TELECONTRACT (PVT) LTD t/a TELCO
versus
SPORROW HAULIERS (PVT) LTD t/a J&J TRANSPORT

HIGH COURT OF ZIMBABWE
CHITAKUNYE & TSANGA JJ
HARARE, 27 May, 2015

Civil appeal

T. Magwaliba for appellant
R. Stewart for respondent

CHITAKUNYE J: This is an appeal against the judgment of the magistrate court granting the respondent's claim as claimed in the summons.

The appellant and respondent entered into a contract for the provision of fibre internet service facilities at two of respondent's premises namely No. 34 Martin Drive, Harare and No. 19 Manyonga Close, Glen Lorne, Harare. The agreement was based on partly written and partly verbal communications between the parties between the 19th March and the 12th April 2012.

The terms and conditions of the agreement between the parties included, *inter alia*, that: -

1. The appellant would install and provide internet services that would operate at an uncontended speed of 5MB (appellant contended it was at a speed of 5Mbps);
2. The respondent would pay the installation costs of US$654-00;
3. The respondent would pay a monthly service fee of US$5000-00 for the provision of internet bandwidth at uncontended speed of 5MB (appellant 5Mbps).

Based on the above terms and conditions respondent paid to the appellant the sum of US$8220-20 broken down as US$5000-00 for internet service at 5MB for the month of April 2012 at both premises and US$3220-20 for fibre installation at both premises.

The appellant on its part embarked on installing the internet fibre connections. It installed at No. 34 Martin Drive whence internet services began on or about 23rd April 2012. The respondent raised complaints with appellant on the speed of the internet service being provided. Appellant attended to the complaint but still not to respondent's satisfaction.

Being dissatisfied with the service and what it deemed appellant's failure to adhere to its obligations, the respondent cancelled the agreement on or about 30th April 2012.

On the 28th November 2012 respondent sued appellant in the magistrates' court seeking the restitution of the deposit in the sum of $4987 paid following the cancellation of the agreement.

The appellant defended the action. After a contested trial the trial magistrate granted judgement in favour of the respondent in the sum claimed.

The appellant being dissatisfied with the judgment appealed to this court. The appellant basically argued that the learned trial magistrate erred in most of her findings against the appellant.

The grounds of appeal included that:-

1. The learned magistrate erred and misdirected herself when she held that the appellant was at fault on the basis that it knew that the Respondent was referring to internet speed measured in 'megabytes' not 'megabits' yet there was evidence that was led before the court that suggested that on a number of occasions, the appellant explained that it was providing internet services to the respondent at a speed of 5MEG, which denotes '5 megabits' and not '5 megabytes'.
2. The learned Magistrate further erred when she held that the Appellant was at fault yet the Respondent breached the terms of the service level agreement by cancelling the contract prematurely and in so doing, caused the Appellant a significant financial loss as it had already expended its resources towards fulfilling its obligations in terms of the agreement between the parties.
3. The learned Magistrate further erred when she held that internet speeds never reached the speed of 5 megabits at number 34 Martin Drive, Harare, yet the evidence suggests that there were tests that were conducted by the Appellant to confirm that internet services were being provided at a speed of 5 megabits. In the circumstances, the Appellant did fulfil its contractual obligations.
4. The learned Magistrate further erred when she held that the Appellant had a duty to explain what was denoted by the '5MEG' and that '5MB' internet speed was impossible to achieve and, in the circumstances, the Appellant failed to clarify the said terms yet there was evidence to suggest that the Appellant did explain the terms of the contract relating to internet speed to the respondent on a number of occasions. In the circumstances, the Respondent could not have been regarded as ignorant of the relevant internet speeds as evidence was led to the effect that the respondent has its own Information Technology (IT) Department and further, the respondent had dealt

with internet service providers in the past that denoted internet speeds in megabits and not megabytes. In the circumstances, the Respondent could not have been regarded as a lay party that was unaware of the industry norms regarding internet speed.

5. The learned Magistrate further erred when she held that the parties failed to reach consensus *ad idem* yet, from the evidence, it is clear that the Appellant and the Respondent met on a number of occasions to clarify the issue of internet speed and furthermore, there was constant communication between the parties pertaining to the internet speed. Furthermore, from the evidence, it is clear that the Respondent made payment to the Appellant for the provision of internet services pursuant to the terms of the service level agreement entered into by the parties, which is a clear indication that the Respondent was amendable to be bound to the terms and conditions thereof.

In her reasons for judgment, the trial magistrate made a finding that the parties from the outset failed to reach consensus *ad idem*. This was a contract which was void for vagueness. She also made a finding that the appellant was at fault because it knew from the onset that the respondent was referring to megabytes but for reasons best known to itself, it decided not to explain to the respondent that 5megabytes cannot be reached because it wanted the contract.

