GENET MINING (PROPRIATARY) LIMITED
versus
ZIMSLATE QUARTZITE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 8-9 February 2016 and 22 June 2016

Civil Trial

A Moyo, for the plaintiff
Mrs *R. Mabwe*, for the defendant

MUREMBA J: The plaintiff is a duly registered company in terms of the laws of South Africa and its principle place of business is Voltargo, South Africa. The defendant is a duly registered company in terms of the laws of Zimbabwe and its principle place of business is Harare, Zimbabwe.

The plaintiff's claim is for the payment of ZAR 505 521.51 together with interest thereon and costs of suit on an attorney and client scale. The plaintiff's claim is based in contract. It avers that in May 2012 the parties entered into a contract in terms whereof the plaintiff purchased goods, namely 116 Concrete Rectangular Portal Culverts for the sum of ZAR 1, 332,738.01. The plaintiff avers that it paid the full purchase price on 1 June 2012. However, it was allowed to collect only 72 of the culverts from the defendant's manufacturer namely Infraset whose premises are situate in Brakpan, Johannesburg in South Africa. The plaintiff avers that it was unable to collect the balance of 44 of the culverts as the defendant had failed to pay Infraset for those culverts. The plaintiff avers that consequent upon the defendant's failure to supply the balance of the culverts, it (plaintiff) cancelled the contract or hereby cancels the contract and claims a refund of ZAR 505 521.51 representing the value of the undelivered/uncollected 44 culverts. The plaintiff stated that at the time the parties entered into the contract it was trading as Gecko Mining (Propriatory) Limited.

In the plea and in the trial the defendant did not dispute that the parties entered into a contract for the purchase and supply of 116 culverts and that the agreed purchase price was

ZAR 1 332 738.01 and that the plaintiff paid it in full and collected 72 of the culverts leaving a balance of 44.

The defendant's defence to the claim is that in the agreement the parties had agreed that the plaintiff would pay the agreed purchase price for the culverts together with transport costs and import duty whereupon the defendant would then deliver the culverts. The defendant averred that it was never a term of the agreement that the plaintiff would collect the culverts. The defendant further averred that it is the plaintiff which is in breach for its failure to make payment for transport and import duty and its failure to furnish the defendant with consignee details. The defendant averred that as a result, it is not in breach of the contract. It said that, instead it is the plaintiff which is in breach. The defendant avers that on that basis it is not obliged to supply the remaining 44 culverts to the plaintiff.

The issue for determination is whether or not it was a term of agreement between the parties that the plaintiff would pay the purchase price together with further money for transport costs. Alternatively, the issue is, did the parties agree that the plaintiff would only pay the purchase price for the culverts and that the defendant was to avail for collection by the plaintiff the 116 culverts?

The Plaintiff's Evidence

The plaintiff led evidence from Petrus Joannes Sassenberg (also known as Pieter Sassenberg) who is its Project Manager in its Civil Division who also represented the plaintiff in its dealings with the defendant.

Pieter's evidence was as follows. He is a holder of a Civil Engineering Diploma. In November 2011 the plaintiff was doing a civil engineering construction project for Mbada Diamonds, in Mutare. He then contracted the defendant for the supply of culverts at Mbada Diamonds. The defendant provided a quotation which the plaintiff approved and issued a purchase order for the supply of 116 culverts including the transportation thereof. The person who was representing the defendant was Francesco Dal Col. After the agreement had been sealed the plaintiff faced numerous challenges with the Reserve Bank of South Africa in trying to transfer funds for the transaction to defendant's Zimbabwe account. All this was being communicated to the defendant. The plaintiff got frustrated to the extent that in January 2012, it then considered cancelling the agreement. It asked the defendant the implications of cancelling the agreement. The defendant said that if the agreement was going to be cancelled it wanted a 30% of the value the agreement as cancellation fee. Seeing that the cancellation

fee was exorbitant the plaintiff promised to reconsider its position. In April 2012, the plaintiff reverted to the defendant and said that it would go ahead with the contract.

