

**UPSET INVESTMENTS (PRIVATE) LIMITED
v
CHITUNGWIZA MUNICIPALITY**

**SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO AND BHUNU JA
HARARE, 29 SEPTEMBER 2017 & 12 OCTOBER 2021**

T. Zhuwarara, for the appellant

Ms R.R. Mutindindi, for the respondent

**Judgment No. SC 110/21
Civil Appeal No. SC 120/17**

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BHUNU JA:

- [1] This is an appeal against the judgment of the High Court dismissing the appellant's claim for US\$119 300.00 being the balance of the purchase price for a 20 - tonne Hyundai Excavator sold and delivered by the appellant to the respondent.
- [2] In dismissing the appellant's claim the court *a quo* upheld the respondent's counterclaim and ordered the appellant to refund US\$140 000.00 to the respondent, being the deposit paid towards the purchase of the Excavator and Front-End Loader.

The brief summary of the case.

[3] The facts giving rise to the claim and counterclaim are hotly contested. The brief facts of the case are that the respondent is a Municipal Council duly constituted as such in terms of the Urban Councils Act [*Chapter 29:15*], whereas the appellant is a company in the business of selling excavators and front-end loaders.

[4] Sometime in 2014 the parties concluded a contract of sale of a twenty-tonne excavator. The terms of the contract are in dispute.

[5] The appellant's claim is that sometime in 2014 it sold and delivered, in good working order, a refurbished 20-tonne excavator for US\$209 300.00 at the respondent's instance and request. The purchase price was payable in instalments with an initial deposit of US\$90 000.00 and the balance of US\$119 300.00 payable on delivery.

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[6] The appellant's complaint is that despite effecting delivery at the respondent's premises on 19 June 2014, the latter refused or neglected to pay the balance of the purchase price.

[7] The respondent denies breaching the contract of sale as alleged or at all and has counterclaimed for a refund of the deposit it paid on account of defective performance. Its defence is that on 16 May 2014 it floated a tender for the purchase of a brand new twenty-tonne Tracked Excavator to the tune of US\$182 000.00. The advertisement read:

“MUNICIPALITY OF CHITUNGWIZA
TENDER NOTICE NO. 05/11

Tenders are hereby invited, in terms of s 211 of the Urban Councils Act (*Chapter 29:15*) from reputable and legally registered companies and institutions **to provide specified brand new plant and machinery** to the Municipality of Chitungwiza. (Emphasis provided).

Supply and Provision of Specified plant and machinery

1	Jet Machine (high velocity clearing machine)
2	Tracked Excavator (30 tonne)
3	Front End loader (3 tonne)

Tender specifications are available at Chitungwiza Municipality Head Office.”

- [8] The appellant won the tender to supply the respondent with a brand new 20-Tonne Tracked Excavator at the cost price of US\$182 000.00 and a brand new 3-Tonne Front End Loader At the cost price of US\$105 000.00. It was therefore a material term of the contract that the appellant was to deliver a brand new excavator and front end loader. The appellant however, in breach of contract, delivered a refurbished dysfunctional excavator.
- [9] It was also a material term of the contract that the respondent would pay US\$140 000.00 deposit for both machinery and the balance upon delivery. The respondent paid the deposit in terms of the contract but the appellant in breach of contract delivered a preowned dysfunctional excavator without the necessary accessories. To date the appellant has not delivered the brand new machinery in terms of the contract.
- [10] That being the case, the respondent counterclaimed for specific performance in terms of the contract or alternatively a refund of the deposit of US\$140 000.00 paid in anticipation of the fulfilment of the terms and conditions of the contract.
- [11] The respondent also claimed payment of damages in the sum of US\$30 000.00 for breach of contract as well as storage charges at the rate of US\$20.00 per day from the date of summons to the date of collection of the defective refurbished excavator. The

claims for damages and storage charges were not persisted with and are not the subject of this appeal. Thus the court *a quo* was left with only two issues for determination. The issues were defined at the pre-trial conference

as follows:

- “1.(a) Whether or not plaintiff (appellant) should be compelled to deliver a brand new excavator.
OR ALTERNATIVELY
- (b) Whether or not the defendant (respondent) is entitled to a refund of the deposit paid.
2. Whether or not the plaintiff (appellant) is entitled to payment of the outstanding amount.”

