INTERFRESH LIMITED
versus
MEGAPAK ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 24 March, 28 April and 8 September 2009

Mr. D. S. Mehta, for the plaintiff
Mr. H. Zhou, for the defendant

PATEL J: The plaintiff in this matter, in terms of the summons as amended by consent at the trial, claims as against the defendant the specific performance of a contract to deliver 319,240 plastic bottles and 369,320 tearstrip closures. The defendant admits that it has failed to deliver the remaining quantity of bottles and closures originally contracted for but denies that its failure constitutes a breach of contract because of the withdrawal by the Reserve Bank of its Basic Commodities Supply Side Intervention Facility (BACOSSI).

Evidence for the Plaintiff

Lishon Chipango is the plaintiff's Chief Executive Officer. His evidence was as follows. In August 2007, the plaintiff launched a new product through its subsidiary, Mazoe Citrus Estates, requiring 2 litre plastic bottles with caps. Subsequently, on the 1st of October 2007, Chipango met the Managing Director of the defendant (Martin Makomva) at the Reserve Bank's presentation of its Monetary Policy Statement. Makomva indicated that the defendant had already received BACOSSI funding for making bottles and referred him to the defendant's Marketing Director (Albert Chitapi). After several meetings and phone calls, he sent an e-mail to Chitapi on the 12th of October 2007 [Exhibit 3] asking him to finalise a quotation for 700,000 bottles and caps. On the 15th of October he met with

Chitapi who confirmed that the defendant could supply the required bottles and caps over a period of 5 weeks. On the 18th of October he received an e-mail from the defendant [Exhibit 4] attaching a quotation for 700,000 bottles and caps. The total cost, inclusive of bottles, closures, cartons and freight charges, was quoted as a sum slightly over $53 billion. The plaintiff then made arrangements to borrow this sum from Barclays Bank. Thereafter, Chipango called Chitapi to reconfirm the price. After the price was reconfirmed, he effected payment of the contract price on the 9th of November. On the 12th of November he e-mailed Chitapi asking him to confirm receipt of the payment [Exhibit 5A] and Chitapi responded on the 13th of November to confirm payment [Exhibit 5B]. Thereafter, the defendant's staff met with the plaintiff's staff to agree on delivery of the products. On the 20th of November the parties e-mailed each other to confirm a delivery plan and the defendant then commenced delivery of the bottles and caps. Each delivery was accompanied by a delivery note and cumulative invoice showing the deliveries to date, as summarised in a schedule prepared by the plaintiff [Exhibit 7]. The invoices furnished by the defendant expressed the unit prices for the bottles and caps in the same amounts as were quoted in Exhibit 4. When the deliveries became erratic, Chipango e-mailed Chitapi on the 3rd of December [Exhibit 8A] and the latter responded explaining that the defendant had problems with its mould [Exhibit 8B]. At a subsequent meeting in mid-December the defendant's staff indicated that they were encountering machine breakdowns. On the 17th of December the plaintiff again queried the erratic deliveries [Exhibit 9A] and Chitapi responded on the same date [Exhibit 9B] raising pricing difficulties for the first time. On the 24th of January 2008, Chipango met with Makomva who indicated that the Bacossi funding had ended and that the price for the remaining bottles and caps should be renegotiated. The proposed price adjustment was rejected and Makomva wrote on the 20th of February [Exhibit 10] restating his position at the meeting. The

plaintiff's lawyers then forwarded a letter of demand to the defendant on the 27th of February [Exhibit 11].

Gabriel Chinembiri is the Managing Director of Mazoe Citrus Estates. He testified that the summary of deliveries [Exhibit 7] was prepared by Mazoe Citrus Estates. The deliveries listed from the 20th of November 2007 to the 4th of January 2008 amounted to 380,760 bottles and 330,680 caps. The prices listed in the delivery notes and invoices were exactly the same as those stated in the original quotation [Exhibit 4] with respect to the bottles, closures and cartons. However, the cost of freight charges was higher than was originally quoted. Chinembiri corroborated the testimony of Chipango as regards the confirmation of transport arrangements for the delivery of 700,000 bottles and caps. He also corroborated the evidence relating to the plaintiff's complaints concerning erratic deliveries and the defendant's explanations relating to plant problems and pricing issues. On the 24th of December 2007, he received an e-mail from the defendant [Exhibit 12A] stating that the old price would only apply to 300,000 bottles and caps as agreed at a meeting held on the 17th of December. He refuted any such agreement between the parties, having regard to his e-mail of the same date to the defendant [Exhibit 9A] as well as the e-mail from the plaintiff to the defendant on the 28th of December [Exhibit 12B].