Pieter asked if the cost price was still the same. In early May 2012, Francesco Dal Col said that the cost price of the culverts was still the same, but there had been an increase in the transport cost which had doubled. Pieter told the defendant that he would not pay the increased transport costs and said that the plaintiff would make alternative arrangements for transport. The defendant promised to revise its transport rate. On 17 May 2012, the plaintiff's logistical manger contacted the defendant and asked for the dimensions and weights of the culverts. The plaintiff wanted this information in order to make alternative arrangements for transport. Towards the end of May the plaintiff indicated to the defendant that it was going to use its own transport to transport the culverts. The plaintiff further asked for the address where it could collect the culverts as well as the contact person it could arrange with, all of which was supplied by the defendant. The plaintiff then requested for the quotation for the culverts from the defendant so that it could pay in rands into the defendant's South African bank account. The quotation was supplied on 1 June 2012. Subsequent correspondence happened between the parties and the plaintiff started collecting the culverts from Infraset in Brakpan in South Africa towards the end of July 2012. When the plaintiff sent its first trucks, which were interlinks trucks to collect the first load, it received correspondence from the defendant to the effect that Infraset had written an email to the effect that the Interlinks trucks it (plaintiff) had sent were not the correct trucks to ferry the culverts. It was said that the culverts needed to be collected using lowbed trucks. That email from Infraset was forwarded to the plaintiff by the defendant. The plaintiff subsequently sent the correct trucks and managed to collect 72 of the 116 culverts. When the plaintiff went for the next load, Infraset said that it was not going to supply it with any further culverts as the defendant had not paid it for the remainder of the 44 culverts.

When the plaintiff contacted the defendant about this, that is when the deadlock started. That is when the defendant raised the issue of transport costs. The witness said that the ZAR 505 521.51 the plaintiff is claiming is the equivalent of the remaining 44 culverts which the defendant or Infraset have not supplied. The witness said that communication between the parties in relation to the purchase and supply of the culverts commenced in November 2011 and ended in July 2012, and was largely by way of email. He went through the various emails in exh 3 which is the plaintiff's bundle of documents. The emails confirm

what the witness said in his evidence. The emails that I need to highlight are the following. The email of 16 May 2012, wherein Pieter wrote to Francesco Dal Col saying:

> "The cost of transport has doubled. I cannot agree to this. It's an additional 800k. We will investigate alternative transport and comment.
>
> Johans can you please investigate alternative transport, maybe our own low beds. Please liase with Francesco"

This email was copied to Johans who is an employee of the plaintiff who was supposed to do an investigation of alternative transport.

This email was in response to Francesco's email of 9 May 2012 wherein he had said:

> "As maintained in our last communication, we have managed to maintain the cost of the product unchanged. However we have encountered numerous difficulties on the side of transport. You will notice a substantial difference. Unfortunately, we have tried many different combinations ….."

Attached to that email was a proforma invoice from the defendant which showed that the cost for the purchase of the 116 culverts remained unchanged at US$ 137 460-00, but the cost of transport was now pegged at US$210 540-00 which the witness said was a double from US$104 000.00.

Johan of the plaintiff wrote an email on 17 May 2012, to the defendant asking for the dimensions of the culverts to enable him to investigate the possibility of making alternative transport arrangements as per directions by Pieter Sassenberg. On the same day Francesco wrote back giving Johan the dimensions, further stating that the plaintiff's comments on transport had been noted. Francesco also said that the plaintiff was entitled to verify the going rates, but he indicated that the defendant was going to revise its transport rate and was still hopeful that the parties could still negotiate the transport amount. On the same day Pieter wrote to Francesco thanking him and promising to revert to him as soon as possible.

On 22 May 2012, Francesco wrote to Johan of the plaintiff asking him "Have you come to any decision yet on the transport issue?" In reply Johan said that he needed to discuss with Pieter and then revert to him as soon as possible.

On 23 May 2012, Francesco wrote a follow up email to Johan asking to be advised as soon as possible saying that the defendant was holding trucks on standby. On 28 May 2012, Francesco wrote another follow-up email to Johan.

On 30 May 2012, Pieter wrote to Francesco saying "we will arrange for the transport. I will submit your invoice to our financial department for payment". Pieter said that here he meant the payment for the culverts only.