Determination of the two issues by the court *a quo*.

[12] Upon consideration of the evidence before it the court *a quo* found that the appellant was guilty of breach of contract. It dismissed the appellant’s claim and sustained the respondent’s counterclaim. Consequently it ordered as follows

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“In the result, I order as follows:

1. The plaintiff’s claim is dismissed.
2. The plaintiff pays the defendant US\$140 000-00 being the refund of the deposit paid by the defendant towards the purchase of the Excavator and Front End Loader.
3. The plaintiff pays to the defendant costs of suit.”

The appeal

[13] Aggrieved by the above order, the appellant appealed to this Court for relief on five grounds. The five grounds of appeal attack the judgment *a quo* basically on failure to appreciate the sufficiency of evidence and failure to apply the *Turquand* rule in its favour.

Analysis of the facts and the law

[14] It is clear right from the outset that the cardinal question to be answered is the validity and fulfilment of the contracts allegedly concluded by the parties. In simple terms the court *a quo* had to determine whether the contract was for brand new or refurbished machinery.

[15] The parties relied on deferent contracts for their competing claims. The terms of the two contracts are incompatible and at variance with each other. The respondent relied on the tender as advertised in the Herald newspaper with a wide circulation in the area. The appellant however denied having responded to the notice floated in the newspaper. Its managing director Darlington Chirara testified that he responded to a deferent notice pinned on the notice board at the respondent's registry office. It was his testimony that the notice was a tender for the procurement of a refurbished twenty-tonne crawling excavator and a refurbished three-tonne front end loader

[16] The appellant's sole witness Darlington Chirara was however unable to verify or prove the existence of the notice he claimed to have responded to on behalf of the appellant. Under cross-examination by Ms *Mutindindi* for the respondent, this is what he had to say:

- “Q. Do you have proof to show that there was such a notice?
A. I do not have any documentary evidence. I could not have removed the notice that was on the notice board because others were supposed to come and see that notice.” (My emphasis)

[17] What the appellant said under cross-examination is ample proof that apart from his mere say so, he has no evidence of the existence of the offer he says he accepted for

the provision of refurbished second hand machinery. It is trite that a valid contract is constituted by an offer and acceptance. The appellant by his own admission failed to establish the existence of the tender for the provision of refurbished second hand machinery. The onus was on the appellant to establish the existence of all the essential elements of a valid contract. Failure to establish the existence of such tender on the alleged terms and conditions was fatal to its case as there can be no acceptance without an offer.

[18] The respondent's version was that it tendered for the procurement of a brand new twenty-tonne excavator and three-tonne front end loader by floating a tender in the Herald Newspaper. After observing all the legal requirements and procedures, it awarded the appellant the tender as amended for the acquisition of a twenty-tonne tracked excavator instead of a thirty-tonne as originally tendered. The appellant duly accepted the tender and undertook to perform the contract in accordance with the given terms and conditions.

[19] The respondent proffered evidence of the described tender notice by producing a copy of the relevant Herald newspaper cutting. It further produced copies of the related minutes of the procurement Board duly constituted in terms of s 210 of the Act. The meeting was held at the respondent's offices on 17 September 2013. It was attended by the appellant's two directors, namely S. Mlambo and D. Chirara, who were accompanied by its legal practitioner Mr *Mucheriwesi* of Mushangwe and Company Legal practitioners. The respondent was represented by its chamber secretary, human resources manager, deputy finance director of works and a medical doctor.

[20] The minutes of that meeting speak for themselves. The record of proceedings captures the recommendations of the Procurement Board as follows:

“... that the tenders for the tenders of the supply of new machinery/equipment be awarded as follows:

1. Scotia Steel (Pvt) Limited – jet machine for US\$119, 113.50.
2. Upset Investments (Pvt) Ltd – Tracked Excavator – 20 tonne for US\$162 000.00.
3. Upset Investments (Pvt) Ltd Front End Loader3 – ton for US\$105 000.00.”