Evidence for the Defendant

Martin Makomva has been the Managing Director of the defendant for the past 9 years. He confirmed his meeting and discussion with Chipango on the 1st of October 2007. He told Chipango that the defendant had already benefited from the BACOSSI scheme and would therefore be able to supply products at lower competitive prices. He then referred Chipango to Chitapi. His evidence was that the plaintiff's order required about 6 to 8 weeks to fulfil. In the event, the order could not be met in full because the Reserve Bank only availed BACOSSI assistance to the defendant for

one month. The funding was stopped at the end of September 2007 and covered customers' orders for the month of October only. Consequently, the defendant wrote to the Reserve Bank on the 29th of November [Exhibit 13] pointing out that the BACOSSI material had run out and that this had impacted significantly on the defendant's pricing structure entailing a ten-fold increase in costs and prices. Makomva himself had previously written to the National Incomes and Pricing Commission (NIPC) on the 22nd of November [Exhibit 14] requesting its approval of price adjustments in light of the defendant's cost build-up. This was followed by further applications to the NIPC on the 28th of November [Exhibit 15], 30th of November [Exhibit 16] and 10th of December 2008 [Exhibit 17]. In early December, the defendant received NIPC approval to adjust prices in response to one of the applications. On the 17th of December he met with staff from Mazoe Citrus Estates to discuss pricing and supplies relating to the plaintiff's order. New prices were agreed at that meeting subject to clearance from Chipango. The latter refused to accede to the revised prices at a meeting in January 2008 and Makomva then wrote to him on the 20th of February [Exhibit 10] pointing out that the BACOSSI facility had terminated and suggesting that supplies be continued at revised prices. This offer was rejected by the plaintiff. According to Makomva, the current cost of a bottle and cap is US 23 cents. The money paid by the plaintiff in November 2007 only covered the cost of what was actually supplied and, therefore, the balance of the plaintiff's order cannot be met at current prices. The entire contract was premised on the continuation of the BACOSSI facility.

Under cross-examination, Makomva conceded that in terms of the conditions stipulated in the quotation [Exhibit 4] the goods were to be despatched once payment had been made into the defendant's account and that payment of the full contract price was confirmed on the 13th of November 2007. He also accepted that the first change in unit prices was only reflected in an invoice generated

on the 24th of December, over 2 months after the original quotation. The prices were increased after NIPC approval was granted. However, this was not communicated to the plaintiff in any written form nor was there any clear agreement between the parties for the prices to be increased.

Albert Chitapi is the Marketing Director of the defendant. He confirmed that the defendant had forwarded the quotation [Exhibit 4] to the plaintiff on the 18th of October 2007 and that he had agreed with Chipango over the telephone that the defendant would be able to deliver 700,000 bottles and caps as and when they became available. He also confirmed receipt by the defendant of the plaintiff's payment of $53 billion on the 9th of November. Deliveries of the goods then began on the 20th of November and continued until it became necessary to review the prices because of the stoppage of BACOSSI assistance. He then met Chinembiri and other Mazoe Citrus Estates staff on the 17th of December and agreed on a new pricing structure. However, he conceded that the e-mails between the parties on the 17th and 18th of December [Exhibits 9A, 9B & 9C] do not reflect any agreement on new prices and that subsequent e-mails on the 24th and 28th of December [Exhibits 12A & 12B] make it clear that there was no such agreement. He further conceded that the agreement with Mazoe Citrus Estates was subject to confirmation by the plaintiff and that no one representing the plaintiff was present at the meeting.

Under cross-examination, Chitapi explained the sequence of the conditions set out in the defendant's standard form quotation [Exhibit 4] as follows: the quotation is sent to and received by the customer; the latter must confirm availability of the product before making payment; after confirmation the customer effects payment; delivery of the product then commences. The price change stipulation only comes into play before confirmation of product availability and before payment of the purchase price is effected. Once product availability is confirmed and the purchase price is

paid, any price change cannot be imposed. In the instant case, the plaintiff did not confirm the availability of the goods between the date of the quotation and the date of payment. Nevertheless, despite that failure to confirm, the defendant accepted the plaintiff's payment of $53 billion as the full purchase price. Moreover, the defendant only increased the unit prices on the 24th of December 2007 after NIPC approval of the new pricing structure.

Contractual Conditions

The principal issue for determination *in casu* is whether the defendant is absolved of its liability to deliver the balance of the plaintiff's order by virtue of the conditions pleaded in paragraph 2 of its plea as amended. In essence, the defendant's plea is that delivery of the remaining goods was subject to (a) the continued availability of the BACOSSI facility and (b) the express term stipulated in the quotation that prices were subject to change at any time without notice.

As regards the BACOSSI facility, there is little doubt that the defendant's pre-existing access to the facility was the principal factor that enabled it to charge a considerably lower price for the products required by the plaintiff and that this in fact influenced the plaintiff to enter into the contract with the defendant. However, there is nothing in the testimony or documentation before this Court to indicate that the continued availability of the facility **after** the plaintiff's order had been placed and confirmed was a condition upon which the contract was premised. Moreover, the fact that the defendant's access to the facility would cease after one month was never communicated to the plaintiff at any stage before the conclusion of the contract. The plaintiff's order was to be fully delivered within 5 weeks (according to Chipango) or 6 to 8 weeks (according to Makomva). The first indication of the BACOSSI facility having terminated was only given at a meeting between Chipango and Makomva on the 24th of January 2008, almost 11 weeks after

payment of the full contract price had been effected. On these facts, it is abundantly clear that the continued availability of the BACOSSI facility was not a condition for the due performance of the contract between the parties.

