GEORGE PATRICK CHIMHINI

versus

INTERFIN SECURITIES (PVT) LTD

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 24 March & 24 August 2011

Adv. *T. Mpofu*, for the applicant

Adv. *E.E.E. Morris,* for the defendant

MTSHIYA J: This is an opposed application wherein the applicant seeks the following relief:

“1. That the respondent be and is hereby ordered to deliver six million (6, 000 000) AICO Africa Ltd shares together with the share certificates within 48 hours of this order.

2. That the respondent shall pay the costs of this application in terms of the Law Society tariff including costs of two Counsels where the two are employed”.

The dispute for determination arises out of the sale of shares or

securities.

The facts of the case are that on 5 November, 2008 the applicant approached the respondent, who is a registered stockbroker, with a request to purchase AICO shares which the respondent said it had on the market. The respondent said it had authority to sell the shares but did not disclose the owner of the shares. The purchase price for the shares was two hundred and sixty quintillion Zimbabwe dollars. On the same date, the applicant transferred the said sum of two hundred and sixty quintillion Zimbabwe dollars (Z$260 000 000 000 000 000 000) into the respondent’s account. The transfer was effected through a bank cheque drawn through the applicant’s bankers namely, Kingdom Bank Ltd.

On 6 November 2008 the respondent deposited the said cheque with its bankers, namely Stanbic Bank Zimbabwe Limited. For reasons unknown to the applicant the respondent was only credited with the amount on 30 January 2009.

Following the cheque payment made by the applicant on 5 November 2008, the respondent, on 7 November 2008, generated a deal note (Advice of Purchase of Securities) which in the main, as related by the applicant, stated the following:-

“9.1 That the price of each AICO Africa Ltd share was thirty two thousand Zimbabwe dollars (Z$32,000).

9.2 That the number of shares that had been sold to me were six million (6, 000 000).

9.3 That the amount of the broker was Z$192, 000 000 000-00 one hundred and ninety two billion dollars).

9.4. That the brokerage was $3, 840 000 000-00 (three billion eight hundred and forty million Zimbabwe dollars).

9.5 That the value added tax was ($576 000 000) five hundred and seventy six million dollars.

9.6 That the government’s stamp duty (Z$3 840 000 000) three billion eight hundred and forty million dollars.

9.7 The amount that was to be paid by the purchaser for the sale to go through was Z$200 256 000 000 (two hundred quintillion, two hundred and fifty six million) which was to be paid by 14 November, 2008. This amount was to be paid by be 14 November, 2008”.

The full purchase price, as already stated, was paid on 5 November

2008.

However notwithstanding payment of the full purchase price for the

shares, on 13 January 2009 the respondent wrote the to the applicant in the following terms:

“Due to failed settlement on the following deals we wish to advise that we have resolved to nullify the deals.

Date Ref Counter Volume Total Consideration

01/11/08 P264475 Aico 6000 000 200 256 000 000 000 000 000

13/11/08 P264951 Aico 200 000 938 700 000 000 000 000 000

13/11/08 P 264952 Aico 200 000 938 700 000 000 000 000 000

13/11/08 P2644953 Aico 200 000 938 700 000 000 000 000 000

Please sign attached copy underneath as acknowledgement and concurrence with the above. Accordingly please return deal notes relating

to the above transactions”

On 3 February 2009 the respondent again wrote to the applicant in the

following terms:

“FAILED SETTLEMENT

Reference is made to our letter dated 13 January 2009 and the meeting we had yesterday. This serves to confirm matters discussed as follows:

During the meeting we both noted that a bank cheque valued at $260 quintillion was received from you on the 5th November 2008. This cheque was banked and subsequently stamped by the bank on the 6th November 2008. However we were only credited with value of the cheque on the 30th January 2009. This payment was intended for the purchase of AICO shares. Deal details are as follows:

Date Ref Counter Volume Total Consideration

01/11/08 P264475 Aico 6 000 000 200 25600000000000000

Now that the money has been received, Interfin Securities will approach the seller to see if the cancelled deal can be restored.

As noted during our discussion yesterday, the decision by the seller to cancel the deal is premised on the ZSE rule that if a deal has not been settled within 60 days it shall be regarded null and void. The seller also contents that he has lost massively due to hyperinflation.

