REPORTABLE ZLR (117)

Judgment No. SC 126/02

Civil Appeal No. 187/01

WASTE MANAGEMENT SERVICES (PRIVATE) LIMITED

v THE CITY OF HARARE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, NOVEMBER 19, 2002 & MAY 16, 2003

P Nherere, for the appellant

A P de Bourbon SC, for the respondent

SANDURA JA: The legal issue which arises in this appeal is whether a notice which purports to terminate a contract, not with immediate effect, but with effect from a future date is effective in the sense that it puts an end to the contract as from that future date.

The factual background is as follows. In August 1997 the appellant and the respondent concluded an agreement in terms of which the appellant undertook the collection and disposal of domestic and commercial refuse from various locations within the City of Harare. The duration of the contract was a period of five years.

Subsequently, the respondent was not happy with the appellant's performance of the contract. Accordingly, on 30 March 2000 the respondent's Chamber Secretary wrote to the appellant company notifying it that the respondent had cancelled the contract with effect from 31 March 2000. Believing that the respondent had no valid basis for the cancellation of the contract and that, in any event, the purported cancellation was ineffective in that it was to occur on a future date, the appellant filed an application in the High Court seeking an order setting aside the purported cancellation, and directing the respondent to perform all its obligations in terms of the contract.

When the matter was heard, the learned judge in the court *a quo* was satisfied that the contract had effectively been cancelled, but referred to trial the dispute concerning the alleged unsatisfactory performance of the contract because it could not be resolved on the papers. Dissatisfied with the finding that the contract had effectively been cancelled, the appellant appealed to this Court.

Before dealing with the main issue, I wish to dispose of a preliminary issue, which is whether the notice given to the appellant was one which purported to cancel the contract with effect from a future date. I have no doubt that it was.

In this regard, the relevant part of the respondent's letter dated 30 March 2000, in terms of which the appellant was notified of the cancellation, reads as follows:

> "In the circumstances, you are hereby notified that the contract is cancelled with effect from 31 March 2000."

That letter was received by the appellant in the afternoon of 30 March 2000. Quite clearly, 31 March 2000 was a future date.

In addition, Mr *de Bourbon*, who appeared for the respondent, made submissions in his heads of argument which indicated that the respondent accepted that the notice purported to terminate the contract with effect from a future date. He submitted as follows:

> "It (i.e. the letter dated 30 March 2000) gives notice of the unsatisfactory performance, and of the intention to cancel at the conclusion of business the following day. … The letter was delivered on the afternoon of 30 March 2000 … and had the clear and unequivocal effect of bringing to an end the contract at close of business the following day."

It was, therefore, the respondent's understanding that the appellant was to continue performing its obligations in terms of the contract until the end of business on 31 March 2000.

However, Mr *de Bourbon* submitted that the principle set out in *Ganief v Hoosen* 1977 (4) SA 458 (C), i.e. that the right to resile from a contract is one that must be exercised *ex nunc*, only applies to a contract of lease. I respectfully disagree.

In my view, what DE KOCK J said in that case does not suggest that the principle applies to leases only, although the dispute between the parties concerned the termination of a lease. He said the following at 460 A-F:

> "The case put forward on behalf of the plaintiff, both in this Court and in the court below, was that the letter (dated 10 February) was a notice strictly in accordance with clause 26 which entitles the plaintiff to give notice on 10 February that he is terminating the lease with effect from 1 March. The defendant's contention on the other hand is that the letter of 10 February, although it purported to terminate the agreement in terms of clause 26, did not constitute an effective or valid termination of the contract. The basis of the argument is that a notice of cancellation to be effective must clearly and unambiguously convey to the guilty party the innocent party's election to bring the contract to an end. It must embody an unqualified, immediate and final decision to treat the agreement as at an end. It cannot stipulate for a termination at some future time. … Such a notice, it is urged, which purports to terminate an agreement as from a future date and which by necessary implication therefore keeps the agreement alive in the interim, cannot in law amount to an effective notice of termination.
>
> It seems to me that the defendant's contention is sound and must be upheld. … In my view, the right to resile from a contract is one that must be exercised *ex nunc*. Support for the views here expressed (is) to be found in the case of *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD 486." (emphasis added)

It is pertinent to note that DE KOCK J referred to the right to resile from a contract,

and not the right to resile from a contract of lease. Had the intention been to restrict the principle to leases he would have said: "In my view, the right to resile from a contract of lease is one that must be exercised *ex nunc*". In any event, I cannot see any logical basis for restricting the principle to a contract of lease.

