COPIER KINGS (PRIVATE) LIMITED t/s NASHUA
versus
FADRY TRANSPORT (PRIVATE) LIMITED
and
N M B BANK LIMITED
and
N M B HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 1, 2 and 25 October 2006

Mr *A P de Borbon,* for the plaintiff
Mr *E Matinenga*, for the defendant

BHUNU J: The plaintiff is a private company which among other things is in the business of luxury tourism, whereas the 1st defendant is the registered owner of a boat called Par Excellence which is at the centre of the legal dispute at hand.

The 2nd defendant NMB Bank Limited is a public company which operates as a registered commercial bank in this country,

The 3rd defendant NMB Holdings Limited is a public company which is the holding company of the 1st and 2nd defendants.

The plaintiff's claim is for an order for the delivery of the disputed boat Par Excellence by one or other of the 3 defendants in terms of an oral agreement allegedly concluded on the 21st of March 2005 plus costs of suit.

While the defendants admit that there were negotiations concerning the sale of the vessel to the plaintiff it is denied that the negotiations crystalized into a legally binding contract.

The facts giving rise to the dispute are somewhat to a large extent common cause. The drama commences at Kariba at a time during which the 2nd Defendant N M B Bank Limited was in turmoil with some of its directors having fled the country on money laundering allegations, notably Mr Mushore and Mr Makoni.

At the same time the plaintiff was scouting for a suitable boat to expand its luxury tourism business.

It appears the source of the trouble was that the fugitive directors were intend on selling the boats in foreign currency for their own benefit whereas the remaining directors were intend on selling it for local currency for fear of any further trouble with the police. The boat also appears to have been pledged to the Reserve Bank of Zimbabwe to secure a loan. The parties were therefore under the impression that there was need for Reserve Bank clearance before they could conclude a binding contract. It was also not clear whether or not the vessel was being sold together with all its tender boats.

Under that scenario Mr Dos Remedios the financial director for 2nd and 3rd defendants and Mr William Kelly the plaintiff's Chairman of its board of directors commenced negotiations for the sale of the disputed vessel.

According to Mr Kelly the negotiations commenced with him phoning one of the directors Mr Paddy Zhanda offering to purchase the boat. Mr Zhanda declined the offer.

Undetered by this initial set back Mr Kelly phoned Mr Dos Romedios a few days later enquiring whether the boat was on sale. Mr Remedios' response was to the effect that the boat was on sale. They already had an offer of US$300 000.00 on the table. The sale was however going to be in Zimbabwean dollars as they had previously encountered problems with foreign currency transactions.

It was Mr Kelly's testimony that he then made an offer to buy the boat for two billion Zimbabwean Dollars. Mr Remedios acknowledged the offer and said he would pass on the message and revert back to him in due course.

In the meantime he phoned a company called GDI which had built and maintained the boat. His information was that the boat was in excellent condition and its replacement value was in the region of US$500 000.00.

A few days later he phoned Mr Remedios enquiring about his offer. His response was that they had since received another offer of US$350 000.00.

As Mr Kelly was anxious to get the boat he increased his offer to Z$3.75 billion dollars to which Mr Remedios expressed no reservations.

What then followed is best told in Mr Kelly's own words as it forms the gravamen of the legal dispute regarding whether or not there was a firm irrevocable acceptance of the offer. This is what Mr Kelly had to say on this crucial issue;

> "On the 21st of March 2005 I was at my premises with Mr Richardson looking at the gate when I received a call on my cell phone from Dos Remedios.
>
> He said, 'We have a deal and I will sent you a contract now'. I then spoke to my managing director Mr Richardson.
>
> We then arranged a meeting.
>
> He said, 'we have a deal'. I understood that to mean we had an agreement."

Mr *De Bourbon's* submission that the facts are not in dispute because Mr Kelly was not cross-examined on this vital aspect of his evidence is factually incorrect and misleading. According to my long hand notes Mr Kelly was asked under cross-examination;

> "Q. I put it to you that indeed there were consultations, the two were negotiating and <u>the seller never accepted your offer.</u>
>
> A. I am not suggesting that the agreement was made on the 22nd of March, but on the 21st of March. <u>We agreed to purchase the boat with all those other things.</u>"

Thus Mr *de Bouborn's* reliance on the case of *S v P* 1974 SA 581 at 582 which he says is authority for the proposition that where a witness is not cross examined on a point, the court can regard the point as being undisputed, is misplaced.

The parties representatives by prior arrangement met the following day the 22nd of March 2005 to hammer out the outstanding terms and modalities of putting into effect the purported contract of sale.

At that meeting Mr Remedios was accompanied by his company secretary Mr Narotam whereas Mr Kelly was accompanied by his managing director Mr Richardson. Both Mr Narotam and Mr Richardson are qualified legal practitioners with extensive experience in both the private and public sectors. They are both ex-magistrates.

The meeting was conducted in a friendly congeneal atmosphere. Various issues pertaining to the purported sale were discussed.

At that meeting the parties negotiated the terms of the contract. Mr Narotam however raised a number of pertinent issues which needed to be resolved before the agreement could be reduced to writing.

