breach at the expiry of the time fixed for the rendering of the performance. When the time for performance arrives and the debtor has neither performed nor tendered performance, then he is said to be in *mora*. Where no time for performance is fixed in the contract, the creditor may fix the time for performance by making demand upon the debtor for performance (*interpellatio*). In order to be

effective such demand should fix the time for performance and the time fixed must be reasonable in all the circumstances. See *Nel* v *Cloete* 1972 (2) SA 150 (AD) at 160.

In *casu*, the respondent admits that there was delay in the delivery of the diaries. The applicant has averred that there were numerous attempts made to follow up with the respondent the delay in the delivery of the diaries. This is admitted by the respondent, the only dispute being whether or not the respondent acknowledged breach, which it denies. I find that there is breach on the part of the respondent, the only question being whether or not the breach is such as would justify cancellation on the part of the applicant.

The diaries ordered by the applicant were meant for use in the year 2010. Of the order of 2500 the respondent delivered 566 leaving a balance of 1 934. The applicant filed the application for restitution in *intergrum* on 28 June 2010 by which time the respondent had not been able to deliver the outstanding diaries. The opposing affidavit was filed on 12 July 2010 at which juncture the respondent was suggesting that it could instead be given the opportunity to supply the balance for the year 2011. The applicant intended the diaries for use in 2010.

In my view the failure to deliver the diaries for use in 2010 especially after the respondent had been placed in *mora* constituted breach of a vital term. In my view the delay in delivery was breach going to the root of the contract. It cannot be gainsaid that the respondent failed to deliver the diaries for use in 2010 and that therefore time was of the essence in this contract. The breach is in my view sufficiently serious to warrant cancellation of the contract.

The question now for determination is whether cancellation is the appropriate remedy or should the applicant have sought specific performance instead of cancellation of the agreement. The applicant contends that specific performance as a remedy is no longer appropriate in view of the fact that the parties contracted for delivery of the diaries for the year 2010. When it became clear that the respondent could not deliver the diaries the applicant took steps to mitigate its loss and sources for the diaries from other suppliers.

It is a principle of our law that the court has a discretion on whether or not to grant specific performance, and further that the court will not grant an order for specific performance where such order would create a disadvantage or hardship on one of the parties, or where it would result in an unfair advantage to one of the parties. The court will also not attempt to force parties against their will to maintain a continued relationship. In *Benson* v *SA Mutual Life Insurance Society* 1986 (1) SA 776 (A), HEFER JA, in discussing the court's discretion to grant specific performance had this to say at p 783C-F:

> "… 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 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 harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy. (*cf De Wet and Yeats* Kontraktereg en Hundelsreg 4th ed at 189). Furthermore, the Court will not impose specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound."

In this case the debtor is still contractually bound but the applicant's position is that an order compelling the respondent to effect specific performance would produce an unjust result in that the applicant would end up with a total of 1934 diaries for the year 2010 which it no longer has use for. I agree. I am not persuaded by the argument advanced on behalf of the respondent that it is able to supply diaries to the applicant for the year 2011. The function of the court is to give effect to the agreement concluded by the parties, and it is not the function of the court to conclude contracts for the benefit of the parties. The contract before me is for the supply and provision by the respondent to the applicant of 2 500 diaries of differing sizes for the year 2010. The respondent has supplied 566 leaving a balance of 1934 diaries undelivered. It is clearly in *mora* and it is not, in my view, within the discretion of this court to order the applicant to accept delivery from the respondent of diaries for 2011. This court cannot know what the requirements of the applicant are as relates to diaries for the year 2011 and to be seen to acceding to that request from the respondent is for this court in effect to impose conditions on one of the parties. The respondent clearly has been unable to perform its obligations in terms of the agreement. The applicant is therefore entitled to relief.

It is contended by the applicant that in the circumstances the only available form of relief in the circumstances is cancellation and restitution. A court order is not necessary for the cancellation of a contract. In this instance the applicant has already cancelled the contract the only query being whether such cancellation was justified in the circumstances. I have already found that the respondent had breached a fundamental term of the contract, thus the applicant was justified in cancelling the contract. The only issue remaining is whether the applicant has made out a case for restitution.

The applicant is seeking no more than the refund of the value of the outstanding diaries. A party seeking restitution asks the court to place him in the same position that he

would be if the contract had not come into being. Effectively cancellation puts a stop to further performance of the contract by both parties thereto. The injured party is by cancellation intimating that he is not prepared to accept performance on the contract by the debtor. I have already found that in this case time was of the essence in the performance of the contract due to the need by the applicant to utilise the diaries during the year 2010 and that therefore a failure to deliver within a reasonable period in 2010 went to the root of the contract. It is an accepted principle that where time is of the essence a breach is of sufficient magnitude to justify the creditor in cancelling even without prior demand made to the debtor to perform or rectify the breach. The applicant contends that this was a mercantile transaction in which time is always of the essence as both parties were dealing in the course of business.

