**JOHN MLILO**

**Versus**

**TSEPO MOLISA**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND NDOU JJ
BULAWAYO 27 OCTOBER & 4 DECEMBER 2008 & 22 JANUARY 2009

*G Nyathi,* for appellant
*L Jamela*, for respondent

Civil Appeal

**KAMOCHA J :** The respondent who was the plaintiff in the court *a quo* issued summons claiming the following :

"(a) an order that defendant fulfils his part of the contract by handing 4 heifers to the plaintiff;
Alternatively, that defendant pays to plaintiff the sum of $16 000 000,00 being the current market value of four (4) 2-3 year old heifers;
(b) An order that in the event that defendant opts to pay money, then he be ordered to pay interest *a tempore morae* calculated from the date of issue of summons to date of payment; and
(c) An order that defendant pays costs of suit in this matter."

The matter went to trial before a provincial magistrate in Gwanda, who in a judgment delivered on 4 September 2006, ordered that the defendant handover 4 herd of cattle to the plaintiff within 14 days of the judgment. In the alternative, defendant was ordered to pay plaintiff an amount of money equivalent to the current market value of the 4 cattle. The valuation was to be done by a mutually accepted third party. The defendant was to bear the costs of suit.

Aggrieved by the court *a quo's* ruling the defendant lodged this appeal on the following grounds:-

"(1) It is contended that the learned trial magistrate erred in making a finding that the appellant should handover the four cattle to the respondent when in fact it is the respondent who breached the contract.
(2) It is contended that the cancellation of the contract by the appellant was lawful and the trial magistrate erred in not giving effect to the cancellation.
(3) It is contended that the trial magistrate erred in failing to address the issue of the $2 400 000,00 (old currency) refunded by the appellant to the respondent.

(4) It is contended that the judgment of the trial magistrate is fundamentally flawed as it seeks to give the respondent both the four herd of cattle and the purchase price amounting to $2 400 00,00 (old currency); and
(5) The trial magistrate failed to give reasons for his judgment."

The last ground of appeal can be disposed of quickly as it is clearly devoid of any merit. The learned provincial magistrate gave his detailed reasons for judgment on receipt of the appellant's notice of appeal. What the appellant should have done when an appeal was being contemplated was to request for the trial court's detailed written reasons for judgment. He did not do that. His complaint is therefore unjustified.

Similarly the third and fourth grounds of appeal are unjustified. This is so, firstly because when the parties drew up a joint pre-trial memorandum the appellant never raised the question of the refund of the $2 400 000,00 as an issue and he now raises it for the first time as a ground of appeal.

The respondent's evidence on that point was that when the appellant decided to purportedly cancel the agreement he took the $2 400 000,00 to the respondent's home and left it with the respondent's teenage son to pass it over to his father. When the son was trying to hand it over to the respondent, he (respondent) refused to accept it and immediately telephoned the appellant. The two had a long discussion about the matter over the phone. He finally told the appellant that he was not accepting the money from his son and told the appellant to go and collect it from him. He reiterated and emphasized that the money was where appellant had left it. Respondent said he never even touched it because as far as he was concerned the agreement was still existant. It was his evidence that the appellant knew very well where to collect his money.

In the light of the above evidence it is preposterous to suggest that the court *a quo* gave respondent both the 4 herd of cattle and the purchase price when appellant was told to go and collect his money but did not want to do so because he was bent on wanting to cancel the agreement. Be that as it may, the respondent still tendered the money at the hearing of the appeal.

I now turn to deal with the first two grounds of appeal. It is common ground that the respondent purchased four herd of cattle from the appellant. Each beast was

being sold for $600 000,00 making a total of $2 400 000,00 for the four animals. The total purchase price was paid in full. However, the respondent did not immediately collect the beasts as he preferred to do so in the presence of the appellant as the cattle were being kept at a farm belonging to the appellant's brother. It is common ground that the beasts were bought during the month of January 2004 and the respondent selected four animals.

The parties' versions differ on the ages, sizes and colour of the animals. The respondent's case was that he had selected four brown heifers which the appellant had allegedly said were 12 months old. While the appellant alleged that no selection of beasts was ever done. He said the respondent bought calves which were 6 months old. He was, however, silent on the colours of the alleged calves. The appellant's story changed as the trial progressed as he then began to allege that he had sold young animals which had just been weaned off. He said they were weaners.

The parties dwelt at some length on the issue of whether the beasts were weaners or heifers. The respondent and his witness Mr Andrew Ndlovu were categoric on the animals they bought from the appellant. They said in all their dealings with the appellant the Sindebele word used as "ithokazi or amathokazi" meaning heifer or heifers. They did not use any English words like "weaner or heifer".

I pause to observe that if the parties had been talking about a weaner or weaners they would have said "iguqa or amaguqa". The appellant appeared to be confused about the beasts he sold. He started off saying he had sold calves and then changed to weaners. On the other hand the respondent and his witness were clear on what they bought from the appellant. The court *a quo* preferred their story to that of the appellant. In my view, the trial court's finding is unassailable and this court finds that the respondent bought four heifers. The heifers had been mounted at the time of the trial.

By December 2004 the appellant had moved the cattle to his own farm in West Nicholson. During the first week of December the parties made arrangements for respondent to collect his four cattle.

On arrival at the farm the appellant attempted to hand over to respondent four cattle that were different from the ones he had chosen. The four were smaller

(younger) than the ones he had chosen and included a black one yet the beasts he had chosen had no such black beast.

Respondent said he told the appellant that whilst he accepted the four cattle selected by appellant, he was not happy that those were different beasts.

Nevertheless, he asked the appellant to give him time to arrange that his herdboys come and drive the cattle away. Appellant was in agreement with that and told his herdboys to expect respondent anytime to come and collect the beasts. This is, in fact, common cause.

Apart from expressing his disappointment about the new lot of beasts the appellant had selected for him the respondent did nothing to suggest that he had breached the agreement. As can be seen immediately above the parties still arranged that the respondent's herdboys would collect the cattle even if the appellant was not present. The appellant instructed his manager to expect the respondent's herdboys.

When the appellant purported to cancel the agreement the respondent refused to accept the purported cancellation. The appellant tried to return the purchase price but the respondent refused to accept it and held him to the agreement. It is therefore not true to suggest that the respondent breached the contract. In fact it was appellant who should be accused of breaching the agreement by offering respondent different cattle from the ones he had selected in terms of the agreement. He, however, attempted to shift the blame onto the respondent until he was reminded in cross-examination that it was his plea that he himself had in fact purported to cancel the agreement. Because the appellant was confused on this issue as well the court *a quo* was entirely correct in holding that it was him who in fact attempted to cancel the agreement. Similarly, the learned magistrate was equally correct in finding that the purported unilaterally cancellation was unlawful and of no force or effect.

In the result this court holds that this appeal is without merit and is hereby dismissed with costs.

Ndou J …… I agree

*Sansole and Senda*, appellant's legal practitioners
*Mabhikwa, Hikwa and Nyathi* respondent's legal practitioners