On 31 May 2012, Izani Truter a Senior Administrator for the plaintiff who is Pieter's personal assistant wrote to Tinashe Chimanikire of the defendant asking for a new proforma invoice reflecting alterations that had been made by Pieter to the proforma invoice of 9 May 2012, which the defendant had initially provided. The alterations that Pieter did to it were to indicate that the plaintiff was only paying the purchase price of US$137 460.00 for the 116 culverts. He indicated that Gecko (the plaintiff) would supply transport and that Mbada Diamonds was to make payment for the import duty. Pieter went on to issue a new purchase order for the purchase of 116 culverts in the sum of $137 460.00 + vat in the sum of US$19 244.40 giving a total US$156 704.40 on the same date of 31 May 2012. On that purchase order he deleted the word 'delivery' and left the word 'collection' where it is written Delivery/Collection.

The amended proforma invoice and the purchase order were sent to Tinashe Chimanikire of the defendant and on 1 June 2012, came his reply saying:

> "As per your request please find attached a new invoice. Kindly advise when payment will be made".

There was an attachment of the new proforma invoice which was dated 31 May 2012. The new proforma invoice or quotation was for 116 culverts. The new quotation is given in both US dollars and rands. It shows US$137 460.00 + vat US$19 244.40 giving a total of US$156 704.00. It also shows R1, 171,159.20 for 116 culverts + R163, 962.29 for vat giving a total of R1, 335,121.49. If paying in US dollars the plaintiff was supposed to effect payment into the account name of MBCA Bank Ltd with the Standard Chartered Bank of South Africa. If payment was going to be effected in rands the money was supposed to be deposited into the account name of Jackfir International Exports (Pty) Ltd in the Standard Bank of South Africa. In that email of 1 June 2012, Tinashe Chimanikire asked Izani Truter to advise when payment would be made. On the same day Izani Truter replied saying that payment was being processed in rands and asked for the physical address where the culverts could be collected by the plaintiff's logistics department. Izani Truter also asked for the contact number and the contact person who would deal with the collection. On the same day Tinashe Chimanikire replied saying:

> "There are 104 units available now and balance (12 units) will be ready in 10 working days. I enclose specifications and weights of culverts in the attachment herewith. The culvert size is 3000 x 3000 and the weight is 6223kg".

Pieter said that the plaintiff opted to pay in rands since it was still having problems with the South African Reserve Bank in paying the defendant in US dollars. On the same day of 1 June 2012, Tinashe sent to Pieter a revised proforma invoice in rands because of fluctuations in the exchange rate. The proforma invoice now showed a total amount payable of R1, 331, 738, 01.

On 18 June 2012, Izani Truter wrote to Tinashe Chimanikire asking for the physical address where the plaintiff's logistics department could collect the culverts, also the contact number and person who would know about the collection. In response Francesco Dal col wrote to Izani Truter on the same day saying, "Further to your request kindly contact Mr Louis Van Zyl on 0118132340, the logistics manager at the plant, which is situated at 77 Molecule Road, Vukania, Brakpan.

On 25 July 2012, Francesco Dal Col wrote to Pieter saying, "please note message received from Culvert Plant re transport." He then forwarded the message which he had received from Infraset saying that the transporters should send Low Bed trucks instead of the normal Super Links they were sending. Pieter said they then sent the correct trucks and collected 72 culverts. Infraset refused to supply the remaining 44 saying that it had not been paid by the defendant for the manufacture of those culverts. The plaintiff raised the issue with the defendant, but failed to get an answer from the defendant resulting in the plaintiff referring the matter to its legal department.

