BELL PTA (PRIVATE) LIMITED
versus
CAB PARK INVESTMENTS (PRIVATE) LIMITED
T/A MACATOO MINING

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 9 June & 20 July 2016

Trial matter

T Magwaliba, for plaintiff
E Jori, for defendant

TSANGA J: In this trial matter the plaintiff Bell PTA (Private) Limited, (hereinafter referred to as Bell), claimed the sum of US$41 400.00 deemed due and owing by the defendant, arising out of a contract for the supply of a technician for servicing its machinery. The contract, according to the plaintiff, was entered into in January 2013 and the unpaid charges were said to cover the months of March, April and May 2013. The defendant is Cab Park Investments (Private) Limited trading as Macatoo Mining, hereinafter referred to Macatoo. It is a mining company based in Hwange. Macatoo had on its premises Bell supplied equipment for which Bell was the supplier of technical back up services. Macatoo disputed owing the amount in question, arguing that it had in fact settled whatever it owed in full.

The context of each party's position is this. The initial relationship between Bell and Macatoo commenced in 2011 whereby Bell would supply its services for technical support for the said machinery on an *ad hoc* basis upon request by Macatoo. This arrangement proved to be unsatisfactory to Macatoo as it was unhappy with what it deemed to be "shoddy and third rate service" being supplied by Bell's technicians. Consequently, in September 2012 a letter of complaint had been written to Bell. In it Macatoo highlighted that as a small entity, it was of the view that its requests were being side-lined. It observed that Bell's technicians were overstretched as they were prioritising Hwange Colliery, a much bigger concern. A visit had been undertaken to Macatoo by Bell's managers. What is common cause is that with a view to providing a better service, it had been agreed that the way forward was to definitely have a full time technician stationed at Macatoo in line with its own expressed growing needs.

Macatoo's position is that to formalise the agreement for a full time arrangement on 7 January 2013, it had generated a signed and dated purchase order to Bell with the following request under description of goods and services:

> "Supply full time technician for 200 hours / month
> * Confirm price
> *Confirm when will be available
> *Send invoice"

The purchase order is not denied by either party although its import is what is in dispute. Thereafter a memorandum of agreement had been sent to Macatoo encapsulating the terms and price for a one year contract. The proposed contract showed a fixed monthly charge of $10 300.00 for a contract of a year's duration. It did not have a start date. However, the contract for one year was never signed by either party and this is not in dispute. The gist of plaintiff's argument, however, is that there was nonetheless an agreement between the parties from whence arises its claim.

Mr Du Toit, Bell's managing director gave evidence on behalf plaintiff. His evidence was that the technician started working full time on 1 February 2013. He also stated that Macatoo had an arrangement for a credit facility for $10 000 per month for spare parts while technical services were up until February 2013 being done on a job by job basis. He said that although the contract had not been signed they had acted on supplying services based on 200 hours a month. He also stated that the only month that Macatoo had paid for labour was for February 2013. A sum of $31 463.57 had been paid by Macatoo on 14 March 2013, to cover spares and that of this amount at least $15 000.00 had been an overpayment and had been credited to labour hence the claim being limited to the months of March to May 2013. For these months, Macatoo received invoices for labour on a job by job basis. It was these invoices sent to Macatoo for labour only on a job by job basis that Mr Du Toit said contained an error in that the charge for labour should have been for the flat rate of 200 hours a month as per agreement for the provision of a full time technician. It is the three invoices that were subsequently generated by Bell in May for labour charges only for the months of March, April, and May to rectify this error that are at the heart of the dispute. He also indicated in his evidence that Mr Kevin Wilson the sales manager who had dealt with Macatoo, had since left the company and was now based in Mozambique.

Mr Chiromo, the managing director of Macatoo gave evidence on behalf of defendant. His evidence was that a technician was provided in January 2014 following the complaints made in September 2012 regarding poor service. As regards the purchase order, his

explanation was that it was to negotiate a contract and that it indicated the issues that still needed to be agreed on, in particular price and start date. Contrary to Mr Du Toit's assertion, his evidence was that the technician was already on site on a full time basis in January when he generated the purchase order. He confirmed receiving the contract and said he had started the process of negotiating internally as management but that the parties never got to an agreement. He emphasised that in terms of the agreement there would have been two technicians availed. However, the unsigned agreement shows that this would have been for relief purposes as opposed to having them both on site at any given time.

Thereafter he said they had received service which was accordingly invoiced for labour and consumables as had been the case previously. He highlighted that the major difference under the arrangement was that they now had the technician on site full time as opposed to any substantive changes in the modus operandi for billing for services rendered. He said it was after they had settled what they owed on 17 May 2013 which he said amounted to $27, 396.39 inclusive of parts and labour based on invoices that they had received, that they had been notified that they owed labour charges for 200 hours for the months of March, April, and May amounting to $41 400.00. They had also been advised that they would be refunded for nay payments made for labour on an ad hoc basis. As Bell had refused to release spares, he explained that it was in this context that an email had been sent indicating that they would pay whatever was still owing under labour. He stated that they had thereafter terminated the arrangement as they were of the view that Bell's conduct was extortionist in seeking to charge for 200 hours retrospectively when invoices had already been sent and settled for actual hours worked. However, he confirmed in cross examination that there was enough work to keep the technician occupied on a full time basis. He also confirmed that Macatoo had gone to employ the technician because the technician had asked for a job upon realising that Bell would not be servicing the machinery and that he would most likely be dismissed.

