

ASSOCIATED NEWSPAPERS OF ZIMBABWE PRIVATE LIMITED  
versus  
GEOFFREY NYAROTA

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 28 & 29 September, 1 & 2 October 2015,  
4 July 2016 & 7 December 2016

**Civil trial**

*T Mpofo*, for the plaintiff  
Defendant in person<sup>1</sup>

TSANGA J: The plaintiff, Associated Newspapers of Zimbabwe (ANZ) is the publisher of the Daily News, a newspaper circulating in Zimbabwe. It was founded by the defendant, Geoffrey Nyarota, (hereinafter referred to as Mr Nyarota) who became its editor up until 2002. In 2003, the paper was shut down by Government owing to its failure to meet certain registration requirements. It is in the processes leading to its re-launch that this trial action finds its genesis.

ANZ claims US\$ 60 000.00 as a refund for purchase price it paid to the defendant, Mr Nyarota, in 2009, for a news and publishing website called *zimbabwetimes* which he had been running from the United States after leaving the Daily News. The expectation was that the website would be converted to the Daily News website once the latter had obtained an operating licence. The agreement regarding the purchase of the website was confirmed through various email correspondence between the parties. ANZ alleges a fundamental breach on Mr Nyarota's part in that the website was never delivered and neither did it get the benefit of the archived material on the website. It also claims interest at the prescribed rate as well as costs of suit.

The essence of defendant's plea is that the website was in fact delivered on the 1<sup>st</sup> of July 2009 arising from the agreement of its purchase, even though ANZ only paid for it in October 2009. As such his defence is centrally that with effect from the 1<sup>st</sup> July of 2009 the

---

<sup>1</sup> Defendant was initially represented by Ms Mahere up to the point when he had finished testifying and was about to be cross examined. She was instructed by Scanlen and Holderness. The case having gone beyond its allocated number of days, it became a partly heard matter. On its resumption the defendant indicated that he was no longer able to meet legal costs and would complete the case as a self-actor.

*zimbabwetimes* website effectively belonged to its purchaser the ANZ, with him playing a managerial role under a secondary agreement for management of the website.

At the time of the trial, some of the issues that had characterised the dispute that ANZ had with Mr Nyarota had fallen away. Those that remained touched squarely on the delivery or otherwise of the website and whether the plaintiff was entitled to a refund. They were as follows:

- a) Whether or not the defendant delivered to the plaintiff the website purchased by the latter in terms of the agreement between the parties.
- b) What are ownership and administrative rights in respect of a website?
- c) How are these transferred?
- d) Whether the plaintiff is entitled to a refund of the sum of \$60 000.00 plus interest on the said sum at the prescribed rate from the date of demand being 9 June 2010 to the payment of in full.
- e) Costs of suit

### **The plaintiff's evidence**

Mr Jethro Goko gave evidence on ANZ's behalf at the trial, in his capacity as chief executive officer of ANZ. He explained that sometime in 2008 he engaged Mr Nyarota who was then based in the United States of America regarding re-launching of the newspaper. At the time Mr Nyarota was running the *zimbabwetimes* which ANZ believed would be an excellent platform for re-launching its operations as the Daily News. This view stemmed from the fact that the website was a known brand with a reading public. To add to that, ANZ held the firm belief that archived news is as good as fresh news and viewed Mr Nyarota's website as giving it a necessary head start. Furthermore, ANZ already knew Mr Nyarota as a key founder member of the Daily News and likewise Mr Nyarota already knew what the Daily News was about. As Mr Goko iterated, the fit was deemed mutually beneficial.

He emphasised that what was communicated through email to Mr Nyarota at the very onset was that he would be paid to relinquish control of the website and that it would become an ANZ product offering. ANZ also expected to assume the responsibility of all the bills that needed to be taken care of regarding the website upon purchase.