Meanwhile we are meeting Stanbic to see how best you can be compensated for loss of value”.

Finally, on 9 February the respondent confirmed the cancellation of the

deal in the following terms:-

“I refer to our letter dated 3 February 2009 and advise that the seller of the six million AICO shares has refused to rescind on the decision to have the deal cancelled.

I further advise that as promised, we have since met Stanbic Bank to see how best you can be compensated for loss of value on the $260 Quintillion. They advise that the delay in giving us value was mainly due to challenges encountered with the clearing system.

Given the above, I advise that the AICO deals as indicated on our letter dated 13 January 2009 have been cancelled”.

The applicant responded to the above intimation as follows:

“1. Reference is made to the above matter and to your letter to me dated 9 February 2009 whose contents have been noted.

2. As you are definitely aware the circumstances of this transaction are that

2.1 I ordered 6 000 000 (six million) AICO shares as confirmed by your deal note dated 7 November 2008 referenced Advice of Purchase of Securities No P 264475.

2.2 In terms of the aforesaid deal note, payment was due on 14 November 2008

2.3. I deposited with you and received my bank cheque drawn on a Kingdom Bank Crown banking Account in a sum of $260 quintillion.

2.4. You deposited my cheque with you bank on 6 November 2008

2.5 To the best of my knowledge my cheque was not dishonoured. You received value. Accordingly I discharged my obligations in terms of the transaction.\

3. In the above premises I advise you that the purported cancellation of the transaction by the seller is a nullity.

4. As far as I am concerned the cause of the alleged delay in crediting your account has nothing to do with me and is a matter between yourselves and your bankers Stanbic.

1. I therefore advise that I will not accept anything short of the 6 000 000 AICO shares which I purchased and paid for in full. I demand that the shares be transferred to me and my share certificate forwarded to me within seven days failing which I shall institute proceedings for the delivery of the shares against you without further notice to you and you shall bear the costs of the same. I believe this shall not be necessary”.

As a response to the above, on 4 March 2009, Stanbic Bank Zimbabwe,

the respondent’s bankers, wrote to the respondent in the following terms:

“We acknowledge receipt of your correspondence dated 10 February 2009, the contents of which we have duly noted. Kindly note that we unable to entertain any discussions for loss of value and the restitution of the same in terms of shares, we are however willing to discuss possible compensation and interest arsing there from in the applicable currency being Zimbabwean dollars. Kindly let us have your indication of the quantum of the same so that we can remit payment accordingly.

We look forward to hearing from you on this issue and thank you for your kind assistance”.

The above letter was forwarded to the applicant who responded as

follows:

“RE DELAYED SETTLEMENT: 6 000 000 AICO SHARES

1. Reference is made to the above matter and to your letter to me dated 5 March 2009 whose contents I have noted.
2. I note with great disappointment that you do not appear to be attaching any importance to this matter considering that it took you almost a month to revert to me. I have been prejudiced by your delay to settle payment for my shares and you are determined to continue the prejudice.
3. I have perused the letter from Stanbic bank and I find the proposal contained therein unreasonable and unacceptable at all.
4. You will need to appreciate these simple and basic facts.
   1. I ordered 6 000 000 (six million) AICO shares as confirmed by your deal note dated 7 November 2008 referenced Advice of Purchase of Securities No P 264475.
   2. In terms of the aforesaid deal note, payment was due on 14 November 2008
   3. I deposited with you my bank cheque drawn on a Kingdom Bank Crown banking Account in a sum of $260 quintillion.
   4. You deposited my cheque with your bank on 6 November 2008.
   5. To the best of my cheque was not dishonoured. You received value. Accordingly I discharged my obligations in terms of the transaction.
   6. Therefore my money was meant for the purchase of shares which I did purchase through yourselves and its value was, and still is 6 000 000 AICO shares. Accordingly any compensation structure should recognise that my loss is 6 000 000 AICO shares. Put differently if your bank and yourselves had acted diligently I should have received 6 000 000 AICO shares and that is all I am asking for.
   7. You will need to appreciate that with the dollarization of the stock market which you are well aware of, the Zimbabwean dollars which your bank is offering cannot buy me any shares anywhere in Zimbabwe.
5. I therefore advise that I will not accept anything short of the 6 000 000 AICO shares which I purchased and paid for in full. I demand that the shares be transferred to me and my share certificate forwarded to me within seven days of this letter failing which I shall institute proceedings for the delivery of the shares against you without further notice to you and you shall bear the costs of the same”.