During cross examination it was put to Pieter that the contract that the parties entered into included a transport component of US$210 540.00 as reflected in the proforma invoice of 9 May 2010. The witness vehemently denied it. It was put to the witness that his unilateral decision to provide the plaintiff's own transport was rejected by the defendant. Pieter denied it. He was shown a proforma invoice dated 31 May 2012, addressed to him showing the amount payable for transport charges for 116 units which was US$210 540.00 or R1 793, 800.00 on p 5 of exh 4 which is the defendant's bundle of documents. Pieter said that this proforma invoice was never served on the plaintiff (invoice No. 12-0095). He was also shown invoice no. 12-0096 showing the import duty payable of US$38 230.12 or R325.720.62. It is also dated 31 May 2012, and was addressed to him. Pieter said that he never received this email. He said that those emails could not have been sent to him on 31 May 2012, because by that date he had already indicated that the plaintiff was only going to pay in rands. He also said that the plaintiff had already said that it was going to provide its own transport in the email of 30 May 2012. It was put to him that when the plaintiff was prohibited from

collecting the remaining 44 culverts it should have demanded that the defendant performs its obligations in terms of the contract. He said that after the plaintiff had failed to collect the remaining 44 culverts, he handed over the matter to the plaintiff's legal department.

The defendant's evidence

The defendant led evidence from Tinashe Able Chimanikire who is its Executive Director. His evidence was as follows. The plaintiff and the defendant entered into a contract on 18 November 2011, for the purchase and supply of 116 culverts. The culverts were supposed to be delivered by the defendant to Mbada Diamonds in Mutare.

The defendant had problems receiving payment from the plaintiff despite the plaintiff saying that the culverts were needed urgently. Payment was only effected on 1 June 2012, about 7 months later. The payment did not include the transport component because the parties were in disagreement as to the amount and were still negotiating the costs for transport. He said that it is true that the plaintiff collected 72 culverts from Infraset, but it was without the authority of the defendant which was in the dark about the collections. He said that he only became aware of these collections after the 72 culverts had already been collected. He said that after 25 July 2012, the plaintiff did not communicate with it in any manner. He said that the plaintiff's legal practitioners never called upon the defendant to perform its obligations *vis* a *vis* the contract. He said that from the last communication of 25 July 2012, the next thing that the defendant saw was the summons issued on 2 August 2013.

Tinashe Chimanikire made reference to the purchase order of 18 November 2011, which was issued by Pieter to the attention of Francesco of the defendant. It shows that the plaintiff wanted to purchase 116 culverts for US$137 460.00 and it also wanted the culverts delivered at a delivery charge (transport cost) of US$104.400.00. The witness also produced the proforma invoice of 9 May 2012, which is similar to the one that was produced by Pieter showing the purchase price of US$137 460.00 for the 116 culverts and the Vat of US$19 244.40 and the new transport cost of US$210 540.00. He explained that the transport cost had increased due to a number of factors which included the delay in transporting the goods which were initially scheduled for transportation in November 2011. He said that at that time transport costs were subsidised. Secondly, he said that there had been an increase in the abnormal load permits payment on the Zimbabwean side by the Ministry of Transport. Tinashe Chimanikire said that the plaintiff was unhappy with the increase in the transport cost and wanted to cancel the transport cost, but at the same time it (the plaintiff) knew that there would be a cancellation fee. He said that the defendant had made such a communication

to the plaintiff in January 2012, when the plaintiff attempted to cancel. He said that there was a cancellation fee for the transport cost if the plaintiff wanted to provide its own transport. He said that, that was implied in the contract. He said that the plaintiff could not be allowed to cancel part of the contract and be bound by another part of the contract. The witness said that the plaintiff later requested for separate proforma invoices for the culverts, transport and import duty which the defendant duly supplied. He said that the plaintiff only paid for the purchase of the culverts but did not pay for the transport costs and the import duty resulting in the defendant not delivering the culverts. He said that the plaintiff never called on the defendant to deliver the culverts it had bought.

Under cross examination Tinashe Chimanikire was adamant that Francesco did not authorise Izani Truter in the email of 18 June 2012, to collect the culverts even though he gave the contact name of Mr Louis Van Zyl, his phone number and the physical address of Infraset in Brakpan.

The witness explained that it cannot refund the R505 521,51 for the remaining 44 culverts because the plaintiff has not yet paid the transport cost which should be made in part payments of 60% deposit and the balance on delivery of the culverts. Asked why he was raising this issue of the deposit for the first time, Tinashe Chimanikire said that this issue was agreed upon in the purchase order of 18 November 2011, but a look at that purchase order does not reveal so. He then made a concession that that purchase order does not talk about such a term. The witness said that the contract between the parties is in the emails. He admitted that the email of 9 May 2012 contains a new proposal which the plaintiff was entitled to accept or refuse. This is the email which talks about the increased transport costs. He admitted that in the email of 16 May 2012, Pieter refused to accept the increased transport costs and stated that there was never an agreement on that issue.