[21] The meeting, having been apprised of the recommendations of the Procurement Board, agreed that:

“Upset investments (is} to supply and deliver brand new equipment within 10 days after receipt of 50% deposit of the total value. Further the Chitungwiza Municipality undertook to pay legal fees as the lawyer’s invoice sic). All payments were to be made through Upset Investments’ lawyers Mushangwe and Company Legal Practitioners.” (My emphasis)

[22] The documentary evidence proffered by the respondent was corroborated in every material respect by oral evidence from four witnesses.

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[23] In its plea, in reconvention before the court *a quo*, the appellant however gave the impression that it responded to an amended extended tender of the original advertised tender. It was its plea in reconvention that the amended tender did not require the provision of new machinery. Paragraphs 4 and 5 of its plea in reconvention read:

“Ad paragraph 4

It is denied, when plaintiff in reconvention advertised its tender, it was not won by its deadline. It was then extended and revised.

Ad paragraph 5

The defendant in reconvention will aver that it submitted its bid during the extension. According to the specifications, it was not a requirement that the excavator ought to be brand new. The tonnage of same was also reduced.

It affirms that the tender won by the defendant in reconvention is not the same with the one initially advertised as evidenced by the discrepancy in tonnage of the excavator”.

[24] While the Procurement Board minutes record the amendment downsizing the weight of the excavator from 30 tonnes to 20 tonnes, there is no record of the amendment of the requirement for the provision of brand new machinery. On the other hand the appellant contended without proof that it responded to a notice pinned on the respondent's notice board for the supply of refurbished second hand machinery.

[25] It is noteworthy that the appellant vacillated between saying that it responded to a notice pinned on the noticeboard and saying that it responded to an amended tender revised notice. Such vacillation and inconsistency undermines the appellant's case.

[26] The appellant's assertion that the respondent offered to buy refurbished second hand machinery is not backed up by any proof of recommendations from the procurement Board as is required by law. Section 210 (4) of the Act requires that any procurement of goods, materials or services be subject to recommendations of the Procurement Board. The section provides as follows:

“A municipal council **shall not** procure any goods, materials or services unless its municipal procurement board has made recommendations to the council thereon and the council has considered such recommendations”

[27] The section is couched in peremptory terms because it constitutes a prohibition coupled with the use of the mandatory term, '**shall not**'. The appellant was unable to proffer any evidence of the procurement board having tendered for the procurement of second hand refurbished machinery. The evidence on record shows that before the full council met to adjudicate over that tender, the then town clerk G. Tanyanyiwa, had, fifteen days earlier, written to the appellant advising him that he had won the tender to supply second hand refurbished machinery. The letter reads:

“Date 6/07/2011

Dear Sir/ Madam

REF: SUPPLY OF REFURBISHED TWENTY TONNE CRAWLING
EXCAVATOR AND 3 TONNE FRONT END LOADER.

Reference is made to the above.

You have been awarded the tender to supply the municipality with the above equipment.

You are required to supply the equipment within 30 days from receipt of deposit which is going to be paid within the next 2 weeks.

May you treat this order with urgency since there are disease out breaks and we would like to use the equipment to arrest the spread of disease.”

[28] It is needless to say that the above letter was false and in fact misleading, because no such tender had been awarded by the respondent at that stage. On the basis of the summation of the evidence in this case, no fault can be laid at the learned judge *a quo*'s door for holding that the ruling contractual terms were as advertised in the Herald newspaper. The letter by G. Tanyanyiwa was pre-emptive and patently unlawful as he had no mandate to award such tender to the appellant without authority from council.

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[29] In dealing with the unlawful and unbecoming conduct of G. Tanyanyiwa, the learned judge *a quo* had this to say:

“I do not believe that a town clerk's actions have the power to override the provisions that is (*sic*) peremptory. Therefore the letter of Mr G. Tanyanyiwa which was written on 6 July 2011 before the full council meeting had been held on 21 July 2011 notifying the plaintiff that it had won the tender to supply refurbished machinery is therefore of force or consequence. It does not bind the defendant. So the contract that was purportedly entered into and between the plaintiff and the defendant pursuant to the letter which was written by G. Tanyanyiwa is a nullity.”