In addition, it is quite clear from the judgment of this Court in *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S) that the Court was of the view that the principle in *Ganief v Hoosen supra* applied to the cancellation of any contract. At 383 A-C GUBBAY CJ, with whom EBRAHIM JA and I concurred, said:

> "The appellant's argument … was that to be valid a notice of cancellation must clearly and unambiguously inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end. …
>
> To my mind, the appellant is correct. His contention derives direct support from the judgment in *Ganief v Hoosen* 1977 (4) SA 458 (C). In that case, DE KOCK J considered the very problem debated before this Court, namely, whether a notice which purports to terminate a contract, not with immediate effect but as from a future date, is effective in the sense that it puts an end to the contract as from that future date." (emphasis added).

The learned CHIEF JUSTICE then quoted with approval part of DE KOCK J's judgment which I have already set out.

In my view, it is clear from what the learned CHIEF JUSTICE said that what had been debated before the Court was "whether a notice which purports to terminate a contract, not with immediate effect but as from a future date, is effective in the sense that it puts an end to the contract as from that future date". Although the dispute in that case concerned the cancellation of a lease, what the learned

CHIEF JUSTICE said was not restricted to the cancellation of a contract of lease.

I am, therefore, satisfied that the principle in *Ganief v Hoosen supra* applies to contracts in general, and that the notice of cancellation of the contract given to the appellant cannot in law amount to an effective notice of termination of the contract. It did not embody an unqualified, immediate and final decision to treat the contract as at an end.

Finally, I would like to consider the appropriate order to issue. As already stated, the duration of the contract was a period of five years, which expired in August 2002. It is, therefore, no longer possible to order the parties to perform their obligations in terms of the contract. I will, however, issue a *declaratur* concerning the notice of cancellation.

In the circumstances, the following order is made:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and the following is substituted –

   "(a) It is declared that the notice of cancellation of the contract given to the appellant by the respondent did not in law amount to an effective termination of the contract.

(b) The applicant's costs shall be borne by the respondent."

CHEDA JA: I agree.

ZIYAMBI JA: I have read the judgment of SANDURA JA. I respectfully disagree with it. My reasons are as follows.

The appellant and the respondent concluded a contract for the collection and transportation of domestic and commercial refuse from certain specified areas within Harare. The contract was concluded in 1997 and was to endure for a period of five years. In terms of Clause 24.1.(i) of the contract, the respondent could, as a result of unsatisfactory performance by the appellant, after written notice to the appellant, cancel the contract and perform the appellant's duties itself.

On the afternoon of 30 March 2000, the appellant received from the respondent, through its Chamber Secretary, a letter in the following terms:

"In terms of Clause 24.1 of the contract you are hereby given notice that as a result of your failure to comply with the written requirements of the Director of Works (now the Director of Health Services), your breach of the conditions of the contract and your unsatisfactory performance of the contract, the City of Harare has determined to cancel the contract and perform the contractor's duties itself.

You have collected refuse in areas not allocated to your firm in breach of Clause 5.1. In some areas allocated to your firm, you have not collected any refuse at all in breach of Clause 4.1 and 5.3. You have failed to comply with the written requirements of the Director of Health Services concerning the collection of refuse. You have breached Clause 19 of the Additional Special Conditions of Contract by submitting payment certificates which did not conform with the contract, and which were in fact fraudulent in that you inflated the number of bins collected and duplicated claims.

The City of Harare cannot continue to prejudice its ratepayers by allowing this contract to continue. In the circumstances you are hereby notified that the contract is cancelled with effect from 31 March 2000."

In response, the appellant's legal practitioners addressed a letter dated 31 March 2000 to the respondent, the relevant part of which reads as follows:

> "We place on record that our client does not accept your purported cancellation of the contract, effective 31 March 2000. Furthermore, and in any event, it does not accept that any grounds exist which can justify cancellation.

We place on record that our client will continue to tender the service required by it in terms of the contract, and will continue to perform the work of refuse collection. Should it happen that our client is prevented from performing services in terms of the contract, it reserves its rights to institute proceedings against the City for damages."