Tinashe Chimanikire admitted accepting the new purchase order of 31 May 2012, from the plaintiff for the purchase of 116 culverts only with indications that the plaintiff would collect the culverts by the deletion of the word ‘delivery’ on the purchase order.

Analysis of evidence

In the closing submissions the defendant raised a point of law saying that a point of law can be raised at any stage. Consequently, I had to ask the plaintiff’s counsel to respond to the point of law, which he did by way of supplementary closing submissions. The point of law is to the effect that what the parties entered into is a simulated or a disguised contract. Amler’s *Precedents of pleadings* 8th ed at p 345 defines simulation as follows:

"A simulated transaction is essentially dishonest because the parties to the transaction do not intend it to have between them the legal effects it purports to convey. The purpose of the disguise is to deceive by concealing the real transaction."

In *Zandberg* v *Van Zyl* 1910 AD 302 it was held that in a simulated contract the parties enter into such a contract in order to secure some advantage which otherwise the law would not give or escape some disability which the law would otherwise impose. Innes CJ said:

> "…the parties to a transaction endeavour to conceal its true character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such agreement, it can only do so by giving effect to what the transaction really is; not what it in form purports to be..."

Mrs *Mabwe* submitted that the contract between the parties was a simulated one in the sense that although the agreement was for the purchase and sale of culverts, payment of the purchase price into the account of Jackfir International Exports (Pty) Ltd in the Standard Bank of South Africa was illegal in that it is in contravention of s 5 of the Exchange Control Regulations of 1996. She submitted that the act of converting the United States dollar payment into South African rands for purposes of making payment into a South African account constituted an exchange of foreign currency. Mrs *Mabwe* submitted that it is that act or conduct which is forbidden by the Exchange Control Regulations. She submitted that such an act is illegal unless it is authorised by an Exchange Control Authority. She said that no such authority gave the mandate for the money to be deposited into Jackfir International Exports (Pty) Ltd for the benefit of the defendant, a Zimbabwean company. She said that Jackfir International Exports (Pty) Ltd is a company with its own legal standing, separate from the defendant, so payment should not have been made through it as a third party. She said that the defendant as a separate legal *persona* is subject to both the tax and exchange control laws of Zimbabwe. Mrs *Mabwe* said that the contract was disguised as one consummated in South Africa in an attempt to eschew the provisions of the Exchange Control Regulations. She said that the contract was done in an attempt to evade the law.

I agree with Mr *Moyo* that a distinction ought to be made between the agreement that the parties entered into and the issue of the payment of the purchase price. The agreement between the parties was for the purchase and sale of the culverts. For such a contract to come into effect the parties ought to agree on the item to be sold and the purchase price thereof. Once that is done the contract is concluded. The parties agreed on the purchase and supply of 116 culverts and the purchase price of US$137 460.00 or ZAR1 171, 159.20. That agreement

is not in any way tainted with illegality. As to how payment of the purchase price was to be done was a separate issue which did not in any way affect the contract itself because the contract itself and how payment of the purchase price was going to be effected are 2 distinct issues. Just like delivery, the issue of payment of the purchase price is an obligation which arises once the contract is completed[1].