It is not in dispute that the parties ultimately settled on USD\$60 000.00 as the purchase price for the website from Mr Nyarota. It is also not in dispute that the parties agreed that Mr Nyarota would also receive a management fee of USD\$7050.00 a month for running expenses for the website in the interim from the United States pending the

relicensing of the Daily News in Zimbabwe. The email to Mr Nyarota from Mr Goko dated 24 August 2009<sup>2</sup> captured the salient points relating to the takeover of the website as follows:

1. "We agreed that ANZ would take over ZimTimes with effect from July 1, 2009, for a consideration fee of US\$60 000.00.
2. ZimTimes would become The Daily News as soon as it was practically and legally possible to do so.
3. No due diligence would be undertaken, and ANZ would take care of all the portal's expenses as from that date.
4. Of the \$60 000.0, ANZ would immediately pay you a deposit of \$40 000.00 with the balance of \$20 000 to be paid by the end of this year. (December 2009)
5. It was agreed that of the \$61 150.00 that I hope you will have in your accounts by the end of this week, this would be made up of \$40 000.00 deposit, as well as \$21 150.00 that represents the budget of the ZimTimes website, for the quarterly period July August and September 2009- at an average monthly budget of \$7050.00
6. It was further agreed that this monthly ZimTimes budget excludes your cost of living allowance of \$4000.00 a month which is currently been paid by a generous friend of the website".....

The remainder of the agreed terms related to the broad framework of the relationship and a role that ANZ envisaged Mr Nyarota could play at ANZ.

In his evidence Mr Goko emphasised that the agreement was between ANZ and Mr Nyarota with no involvement of any other third parties. In other words, his assertion was that it was Mr Nyarota who was paid directly for the technical management of the website. He also said that on ANZ's part, its expectation was that Ecoweb was going to take over running the website from Zimbabwe once they had sorted out their licence issues. This, however, had not been part of the discussion with Mr Nyarota.

The parties had continued their active email engagement over the ensuing months. On April 28 2010<sup>3</sup> Mr Goko communicated to Mr Nyarota that Ecoweb was in fact ready to start hosting the daily news portal and that in order to fully control the website, ANZ needed to have the domain name, passwords, and other protocols. The email was specific that what they required was to be advised of the current ISP which was hosting the site to transfer the information from their servers to Ecoweb's servers. He also emphasised their keenness to see the migration of the website from the then host Lunarpages to Ecoweb. Mr Nyarota was put in touch with the relevant people at ANZ to facilitate this process of migration. Mr Goko's evidence was that still no migration occurred. It had then emerged that Mr Nyarota did not have the information relating to the passwords for the website as he had in fact been

---

<sup>2</sup> Page 8-9 of Exhibit 1 – Plaintiff'

<sup>3</sup> Page 20 of Exhibit 1

managing the website through one Joshua Dziba, the webmaster who was the liaison person with Lunarpages. Mr Goko disputed as part of his evidence that they owed anything to Mr Dziba who was said to have pointed out that there were monies owed to him which still needed to be paid before he could attend to the transfer. The essence of his evidence was that ANZ never got the website and eventually had to launch another one. It had been anticipated that the website would be up and running on 5 May 2010.

In cross examination Mr Goko denied that operational control of the website had been taken over in July 2009 and also disputed that he was aware that the operational costs specifically included the payment of a webmaster. He said that what had been agreed was to give Mr Nyarota enough money to run the website and that what he decided to do with it in terms of whom he paid was his own business.

Much of the cross examination of Mr Goko by Ms Mahere who was then representing the defendant centred on the role that ANZ had envisioned Mr Nyarota would play in Zimbabwe once the paper had been re-launched given their perception that he was in fact the face of the Daily News. A running theme of the cross examination was that it had always been envisaged that Mr Nyarota would continue to manage and run the website even when it became the Daily News. She put it to Mr Goko that he reason why Mr Nyarota did not deliver the website was that he would continue to run it. Mr Goko's response was that there was a need to separate the issue of the purchase of the website and the discussion that the parties had had regarding a possible relationship with Mr Nyarota.