As for the conditions set out in the plaintiff's quotation, it is clear that the price change stipulation could only have come into play **before** confirmation of product availability and **before** payment of the purchase price was effected. In this respect, Chitapi had no option but to concede that once product availability was confirmed and the purchase price was paid, any subsequent price change could not have been contractually imposed. In the instant case, Chipango met with Chitapi on the 15th of October 2007 to confirm the defendant's capacity to deliver 700,000 bottles and caps over a period of 5 weeks. On the 18th of October the defendant forwarded its quotation for the 700,000 bottles and caps. Thereafter, Chipango called Chitapi to reconfirm the price and, having reconfirmed the price, he proceeded to effect payment of the full contract price of $53 billion on the 9th of November. On the 13th of November Chitapi confirmed receipt of the payment by the defendant. Subsequently, on the 20th of November, the parties confirmed a delivery plan and the defendant then commenced delivery of the bottles and caps. Given this sequence of events, it is very clear that the defendant accepted the plaintiff's payment of $53 billion as the full purchase price before commencing delivery of the contracted goods. Thereafter, the defendant was contractually precluded from changing the purchase price as it purported to do on the 24th of December 2007. Indeed, it would be absurd in any commercial transaction to allow the seller to alter the contract price after he has accepted the agreed amount in full payment and begun delivery of the contracted goods in accordance with an agreed delivery plan.

Specific Performance

It is settled that a plaintiff who elects to enforce a contract is entitled to specific performance where the defendant is in a position to perform the contract – because justice demands that those who enter into contracts should fulfil their obligations. See *Farmers Co-op Society v Berry* 1912 AD 343 at 350; *Smith & Ors v Zimbabwe Electricity Supply Authority* 2003 (1) ZLR 158 at 158G.

However, the Court has a discretion to refuse to grant an order for specific performance on several grounds. In particular, a decree of specific performance might be declined, *inter alia*, where it would operate unreasonably hardly on the defendant or where it would produce injustice or be inequitable in all the circumstances. Moreover, the Court is not confined to the circumstances prevailing at the time that the contract was entered into and is at large to consider the circumstances at the time that specific performance is claimed. See *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378-379 & 381; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781; Christie: *The Law of Contract in South Africa* (3rd ed.) at 579-584.

In the instant case, it is submitted that an order for specific performance would cause undue hardship to the defendant. More specifically, it is argued that the BACOSSI facility was only availed to the defendant for one month and that the defendant would now have to incur its expenses in foreign currency. It is further argued that it would be unduly inequitable to require the defendant to deliver the outstanding balance at twice the original cost (in local currency) and that the plaintiff has not suffered any loss as a result of the defendant's failure to deliver.

Having regard to all the relevant circumstances, both past and present, I am unable to see any merit in these submissions. Looking firstly at the plaintiff's position, it is not disputed that it obtained a bank loan in order to pay the contract price and that it would be required to repay that loan with interest. Moreover, as a result of the defendant's failure to deliver the contracted goods timeously,

the plaintiff was unable to fulfil the projected sales of its own product. On these facts, it is difficult to sustain the argument that the plaintiff has emerged materially unscathed from the transaction *in casu*.

Turning to the defendant's situation, it is common cause that the defendant had already availed itself of the BACOSSI facility on very favourable terms before entering into the present contract. Armed with that commercial advantage, it then promised to deliver to the plaintiff a quantified amount of goods at an agreed price and within a specific period. Before making that promise, the defendant was presumably equipped with all the information and material resources that it required in order to make an economically sound decision on the matter. In these circumstances, the only inference that one can reasonably draw is that the defendant's failure to deliver as promised was attributable to its failure to exercise due commercial diligence. It has obviously mismanaged and squandered the financial advantage afforded by the BACOSSI facility and cannot now entreat the Court to condone its commercial incompetence.

Disposition

It follows from all of the foregoing that the defendant is liable to deliver the outstanding balance as contractually agreed and that the plaintiff is entitled to an order for specific performance of the contract. However, having regard to the evidence before me, I do not think that it would be either feasible or equitable at this juncture to expect the defendant to comply with its contractual obligations within the period of 7 days as per the relief sought by the plaintiff. In my view, a longer period for due compliance would more aptly meet the justice of the case.

In the result, judgement is entered in favour of the plaintiff as against the defendant as follows:

(i) The defendant be and is hereby ordered to deliver 319,240 (2 litre) plastic bottles and 369,320 tearstrip

closures to the plaintiff within 30 days of the date of service of this order upon the defendant.

(ii) The defendant shall pay the costs of suit.

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