

REPORTABLE (24)

EL ELION INVESTMENTS (PRIVATE) LIMITED
v
AUCTION CITY (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GUVAVA JA & UCHENA JA
HARARE, JANUARY 22 & JUNE 21, 2016

L Madhuku, for the appellant

F Mahere, for the respondent

UCHENA JA: The appellant El Elion Investments (Pvt) Ltd was the plaintiff in the Magistrates' Court and respondent in the appeal to the High Court by Auction City (Pvt) Ltd the respondent in this appeal.

The appellant submitted a tender for the purchase of shoe manufacturing equipment which was being sold by the respondent on behalf of Mrs Grimmel in her capacity as the Liquidator of Conte Shoes (Pvt) Ltd. The respondent who is an auctioneer floated a tender for the sale of the shoe manufacturing equipment. The appellant's tender for the equipment was in the sum of \$100 000-00. The respondent accepted it. The appellant paid a deposit of US\$10 000-00 in terms of the conditions of sale. The conditions of sale obliged the appellant to pay a deposit of 10% and the balance in 7 days. The appellant failed to pay the balance within the stipulated period. It was granted several extensions but still failed to

pay the balance of the purchase price. The respondent's principal cancelled the sale. The appellant demanded a refund of the deposit from the respondent. The respondent refused to refund the deposit stating that it was entitled to its commission and to recover its principal's expenses.

The appellant issued summons in the Magistrates Court claiming the refund of the \$10 000-00 deposit. The Magistrates Court ordered the appellant to refund \$8 277-00 to the respondent. It reasoned that an auctioneer is only entitled to a commission when a sale is successfully performed. The respondent appealed to the High Court which upheld the appeal and set aside the Magistrate's decision. The appellant appealed to this Court against the High Court's decision. The following are the appellant's grounds of appeal;

- “1. The court *a quo* erred in law in finding that the respondent was entitled to a commission merely upon its acceptance of the offer made by the appellant pursuant to the auction and not upon a successful performance of the contract of sale by the appellant.
2. The court *a quo* erred in law in finding that clause 9 of the Notes and Conditions of Sale was valid and enforceable in the circumstances of this case.
3. The court *a quo* grossly misdirected itself on the facts, such misdirection constituting an error of law, in finding that security costs were due and payable in the circumstances of this case.
4. In any event the court *a quo* erred at law in entertaining the appeal when on the facts the respondent had fully satisfied the judgment of the Magistrates Court.”

In its Heads of Argument the appellant abandoned grounds of appeal 3 and 4.

AUCTIONEER'S COMMISSION

Professor *Madhuku* for the appellant submitted, that the court *a quo* erred when it set aside the Magistrate's decision. He however admitted that a contract was concluded when the respondent accepted the appellant's tender. The issue is whether after a contract has come into existence an auctioneer is entitled to his commission. Relying on the

case of *Crusader Real Estate Consultancy (Pvt) Ltd v Cabs* 1999 (2) ZLR 257 (S), Professor *Madhuku* submitted that an auctioneer is only entitled to commission after the performance of the contract and not on its conclusion.

Miss *Mahere* for the respondent submitted that an auctioneer is entitled to his commission on the conclusion of the sale. She further submitted that the tender made by the appellant is the offer which was accepted by the auctioneer (the respondent) concluding the contract of sale. In conclusion, she submitted that the sale and not its performance entitles the respondent to his commission. I agree.

The case of *Crusader (supra)* relied on by Professor *Madhuku* does not support his submission that an auctioneer is only entitled to commission on the successful performance of the contract. The court's decision in that case was based on the sale secured by the auctioneer having been subject to confirmation by the Sheriff on whose behalf it was being conducted. The Sheriff did not confirm the sale. It is for that reason that the Court refused to grant the auctioneer's commission for the conditional sale. It was not because there had been no performance of the contract he had conditionally secured for his principal. EBRAHIM JA clearly makes this point at pp 259H to 260A-C where he said:-

“In the instant case, the property was not sold on public auction and an approach was made to the seller (the Sheriff) by the buyer (the respondent/ judgment creditor) for the eventual purchase of the property. Both the seller and the purchaser in this matter were already acquainted with one another due to the court action taken by the respondent in seeking to execute on the immovable property. These facts clearly emerge from the statement of agreed facts placed before the learned judge *a quo*.