He was also cross examined on the issue of late payments from the administrative costs of the website. It was put to him that the difficulties around the transference of the website were equally a result of the failure by the ANZ to pay the service provider. Whilst he conceded in cross examination that the money for the running costs of the website was behind schedule as the payment of February had not been made in April, he was adamant that late payment had never at any time stopped the running of the website. He also insisted that situation regarding payment had been rectified. He also said that with effect from 1<sup>st</sup> April 2010, the administration fee for the website had fallen away because the Daily News was ready to take over its website. He disputed the allegation that Mr Nyarota had delivered a functional website in early April 2010 and emphasized that what he had merely done was to tinker with the face of the website but that the domain name was never changed nor when any passwords transferred. He also said that ANZ had no problems with the content of the website but that it was the delivery of the website that was at the crux of the dispute. His

evidence was that in late May 2010, Mr Nyarota was still trying to hand over control of the website.

In re-examination, he highlighted that Mr Nyarota had attempted as evidenced by correspondence between the parties, to hand over operational control of the website but had ultimately not done so. He also said that ANZ had decided to move over to Ecoweb because they wanted a host that they could reach any time without having to call the US. He said Mr Nyarota himself agreed that it made sense.

### **Evidence of the expert witness**

Mr Russel Holland also gave evidence on plaintiff's behalf. He is the Systems Administrator for the Zimbabwe Internet Service Providers Association (ZISPA). He manages the system for domain name registration for the *co.zw* space. He explained to the court that his work entails registering new domain names, making changes and modifications and deleting domain names. He also manages the primary name server on which information is recorded and the associated data base of each domain name. As such, he spoke as an expert in the field.

His evidence canvassed issues such as what gives one complete access to upload to a website including the relationship between owning and controlling a website and a domain name. He further highlighted that a change of name of a website would in itself not amount to change of ownership as a complete purchase would entail the following:

- a. There is a need for the transfer of the domain name to go through
- b. There is a need for the transfer of the associated computer files
- c. There is a need for the transfer of the administrative controls of the website being the user name and password which then allow the owner to upload material as well as maintain a relationship with the ISP of their choice.

To accomplish the above, a new owner essentially needs to know the current user name; the password; the log in interface, as well as who the previous owner had gone through to get to the key provider. The hosting company would also need to be advised of the change of ownership. He stressed that it would not be a complete purchase where the administrative control did not move to the purchaser. `

Materially, he stated that he had also gone through a website which allows one to examine the history of a domain from snapshots taken that reveal who owns the domain name

at a given time and who is registered to it. His interest was in the *zimbabwetimes.com* website. Exhibit No.2 was admitted into evidence with the necessary information of his findings. In essence, his finding was that the *zimbabwetimes.com* had become the new owner of the domain on the 17<sup>th</sup> of May 2008 with Mr G Nyarota as the administrative contact. The technical contact was Lunarpages which was the hosting company, essentially managing the server on which the website was being hosted. What is of significance was his observation that according to the snap shot, registration for the domain was due to expire in September 2010. He also observed that as of October 2010, Mr Nyarota was still the administrative contact. However, the domain name was also up for auction as the owner of the domain name had failed to renew it. As of 6 December 2010 the new owner had become Mr Stephan Schwab and had later changed to *zimbabwetimes.vancouver*. He indicated however that the details of the administrator of this domain were hidden through a privacy body.

The crucial point from the snapshots that he presented in evidence was that at no time was that domain ever transferred to ANZ. As such, his conclusion was that there was no evidence of a successful purchase. His cross examination by Ms Mahere was more of a quest for technical clarifications and did not in my view alter the findings he had placed before the court which in my view were in fact helpful to both sides.

