BENCHILL INVESTMENTS (PVT) LTD
versus
BATTERY WORLD (PVT) LTD

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 15 and 16 November 2010

Civil Trial

H. Mutasa, for the plaintiff
DLL Morgan, for the defendant

KUDYA J: The facts that gave rise to this case arose in the financial tumultuous period of August 2008 when hyper-inflation wrecked the Zimbabwean economy. The plaintiff company issued summons out of this court on 24 July 2009 seeking specific performance and in the alternative contractual damages for breach of contract in the sum of US$4 000.00. The action was contested by the defendant company.

Most of the facts were common cause. What happened was this. On 13 August 2008, the plaintiff through its managing director Godwin Dingwiza (Dingwiza) went to the Harare town branch of the defendant company to purchase three different types of batteries for its customers. It desired 30 batteries of a type called 622; 10 of a type called 631 and 10 of a type called 652. The defendant's sales representative, one Collin Chakupa confirmed that the batteries were in stock. Chakupa tore a bond paper into half and wrote the quantity of each type and the value of each battery and date stamped and appended his signature on the paper before handing it over to Dingwiza. Chakupa directed Dingwiza to pay for the order using a bank cheque in place of an electronic bank transfer commonly referred to as real time gross settlement, RTGS. The reason for the preference was that electronic bank transfers were taking two weeks to effect payment. Dingwiza duly went to his bank were he applied for a bank cheque in the sum of $250 000.00 instead of the total of $227 978.00 reflected on the piece of paper. He collected the bank cheque on 14 August 2008 and took it to Chakupa on 15 August 2008. Chakupa received the cheque and took it to his branch manager Mrs Jennifer Anne Jayne. The

branch manager informed Dingwiza that his order was too large. In his presence and hearing she phoned Mr Fourie, the Sales Manager based at the defendant head office in Graniteside Harare. Jayne told Dingwiza that she had made a special order for him and that the he should collect his batteries on 18 August. She kept the cheque. On 18 August the batteries were not at hand. On 27 August Chakupa telephoned him to come and collect half the number of type 631 batteries and some undisclosed number of the 622 type. When he arrived at the branch he was shown the consignment which had been set aside for him. Jayne approached him and advised him that head office had ordered her not to release the batteries to him. She referred him to Fourie. Dingwiza went back to his office and wrote a letter of 1 September detailing what had transpired from the time he received the quotation through to the events of 27 August and seeking the delivery of the order. Mrs Jayne responded to it on the same day. She denied personally giving him a "quotation" and confirmed that she did not have the batteries in stock on 15 August and that she was to make a special order which she would supply once approved by Mr Fourie. Mr Fourie approved but for reasons not known to her the batteries were not dispatched from the factory. She regretted that she had kept his cheque for two weeks and had failed to supply the order. She indicated that he had on a few occasions declined to collect his cheque insisting on the supply and returned the cheque. He refused to accept the cheque and returned it to the defendant.

He went to see Fourie at head office. Fourie advised him that as the cheque had not been deposited into the defendant's account, the plaintiff's purchase could not be honoured. Dissatisfied, Fourie referred him to the managing director who confirmed Fourie's reasoning. He sought legal advice from Chadyiwa and Associates, legal practitioners who wrote to the defendant on 11 September 2008 seeking delivery of the batteries and threatening, amongst other things, legal action. The defendant's erstwhile legal practitioners responded to the letter on 19 September and denied that an agreement of sale had been executed through acceptance of the cheque. The defendant regarded the so called quotation as an inquiry. The parties' legal practitioners exchanged further correspondence on 25 September and 20 October 2008 which failed to resolve the dispute, hence the present action. On 16 June 2009, Dingwiza sought three quotations for

similar batteries from three different companies. These were Easycount Battery Centre (US$4 350); Divart Spares (US$4 100); and battery World (US$3 555). He averaged the quotations and arrived the US$4 000.00 which he seeks in the alternative as the reasonable cost of the 50 batteries which he purchased but which the defendant refused to deliver.

Under cross examination, Dingwiza was taken to task over three issues. The first was that the piece of paper that Chakupa wrote was not a quotation; the second was that he paid a cheque in excess of the amount indicated on the piece of paper because he was aware that the cost of each battery indicated thereon was subject to change without notice and thirdly that no agreement of purchase was concluded between the plaintif and the defendant. The first two challenges were factual while the third was legal.

