GILL GODLONTON & GERRANS
versus
UPRIDGE TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 21 September 2007 and 31 October 2007

Civil Cause

Mr *H Mutasa* for plaintiff
Mr *K Gama* for defendant

MAKARAU JP: Thirty one bags of sugar soured the relationship between the plaintiff and the defendant to such an extent that on 11 April 2007, the plaintiff issued summons against the defendant claiming delivery of the thirty one bags or alternatively, payment of the market value of the sugar as at the date of judgment, together with interest thereon at the prescribed rate from the date of the failed delivery to date of payment in full and costs of suit.

The facts leading to this suit are largely common cause. They were set out in a statement of agreed facts between the parties and I summarize them as follows:

On 8 February 2007, the plaintiff requested for and was supplied with a quotation for the following items:

(i) 672 x 1kg bars of Elangeni soap with a total price of $3 494 400
(ii) 75 x 2kg bags of cake flour with a total price of $310 500
(iii) 129 x 2litre bottles of cooking oil with a total price of $2 051 100
(iv) 17 x 50kg bags of sugar with a total price of $816 000

On 12 February 2007, after the bank's cut off time, plaintiff deposited $7 446 300 into the defendant's bank account and the said sum included $1 488 000 meant by plaintiff to be the purchase price for 31 x 50kgs of sugar. A day later, the defendant delivered all the items requested by plaintiff except sugar. It was not specifically agreed that the sugar be immediately delivered. By 13 March, 2007 the sugar had not been delivered and the plaintiff demanded a refund of the purchase price together with interest at the prescribed rate.

In dispute between the parties was whether the defendant had sugar in stock when the plaintiff paid for the sugar and whether the defendant had sugar at any other subsequent date.

In support of its case, the plaintiff called one witness Joseph Dlamini. He is employed by the plaintiff as one of its managers. He is the one who telephoned the defendant for a quotation on the order. At the time, he was dealing with one Francis whose second name he did not know. Part of the order placed with the defendant was delivered to the plaintiff's offices. The sugar was not delivered and he was advised that the truck that had been used to effect delivery of the other grocery items was small and could not take the sugar as well. Delivery of the sugar was promised on a later date. When delivery of the sugar delayed, he followed the issue by telephoning the defendant initially, followed by a visit to the defendant's business premises. Later, Francis and another employee of the defendant's visited the plaintiff's offices to further discuss the matter. At that time the defendant no longer had the sugar in its stocks. The plaintiff then requested for a refund of the purchase price together with interest thereon at the prescribed rate. This was not paid. Later the plaintiff was informed that some other sugar had been sourced for it or could be made available to it but at a higher price. This alternative offer was declined.

The witness was long winded in his responses to questions put to him in cross-examination. He would not answer questions directly leaving me with the impression that he was evading answering the questions put to him. I therefore formed an unfavourable impression of the witness and will only rely on his evidence where it is corroborated by other reliable testimony.

After the testimony of this witness, the plaintiff closed its case.

The defendant called Francis Mavakise who is its chief buyer as a witness. His testimony was to confirm the trading relationship between the parties and that the defendant supplied the plaintiff with the other items listed on its order to the defendant. He denied that at the time the plaintiff deposited money into the defendant' account, the defendant had sugar in its stocks.

Finally he testified that due to the fact that sugar is not readily available on the market, it will work a hardship upon the defendant if it was ordered to supply the plaintiff with the sugar. He concluded by testifying that the defendant was willing to refund the purchase price of the sugar together with interest at the prescribed rate.

I formed a favourable impression of this witness. He was direct in his evidence both in chief and under cross-examination.

Mr *Mutasa* correctly in view identified the issue that falls for determination in this matter. It is whether on the evidence before me, the parties concluded an agreement of sale in respect of the 31 bags of sugar.

It is trite that a contract of sale, like any other contract, comes into being after an offer to treat on certain specified terms has unequivocally been accepted by the party to whom the offer is made. In *casu,* I therefore have to determine who made the offer and in what form that offer was made.

It appears that the plaintiff is proceeding on the basis that by giving the plaintiff a quotation on the price of sugar, the defendant made a firm offer to the plaintiff to treat on the basis of the offered price and that when the plaintiff paid the purchase price of sugar as quoted, a contract of sale for the ordered quantity of sugar was thus birthed. The plaintiff further argues that by attempting to source for sugar for the plaintiff after delivering the other items of groceries, the defendant was thereby acknowledging that it was bound in contract to supply the sugar.

I am unable to agree.

In my view, an inquiry into the price of a product is not an offer to purchase the product at that price. Similarly, the supply of a quotation is no more than a response to a price inquiry and is not an offer to sell the product at that price. The inquiry and the response to the inquiry are not made and given with the intention of bringing into being a contract. They are in my view exchanges of information preparatory to possibly contracting in future if the response is commercially favourable.

It is my further view in this matter that the response to the inquiry as to the purchase price of the items in this case was akin to the posting of prices in the shop. It surely cannot be held that by advising the public how much the defendant would sell a bag of sugar, it was binding itself to sell the sugar to all who tendered the price to it and once the amount of the price tendered, a contract to sell the sugar came into being even when the sugar was no longer available. It is my view that the contract to sell and to buy in such situations comes into being when after the purchase price has been tendered, the defendant delivers the sugar. Should he advise the customer that the sugar is sold out; he surely cannot be compelled to go to the market and procure the sugar for the customer simply because he informed the customer of the price of the now unavailable product. Not only does it sound ludicrous to me to compel it to do so but it

also appears to me to cut across the established principles of the law of contract that a contract of sale comes into being when the parties make an offer for an agreed *merx* at an agreed price and do so with the intention to bring about an agreement of sale not to get information that will determine whether they will buy or not.

It is therefore my finding in this matter that no contract of sale for the sugar was concluded between the parties in this matter. The furnishing of the quotation to the plaintiff by the defendant was no more than saying, if the defendant was going to sell the sugar to the plaintiff, it would sell it at that price. The parties still had to conclude the actual agreement of sale for the 31 bags of sugar.

The defendant has properly in my view offered to refund the purchase price paid by the plaintiff for the sugar together with interest at the prescribed rate from the date of the deposit into the defendant's account to date of payment in full.

Accordingly, I make the following order:

1. Judgment is hereby entered for the plaintiff in the sum of $1 488 000-00 together with interest thereon at the prescribed rate from 13 February 2007 to date of payment in full.
2. Each party shall bear its own costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners.
Madzivanzira, Gama & Partners, defendant's legal practitioners.