### **The defendant's evidence**

The crux of defendant's evidence was that problems regarding the delivery of the website were due to ANZ's failure to pay running costs for the website in accordance with the parties' contract. His evidence was that the makings of the collapse of the contract started in March 2010<sup>4</sup> when the plaintiff terminated the management agreement it had with him with effect from April 2010. Mr Nyarota maintained in his evidence that the delivery of the website effectively took place when the parties agreed to its sale on the 1<sup>st</sup> of July 2009 and that he had thereafter held the website under a management arrangement, with ANZ paying for its administration. He described his understanding of his role as that he would take care of the management on behalf of the new owner and would continue to ensure that it was populated with correspondence and attend to its administration costs that were pertinent to running a successful website. He emphasised that in doing all this he was vested with total control of the website by ANZ as a result of their total faith in him. He stated that the agreement was not that the Daily News website itself would start on the 1<sup>st</sup> of July 2009, but

---

<sup>4</sup> See page 13 of Exhibit 1

that ANZ would take over *zimbabwetimes* website which would later become the Daily News.

He said that he had realised as well as fully appreciated that from July 1 2009, it was no longer his website and that he took the necessary steps to ensure that new owners were happy with it. Consequently, his assertion was that if there were any problems relating to the transfer of the website, this was due to ANZ's failure to pay running costs in accordance with the contract as agreed to by the parties. His documents were admitted as Exhibits 3 and 4.

He emphasised that the parties had never discussed the technical aspects as the agreement at the time was purely editorial, relating as it did to the contents of the website. He confirmed that he had not communicated that Lunarpages were hosting the website and that the decision on the webmaster vested in him as he was fully seized with power and capacity to manage without recourse to ANZ or Mr Goko. He also said that there was no agreement or specification of which domain would be used for the new website and neither had the party's agreement specified by name who would manage the technical aspects of their agreement. Throughout 2009 he had not been asked for the domain name or to be put in touch with the webhost. His point was that there had been no complaints from ANZ that it had not taken over website because the takeover of the website was non-technical at the material time. His view was that what ANZ was "taking over" was the ownership of the website but doing so through him as they retained him as its manager. Mr Nyarota drew a distinction between transfer of the content of the website and the transfer of the hosting of the website as two separate issues. His view was that what he had sold was the content of the website. As regards the website itself, his view was that he had sold the website to ANZ in July 2009 and that from that time he was merely managing it on their behalf as per the parties' secondary management agreement. However, he conceded in cross examination that he had not only sold files and data on the website but that he had also sold the pathway to the website but qualified his acceptance of this fact by emphasising that he was then engaged by ANZ to be in control of that website. He explained that Joshua Dziba was the webmaster and that there had been no need to terminate his services when ANZ bought the site in 2009.

He zeroed in on his understanding of what the parties agreed being that he would play both an editorial and a management role at ANZ and that he would manage the online version of the newspaper. He was emphatic that he never envisaged relinquishing a management role. He had arrived in Zimbabwe from the United States in February 2010. He further explained that the dummy site of the *dailynews* which he had created in January 2010 was for the

benefit of the two Directors of ANZ, Mr Goko and Mr Smail. This was to impress upon them how meticulously he was carrying out his work. His version was also that the website became the *dailynews* website on 1 April 2010 amid congratulations for a job well done.

He said the arrival of Mr Luchie Marumahoko on to the scene in April 2010 to take over the management of the site at the behest of ANZ was a total negation of the management arrangement that the parties had agreed to in September 2009 in terms of which he was to run the website. The attention of the court was drawn to the letter in which Mr Goko had written to Mr Nyarota on March 17 2010<sup>5</sup> indicating that from 1 April 2010 ANZ would have a full time Chief Finance Officer through whom all payments would be made to service providers and writers. It specifically stated that the running expenses would not be handled by Mr Nyarota from then on. Also captured in that letter was the communication that Ecoweb would be hosting the website because it was now practically possible to do so. This was communicated thus: “By the way am I am arranging for Ecoweb to host our website as soon as it is practically possible.” Mr Nyarota stated in his evidence that he considered Mr Luchie Maromahoko who had been tasked with overseeing the transfer of the hosting of the website as having usurped his managerial functions and that it was for his engagement in April 2010 that things started to go wrong.