The dispute remains unresolved and on 31 March 2009, the applicant

filed this application seeking the relief indicated on the first page of this judgment.

I have deliberately given a detailed background and reproduced in full the relevant correspondence between the parties so that the issues for determination can easily be understood.

I shall, in dealing with this matter, also quote extensively from the relevant statutes upon which this dispute will fall to be determined.

Advocate *Mpofu,* for the applicant, submitted that the respondent is an agent *sui generis* and that its obligations towards the applicant are established in terms of statutory law. He said the generation of the brokers note (Advice of Purchase of Securities) sealed the contract between the two parties. He said the law, as we shall see, protects the broker (respondent) in the event of non-payment of the purchase price of the shares. He went further to submit that the nature of the transaction did not allow for reliance on any third party. The respondent made his offer of shares and the applicant complied with what was required of him to be the owner of the AICO shares.

Advocate *Mpofu* submitted that the applicant had paid for the shares through a bank cheque that was honoured. That being the case, he submitted, the payment date was 5 November 2008 – a date well before the deadline date of 14 November 2008. He said the issue of the applicant’s previous cheques which had been dishonoured in earlier transactions was of no relevance to the issue at hand. He said it was incumbent upon the respondent to ensure that the value of the shares had been received.

Advocate *Mpofu* went further to submit that as for the applicant, his obligation was fulfilled through payment by a bank cheque which was honoured. The applicant had no recourse to the respondent’s bank regarding the delay that might have occurred in clearing the cheque. He further submitted that there was no evidence that the AICO shares were no longer available. Accordingly the relief for specific performance was appropriate.

Advocate *Morris* for the respondent submitted that notwithstanding the generation of the broker’s note, the respondent was merely acting as an agent. The broker was not selling its own shares. He said in terms of the broker’s note payment was to be made on 14 November 2009 and not 30 January 2009. He argued that until payment appeared in the respondent’s bank statement, there was no payment to talk about. That being the case, Advocate *Morris* argued, the transaction had failed on 14 November 2008. He said the delay in having the applicant’s cheque cleared had nothing to do with the respondent.

Advocate *Morris* submitted that the court could not take judicial notice of the fact that the AICO shares were still on the market. It would therefore not be proper for the court to grant an order for specific performance, he argued.

I believe the real issue for determination is whether or not there was a valid contract between the parties which obliged the respondent to deliver AICO shares to the applicant. (i.e need for an order for specific performance)

I believe there was *in casu* a valid contract. There is no doubt in my mind that in entering the transaction (contract) the respondent represented to the applicant that he had the capacity to deliver the shares once payment had been made by the applicant. There was no question of the respondent relying on a third party for the transaction to go through. The question of whether or not the respondent had control of the AICO shares as an agent was of no concern to the applicant. The respondent told the applicant that it had AICO shares for sell and that it had authority to sell them. It gave the price of the shares and the applicant accepted the offer. The applicant then proceeded to effect payment through a bank cheque on 5 November 2008 before the deadline date of the 14 November 2008. The cheque was not dishonoured.

Indeed following payment, the respondent, as per statutory rules, generated the requisite broker’s note indicating the full particulars of the transaction. The rules require that a registered broker, such as the respondent, who has purchased or sold any listed securities on behalf of a client should, within twenty four hours after the purchase or sale despatch a broker’s note to the client. It is important to note that this was not the first time the applicant was buying shares through the respondent.

I believe that the transaction between the parties is clearly regulated by statutory law. That being the case, my view is that, *in casu* arguments about the ordinary law of agency are misplaced. Admittedly the respondent acted as an agent but his agency was clearly regulated by statutory provisions as we shall see in this judgment.

I also want to believe that, in generating the broker’s note on 7 November 2008 after receiving a bank cheque on 5 November 2008 for the purchase price of the shares, the respondent was confirming the transaction/contract.

All what remained was the respondent to deliver the shares to the applicant.