At law, in a contract of sale, payment must be made to the seller himself or to his properly authorised agent[2]. Payment made to a person under an authority to receive payment is valid, but this person incurs no obligations or rights under the contract and is not entitled to sue[3]. His right is restricted to receipt of payment. After the contract had been concluded it is the defendant which directed the plaintiff to deposit the purchase price into the South African bank account of Jackfir International Exports (Pty) Ltd. There was nothing irregular about that since a third party is perfectly entitled to receive payment on behalf of the seller, as long as he has been authorised by the seller to receive payment. The plaintiff's funds were in rands and in South Africa. The plaintiff simply deposited the rands it had into Jackfir International Exports (Pty) Ltd South African bank account. There were no exchange control issues involved. I do not see how the Exchange Control Regulations where contravened by this act or conduct. In any case, Zimbabwe adopted a multi-currency system in 2009. We use both the United States Dollar and the South African Rand as legal tenders. The latest proforma invoice that was issued to the plaintiff by the defendant clearly gave the purchase price of the culverts in both currencies i.e. the United States Dollar and the South African Rand. The plaintiff elected to pay in rands, which it did. There is nothing illegal about that. The payment of the money into the bank account of Jackfir International Exports (Pty) Ltd was not in any way a disguise. The plaintiff did not obtain any advantage from it. This did not in any way affect the nature of the agreement the parties entered into. Once payment had been made into the defendant's nominated account it was up to the defendant which is a Zimbabwean resident to deal with the funds in the manner that is prescribed by the Exchange Control Regulations. As to how the money was going to be transferred to the defendant by Jackfir International Exports (Pty) Ltd that had nothing to do with the plaintiff. The plaintiff's obligation ended when it deposited the money into the bank account of Jackfir International Exports (Pty) Ltd as directed by the defendant. The point of law raised by the defendant is therefore dismissed.

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[1] C.I Belcher Norman's Purchase & Sale in South Africa 4th ed p3.
[2] C.I Belcher Norman's Purchase & Sale in South Africa 4th ed p221
[3] C.I Belcher Norman's Purchase & Sale in South Africa 4th ed p222

A contract of sale is an agreement to exchange property for a price[4]. For it to be enforceable it must be defined with sufficient certainty, and it must be clear that the parties are in agreement on what property is being bought and sold and the price must be clear and expressed in money[5].

In the circumstances of the present matter, the contract of sale between the plaintiff and the defendant was created by way of purchase orders. A purchase order is a written authorisation or commercial document issued by a purchaser or buyer requesting a vendor or a seller to furnish certain goods on agreed prices to the purchaser. It is an offer from the purchaser to buy certain articles at a certain price. So the offeror is the purchaser. The offeree is the seller, who accepts to supply the goods. The contract is formed when the seller accepts to supply the requested items. So no contract exists until the purchase order is accepted. In the purchase order the purchaser also stipulates the shipping instructions. The purchaser should clearly and explicitly communicate his requests to the seller so that there is no confusion when the purchase order is received.

An invoice is a document produced or issued by the seller to a buyer indicating the price of goods, products or services being sold. It also states the delivery and payment terms. On the other hand a proforma invoice is not a true invoice, but simply a document that declares the seller's commitment to provide the goods or services specified to the buyer at certain prices. In simple terms a proforma invoice outlines how much a certain number of goods or services will cost. It is designed to give the buyer or customer an idea of how much what they are asking for will cost them. It can also be referred to as a quotation or estimate. The customer is entitled to agree or disagree to the seller's terms because the customer is the offeror and the seller is the offeree.

In *casu* the plaintiff being the buyer or purchaser was the offeror whilst the defendant who is the seller was the offeree. For a sale agreement to come into effect between the parties it was for the plaintiff to issue a purchase order to the defendant for the purchase of the culverts. In so doing it was up to the plaintiff to state the terms of its offer. It was entitled to state the number of culverts it wanted to purchase, for what price and to stipulate the shipping instructions. In other words, it was entitled to state how delivery of the culverts was supposed to be effected by the defendant to Mbada Diamonds, Mutare.

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[4] RH Christie *Business Law in Zimbabwe* 2nd ed p 142.
[5] RH Christie *Business Law in Zimbabwe* 2nd ed p 142 & 144.

It is not in dispute that the plaintiff issued 2 purchase orders to the defendant. The first one was issued on 18 November 2011. This one clearly stated that the plaintiff wanted to purchase 116 culverts for US$137 460.00. It was clearly stated in the purchase order that the plaintiff wanted the culverts delivered at a cost of $104 400.00. It is not disputed that the plaintiff faced problems in trying to effect payment of the purchase price and transport cost from South Africa. As a result the parties could not proceed with this contract, which according to both parties had already been concluded since the defendant had accepted to supply the ordered goods.