In cross examination Mr Nyarota said he had eventually transferred the correct details of the user name and password to Mr Luchie Marumahoko who was facilitating the transfer. His view was that at that point ANZ had two webmasters, Mr Marumahoko whom the ANZ employed and Mr Dziba who had been managing the webmaster under Mr Nyarota’s direction and whom he said ANZ had therefore inherited when it bought the website from him. He was adamant in his re-examination that the new webmaster refused to pay the old webmaster for services rendered and hence the failure to complete the migration successfully.

Having been dismissed from the managerial position by letter dated 27 May 2010, he stated in that he had no way of ascertaining whether ANZ had control of the domain or administrative protocols of the site or of the files. His view was that if ANZ is not using the site, only they could explain why they are not able to use it.

### **The legal arguments**

Mr *Mpofu* who appeared for the plaintiff, submitted that what the parties concluded was a synallagmatic contract in which the parties were to carry out their respective

---

<sup>5</sup> Page 20 of exhibit 3



obligations. He cited as his authority, the case of *Blumo Trading (Pvt) Ltd v Nelmah Co (Pvt) Ltd & Anor*<sup>6</sup> which puts forth the principle that a party cannot enforce a contract unless they have performed their side of the bargain. He argued that under the circumstances of non-fulfilment, restitution of the \$60 000.00 paid was in order. He also relied on the cases of *Extel (Pvt) Limited v Crown Mills (Pty) Ltd*<sup>7</sup> *Sacs NO v Proudfoot SA (Pty) Ltd* 2006 (6) 358 (SCA). Since Mr Nyarota did not rebut the expert witness's evidence that no transfer had taken place this evidence was taken to be admitted. Several Supreme Court decisions were cited in support of the contention that what is asserted and not disputed is taken to be admitted. (*Nhidza v Unifreight Ltd*,<sup>8</sup> *Minister of Land and Agriculture v Commercial Farmers Union*<sup>9</sup> SC; *Daniel Shumba & Anor v ZEC & Anor*<sup>10</sup>). Furthermore, he argued that Mr Nyarota was bound by his plea in which he had submitted that he had delivered the website on July 1 2009, when in reality as late as May 2010 he was still trying to effect delivery. Since purchase of the website was so that the readers would have access to historical articles contained on the *zimbabwetimes* website, with the website not having been successfully delivered, Mr Mpofu argued that clearly ANZ has suffered prejudice.

Mr Nyarota's closing submissions emphasised the fact that the nature of their agreement was a management contract which had not dealt with technical aspects of the website. He pointed to the email that captured what the parties had agreed to as a necessary starting point in appreciating the agreement. He also zeroed in on the fact that the plaintiff could not claim a refund for a website which it had owned with no problems from the 1<sup>st</sup> of July 2009. He put forward a counterclaim in response to the claim for restitution, being that each party would need to be restored to their original position. It was improperly made at the stage of closing submissions. His submissions being largely of a factual nature on what was agreed are canvassed more fully in analysis.

## **Factual and Legal Analysis**

The plaintiff's claim fundamentally rests on the fact that there was ultimately no delivery of the website, hence its entitlement to a refund. It is the pivot upon which

---

<sup>6</sup> *Blumo Trading (Pvt) Ltd v Nelmah Co (Pvt) Ltd & Anor* 2011 (1) ZLR 196 (H)

<sup>7</sup> *Extel (Pvt) Limited v Crown Mills (Pty) Ltd* [1998] 4All SA 465 (A), 1999 (2) SA 719 (SCA);

<sup>8</sup> *Nhidza v Unifreight Ltd* SC 27-99.