In the case of *Martin v Currie (supra)* at p 53 BRISTOW J stated:

‘I think it clear that the employment of an auctioneer does not give him any authority except to sell by auction. The case of *Muller v Kemp* (1 Searle 167) was cited to us, which, on the facts, is not in point, but the court there cited, with approval, a passage from Storey on Agency which states that the agency of an auctioneer ends as soon as the auction is held. An auctioneer is

employed to sell property by auction on the conditions arranged; if he sells the property he gets his commission: if he does not sell the property he gets no commission.’

On the facts of the present case, it cannot be said that the appellant sold the property. It was the Sheriff who did so. In the circumstances the appellant clearly was not entitled to receive the commission he claims.” (emphasis added)

The difference between this case and the *Crusader* case (*supra*) is that the crusader auction sale was subject to confirmation by the sheriff while in this case the sale through tender was not subject to any confirmation by the auctioneer’s principal. It became perfecta on acceptance by the auctioneer on behalf of its principal.

In this case the parties entered into a contract which the appellant partly performed by paying the deposit. When he failed to pay the balance of the purchase price and sought indulgencies he was already in the middle of a contract. The auctioneer had already performed his mandate and was entitled to his commission from the moment the contract was concluded. The auctioneer’s commission has nothing to do with the performance of a contract. It is earned the moment a sale through him/it comes into existence. The court *a quo* was therefore correct when it held that the respondent was entitled to his commission which was 10% of the agreed price of \$100 000 00.

Clause 9 of the Notes and Conditions of Sale

Clause 9 of the Notes and Conditions of Sale reads as follows;

“The balance of the total amount of the invoice must be paid to Auction City within 7 days of notification of the outcome of the tender. Should this condition not be met in its entirety, the sale may be cancelled solely at the discretion of the liquidator. In such case, any deposit will be refunded less agent’s commission (including VAT) and any expenses incurred by the Liquidator or her agents in the process of conducting the sale and its aftermath. The timing of such refund will be at the discretion of the Principal or her agents.”

Professor *Madhuku* for the appellant submitted that this clause offends against the provisions of the Contractual Penalties Act [*Chapter 8:04*] and is therefore illegal and not enforceable.

Miss *Mahere* for the respondent submitted that the appellant did not plead this issue in the Magistrates Court and it was not canvassed in the appellant's evidence. Professor *Madhuku* submitted that it was pleaded in the Magistrates Court by referring to particular of claim No 8 on record p 24. In particular 8 the appellant said;

“8. In the circumstances Plaintiff is entitled to a full refund of its deposit as first and Second Defendant have no legal basis for withholding Plaintiff's deposit in the sum of \$10 000-00. “

The above is not a plea that the respondent is in terms of the Contractual Penalties Act not entitled to keep the deposit, but a mere allegation that the respondent does not have a legal basis to withhold the deposit. It refers to respondent's legal basis to keep the deposit as opposed to the appellant's legal basis for claiming a refund.

Professor *Madhuku* thereafter relied on the appellant's closing address as proof that the issue of contractual penalties was pleaded in the Magistrates Court.

Miss *Mahere* in response while admitting that the appellant dealt with the contractual penalties issue in its closing submissions submitted that a closing submission is not part of the parties' pleadings. I agree. A closing submission made at the end of a trial on an issue not pleaded or canvassed in evidence does not constitute a pleading or evidence on that issue. Where the issue has to be pleaded the comment on it in closing submissions does

not cure the need for it to be pleaded. Closing submissions are not pleadings. WESSELS J in

Benson & Simpson v Robinson 1917 WLD 126 commented on pleadings as follows:

“The Plaintiff shall state in concise terms what facts he intends to rely on and to prove and the Defendant shall do the same so that on the day of trial neither party shall be taken by surprise and that it may not be necessary to have the case adjourned, thereby causing wasted expense to both litigants—“

The same point was made in *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at page 210G-H where Mc CREATH J said;

“It is of course a basic principle that particulars of a claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. (Harms Civil Procedure in the Supreme Court) at 263-4.”