In response to the first issue, Dingwiza maintained that the "rough scrap of paper" as it was termed by Mr Morgan, was a quotation. Dingwiza had dealt with the city office branch of the defendant in question in his capacity as the managing director of the plaintiff and its sister company, Selfex Investments, and had received standard quotations on special printed documents which were dissimilar to the "rough scrap of paper". It seemed to me that the rough scrap of paper was a quotation notwithstanding that it was not on the standard quotation paper. This was because he requested for a quotation from Chakupa. Chakupa then wrote out a quotation which bore the defendant's name, date stamp and his signature in addition to the specifications of the order and price per unit which was then added up to one grand total. Chakupa was not called to dispute Dingwiza's testimony that both Dingwiza and Chakupa regarded the piece of paper as a quotation. Again, after Dingwiza wrote a letter of complaint, the branch manager Mrs Jayne responded to the letter by hand on a bond paper and not on the official letter head of the defendant. It would appear to me that the defendant did not have any difficulties in communicating with its customer on rough scraps of paper. I am satisfied that Dingwiza told the truth that he was given a quotation by the sales representative Chakupa.

On the second factual dispute, Dingwiza produced other invoices by the defendant dated 25 June 2008, 21 July 2008 and 23 September 2008 which demonstrated that he used to pay high value cheque for battery purchases for which he received a refund. The

originals of the copies he produced were produced by the defendant. The averments in the plea denying such a practice between the parties were therefore ill founded. The suggestion in cross examination that overpayment betrayed absence of a fixed price was demonstrably wrong. It was accepted by Mommsen, the managing director of the defendant that at he time prices of batteries were controlled by the National Incomes and Pricing Commission. I am satisfied that Dingwiza was a truthful witness in regards to the quotation and practice of overpaying for batteries in order to receive a refund.

Graham Pierce Mommsen, the managing director of Battery world testified. He was not involved in the day to day operations of the town branch. He spoke to the general policy of his company on quotations in the hyperinflationary environment that characterized the Zimbabwean economy at the time. He stated that at the material time prices for the 42 range of batteries that his company traded in was fixed by the National income and Pricing Commission. His testimony that his company gave out quotations that were valid for 24 hours was contradicted by his town manager Mrs Jennifer Anne Jayne (Mrs Jayne) who said the quotations were valid for 48 hours. While he spoke to Dingwiza when he came to complain and demand for the 50 batteries in September 2008, his averments that he was briefed directly by Mrs Jayne on the issue was disputed by her as she stated that she only dealt with the Group Sale and Marketing manager Mr Fourie. His averment that the scrap of paper was a price list though confirmed by Mrs Jayne in her evidence was at variance with Mrs Jayne's acknowledgment in her reply to Dingwiza's letter on 1 September 2008 that it was a quotation. He produced new price list of 5 September as exhibit 2. He agreed that prices were fixed by price controls until 5 September.

Mommsen's testimony was weakened by fact that he did not deal with the plaintiff's managing director until at the tail end of the dispute. He did not know what actually transpired. Mrs Jayne denied ever talking to him directly over the issue. She dealt with Fourie. When he said dealt with her over the cheque twice before the visit by Dingwiza, he was not being truthful. Again, if prices were fixed there would have been no fear of price movements and it would not have been necessary for the plaintiff to pay higher value cheques to absorb the unknown but anticipated inflationary induced cost.

In her testimony Mrs Jayne gave two reasons for not banking the keeping the plaintiff's cheque. The first was that Fourie advised her to return the cheque if she did not have batteries in stock. In her letter of 1 September 2008 she intimated that she had on several occasions requested Dingwiza to collect the check but he had insisted on the fulfillment of the order. The second was she could not bank it in the absence of an actual cash sale. She gave some answers which contradicted her letter of 1 September 2008 and some of her testimony was not canvassed with Dingwiza when he was cross examined.

The outcome of the pre-trial conference of 28 July 2010 was the filing of a joint pre-trial conference minute on 28 September 2010 referring nine issues to trial. From the pleadings, evidence and arguments I perceived that these could be reduced to the following three issues:

1. Whether the parties concluded an agreement of sale on 13 August 2008 or at any time after that

2. Whether the defendant breached the agreement

3. The nature of the relief that the plaintiff is entitled to

I proceed to determine these issues. In its declaration, the plaintiff avers that a contract of sale was concluded with the defendant on 13 August 2008. The evidence of Dingwiza was that when he entered the town branch of the defendant he asked Collin Chakupa for a quotation for 50 batteries. Chakupa had them in stock and he wrote out the quotation to the tune of ZW$227 798.00. Dingwiza indicated his intention to purchase the batteries through an electronic bank transfer. Chakupa advised him to utilize a certified bank cheque. Dingwiza left and went to his bank where he applied for a bank cheque. He collected the bank cheque the following day. He went back to the shop to purchase the batteries on 15 August 2008 and found the batteries out of stock.