<sup>9</sup> *Minister of Land and Agriculture v Commercial Farmers Union* SC 111/2001

<sup>10</sup> *Daniel Shumba & Anor v ZEC & Anor* SC 11/08

arguments relating to restitution and admissions made, are crafted. In his closing submissions Mr *Mpofu* explained the claim thus:

“It is clear that the defendant has failed to understand plaintiff’s claim as well as his position in respect thereto. The matter is a simple one. At the end of the day it is accepted that the website was not delivered to the plaintiff and that it has not enjoyed the results of its outlay. Defendant received USD\$60 000.00 and was mandated to deliver a website. Defendant has not delivered that website. He has not undertaken to deliver it. He must therefore refund plaintiff what he has paid. The matter is that simple”.

The matter is in fact not that simple. Whether or not there was delivery of the website in terms of the agreement between the parties is in my view as much a factual question as it is a technical one. This is more so given that what has led to the necessity to ultimately have this dispute surrounding the website, resolved in a court of law, emanates from the reality that parties to a dispute inevitably see an issue from different perspectives. These are often characterised by a selective standpoint which they bring to bear upon the dispute. Needless to say, perspectives are generally not shared by the other party because perceptions of what is salient or what is relevant or irrelevant may not be mutual.

Thus the defendant’s perspective on the other hand as I understand it, is that in arriving at a just conclusion, it is necessary for this court to be informed by the dimensions or characteristics of the agreement that pertained to the website in order to grasp what actually happened between the time that the website was bought by ANZ up to the time when delivery is supposed to have failed.

The expert’s evidence was clearly valuable and useful from the perspective of setting out the processes involved in the full transference of a website from one party to another, which ANZ says Mr Nyarota failed to do. The difficulty with an approach to a dispute that looks predominantly at the technical outcome, is that technicalities by nature limit the dimensions that are to be included in the analysis of a dispute. Such a “narrowing perspective” may dismiss factors as irrelevant when they are in fact central to the understanding of the legal dispute.

A focus on the technical aspects of delivery of the website as the end result would indeed block the “whole story” in the crucial task of what ought to be analysed in arriving at a just conclusion. It would fail to acknowledge the range of factors that may have an equally significant bearing on the understanding of the case. Thus in its analysis this court will carefully examine “what all was involved” as opposed to a more hasty conclusion based on a technical failure to deliver the website. It is such an approach to analysis which in my view would result in doing justice between the parties. Equally as fundamental in the analysis of

the evidence towards dispute resolution, is whether there was in fact any relationship between the dimensions or any characteristics of their agreement and the technical failure to deliver the website.

It is a fact that at the time the agreement to purchase the website in 2009 was reached, the Daily News was not yet relaunched. Even then, Mr Goko's communication to Mr Nyarota is clear that the takeover would be immediate and that all costs relating to the hosting of the website would become the financial charge of ANZ. It is also clear that it is control of the website that the ANZ was after, and control cannot be about a cosmetic purchase. Mr Nyarota's appointment to manage the website thereafter should not be allowed to cloud the issue of what the intention was. It was that Mr Nyarota would relinquish control of the website. It is evident from the letter that captured the essence of the agreement between the parties<sup>11</sup> that what was envisaged was the transfer of ownership of the website to ANZ inclusive of its content and control. This is also supported by an email dated August 12 2009<sup>12</sup> that the money that was being paid to him for "relinquishing" control of *zimbabwetimes*. The intention was at all times to vest total ownership of the website in ANZ on the understanding, however, that Mr Nyarota was to continue running the website up until such as time that the ANZ was itself ready to take over. Until such eventuality, Mr Nyarota had continued to operate the technical side of the website. He had been using Mr Dziba as webmaster and Lunarpages as host. The parties were fully aware that there were web costs involved and that there were players, behind those costs who may however have been nameless at the time.