A party is therefore required through pleadings to place on record its case or defence before the trial starts. This is especially so when a party intends to rely on issues which have to be proved.

It is accepted that a point of law can be raised at any stage of the process even on appeal. The law on the raising of points law for the first time on appeal is clear and has been articulated in a plethora of cases. In *Muchakata v Netherburn Mine* 1996 (1) 153 (S) at p 157A KORSAN JA said;

“Provided it is not one which is required by a definitive law to be specially pleaded a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 460; *Paddock Motors (PTY) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.”

In *Muskwe v Nyajina & Ors* SC 17/12 ZIYAMBI JA at p 2 of the cyclostyled judgment said;

“Undoubtedly a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations, one of which is that the court has to consider whether raising a point of law at this juncture would cause prejudice to the party against whom it is raised.”

Points of law come in different forms. Some come as settled law to which proven facts are applied to determine the result. Some call for the leading of evidence to establish their applicability. This usually, applies to statutory provisions whose applicability depends on stated conditions. In this case the appellant relies on the provisions of s 4 of the Contractual Penalties Act [*Chapter 8:04*] which provides as follows;

- “(1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.
- (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may—
 - (a) reduce the penalty to such extent as the court considers equitable under the circumstances; and
 - (b) grant such other relief as the court considers will be fair and just to the parties.
- (3) Without derogation from its powers in terms of subsection (2), a court may—
 - (a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or
 - (b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.
- (4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor’s proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question.”

Section 4 (2) to (4) clearly indicate that the Magistrates Court and this Court can only apply the provisions if adequate information has been placed before them. In terms of s 4 (2) if it appears to a court that the penalty is out of proportion to any prejudice suffered

by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may either reduce the penalty to an extent it considers appropriate or grant such other relief it considers fair and just to the parties.

The first stage of the court's consideration of this issue is to determine whether the penalty in respect of the respondent's commission, is out of proportion with the prejudice suffered by the creditor. This can be determined from the known facts of this case. The other two options under (2) (a) and (b) can, only be determined from evidence specifically led for that purpose. In this case since the deposit is equal to the respondent's commission whose facts are clear on the record it is not necessary to consider other deductions stipulated whose consideration would have depended on evidence which was not led in the Magistrates Court.

Section 4 (1) provides that a court can in the absence of limitations imposed by the Act enforce penalty stipulations. In my view if the proportionality of the penalty stipulation is apparent to the court and it can from the known facts determine that there is no disproportionality between the penalty stipulation and the prejudice suffered by the creditor, the court may enforce the penalty stipulation.

The facts of this case establish that the respondent as the creditor's agent performed his duties as an auctioneer. He caused the appellant and the Liquidator of Conte Shoes (Pvt) Ltd to enter into a contract of sale. He fully performed his mandate in respect of that contract. He is entitled to his full commission of 10% of the agreed purchase price. There can be no disproportionality if he retains the deposit of \$10 000-00 paid by the appellant. Ordering a reduction would amount to a reduction or alteration of the auctioneer's remuneration in terms of the contract after he had fully performed his mandate.

In the Crusader case (supra) EBRAHIM JA quoted the case of *Martin v Currie* where it was held that;

“An auctioneer is employed to sell property by auction on the conditions arranged; if he sells the property he gets his commission: if he does not sell the property he gets no commission.”

There is nothing unusual about an agent being paid his commission in full after he has performed his mandate. The appellant entered into the contract fully aware of condition 9. Yeukai Gatsi who contracted on its behalf on p 101 of the record signed a Tender Purchase form which clearly states “I fully understand and agree to abide by the Conditions of Sale attached hereto.” The appellant’s breach of contract if not penalised would leave the respondent with no or inadequate remuneration for work done. There is in my view nothing illegal about an auctioneer who has performed his mandate being paid his commission.

There is no merit in the appellant’s appeal. It is dismissed with costs.

MALABA DCJ: I agree

GUVAVA JA: I agree

Mundia & Mudhara, appellant’s legal practitioners.

Coghlan Welsh & Guest, respondent’s legal practitioners.