In determining whether a contract of sale was concluded, it is necessary to return to the basics of a contract of sale. I must determine the stage at which Dingwiza made the offer and when Chakupa accepted it. Christie's *The Law of Contract in South Africa* 3rd ed at page 42 states that:

> "There seems no good reason for a member of the public, or the court, to conclude that a shopkeeper's action in exposing goods for sale should be

> interpreted as an offer (as suggested by Wessels) or as a conditional offer (as suggested by Kahn) or as a mere declaration of intention (as suggested by Winfield) to the exclusion of other possibilities. Tacit or implied contracts and tacit or implied terms in contracts are not inferred unless it is necessary and not merely reasonable to do so, and the best conclusion seems to be that the attachment of a price ticket to goods exposed for sale, without more, creates no necessary inference of a firm offer of those goods for sale."

The position in England is set out in *Benjamin's Sale of Goods* 3rd ed in para 135 at pp 95-96 in these terms:

> "In the law of sale of goods, it is well settled that the display of goods in a shop or shop-window is ordinarily nothing more than an invitation to treat. The shopkeeper does not make an offer to sell; it is the customer who makes an offer to buy, which the shopkeeper may accept or reject at his pleasure. There is therefore no sale or agreement to sale, even in a self-service shop or supermarket…….The same general principle applies in the case of an advertisement, catalogue or price list of goods: each is normally construed as an invitation to treat, for otherwise (it is said) a seller whose stock is necessarily limited might be made liable to an indefinite number of buyers."

While as noted by Dr Hackwill in *Mackeurtan's Sale of Goods in South Africa* 5th ed at page 1 "no such distinction exists in our law" between a sale and an agreement to sell as in English law, it seems to me that the general principles in regards to goods displayed in a shop or shop-window is the same. See *Crawley v R* 1909 TS 1105 cited by Christie, ibid, at p.41.

Once Chakupa had indicated that the batteries were in stock and supplied Dingwiza with the purchase price, if Dingwiza had $227 798.00 in cash, he would have made the offer to purchase them by handing over the cash to Chakupa who would have accepted the offer by receiving the cash. At that stage the plaintiff and the defendant would have concluded a contract of sale. The items were identified, the price known or easily ascertained and the parties were of one mind, the plaintiff to buy and the defendant to sell. The facts reveal that Dingwiza did not make a cash sale. However Dingwiza went away. In my view Chakupa would not know whether Dingwiza would make a firm offer to buy until he brought the bank certified cheque. In any event the quotation that was supplied to Dingwiza by Chakupa fell into the category of an invitation to treat. In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA

555 (A) at 569E CORBETT JA held that the appellant's a quotation constituted an invitation to treat or to do business while the respondent's order constituted a contractual offer.

In the present case, it was common cause between the parties that a bank certified cheque was as good as cash. The bank certified cheque came on 15 August 2008. It was common cause that the 50 batteries required by the plaintiff were no longer in stock. They had been sold to other customers. The failure by Chakupa to reserve the batteries for Dingwiza together with the added failure by Dingwiza to take issue with Chakupa over the disposal of the 50 batteries that had been in stock demonstrates that there was no contract of sale that had come into existence on 13 August 2008. Even though Chakupa was not called to testify, it was never Dingwiza's testimony that after he expressed an intention to buy, Chakupa advised him that he was reserving the batteries for him in anticipation of payment. After all when Dingwiza left on 13 August 2008 with the quotation he was being invited to come and do business with the defendant and make an offer to purchase the batteries once he had a bank certified cash. On the evidence of Dingwiza, I am satisfied that no contract of sale was concluded between the plaintiff and defendant on 13 August 2008.