Mr Nyarota's distinction between selling the website and the technical aspects of the transference of the website now needs to be examined. This would seem to suggest that the sale was in "bits." It is here that the factual reality needs to be understood conjunctively with the technical reality. The website could not certainly have been purchased for \$60 000.00 with the expectation that the components that made up the sum total of the whole, in relation to a website, would be excluded. The website was bought as a complete unit inclusive of domain and the coding associated with the site. As explained by the expert witness, a change of name of the website is not what transfers a website. In other words, everything associated with the functionality of that website is what the ANZ had in mind when in entered into an agreement about relinquishing control. Assigning Mr Nyarota the authority to continue managing the site did not mean that the sale was limited to the content of the website only,

---

<sup>11</sup> Page 2 of exhibit 1

<sup>12</sup> Pages 4 and 5 of Exhibit 1

otherwise why pay for everything that is associated with it. The website had been sold as a holistic unit – a fact supported by ANZ’s agreement to assume from 1 July 2009 all costs associated with the website. I conclude that the website and its functionality were purchased as a whole.

It is also a fact that once the Daily News was launched, the expectation was that the running of the site would become a Daily News affair. It is indeed in this context that ANZ sought to transfer the hosting of the website from Lunarpages to Ecoweb. Finding a local host in my view made sense. When ANZ was in a position to take over, Mr Nyarota should have been fully prepared to facilitate that process of a smooth transition involving the hosting company, himself as the seller, and the ANZ as the purchaser. This was a process which he saw as needing no more than a few days to complete. Mr Nyarota cannot strictly speaking say he transferred the website in 2009 when none of its functionality was transferred to ANZ. The fact that when ANZ were ready to take over full functionality, the process floundered. This is now what I will turn to.

Whilst there is support from the correspondence between various parties that problems relating to the transitions had to do with a dispute over payment which Mr Dziba deemed owing to him, this appears to have been only part the cause of the ultimate flounder. I will address the issue of payment first before looking at the other crucial factor that also seems to have contributed to the failure to deliver the website as stated in the evidence.

As regards payment, one email by Mr Nyarota to Mr Dziba the webmaster dated 16 May 2010<sup>13</sup> partly read as follows:

“The transfer has not been successfully executed and this has caused me much stress over the past week. I needed your assistance for the successful execution of the transfer. You were holding yourself incommunicado, I believe mainly because of non-payment of your outstanding dues, which is understandable. I have not been able to give you an update mainly because ANZ has not provided me with clear information as to when the outstanding disbursement can be expected. I am sorry about the delay in payment but this is for reasons currently beyond my control much to my embarrassment.....I would be extremely grateful if you could assist on the transfer. The people at Ecoweb require the file transfer protocol from Lunarpages. Can you please help me obtain these details from Lunarpages? I gave them the wrong username on Thursday in error.....”

In an email dated 20 May 2010<sup>14</sup> Mr Goko had weighed in on this dispute of what was owed to Mr Dziba as follows:

---

<sup>13</sup> Page 11 of exhibit 1

<sup>14</sup> Pages 27 and 28 of exhibit 1

“I consider your association with this Mr Joshua as a private affair. We have been paying you both a management fee and a production fee ever since we bought the Zimbabwe Times from you- and expect you to have funded all website costs from that fee. You can’t simply now whip up names of people that we allegedly owe, but whom you never mentioned for the past nine months or canvassed us to pay for work that was done outside of the agreed mandate”

A running theme from the correspondence from the time the website was purchased up until the crucial period when transfer of hosting the site was to be moved from Lunarpages to Ecoweb, was that of ANZ’s constant late payments for services rendered. More significantly, at the material time when the issue of migration was first raised with Mr Nyarota, Mr Goko wrote to him on 17 March 2010<sup>15</sup> highlighting that payment for running expenses was late due to the liquidity crunch bedevilling the economy and that he was going to try and hand over February funds. Equally important is that he had communicated to Mr Nyarota that ANZ would be appointing a new Finance manager and that with effect from 1<sup>st</sup> April all payments to service providers would be paid directly. Effectively Mr Nyarota would not be responsible for payment as no money would be forwarded to him for this purpose.