The price of Z$3.75 billion was already agreed but Mr Kelly offered to make a down payment of Z$2 billion and to pay the balance by 2 equal monthly installments.

The issue of current bookings was resolved with plaintiff electing to honour all existing bookings.

The issue of employees was also resolved with the plaintiff electing to inherit them.

Mr Narotam then brought in the issue of the tender boats. The plaintiff was under the impression that the boat was being sold together with its tender boats whereas Mr Dos Rmedios was of the view that they wre seperate.

In his own words in court Mr Kelly had this to say:

> "Mr Narotam then brought in the issue of tender boats. He said they were separate. I expressed surprise and he said they would come back to me."

On 29 March Mr Kelly spoke to Mr Dos Remedios on the phone and was advised that the boat had been pledged to the Reserve bank to secure a loan. There was therefore need for Reserve Bank clearance.

At one time Mr Kelly said he spoke to Mr Remedios before traveling to South Africa. He sought confirmation of the deal he asked, "Deal accepted? and Mr Dos Remedios respondent, "Absolutely." He then proceeded in his evidence thus:

> "On my return from South Africa I used the same words "Deal accepted?" and he said "Not exactly. The Reserve Bank issue, the tender boats and the staff? I pointed out that the RBZ issue was only brought in after we had concluded the agreement. that the staff issue had been settled and on the tender boats I said if that is a deal breaker keep it. To which he replied, "It is not a deal breaker and I am sure we can resolve that issue."

The issue was however never resolved.

Mr Narotam never reduced the alleged oral contract to writing as previously discussed. Mr Richardson then took it upon himself to make a draft agreement which attempted to address the outstanding issues. The plaintiff however did not sign that draft agreement.

Clause 3 of the draft contained a condition precedent which provided as follows:

> "(a) It is recorded that it is a condition precedent to this agreement that the seller obtains authority from the Reserve Bank of Zimbabwe to proceed with the sale of the vessel to the purchaser. In the event that such authority is not granted by 31 May 2005 the purchaser shall be entitled to cancel this agreement without incurring any penalty for such cancellation.
>
> (b) The seller undertakes to use all reasonable endeavours to obtain such authority as expeditiously as possible and to refrain from any act or omission that will or be likely to impede or delay the granting of such authority."

While the above draft is not binding on anyone, it provides an insight as to what the plaintiff thought had been agreed upon between the parties.

It is trite and a matter of elementary law that consensus is of the essence of contract, that is to say consensus *ad idem* is the basis of contract. For there to be a binding contract the parties must understand each other in the sense that there is a meeting of the minds. There can be no contract where the parties negotiate or speak at cross purposes.

The case of *Maritz v Pratley* 1894 (1) SC 345 is on all fours with the facts of this case. In that case a mirror and mantle piece were placed on top of each other but being sold separately at an auction sale. Defendant bid on the understanding that both items were being sold together yet the seller intended to sell them separately. The court held that there was no con tract because there was no agreement as to the subject matter of the sale.

In the case at hand there was no agreement as to whether or not the vessel was being sold together with all its tender boats. Under cross-examination Mr Richardson gave the unmistakable impression that the tender boat issue remained a live issue which was never resolved between the parties. He was asked and he responded:

"Q. Both you and Mr Kelly referred to Mr dos Remedios being embarrassed when the issue of tender boats was mentioned.

A. Yes

Q. Was that issue agreed

A. He said he would consult Mr Narotam and revert back to us

Q. There would have been no need to consult if there had been an agreement

A., We were not adversasries when we were discussing. We did not want to get confrontational at that point. Mr dos Remedios did indicate that he would discuss the issue with Mr Narotum and I expected the outcome to be positive.

Q. The outcome was never communicated to you

A. Yes

Q. The issue of tender boats was an important issue.

A. No, to us whichever way they went, we would have got the agreement. In every institution there is a process of consultation and it was apparent that consultations were taking place. Mr dos Remedios is a senior member of the bank, he appeared to be fully authorised to sell the boat."

Mr Richardson's E-mail dated 27 April 2005 addressed to Mr Narotam at page 89 of the agreed Bundle of documents puts it beyond question that the sale of the vessel was yet to be concluded. It reads:

> "I thank you for your E-mail. You are obviously under a lot of pressure and in order to assist you I annex here to a draft agreement of the sale for the vessel for your perusal in the event that you require any alteration, please communicate these to me for my consideration, where after I shall attend to the final document."

From the foregoing it is clear on the basis of the plaintiff's side of the story that there was no agreement as to the true identity of the property being sold. There was equally no agreement as to the exact terms and conditions of the alleged contract of sale. The parties were still negotiating the terms and conditions of the intended sale. It was therefore premature and remiss of the plaintiff to attempt to convert mere cordial negitiations into a firm binding contract.

That being the case I am satisfied on a balance of probabilities that having regard to the basic principles of contract the plaintiff has failed to place before this court any evidence that there was an unequivocal acceptance of the offer which crystalysed into a firm binding contract of sale. For that reason the court retains the verdict of absolution from the instance with costs.

Coghlan Welsh & Guest, the plaintiff's legal practitioners
Gill Godlonton & Gerrans, the defendant's legal practitioners