The plaintiff considered cancelling the contract, but because of the exorbitant cancellation fee it decided not to. Further discussions on the terms of the contract, particularly on the purchase price of the culverts and the transport or delivery cost resulted in the parties not agreeing on the transport cost which had doubled from US$104 400.00 to US$210 000.00. The plaintiff's witness Pieter made it clear that he was not agreeing to this increase in the email of 16 May 2012. On 17 May 2012, Francesco replied that he had noted Pieter's comments on transport. Subsequent to this Pieter then issued a new purchase order on 31 May 2012, which Tinashe Chimanikire admits to have received. This purchase order clearly states that the plaintiff wanted to be supplied with 116 culverts for the price of $137 460-00 plus vat $19 244.40 giving a total of US$156 704.40. In the new purchase order the plaintiff did not offer to be delivered with the culverts by the defendant. The plaintiff deleted the word 'delivery' and left the word 'collection' clearly showing that it wanted to collect the culverts. On receiving this purchase order, the defendant went on to supply the plaintiff with the banking details on the same day. These were given on the proforma invoice which was a revised quotation which also certified the exchange rate of that day since the plaintiff had indicated that it wanted to pay the purchase price in rands. The purchase price was even stated in rands, it reflected as R1 332 738.01. It is common cause that, that is the amount that the plaintiff then deposited in the bank account that the defendant supplied. The deposit was made on 1 June 2012. In supplying these details and asking the plaintiff to deposit the money the defendant made an acceptance of the new purchase order of the plaintiff, i.e. the purchase order of 31 May 2012.

The plaintiff having issued a new purchase order in place of the 18 November 2012 one, and the new purchase order having been accepted by the defendant, it is clear that the parties replaced the old contract with the new contract. There was a novation of the old

contract. Novation results in the contracting parties replacing an old contract with a new one[6]. The effect of a novation is that the parties' rights and duties are governed entirely by the new contract. The rights and duties under the old contract are extinguished and replaced with fresh contractual obligations as per the new contract[7].

In the circumstances of the present case what binds the parties is the contract of 31 May 2012. The purchase order thereof is very clear. It is for the supply of 116 culverts and nothing more. The argument by the defendant that the contract had not been finalised as the transport issue was still under negotiation is without substance. The offeror is the plaintiff and it was up to the plaintiff to indicate the terms of the contract that it wanted to be bound by. If it did not want the culverts delivered by the defendant it was perfectly entitled to stipulate the shipment terms it wanted. It was the plaintiff's decision to make and not the defendant's. The defendant as the offeree cannot and could not force the plaintiff to pay for transport costs. An offer is a proposal which is put forward by the offeror and it is up to the offeree to accept that proposal. The offeree's duty is to accept the offer unequivocally. The acceptance should bring negotiations to an end. In *casu* it appears that the negotiations on the issue of transport costs were brought to an end of 31 May 2012, when the plaintiff issued a purchase order for the supply of the culverts minus delivery thereof. The defendant decided to accept the payment of the purchase price in rands and issued a proforma invoice to that effect which proforma invoice did not include costs for transport. What also shows that the transport issue was no longer for further negotiations are the emails from the defendant supplying the plaintiff with the details of where the plaintiff could collect the culverts in Brakpan, South Africa. Tinashe Chimanikire personally gave the plaintiff's logistics department specifications, weight and size of the culverts after the plaintiff had informed the defendant that it wanted to arrange its own transport and therefore needed these details in order to make the necessary transport arrangements. After the purchase price had been paid to the defendant on 1 June 2012, Francesco of the defendant, on 18 June 2016, supplied the plaintiff with the details of where the plaintiff could collect the culverts and the contact person the plaintiff could see at Infraset for the collection of the culverts i.e. Mr Loius Van Zyl on 011813 2340, the Logistics Manager at the plant situated at 77 Molecule Road, Brakpan. If the plaintiff was not supposed to collect the culverts on its own, then the

[6] Innocent Maja *The Law of Contract in Zimbabwe* at p 140.
[7] Innocent Maja *The Law of Contract in Zimbabwe* at p 140.

defendant would not have supplied all this information about the place where the plaintiff could collect the culverts.