This history of late payments in my view cannot be totally ignored in view of the claim that ultimately the website collapsed because ANZ failed to meet the costs of running the website. Mr Goko’s assertion that late payment had previously not stopped the running of the website misses the crucial point that it had evidently eroded trust where critical players were involved. Also ANZ had assumed financial responsibility for the website from the time of its purchase.

It seems to me somewhat foolhardy that the transfer process could have faltered over the small payment said to have been owing to the webmaster. Mr Nyarota in particular was aware at all times how much he had been paid for website and presumably what would be legally be at stake if he failed to deliver. Crucially he was the one who at all times had liaised with Mr Dziba who was his interface with the hosting company. If I have understood his argument the website closed because dues were not paid and also because Mr Dziba was owed \$1700.00 for work to the website and for work he had done in the month of April. Mr Nyarota had already advanced him \$1000.00 of the website fee. I therefore find it odd that knowing what was at stake, and knowing that a website will be shut down for non-payment of fees, and furthermore knowing that he had not entirely fulfilled his side of his bargain as in reality ANZ did not have control of the website, that \$700.00 could have been allowed to put him in potential legal jeopardy for failing to deliver.

---

<sup>15</sup> Page 20 of Exhibit 3

In any event, Mr Goko's evidence was not controverted that all payments had ultimately been made as supported by receipts it placed before the court. Crucially, neither Mr Marumahoko nor anyone from Ecoweb who would have given the full picture of why the transition ultimately floundered were called to give evidence. Likewise Mr Dziba the crucial player on the defendant's part did not to come to give evidence. These players in the dispute were important given Mr Nyarota's claim that ultimately the passwords that had stalled the process were provided and his claim that ANZ had been given access.

As stated, it is in analysing the evidence in this matter from the perspective of "all what was involved" that the resolution to the dispute is likely to be found. There is absolutely no doubt that the one issue that Mr Nyarota appears to have felt most strongly about in his evidence, was the fact that he had understood the position at all times to be that the management of the website would remain with him. In cross examination of Mr Goko, by Mr Nyarota's then counsel, it was put to him that Mr Nyarota's expectation that he would continue to run the website had led to the failure to deliver the website. In his examination in chief Mr Nyarota also spoke to this issue when he was asked the following questions:

"Question: Throughout 2009 when you were managing the website, did they ever approach you to say give us the domain name for the website?"

Answer: Never

Question: Did they ever say put us in touch with the webmaster?"

Answer: Never

Question: Did they ever complain about non fulfilment between July and December 2009?"

Question: Never.....and even beyond December 2009 up to March 2010.

Question: If the agreement had gone on for nine months, and there had been a problem with takeover, what would you have expected them to say?"

Answer. I would have expected them to say we have "no keys" and I would have explained that it was our agreement that you would purchase the Peugeot, and that you would retain my services as an experienced driver, and that you would pay me handsomely without interference from yourselves. I would point out that websites are controlled by editors /managers and not by owners. Owners should look for people with requisite skills to run on their behalf...."

Clearly behind the façade of seeming cooperation, Mr Nyarota had a festering grievance relating to the divesture of control of the website from his hands which he had been prepared to countenance in expectation of a role to play. The issue of his role or lack thereof within ANZ was in fact for the greater part what formed his initial defence. The end result is

indeed that whether because of the issue of payment or because of issues of power and control, the website was not delivered. There is no reason in my view why ANZ should not recover its money back when it did not receive a website.

Accordingly, it be and is hereby ordered that defendant pays the plaintiff as follows:

- a) Payment of the sum of US\$60 000.00
- b) Interest on the sum of US\$ 60 000.00 at the prescribed rate from date of demand being 9 June 2010 to the date of payment in full.
- c) Costs of suit

*Gill Godlonton and Gerrans, plaintiff's legal practitioners*