In view of the above my finding is that the purported cancellation of the transaction on 13 January 2009 was null and void. It should also be noted that as per the respondent’s letter of 3 February 2009, the cancellation was being made even before 30 January 2009 when the respondent was credited with the value of the cheque of 5 November 2008. The cheque, as we saw, had already been banked and stamped by the respondent’s own bank on 6 November 2008.

It would, in my view, be unreasonable to accept that after generating the broker’s note on 7 November 2008, upon being paid on 5 November 2008 and also upon banking the proceeds on 6 November 2008, the respondent never made a follow up of the transaction until 13 January 2009. The respondent was executing his usual business and it is reasonable to expect that follow ups were made or ought to have been made.

If indeed payment had not been made, the law provides protection for the respondent. Section 121 (5) of the Securities Act, [*Cap 24*:*25*](“the Act”) which repealed the Zimbabwe Stock Exchange Act [*Cap 24*:*18*] provides as follows:

“(5) The repealed Act, other than Parts III to VI, Part IX, Part XIV, shall be deemed to be rules made by the Zimbabwe Stock Exchange in terms of section sixty-five, and may be amended or repealed accordingly:

Provided that any reference in the repealed Act to the Minister or the Registrar shall be construed as a reference to the Commission”

The relevant rules for our purposes *in casu* are ss 54, 55 and 57 of the repealed Act which in full, provide as follows:

“54 **Registered stockbroker to dispatch broker’s note to client within twenty-four hours of purchase or sale of listed securities.**

1. Subject to s 17 of the Stamp Duties Act [*Cap 23:09*], a registered stockbroker who has purchased or sold in Zimbabwe any listed securities on behalf of a client shall, within twenty-four hours of that purchase or sale, as the case may be, dispatch to the client a broker’s note –
2. advising the purchase or sale of the listed securities; and
3. stating the price at which the purchase or sale referred to in para (a) was effected and the brokerage charged in respect of that purchase or sale; and
4. with the words “Subject to the Zimbabwe Stock Exchange Act [*Cap 24:18*] and the regulations and rules made thereunder and the usage of the Zimbabwe Stock Exchange” thereon; and
5. containing such particulars, other than those set out in para(s) (a) (c), as may be prescribed.
6. A registered stockbroker who does not comply with subs (1) shall not have any legal claim to brokerage in respect of the purchase or sale concerned, whether or not he ceases to be registered after that purchase or sale.

55 **Registered stockbroker to act as agent of client in purchase or sale of listed securities unless otherwise authorised and makes disclosure**

A registered stockbroker who has been instructed by a client –

1. To purchase any listed securities on behalf of the client shall not, in connection with that purchase, enter into any arrangement whereby, instead of purchasing the listed securities from a third party, the registered stockbroker sells his own listed securities to the client; or
2. To sell any listed securities on behalf of the client shall not, in connection with that sale, enter into any arrangement whereby, instead of selling the listed securities to a third party, the registered stockbroker purchases the listed securities on his own behalf;

unless that registered stockbroker –

1. has obtained the consent of the client to that arrangement; and
2. discloses that arrangement to the client in the broker’s note concerned.

57 **When listed securities purchased by registered stockbroker on behalf of client must be paid for, and duty of registered stockbroker if purchase price not paid**

(1) Where a registered stockbroker purchases any listed securities on behalf of a client, the client, shall pay to the registered stockbroker the purchase price of the listed securities in cash or by cheque against an offer to deliver the listed securities, unless the client –

(a) arranges with a banking institution or non-member institution for the listed securities to be paid for against delivery of he listed securities to the banking institution or non-member institution; and

(b) notifies the registered stockbroker in writing of the arrangement referred to in para (a).

(2) A registered stockbroker referred to in subs (1) who has not been –

(a) paid the purchase price of the listed securities concerned in terms of that subsection; and

(b) notified in terms of para (b) of that subsection;

Shall sell, as soon as is reasonably possible after the failure

to pay that purchase price and , in any event, not later than

sixty days thereafter, those listed securities on behalf of the

client.