[30] In apparent concession that the town clerk acted unlawfully and unprocedurally, the appellant sought to rely on the *Turquand* rule in an attempt to sanitise and regularise G. Tanganyika's unlawful and irregular conduct.

[31] The *Turquand* rule is derived from the famous British case of *Royal British Bank v Turquand* 1856 199 ER 886. In that case the directors of the respondent company could borrow on behalf of the company under a company resolution. Two directors of the company signed a bond on behalf of the company under the company seal without the requisite company resolution. When pressed for payment, the company objected on the basis that the directors had signed without company resolution. The court held that when dealing with a corporate body, parties are not bound to do more than peruse the statutes of the company. And if the power to transact is given in the statute, then the party so contracting has the right to infer that the authority to so contract on the part of the corporation has been perfected by the necessary resolutions. In other words a party contracting with a company is entitled to assume that all the internal procedures have been complied with, provided the company has the power to transact.

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[32] This case can easily be distinguished from the *Turquand* case on two grounds:

- (a) first, the respondent, being a municipality, was expressly prohibited by s 210 (4) of the Urban Councils Act from contracting without the necessary recommendations from the Procurement Board and approval from council. A statutory prohibition is mandatory and binding on the parties as everyone is presumed to know the law regardless of whether one has read and understood the law. No such statutory prohibition bound the respondent in the *Turquand* case (*supra*). The finding by the learned judge in the court *a quo* that the unsanctioned contract to provide refurbished machinery was a legal nullity as it was prohibited by law is beyond reproach.

The argument that s 210 of the Act constitutes internal issues unbeknown to the appellant is therefore baseless and without any foundation at law. The respondent had therefore no capacity to transact in contravention of the law.

Second, the letter written to the appellant by the town clerk G. Tanyanyiwa conveying the message that the appellant had won the tender to supply the machinery was false in fact and misleading. It was written without council authority fifteen days before the adjudication of the tender. The letter was fraudulently, calculated to prejudice other bidders and the respondent because it was meant to abort the whole purpose of the tender to identify the most suitable bidder for the supply of the advertised new machinery.

[33] As correctly observed by the learned judge *a quo*, the *Turquand* rule cannot override a statutory prohibition. This is for the simple reason that the rule was not designed to promote and perpetuate illegality. It is meant to protect gullible members of the public who innocently contract with company agents oblivious of their failure to observe internal procedures.

[34] Reliance on case law where the rule was applied in our jurisdiction was therefore misplaced because in this case the purported contract was void *ab initio* and a nullity at law on account of fraud and statutory prohibition.

[35] In this case no contract came into existence because there was no meeting of the minds regarding the object of the sale. The respondent intended to purchase brand new machinery whereas the appellant was bent on providing refurbished second hand

machinery. It is clear that both parties did not intend to contract on the basis of each other's terms. Consensus being the essence of contract there can be no contract in the absence of agreement on all material terms of the contract. In the absence of agreement on the nature and quality of the object of the intended sale no binding obligations came into being. In the absence of a valid enforceable contract, the learned judge *a quo* cannot be faulted for dismissing the appellant's claim for payment of the balance of the purchase price of a non-existent contract.

[36] Turning to the respondent's counterclaim, it is clear that it paid the deposit of US\$140 000.00 in anticipation of a valid contract that never came into being. The obligation to refund the deposit paid is a natural consequence of the respondent's failure to supply the brand new machinery in terms of the respondent's offer.

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[37] No dispute arose regarding the appellant's right to collect his unwanted refurbished excavator. In the result the appeal can only fail. It is accordingly ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellant shall bear costs of the appeal.

GARWE JA: I agree

HLATSHWAYO JA: I agree

Kachere Legal Practitioners, the appellant's legal practitioners

Matsikidze and Mucheche, the respondent's legal practitioners