JEREMY CRANSWICK
and
ROBERT FISHER
versus
NORMAN SACHIKONYE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 July & 10 September 2014

Civil trial

M. E. Motsi, for the plaintiffs
U. Sakhe, for the defendant

ZHOU J: In August 2004 the first plaintiff and the defendant met at a farm in Rusape to discuss the sale to the defendant of farm equipment belonging to the two plaintiffs. In the discussion the first plaintiff represented himself and the second plaintiff. The parties agreed that the equipment which was at three different locations be moved to the defendant's farm, after which a price would be determined based on what they referred to as "a blend of market prices at second hand agricultural sales outlets". Subsequently, the equipment listed in annexure "A" to the plaintiffs' summons was delivered at the defendant's farm sometime towards the end of 2004. But it was only in May 2005 that the plaintiffs presented a price list representing the value of the equipment to the defendant. The total figure presented to the defendant was Z$206 981 000-00.The defendant failed to pay the purchase price in the above sum of money.

On 11 July 2006 the plaintiffs instituted the action *in casu* claiming the return of the farming equipment, holding over damages and costs of suit. The plaintiffs abandoned the claim for holding over damages at the commencement of the trial. The basis of the claim was that the agreement between the parties was not a valid agreement of sale as there was no agreement on the purchase price. The defendant opposed the claim on the basis that the parties did agree on the purchase price, in the sum of Z$206 981 000-00. The defendant

tendered that amount. Through his legal practitioners he presented a cheque in that amount to the plaintiffs' legal practitioners. The cheque was sent under cover of a letter dated 27 September 2006. The letter read as follows:

> "**RE: JEREMY CRANSWICK and ANOTHERvs N SACHIKONYE CASE NO HC 4098/06**
>
> We refer to the above matter.
>
> In line with the tender made in the plea, we forward herewith our cheque in your favour in the sum of $206 981.00 (revalued) in full and final settlement.
>
> Please acknowledge receipt thereof."

The letter was duly stamped by the plaintiffs' legal practitioners to acknowledge receipt on 2 October 2006. The cheque was accepted and deposited into the account of the plaintiffs' legal practitioners. It was duly honoured by the bankers for the defendant's legal practitioners on 4 October 2006. On 9 October 2006 the plaintiffs' legal practitioners wrote to the defendant's a letter, the relevant portions of which read as follows:

> "Your letter dated 27th September 2006 refers.
>
> We acknowledge receipt of your cheque in the sum of $206 981.00 which we accept on a ***without prejudice*** basis.
>
> We will advise you of our client's attitude the moment we get instructions from them"

By letter dated 3 November 2006 the plaintiffs' legal practitioners wrote to the defendant's lawyers advising that the plaintiffs persisted with their claim and that litigation would accordingly be proceeded with.

Two issues were referred to trial, namely:

(1) Whether or not the agreement between the plaintiffs and the defendant is a valid contract of sale; and
(2) Whether or not in light of the tender of payment made by the defendant, plaintiffs are entitled to the return of the equipment or assets.

The plaintiffs gave evidence themselves. The primary witness was the first plaintiff. The second plaintiff's testimony was just to confirm that he had given the first plaintiff authority to sell his equipment, otherwise he was not personally involved in the negotiations with the defendant. Jeremy Cranswick, the first plaintiff, testified that in August 2004 he met the defendant at Rockingston Farm in Rusape. At that meeting the parties agreed that the

defendant would buy irrigation equipment belonging to the two plaintiffs at a price which would be "a blend of market prices at second hand agricultural sales outlets". According to him there was no agreement of sale between the plaintiffs and the defendants which was concluded in August 2004 as the parties did not agree on the purchase price. The equipment was moved from different locations to the defendant's farm. The list attached to the plaintiffs' declaration reflects the equipment which was delivered to the defendant. In his evidence-in-chief the first plaintiff stated that the parties did agree on a purchase price payable in United States dollars because of the high inflation. He, however, could not recall the amount agreed upon. He denied that there was agreement on a purchase price of Z$206 981 000-00 (Z$206 981 revalued), and stated that he had no knowledge as to where the plaintiff had obtained that figure from. It was shown in cross-examination, however, that that amount had, in fact come from the first plaintiff himself. In his evidence he telephoned the defendant several times to make a follow-up on the payment but no payment was forthcoming despite numerous promises by the defendant to make the payment.

The defendant's evidence was that the agreement was that all the equipment would be collected from the different locations and brought to his farm. The equipment was at three different locations, namely, Rockingston Farm in Rusape, Marlborough Farm in Headlands, and Inyathi Farm in Rusape. After that a list would be prepared on the basis of which the price would be determined. He stated that after a full list of the equipment had been prepared the first plaintiff prepared and presented to him a price list which amounted to Z$206 981 000-00 (which became Z$206 981 after the revaluation of the Zimbabwe currency). That was in May 2005. He failed to pay the agreed purchase price because he did not have a good yield for the 2004/2005 cropping season. Accordingly, he undertook to make the payment from the proceeds of the sale of his 2005/2006 crops. He was to pay interest on the agreed purchase price. That offer to pay during the following season was accepted by the first plaintiff. He stated that he never received any other price list other than the one referred to above. After being served with the summons he tendered payment of the purchase price and made the payment as stated above.