Notwithstanding this letter, the appellant's vehicles were denied access to the respondent's waste disposal site thus, so it was alleged, precluding the appellant from performing its obligations in terms of the contract.

The appellant then filed an urgent application in the High Court on 5 April 2000 seeking the following relief:

"IT IS DECLARED THAT:

1. The purported cancellation of the applicant's contract DW9/96 with the respondent effective 31 March 2000 is declared to be unlawful and is hereby set aside; and

IT IS ORDERED:

2. That the respondent be and is hereby directed to permit the applicant to execute its obligations in terms of the aforementioned contract; and

3. That the respondent be and is hereby directed to perform all its obligations in terms of the aforementioned contract; and

4. That the respondent pay the applicant's costs of suit."

The High Court found that the contract was properly cancelled, but referred to trial the dispute on the papers as to the performance of the agreement. The appellant now appeals against the whole judgment of the court *a quo*.

The main argument advanced by the appellant is that the notice of termination advising of termination on a future date is invalid. For this proposition the appellant relied on the following remarks of DE KOCK J in *Ganief v Hoosen* 1977 (4) SA 458 (C), at 486:

> "I do not think that a lessor who has the right of election to cancel, and who wishes to cancel, is entitled to declare the contract cancelled as from some date in the future and to hold the tenant bound by the lease until the arrival of that date. In my view, the right to resile from a contract is one that must be exercised *ex nunc*. Support for the views here expressed are to be found in the case of *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD 486."

These remarks were approved by GUBBAY CJ in *Jackson v Unity Insurance*

Company Limited 1999 (1) ZLR 381 (SC) at 383 C-E. In both cases the notice was given in cancellation of a lease.

The respondent, however, submitted that this principle being a rule of the law of lease, there is no basis for the application thereof to the law of contract. Further, so it was submitted, the letter of termination fulfils the legal requirements for the cancellation of a contract, which are that the notice of cancellation must be clear and unequivocal (as to which see *Kragga Kamma Estates CC & Anor v Flanagan* 1995 (2) SA 367 (A) at 375); and that the cancellation takes effect from the time that it is communicated to the other party (see *Swart v Vosloo* 1965 (1) SA 100 (A) at 105).

In *Ganief's* case *supra* the plaintiff had in December 1971 leased certain premises to the defendant for five years. The defendant not having paid the rent on due date or within seven days thereafter, the plaintiff became entitled to cancel the lease in terms of a clause of the contract. The sole question before the court was whether the plaintiff had effectively put an end to the contract as he was indeed entitled to do**.** The plaintiff relied on a letter dated 10 February 1975 written to the defendant by his legal practitioners. The letter purported to cancel the lease with effect from the first day of March 1975. On behalf of the defendant it was submitted that:

> "a notice of cancellation to be effective must clearly and unambiguously convey to the guilty party the innocent party's election to bring the contract to an end. It must embody an unqualified, immediate and final decision to treat the agreement as at an end. It cannot stipulate for a termination at some

future time."

It was clear from the notice, so it was submitted, that the plaintiff intended to keep the lease alive for the rest of February. This contention was upheld by the learned judge who relied for support on the *Alpha Properties* case *supra*.

The *Alpha Properties* case was also concerned with the purported cancellation of a lease. In that case the lease provided that if the rent remained unpaid for seven days after it became due the landlord could cancel the lease forthwith. The lease was a monthly one. The rent was not paid for more than seven days and the lessor's agents wrote to the defendant:

> "by reason of the fact that you have failed to pay your rent for this month, we have been instructed to give you one month's notice to vacate the premises at the end of July 1946."

The defendant through his attorney wrote:

> "My clients note that a month's notice of termination of the monthly tenancy has been given them, to expire at the end of July, 1946. As the tenancy is a monthly tenancy, my clients recognise that it is at any time subject to one month's notice terminating it at the end of a month, but my clients intend availing themselves of the protection afforded them by reg. 4 of War Measure 89 of 1942 … ."

MILLIN J, at p 490 of the report, had this to say:

> "I think it is trite law that an election to claim a forfeiture should be made in clear and unequivocal terms, so as to leave no room for misunderstanding by a reasonable man in the position of the defaulting party. The letter of 28 June, while alluding to the failure to pay the June rent, does not refer to clause 14 of the lease and does not state that the lease is cancelled or forfeited. On the contrary, having made the allusion to the non-payment of rent as a reason for

> what follows, it proceeds to give one month's notice to vacate the premises at the end of July".