The major issue is whether the magistrate erred and misdirected herself in making a finding that the parties never reached consensus *ad idem* and that the contract is void for vagueness.

In their testimony, both parties referred to verbal communication and written correspondence between the parties as evidence in support of their respective versions.

The respondent's evidence in the court *a quo* was to the effect that it believed the contract was for the provision of internet service at a speed of 5 megabytes per second. In this regard respondent's first witness Vikram Singh produced a number of documents showing that parties were talking about 5megabytes. He alluded to the letters of offer and the draft Contract document all referring to speed of 5meg which respondent understood to be megabytes. (see exhibits 1, 2 and 3). Paragraph 1.3 of exhibit 1 states that:-

"Customer is required to pay $5000.00 for unlimited at 5meg speed line."

Exhibit 3 (draft contract) refers to 5MEG as the service speed to be provided for the monthly payment of $5000-00. It was the witness' evidence that by 'meg' is meant

megabytes and that is what respondent contracted for and not the 5megabits appellant alleged.

When respondent was served with the draft contract the witness responded seeking amendments to the daft. This was before the installation at 34 Martin Drive. In that response the witness indicated, *inter alia*, that the minimum speed at both sites is to be 5MB and the cost for both packages to be USD5000-00. This was before installation was done at 34 Martin drive. That e-mail is dated 29 March 2012. (exh.5)

On that same date appellant responded to the proposed amendments through its witness Cleopatra indicating that they would put the amendments in the contract. So as of that date appellant is deemed to have known that the internet speed required is 5MB. (see exhibits 5 and 6).

The e-mail by Vikram dated April 20, 2012 at 8:23AM addressed to Ndaba of appellant company, is quite instructive on the respondent's position. It states, *inter alia* that:-

> "Dear Ndaba,
> Thank you for visiting us yesterday morning.
> I would like you to peruse the exchange of e-mails below between Cleopatra and myself. Kindly take note that it was specifically stated that our speeds should be 5MB and there was nothing to the contrary stated by Telco.
> Apart from the below, we have had a few meetings with Chris and Cleopatra and upon seeking specific clarification they assured us that we were talking about Mega bytes and not megabits.
> I think it is unprofessional at this stage to be going back and saying that your sales team misquoted us. We have already made payment to you in good faith and it is only at this stage are you saying there was an error.
> With due respect, if your staff cannot distinguish the difference between the two, surely we should not be made to suffer.
> We are currently on ZOL and it was only upon meeting your sales team and their subsequent assurances regarding 5 Megabytes speeds that we thought about changing to another service provider."

The appellant's Sales and Marketing Manager, Cleopatra Tsuma, gave evidence which tended to confirm the above. In her e-mail of the 3rd May 2012 she confirmed that Vikram wrote '5MB' as he contended and she went on to say that:-

> "While we note that he wrote 5MB we assumed an error on his part.''

Under cross examination Cleopatra conceded as much in the following exchange:

> "Q. Can you confirm that this was the e-mail that my client wrote to you- exhibit 5?
> A. yes
> Q. you will note that the plaintiff's representative referred to megabytes?
> A. yes
> Q. Have a look at exhibit 6 you agreed to the terms that were raised by the plaintiff?
> A. Yes
> Q. Including that the internet was to be provided in megabytes?

A. yes''
Later on she was asked:
Q. The plaintiff was acting on the assumption that he was buying megabytes"
To which she replied:-
A. Probably I do not know what they were thinking."

Later on Cleopatra conceded that it was prudent for her to have explained to the respondent that they were in fact buying megabits and not megabytes. She also confirmed that the contract as it stands does not explain the speed of the service to be provided and does not explain the difference between megabits and megabytes.

I am of the view that the above shows clearly that from inception, respondent was referring to megabytes, hence when such was not reflected clearly in the draft contract respondent raised a query on it and asked that 5MB be confirmed by appellant. The appellant through its sales and marketing manager confirmed the speed of 5MB as per exhibit 6.

When that speed was not reached at 34 Martin Drive respondent complained and appellant attended to the query without success.

The appellant insisted the speed agreed to was 5megabits and not 5 megabytes. Unfortunately appellant could not refute the evidence by Cleopatra that she had confirmed the respondent's query on the speed of 5MB. The argument that such speed is not possible or that 5MB refers to storage and not internet speed would only serve to show that the parties were not *ad idem*. The appellant noted the speed being requested but did not deem it fit to advise respondent on the error if any. The appellant instead endorsed that error and proceeded to install internet at 34 Martin Drive knowing well that respondent was expecting an internet speed of 5 megabytes per second.

Though the appellant's witnesses said megabytes refers to storage, they conceded that 8megabits equals 1 megabyte and so 5megabytes would translate to 40 megabits.

In computer terms a 'byte' is described as a set of eight bits treated as a unit. A 'bit' is described as a unit of information in binary notation equivalent to either of two digits, 0 or 1. (see *Webster's Universal Dictionary & Thesaurus*). As can be noted the two are related.