An agreement of sale is validly concluded only if the parties agree on the property to be purchased and the purchase price. As regards the purchase price the parties must agree, expressly or by implication, on or fix a specific amount. The alternative option would be for the parties to agree upon a mechanism or some external standard by which that amount may be established without further reference to them. See *Machanick* v *Simon* 1920 CPD 333 at

338; *Burroughs Machines Ltd* v *Chenille Corporation of South Africa (Pty) Ltd* 1964 (1) SA 669 at 670C-F; *Chikoma* v *Mukweza*1998 (1) ZLR 541(S).

I accept that when the parties met on 4 August 2004 no agreement of sale was concluded. The property to be sold had not even been properly identified as it was yet to be collected from the different locations where it was being kept. Also, the parties did not agree on a purchase price. It was not possible, in any event, for the parties to agree on a purchase price when the specific equipment which was to be sold had not even been established. However, after the equipment had been collected and put together at the defendant's farm the parties did agree on a purchase price in the sum of Z$206 981 000-00. That price, as noted above, was proposed by the plaintiffs and was accepted by the defendant. The mechanism by which it was established is of no relevance as it is a specific amount. In fact, exhibit 4, the notes written by the first plaintiff, has attached to it a document entitled "Inventory 2 (May 2005) which shows the value of the items listed therein as at the time that the purchase price was determined and agreed upon. The defendant stated that he offered to pay interest to compensate the plaintiffs for the loss occasioned by delayed payment of the purchase price. That offer to pay interest is recorded in exht 4. The first plaintiff in his evidence testified that he advised the defendant that if there were delays in payment of the purchase price then the price would have to be based on a United States dollar value because of the high inflation in the country then. That proposal is also recorded in exh 4. A reading of the paragraph numbered 4 in that exhibit reveals that the defendant's offer to pay interest was in response to the intimation by the first plaintiff that a United States value would be used to determine the price if there were delays. There is nothing to suggest that the plaintiffs rejected the offer to be paid interest. The plaintiffs' conduct after May 2005 is consistent with an acceptance that the purchase price agreed upon was that contained in "inventory 2". The numerous follow-ups made by the first plaintiff asking for payment show that the parties knew what the purchase price was. The issue of the consequences of the failure to make a timeous payment of the purchase price does not affect the validity of the agreement of sale which the parties concluded once they agreed on the purchase price. It is irrelevant, too, that in May 2006 the plaintiffs came up with another price list. That price list was not agreed upon. If the plaintiffs were of the view that the price which is contained in "inventory 3 (May 2006)" represented the correct value as at that date then they would have been entitled to be compensated for the loss occasioned by the delay. But that is not their cause of action. The basis of their claim is that no agreement of sale was concluded between the parties. Having

regard to the totality of the evidence presented, I am convinced that the plaintiffs' contention is not sustainable. In his evidence-in-chief the first plaintiff had flatly denied knowledge of the figure of Z$206 981-00. I have no difficulty in finding that the denial of knowledge of that figure was a deliberate attempt to mislead this court.

In any event, once the plaintiffs accepted the cheque which was issued by the defendant through his legal practitioners "in full and final settlement", and deposited it into their legal practitioners' account and benefitted from the proceeds thereof they are estopped from asserting that they were not paid for the equipment or that the acceptance was on a without prejudice basis. In the case of *Cit-Chem (Pvt) Ltd* v *Ceres Farm(Pvt) Ltd* 2001(2) ZLR 49 (H) the plaintiff had issued summons against the defendant claiming payment for goods sold and delivered, together with *mora* interest at the prescribed rate. Following correspondence between the parties, the defendant tendered payment of an amount but the plaintiff's legal practitioners wrote back to say that the amount would be accepted without prejudice to plaintiff's claim for interest. On the same day that the plaintiff's legal practitioner wrote his response to the tender, the defendant, unaware of the letter from the plaintiff's legal practitioners, sent a cheque for the amount tendered. The cheque was sent under cover of a letter which stated that it was in full and final settlement of the plaintiff's claim with interest and costs. The plaintiff deposited the cheque into its bank but persisted with its claim. The court held, *inter alia*, that by accepting the cheque, the plaintiff must be taken to have accepted the tender, and to have compromised its claim, including the claim for interest and costs. *In casu* the plaintiff did not just accept the cheque and deposited it into the legal practitioners' account; it did not even tender to refund the money. Further, the legal practitioners for the plaintiff sought to allege that the cheque had been accepted without prejudice some days after it had been honoured by the bankers for the defendant's legal practitioners. In those circumstances, the plaintiff is estopped from persisting with the claim. See also *Burt NO* v *National Bank of South Africa Ltd* 1921 AD 59 at 67; *Cecil Jacobs (Pty) Ltd* 1966 (4) SA 41(N) 46B.

In the circumstances, I come to the conclusion that the plaintiff is not entitled to the relief sought. Accordingly, judgment is given in favour of the defendant against the plaintiffs, in the following terms:

1. The plaintiffs' claim be and is hereby dismissed.
2. The plaintiffs shall pay the defendant's costs jointly and severally the one paying the other to be absolved.

Motsi & Associates, plaintiffs' legal practitioners
Kantor & Immerman, defendant's legal practitioners.