1. If the sum realized by the sale referred to in subs (2) is less than the purchase price referred to in subs (1), the registered stockbroker concerned shall, as soon as is reasonably possible after that sale and, in any event, not later than sixty days thereafter, sell on his own behalf so much of any other securities -
2. Held by him on behalf of: or
3. To be delivered to him by;

The client concerned as may be necessary to realize the difference between that sum and that purchase price,

1. A registered stockbroker referred to in subs (1) who has not been paid the purchase price of the listed securities concerned in terms of that subsection and has been notified in terms of para (b) of that subsection shall-
2. before purchasing those listed securities on behalf of the client, satisfy himself that the arrangement referred to in para (a) of that subsection has been made; and
3. as soon as is reasonably possible after purchasing those listed securities on behalf of the client, offer to deliver those listed securities in negotiable order to the banking institution or non-member institution concerned against payment of the purchase price of those listed securities; and
4. if payment of the purchase price of those listed securities is not made forthwith in terms of para (b), sell as soon as is reasonably possible after the date of the failure to make that payment and, in any event, not later than sixty days thereafter, those listed securities on behalf of the client.
5. If the sum realized by the sale referred to I para (c) of subs (4) is less than the purchase price referred to in subs (1), the registered stockbroker concerned shall, as soon as is reasonably possible after the date of the failure to make the payment referred to in that paragraph and, in event, not later than sixty days thereafter, sell on his own behalf so much of other securities –
6. held by him on behalf of; or
7. to be delivered to him by;

the client concerned as may be necessary to realize the difference between that sum and that purchase price.

1. In this section –

‘purchase price’ includes the brokerage payable on the purchase of the listed securities concerned”.

The above rules, particularly rules 54 and 57, are quite relevant to

the determination of the issue *in casu*.

It is clear from the above rules that the broker’s note is issued upon payment of the purchase price of shares as happened in *casu*. The respondent admits that having been instructed to purchase shares, it indeed proceeded in terms of r 55. The respondent did not, however, proceed to act in terms of r 57 (2). The relevant part of the rule, as we have seen above, provides as follows:-

“57 (2)

A registered stockbroker referred to in subs (1) who has not been –

(a) paid the purchase price of the listed securities concerned in terms of that subsection; and

(b) notified in terms of para (b) of that subsection;

Shall sell, as soon as is reasonably possible after the failure

to pay that purchase price and , in any event, not later than

sixty days thereafter, those listed securities on behalf of the

client”.

The above provision in our law, in my view, governs the transaction *in casu* and indeed settles the matter.

The period of 60 days expired before 13 January 2009 and by that time, if it believed it had not been paid, the respondent had not availed itself to the protection of the law. Accordingly, given the clear provision of the law, I am unable to accept that the respondent can hide behind the general law of agency. The provision clearly refers to shares that are already purchased and are under the control of the broker. The broker can, in terms of law, sell the shares to realise the purchase price. That is what the broker should have done before the expiry of 60 days.

In *casu* the respondent purchased AICO shares for the client (the applicant) and was paid the purchase price which then lay in its bank up to 30 January 2009. Without proving that the applicant’s cheque was dishonoured, the respondent, in *casu*, cannot deny that payment was made. There was, in my view, no need to proceed in terms of s 57 (2) of the Act. All that the respondent had to do was to chase its bank for the value of the cheque before the expiry of the 60 days. That was not done and the responsibility to do so did not fall on the applicant. It fell on the respondent who had a duty to deliver the AICO shares that had been paid for through a bank cheque on 5 November 2008. It is strange that the respondent was only heard on 13 January 2009.

I agree with the applicant that the issue of the applicant’s previous cheques that were dishonoured in other transactions has no relevance *in casu.* If anything, that issue should have prompted the respondent to make a timeous follow up of the cheque payment. The respondent can have recourse to its own bank which makes reference to what it refers to as “challenges encountered with the clearing system”. That, in my view, had nothing to do with the applicant whose cheque was honoured.

In view of the foregoing, my finding is that there is merit in the applicant’s claim and the relief sought should be granted.

I therefore order as follows:

1. That the respondent be and is hereby ordered to deliver six million (6 000 000) AICO Africa Limited shares together with the share certificates to the applicant within seven days.
2. That the respondent shall pay costs of this application in terms of the Law Society tariff including costs of counsel.

*Mtetwa & Nyambirai*, applicant’s legal practitioners

*Atherstone & Cook*, respondent’s legal practitioners