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Judgment No. S.C. 89/2001
Civil Appeal No. 216/99

SOMBRO HOLDINGS (PRIVATE) LIMITED v

MUIRHEAD INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MUCHECHETERE JA & ZIYAMBI JA
HARARE, SEPTEMBER 25 & NOVEMBER 22, 2001

A P de Bourbon SC, for the appellant

J C Andersen SC, for the respondent

CHIDYAUSIKU CJ: The dispute between the appellant and the respondent in this case is over the date from which interest on the purchase price is due to run in terms of an agreement of sale entered into by and between the parties. The appellant maintains that interest began to run as from 1 November 1994 in terms of clause 7 of the agreement. The respondent on the other hand contends that interest began to run on 13 December 1994 when the appellant tendered the shares and the purchase price became due and payable in terms of clause 2 of the agreement. The purchase price was in fact paid on 21 December 1994. The respondent admits liability for interest for the period 13 December 1994 and 21 December 1994. The High Court resolved this dispute in favour of the respondent and held that interest started to run from 13 December 1994. The appellant was aggrieved by this decision and now appeals to this Court.

The facts of this case are briefly the following:

On 27 October 1994 the parties entered into an agreement of sale of a loan account and shares in Selborne Holdings (Private) Limited. The agreement of sale had eight clauses. For the purposes of this appeal only clauses 1, 2, 5, and 7 are relevant. These clauses provide as follows:

> "1. With effect from the 1st November 1994, the Seller has sold to the Purchaser its loan account and all the issued shares in SELBORNE HOLDINGS (PRIVATE) LIMITED (the Company) on the following terms and conditions.
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> 2. The sale price shall be the sum of $4 600 000,00 (Four million, six hundred thousand dollars) and shall be paid in cash in Bulawayo on delivery of the scrip for the sold shares in negotiable form. …
>
> 5. The Seller undertakes to deliver to the Purchaser a certified copy of Deed of Transfer Registered No. 1507/49 which is the holding deed for the immovable property as soon as it has been issued by the Registrar of Deeds and also to procure that the accounts for the Company are written up by Coopers & Lybrand as at the 31st October, 1994, as soon as possible. …
>
> 7. Should the Purchaser fail to make payment on 1st November, 1994, it shall pay interest on the purchase price at the rate of 35% per annum until payment is made. Further, should the Purchaser fail to make payment by 1st December, 1994, the Seller shall have the right to sue for specific performance or cancel and claim damages."

The judge in the court *a quo* in his judgment (HB-93-98) at pp 52-53 of the record came to the following conclusion:

> "It should be observed that Mr Cole is the legal practitioner who drafted the agreement. He inserted the two conflicting provisions about condition of payment. He also included the provision that payment was to be made <u>on presentation of the scripts</u> (the underlining is mine). It is clear from his evidence that he did not present the scripts to UDC. All he needed to do was to present the scripts to UDC as in the agreement and demand that payment be made as per the agreement.
>
> Instead he chose to discuss the matter, even with a person who did not seem to know about the matter. If he had presented the scripts it was up to UDC to contact Harare, or to raise the matter with the defendant and the plaintiff could

> then be within his right to say payment should have been made on the dates (the) scripts were presented. Any delay in payment after presentation of the scripts would then be a matter between the defendant and UDC. After all it is the defendant who was arranging payment with UDC.
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> Alternatively the scripts could have been presented to the defendant so that he takes them to UDC. It was not proper for Mr Cole to concern himself with the fact that the money was with UDC because he drafted the agreement and there is no mention of UDC in the agreement. It was the defendant who was to be presented with those scripts and be left to sort out payment with UDC. In fact, when the scripts were presented properly, UDC made payment. It also follows that the failure to pay on 1 November 1994 is not a condition that can be enforced as long as the presentation of the scripts had not been made by that date. This could only be enforced if the scripts had been presented before 1 November.
>
> In the result, I came to the conclusion that the plaintiff, having drafted the agreement that was signed by the parties, did not follow the provision of that agreement. There was no basis for expecting payment before the scripts were presented. The plaintiff clearly did not present the scripts but contacted a person in UDC who did not seem to know about the matter. The scripts were neither presented to UDC nor the defendant. The defendant seems to concede, and rightly so, that interest can only be claimable from the time the scripts were presented. The scripts were presented on 13 December and payment was on 20 December. Accordingly, the delay in payment was only from 13 to 20 December, a delay of seven days. I arrive at this number of days by taking into account the day the scripts were presented. Payment should have been made that day but it was not. I do not include the 20th because that is the day payment was made and that day cannot be included in the default days. On this basis I come to the conclusion that the plaintiff's claim succeeds only to the extent that (it) is entitled to interest for seven days only. The plaintiff has conceded the defendant's counter claim."

Mr *de Bourbon*, for the appellant, submitted that the learned judge in the court *a quo* erred in finding that there was a dispute between the provisions of clause 2 and clause 7 of the agreement. He also submitted that the court *a quo* erred in finding that there was no compliance with the provisions of clause 2 by the appellant and should have held that interest ran from 1 November 1994.

In my view, the court *a quo* was correct in concluding that there was a conflict between clauses 2 and 7 of the agreement. There is clearly such a conflict in

that clause 2 provides that the purchase price is due and payable in cash upon delivery of scripts for the sold shares in negotiable form. It logically follows, and must be deemed as an implied condition of the agreement, that there is no delay in the payment of the purchase price until it becomes due upon the delivery of the shares. Interest can only accrue upon failure to pay the purchase price on time.

Clause 7 provides that interest shall run from 1 November 1994. To the extent that this clause purports to make interest payable before the purchase price was due and payable it is in conflict with clause 2. The appellant was the author of the agreement and the *contra preferentem* rule requires interpretation favourable to the respondent be adopted. This is what the learned judge in the court *a quo* did and he found for the defendant (now the respondent). I agree with this approach and would dismiss this appeal on that basis.

Mr *Andersen* has submitted that the two clauses can be reconciled. He submitted that properly construed clause 2 of the agreement between the parties was to the effect that the purchase price for the shares was only due on delivery of them, from which time the respondent would be in *mora*. He cited Makeurtan's *Sale of Goods in South Africa* (5 ed) pp 202 and 206 as authority for the above submission. He further submitted that the provision for interest to be paid from 1 November 1994 in clause 7 was subject to the condition that delivery had taken place by that date. On this reasoning interest started accruing not on 1 November 1994 as the delivery of the shares had not occurred, but on 13 December when the shares were delivered. I had misgivings about this argument because the agreement was signed on 27 October, some three days before the date interest was due to accrue in terms of clause 7. It

would appear highly unlikely that the parties foresaw the scripts or shares being delivered within that short space of time. However, these misgivings were allayed by the appellant's concession through Mr Sommer that no interest was payable before delivery or the tender of the shares. It is common cause that the shares were neither delivered nor tendered prior to 13 December 1994. On that basis the court *a quo's* conclusion that no interest was payable before 13 December 1994 is further fortified.

In the result, the appeal is dismissed with costs.

MUCHECHETERE JA: I agree.

ZIYAMBI JA: I agree.

Webb, Low & Barry, appellant's legal practitioners

Lazarus & Sarif, respondent's legal practitioners