Whether or not a transaction is considered a mercantile transaction depends on the circumstances surrounding the contract. In this instance the applicant required the diaries for use in 2010 and by implication time was of the essence, even if no specific date for delivery had been set between the parties. It is accepted that in mercantile transactions the time for performance is intended to be a vital term of the contract. Thus a failure by one of the parties to the contract entitles the other to cancel. It has frequently been held that time is of the essence in what is usually described as a mercantile transaction, that is to say a contract in a fluctuating market or a market in which prompt delivery or payment is necessary to keep the wheels of commerce or industry turning.[1] In *Greenfield Manufacturers* (*Temba*) (*Pty*) *Ltd* v *Royton Electrical Engineering* (*Pty*) *Ltd* 1976 (2) SA 565 (A) WESSELS JA stressed that the inquiry into the question of whether or not time is of the essence is focused on the existence of a tacit term and the nature of that tacit term. At 569B-E the learned judge of appeal commented thus:

> "In effect, the trial court held that it had been proved by a preponderance of probability that the parties had agreed (1) expressly, that delivery was to be effected within 8 weeks from 19 June 1973 (i.e., by no later than 14 August 1973) and (2) tacitly, that the respondent would be entitled, at its election, to repudiate the contract in the event of a failure by appellant to effect delivery within the stipulated time. I say tacitly, because it was not averred in the pleadings that such a term had been expressly agreed upon between the two parties. Whether such a tacit term is part of an agreement is a question of fact, and where it is in issue, that issue is to be resolved in the same way as issues of fact are ordinarily resolved, i.e. by a consideration of the relevant evidence. In

[1] R H Christie-The Law of Contract in South Africa 3ed

Goldstein & Wollf v *Maison Blanc* (*Pty*) *Ltd*, 1948 (4) S.A. 446 (C) it was stated (at p. 453), that there is

> "a strong presumption that time is of the essence in a mercantile transaction proper". I understand this to mean no more than that the circumstances in which a "mercantile transaction proper" is concluded and the terms thereof might afford cogent evidence that the parties had in fact agreed that "time is of the essence" ."

The respondent in the tender document indicated that delivery would be effected to ZETDC Head Office within weeks. Although the precise date and time of delivery were not fixed it seems to me that there was a time frame for delivery which was agreed between the parties. The applicant contends that the order was confirmed on or before 18 December 2009, but even if I were to accept that confirmation of the order was not effective by this date as the respondent suggests, from the opposing affidavit it is clear that by the end of December the respondent had been given the order to deliver the diaries in terms of the tender. This is evident from the statements to the effect that the respondent's supplier in South Africa had closed for the festive season making delivery before the New Year impossible. Notwithstanding the acceptance of the order and the undertaking to deliver within weeks there has been insufficient delivery. The facts as pleaded by both parties confirm, in my view, that time was of the essence, and I would go further and suggest that it tacitly accepted by both parties that in order to comply with its obligations the respondent had to deliver before the New Year or as early as possible thereafter. There was however no delivery before the New Year. There was partial delivery well after the year had started. Thus there was a fundamental breach of the contract which went to the root of the contract entitling the applicant to cancellation. See *Erasmus* v *Pienaar* 1984 (4) SA 9 (T).

I would find that the failure by the respondent to deliver within a reasonable time amounts to a repudiation of the contract, entitling the applicant to cancellation of the contract. The applicant, in view of the non performance by the respondent of its obligations is also no longer bound by the contract, in which case it would demand and be entitled to be placed financially in the position it would have occupied had the contract not been concluded. It is implicit in a claim for restitution that each party must restore whatever he has received under the contract. The applicant, in order to comply with this requirement has accepted the 566 diaries delivered to it and only demands the value of the balance of the order.

In the premises the applicant is entitled to the order as prayed for and I will issue an order as follows:

1. The respondent be and is hereby ordered to pay the applicant the sum of USD $21 028-67 being the cost of one thousand nine hundred and thirty four diaries together with interest on the said sum at the prescribed rate with effect from 26 May 2010
2. The respondent is ordered to pay the costs of this application.

Muza & Nyapadi, applicant's legal practitioners

Hogwe-Dzimirai & Associates, respondent's legal practitioners