He held that such a letter was not effective as an election to cancel the lease for non-payment of rent but was merely a month's notice to terminate the lease in the ordinary course and that the defendant was therefore entitled to the protection afforded tenants by reg. 4 of War Measure 89 of 1942. He drew a distinction between this case and the case of *I.I. Investments (Pty) Ltd v Spangenthal* (1939 WLD 274) where, he said, the learned JUDGE PRESIDENT came to the conclusion that the intention of the notice was to cancel forthwith and to give the lessee time to vacate.

In the *I.I. Investments* case *supra*, the lease in question was for five years from June 1938. It contained a clause that gave the lessor, in the event of the rent not having been paid timeously, the right to cancel the lease "at once". On 10 March 1939 the applicant (lessor), not having received payment of the rent on due date, wrote to the respondent in the following terms:

> "Please take notice that you must vacate the premises … now occupied by you, by the end of March, 1939. Also, please let us have a cheque by return of post for this month's rent, light and water".

BARRY AJP held that provided the intention to cancel was made clear to the lessee, the lessor was entitled to exercise his right to cancel and at the same time give the lessee time in which to vacate, and demand rent for that extended time. At p 278 of the report he said:

> "In the present case, while the notice contained in the letter of 10 March was laconic, elliptic and

> inconsistent, the reply showed that the respondent had no difficulty in understanding what was demanded in the notice. He clearly understood the notice to mean that the lessor terminated the lease."

And finally, in the *Jackson v Unity Insurance Co Ltd* case supra the lease contained a clause entitling the lessor in the event of any breach of the contract of lease, to "immediately cancel and terminate the lease, re-enter and take immediate possession of the premises". On 5 December 1997, the appellant having committed a breach of the terms of the lease, the respondent despatched to him a letter advising him that the lease was to terminate on 31 January 1998. The appellant refused to vacate and continued to pay rent for the premises and perform the other conditions of the lease. An application for his ejectment succeeded in the High Court, but on appeal it was held that:

> "a valid notice of cancellation must clearly inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. What the landlord purported to do was to declare that the contract was to terminate at some future date and hold the tenant bound until that date arrived. The notice of cancellation was therefore invalid."

It will be seen that all the cases to which we referred were concerned with the cancellation of lease agreements. We have not been referred to any case in which the agreement cancelled was other than a lease agreement. However, I take note that although all the cases were concerned with agreements of lease, there would appear to be some merit in the view that the learned judges, by their use of the word contract, were referring to contracts in general. I do not wish, however, in the absence of full argument on the point, to make the distinction urged upon the Court by the respondent between contracts of lease and contracts in general. In any event, I

am of the view that such a distinction is not necessary to enable me to arrive at a decision in this matter.

Whatever the position, it seems to me that what the learned Judges were concerned with in each case was whether the notice of cancellation was clear and unequivocal so that it left no doubt in the mind of a reasonable man in the position of the defaulting party of the aggrieved party's intention to cancel the contract.

It seems to me that the notice in this case clearly and unequivocally conveyed to the appellant the intention of the respondent to cancel the contract. That the appellant understood it to be so is evident from the appellant's response – a refusal to accept the cancellation. The letter was received on the afternoon of 30 March and there could have been no doubt in the appellant's mind as to the intention to cancel the contract with immediate effect. (It will be noted that a day is "a period of twenty-four hours as a unit of time, esp. from midnight to midnight" - *The Concise Oxford Dictionary*). 31 March commenced at midnight on the night of 30 March. What the respondent, in effect, communicated to the appellant on the afternoon of 30 March was that the contract was cancelled.

It cannot, in my judgment, reasonably be read into the notice that the appellant was put under an obligation to do any work in performance of the contract on 31 March. To do so would be to place an artificial interpretation on what is, in my view, the clear and unequivocal intention to cancel set out in the notice and

understood as such by the appellant. Indeed the appellant, in refusing to accept the cancellation, expressed its intention to continue performance in defiance of the notice of cancellation.

Finally, I cannot, with respect, accede to the view that in the present case the notice of a few hours would qualify to bring the notice within the class prohibited by *Jackson's* case *supra*.

Accordingly it is my view that the contract was properly cancelled and I would, therefore, dismiss the appeal.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Kanokanga & Partners, respondent's legal practitioners