That relationship entails that if parties are to agree on the provision of either of them, they ought to be clear in their agreement. It cannot be left to assumptions. The use of the prefix 'meg' was not helpful at all as both 'bytes' and 'bits' are prefixed with the same 'meg'.

The sole premise of the appellant's assertion that 'meg' relates to megabit is based on what it termed industry standard. That data transfer industry standards hold that such speeds are measured in megabits per second and not megabytes.

That was countered by respondent's witness who claimed to know that there are places were megabytes is used.

Contract law deals with terms implied by trade usage which may be deemed synonymous with industry standard. In *Business Law in Zimbabwe* by RH Christie, the author at page 59 discusses the aspect of trade usage in these terms:-

> "Those who deal in a particular market or trade tend to develop terms which have all the characteristics of terms implied by law except that, by usage, they are applied only to dealings in the particular market or trade. When both parties are familiar with the usage and do nothing to exclude the term there is no difficulty in holding that their common intention is to imply it in their contract. When one party is ignorant of the usage, however, the implication of the term is not so simple, and the approach to be adopted by the court has been thus summarised: 'Nevertheless, despite its ignorance, appellant would be bound by – and the contract would be subject to – the alleged trade usage provided that it is shown to be universally and uniformly observed within the particular trade concerned, long established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract." Per CORBETT J in *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973(2) SA 642 at 645.

In R. H. Christie, *The Law of Contract in South Africa* 5th ed. pages 161-167 the learned author states that:-

> "The proper inquiry must be whether the party professing ignorance has so conducted himself that the other party, on the principle of quasi- mutual assent, is entitled to assume that he knew of the trade usage and intended to incorporate it tacitly in the contract."

In *casu*, it is apparent that respondent did not conduct itself in any manner suggesting that it knew of the trade usage or sought to have same *tacitly* incorporated. The respondent's conduct as per exh. 5 is demonstrative of a party seeking clarification on a perceived ambiguity. In that exhibit, respondent sought confirmation of the service speed to be provided.

In exh. 6 appellant confirmed the speed as 5MB. This demonstrates the appellant's acquiescence to internet provision at the rate of 5Megabytes. The appellant cannot therefore seek to rely on what it terms trade usage when in response to the service speed to be provided it confirmed a speed of 5MB. Whether such speed is achievable or not, the fact is that the appellant confirmed that the agreement was for providing internet service speed of 5 megabytes. It is that internet service respondent believed it was paying for and nothing less.

I am of the view that the court *a quo* cannot be faulted for concluding that the parties did not reach consensus ad idem. It is apparent that when respondent paid the sums in question, it expected appellant to provide uncontended internet speed of 5 megabytes as had

been confirmed by appellant whilst appellant understood the internet speed to be 5 megabits as it assumed respondent had made an error in citing 5 megabytes.

In as far as the core of the contract was the provision of internet service at a speed the parties did not apparently have the same understanding on, it follows that the contract is void. In reaching this decision I am mindful of the approach by this court to endeavour to help the parties in the enforcement of their agreement. As was held in *Chikoma* v *Mukweza* 1998(1) ZLR 541(S),

> "The approach that the courts will adopt to the issue of whether a contract is void for vagueness will be to help the parties towards what they both intended rather than obstruct them by legal subtleties and allow one of the parties to escape the consequences of all he has done and all he has intended. The courts will interpret contracts fairly and broadly, without being quick to find defects, following the principle *ut res magis valeat quam pereat*." (an agreement intended as a contract should be given effect as far as possible).

In *casu*, the gravamen was that the respondent believed the contract was for 5 megabytes whilst the appellant believed it was for 5 megabits. The appellant argued that the 5 megabytes is for storage and not internet speed whilst respondent contended that it was made to believe that a speed of 5 megabytes was possible by appellant's sales and marketing officers. It was on that representation that it opted to engage appellant. If therefore what each party believed they were contracting for is materially different from what the other party believed, it is not possible to help the parties realise their intention in entering into the contract.

The other grounds of appeal were premised on what appellant claimed to have done in pursuance of the contract. I am of the view that in as far as appellant was made aware of the internet speed respondent wanted, but chose to ignore that as an error, appellant must accept the consequences of its own conduct. Had appellant upon realising that the internet speed being requested for was untenable it could easily have clarified that with respondent before embarking on the civil works and installation at No. 34 Martin Drive.

I am of the view that that contract is void and cannot be enforced.

The respondent asked for costs on the legal practitioner client scale. I however found no adequate justification for costs at such a scale. Costs will be on the ordinary scale

Accordingly the appeal is hereby dismissed with costs.

TSANGA J agrees ……

Mawere & Sibanda, appellant's legal practitioners.
Messrs Wintertons, Respondent's legal practitioners