

Judgment No. HB 109/08
Case No. HC 2830/07
Xref HC No1974/07

STEWARTS AND LLOYDS (PRIVATE) LIMITED

VERSUS

MORRISON MASHOKO

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 22 SEPTEMBER 2008 AND 6 NOVEMBER 2008

Ms N NDlovu assisted by *Mr P Ncube*, for applicant
Mr V. Majoko for respondent

Contract

Summary Judgment

CHEDA J: This is an application for summary judgment.

The salient facts of this matter which are largely common cause are that respondent who is a former employee of applicant offered to sell applicant an IT Windmill for \$1.2 million.

Pursuant to this agreement, respondent issued applicant with an invoice for the IT Windmill on the 10th November 2006 which invoice had his banking details. Applicant then deposited the said amount as per the invoice.

After payments had been made respondent promised to deliver the windmill but failed to keep his promise. Respondent thereafter began to issue one reason after the other for his failure to honour the contract.

Summons were issued against him and he entered an appearance to defend. The essence of his defence is that he is unable to deliver the said Windmill because he is not in possession of it. He further stated that he had sourced the Windmill from one Mvere of Mazoe who was in possession of the Windmill and had paid him \$80000-00 for it. However, the said Mvere later sold the same Windmill to Maphosa and Blessing who were applicant's employees.

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The question which falls for determination is, whether or not respondent has a bona fide defence? His defence for his failure to deliver the said Windmill is spurious and therefore lacks bona fides. If he is now incapable of delivering the said Windmill as per its description on the invoice then he should fulfill plaintiff's alternative claim.

As pointed above he has no bona fide defence and in addition his defence is not valid at law see *Niri v Coleman and others* 2002 (2) ZLR 280(H).

The contract was between applicant (plaintiff) and respondent (defendant). Mvere was not privy to this contract. If there was a contract between defendant and Mvere, that is an entirely different contract altogether and cannot be used to frustrate plaintiff's genuine claim. This is a clear case where defendant is delaying and/or postponing the inevitable.

Defendant's defence is rejected in the circumstances.

The following order is made:

- (i) defendant be and is hereby ordered to deliver to Plaintiff an IT Windmill within 20 days of service of this order.
- (ii) alternatively, defendant be and is hereby ordered to pay the cost of the IT Windmill with interest at the current prevailing bank rate at the time of judgment.
- (iii) defendant to pay the costs of suit.

Messrs Coghlan and Welsh, plaintiff's legal practitioners
H. Mukonoweshuro and partners, defendant's legal practitioners