Furthermore, if the plaintiff was not supposed to collect the culverts, the defendant's Francesco Dal Col would not have, on 25 July 2012, forwarded to the plaintiff an email that he had received from Infraset which was saying the transporter should send Low Bed trucks instead of the Interlink trucks it had sent. This act by Francesco is further evidence corroborating that the plaintiff is the one which was supposed to do the collection of the culverts as per the agreement between the parties as reflected in the plaintiff's purchase order of 31 May 2012. This means that as at 25 July 2012, the defendant was aware that the plaintiff was now collecting the culverts from Infraset. Tinashe Chimanikire was therefore lying that when the plaintiff collected the culverts the defendant was not aware of it and it was still waiting for the plaintiff to pay transport costs for it (defendant) to go to Infraset, collect the culverts and deliver them to Mbada Diamonds in Mutare.

The chain of correspondence between the parties and the purchase order of 31 May 2012 show that it was not a term of the contract that the defendant would deliver the culverts to the plaintiff. The plaintiff was supposed to do its own collection.

The defendant does not dispute that it did not pay Infraset for the manufacture of the remaining 44 culverts. This is why the plaintiff was not able to collect these from Infraset. It is common cause that the plaintiff paid the purchase price for these 44 culverts to the defendant. The 44 culverts are valued at ZAR 505 521.51, that is agreed. By failing to pay for the manufacture of these to Infraset, the defendant is in breach of the contract between it and the plaintiff. What is baffling is that the defendant is still insisting that the plaintiff should pay it transport costs when it fully admits that the plaintiff has already collected 72 culverts from Infraset. The defendant has not incurred any transport costs. There is no reason why it should be paid transport costs. Tinashe Chimanikire said that by 1 June 2012, when the plaintiff paid the purchase price for the culverts, the parties had not yet finalised the issue of transport costs which he said was still subject to further negotiations. If the issue was still under negotiation and the plaintiff subsequently went on to collect the culverts on its own, then it means that the issue of transport costs which was between the parties then automatically fell away. Since it is an issue that had not been finalised, the defendant cannot therefore claim that the plaintiff should pay it transport costs. The plaintiff cannot be bound by a term which was not agreed upon by the parties.

In view of the breach of the contract by the defendant the plaintiff is within its rights to cancel the contract and claim damages for the refund of the ZAR 505 521.51 which is the equivalent value of the 44 undelivered culverts. An innocent party is entitled to cancel a contract if there is a breach of the contract. The right to cancel is exercised by way of notice of cancellation[8]. The notice of cancellation must be express and must be communicated to the guilty party[9]. However, it is also a principle of our law that if cancellation has not been previously communicated, it takes effect from service of summons or notice of motion or application on the guilty party. Put differently, the institution of legal proceedings is adequate notification of cancellation[10].

In *casu* no notice of cancellation of the contract was communicated to the defendant. However, the service of the summons by the plaintiff was adequate notice of the cancellation of the contract. The plaintiff is therefore entitled to the damages it is seeking.

I will grant costs in favour of the plaintiff on the attorney and client scale. There is justification for the award of such costs in this matter. The defendant knew from the onset that its defence was devoid of merit. The defence was groundless and hopeless. It was frivolous, vexatious and clearly an abuse of court process. The defendant defended this unassailable claim solely to gain time. It cannot be true that the defendant genuinely believed that it had a reasonable defence when it fully knew that the plaintiff never agreed to pay the transport cost that had doubled.

In the result, it be and is hereby ordered that the defendant pays to the plaintiff:

1. The amount of ZAR 505 521.51 and interest thereon at the rate of 5% per annum from the date of summons to the date of full payment.
2. Costs of suit on the attorney and client scale.

Kantor & Immerman, plaintiff's legal practitioners
Musarira Law Chambers, defendant's legal practitioners

[8] Innocent Maja *The Law of Contract in Zimbabwe* at p 130.
[9] Innocent Maja *The Law of Contract in Zimbabwe* at p 130.
[10] *Sally Maplanka* v *B. A Ncube Holdings* HB 63/10 at p 5-6.