Dingwiza testified that Mr Fourie, who was also not called by the defendant to refute the allegation, intimated to him in mid September 2008 that had the cheque been banked, the 50 batteries would have been delivered to him. Dingwiza further averred that the plaintiff could not be penalized for the defendant's failure to bank the cheque once he had handed it over to Chakupa. It was on the basis of these averments that Mr *Mutasa*, for the plaintif, contended that by accepting the cheque, the defendant demonstrated the existence of a prior contract of sale. The facts from Dingwiza's testimony were that after he handed the cheque to Chakupa, he was advised that the batteries were no longer in stock. He waited as Chakupa conferred with his branch manager Mrs Jayne to whom he handed over the cheque. The branch manager invited Dingwiza to her work station and reaffirmed that the batteries were out of stock. She advised him that she would make a special order for him directly with the factory after she had talked with Mr Fourie on the telephone and requested him to collect the order on 18 August. Apparently that special

order was made with the manufacturer but the required batteries were never supplied to the town branch and by extension to the plaintiff.

If I understood Mr *Mutasa* well, he contended in the alternative that a contract of sale was concluded on 15 August 2008 because Mrs Jayne accepted the cheque and asked Dingwiza to collect the batteries on 18 August. Mrs Jayne in her testimony did not agree with Dingwiza on what transpired when he brought the cheque. She basically stuck to the contents of her letter of 1 September 2008 that when Dingwiza brought the bank cheque of ZW$250 000.00 she explained to him that she did not have the batteries in stock and advised him that she would make a special order for the batteries and if the order was approved and batteries delivered she would supply. I agree with Mr *Morgan,* for the defendant, that the cheque was accepted on two conditions, firstly the approval of the order and secondly, the availability of batteries. As it turned out the order according to Mrs Jayne's letter, which was contrary to her oral evidence, was approved but the factory did not deliver the batteries to the defendant. At best she concluded a conditional sale with the plaintiff on 15 August 2008 but it fell through because the factory did not deliver the order due to the viability problems occasioned by price controls.

I accept that Mrs Jayne gave evidence that contradicted her letter of 1 September 2008. In her evidence she regarded the paper given to Dingwiza by Chakupa as a price list yet in her letter of 1 September she agreed with Dingwiza's letter of the same date that it was a quotation when she stated that "I personally did not give you a quotation for the batteries when you brought your bank cheque of 250 000." In her evidence she stated that she advised Dingwiza to make the order directly to Fourie yet in the letter she said she would make the order herself. She was truthful in her explanation that cash sales were at a discount of 25% of the controlled price for which the plaintiff paid the high value cheque. She contradicted Mommsen by saying she dealt directly with Fourie and never discussed the issue over the telephone with Mommsen. Despite her shortcomings I found her to be a truthful witness on the events of 15 August 2008. Her letter of 1 September 2008 which the plaintiff accepted as the truth indicated that batteries were in short supply. It was common cause that the period in question was one of roaring hyperinflation where despite price controls the prices of commodities were changing

rapidly in tandem with an exchange rate based on the illegal parallel market. Despite this economic phenomenon, the price of batteries did not change until 5 September 2008. But by then, having failed to source the batteries, the plaintiff through Mrs Jayne had by returning the cheque to the plaintiff by letter of 1 September cancelled the conditional sale. The probabilities favoured Mrs Jayne's story that the cheque was accepted on condition of approval of the order and availability of the batteries from the manufacturer, Central African Batteries (Pvt) Ltd. If at all a sale was concluded on 15 August, it was a conditional sale. The failure to fulfill the second condition before the cancellation of the contract was not of the defendant's making.

The evidence adduced by Dingwiza on the discussions he had with Fourie, Mommsen, Chakupa and Mrs Jayne after 15 August 2008 until the issuing of summons centered on whether or not the defendant was legally obliged to deliver the batteries. Whether or not Dingwiza gave the correct account of what transpired does not alter the legal position that he did not conclude a contract of sale for the plaintiff with the defendant on 13 August 2008 or execute anything other than a conditional sale on 15 August 2008, which conditional sale was cancelled on 1 September 2008.

Accordingly I answer the three issues against the plaintiff. I hold that the defendant did not enter into an agreement of sale with the plaintiff on 13 August 2008. Further, that even if it entered such an agreement on 15 August, it was conditional sale, which the defendant did not breach because it was not responsible for the non-fulfillment of the second condition before it cancelled it. The defendant is therefore not liable for either specific performance or in the alternative contractual damages for breach of contract.

The defendant prayed for costs based on the Law Society tariff. The definition, justification or legality of such a scale of costs was not argued before me. Costs being in the discretion of the court I see no reason why the defendant should not be awarded its costs on the ordinary scale.

Accordingly, the plaintiff's case is dismissed with costs.

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