The correspondence between the parties which was the reference point as to whether or not Macatoo acknowledged the sum claimed as owing related to an email sent by Mr Chiromo on 20 May 2013 to Mr Kevin Wilson. It was sent following payment of what Macatoo believed it owed and upon receipt of further invoices based on 200 hours a month. It was also sent against the backdrop of conversations which Mr Chiromo emphasised had taken place regarding what was deemed still owing and in view of Bell's refusal to release

spare parts. Bell's position was that the contents of this email amounted to an acknowledgment of debt. It read as follows:

> "Dear Kevin
> "The outstanding amount is made up of labour charges for February to May which invoices we had not received at the time we made the last payment until now. Also we have not received any credit notes reversing the labour that was charged on individual jobs. **We are committed to paying everything we owe as we attempted to do when we paid the 27K.** It appears that we are being made to pay for the inefficiencies of your invoicing department. Every month we struggle to get hold of invoices and my Accountant spends lots of time on the phone requesting invoices. Meanwhile we have equipment standing and your technicians have no work to do because we cannot access the spares. I thought our initial agreement to not let labour invoices stand in the way of accessing spares benefitted both parties."

On 24 May Mr Chiromo wrote to Mr Kevin Wilson terminating the contract as follows:

> "Please be advised that we will no longer require fulltime Bell Technicians on site with effect from 1 June 2013. We will henceforth place orders for specific jobs should the need arise.
>
> We are grateful for the support you have given us thus far."

In response Mr Wilson had expressed shock on the basis that Bell had gone through a justification exercise for employing a full time technician. More significantly, he expressed concerns regarding the implication of going back to the previous arrangement when there was no dedicated technician on site.

The legal submissions

Mr *Magwaliba* as the plaintiff's counsel argued in his submissions that Macatoo could not resile from the admissions it had made in the email it sent on 20 May regarding its willingness to pay for labour charges. For the contention that one cannot resile from an admission made, he drew the court's attention to the cases of *Louw* v *Nel,*[1] *Water Renovation (Pty) Ltd* v *Gold Fields of SA Ltd.*[2] He further out forward that the agreement was essentially meant to record terms and conditions of their relationship. Emphasis was equally placed on the argument that courts lean in favour of upholding a contract. The cases of *Madan* v *Macedo Heirs & Anor,*[3] *Associated Printing and Packaging (Pvt) Ltd* v *Lavin & Anor*[4] were drawn on in this regard. The essence of his argument was that the conduct by Macatoo admitted to the existence of a contractual relationship. He drew on the case of *Antonio* v

[1] 2011 (2) SA 172 (SCA)
[2] 1994 (2) SA 588 A @ 605 H-J
[3] 1991 (1) ZLR 295 (S) at p 301
[4] 1996 (1) ZLR 82 (S) at p 87

Ashanti Goldfields Limited [5] in particular that the proposal was intended to create a binding contract and that the conduct of the parties was consistent with the acceptance of the offer.

He also pointed to the letter terminating the contract, highlighting that if there was no contract, then what would Macatoo have been terminating as of 1 June 2013.

Mr *Jori* on the other hand, as counsel for the defendant, put emphasis on the purchase order and argued in his submissions that it could not be construed as an offer with the intention that by its mere acceptance a contract would form. His point of emphasis was that the offer was neither certain nor in definite terms as it required confirmation of two essential requisites of a contract, namely the price and the start date. His position was that it was simply intended to start negotiations with a view to finally arriving at contract. He rejected the argument that the agreement would have been a mere record of the agreement particularly as the price quoted in the agreement was different from the $60.00 an hour that was generally applicable. He further stressed that the technician had in fact been dispatched before the purchase order in response to the complaint on shoddy service. It was his view that not much store could therefore be placed on the fact that a full time technician had been provided since he was already on site at the time of the purchase order.

He further argued that Bell had not shown that its technician had worked 200 hours. He also rejected the argument that the invoices for labour had contained an error pointing out that Mr Wilson was not available to be cross examined on whether this was a mistake at all. His position was that the court should not make a contract for the parties but should instead seek to resolve factual disputes in order to ascertain where the truth lies. He stressed that the contract that his client had admitted to was the contract on a job by job basis which had commenced in mid-2012 and ended in May 2013. What Bell considered as the termination of a contract was argued by Mr *Jori* to have been simply a termination of the arrangement of service provision on a job by job basis albeit with the technician being on site full time.

Mr *Magwaliba*'s response to the above submissions was that this court should place emphasis on the contextual approach whereby when taken together with the circumstances surrounding it, the order placed on 7 January resulted in purchase order. He relied on the principle expressed in the case of *Prenn* v *Simmonds*[6] regarding non isolation of agreements from the matrix of facts in which they were set, and as applied in the case of *Varden Safaris*

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[5] 2009 (1) ZLR 354
[6] [1971] 3 All ER 237 at p 239

(Private) Limited v *Forestry Commission.*[7] He also emphasised that although Macatoo had overpaid for spare parts by about $15 000.00 it had not sought a refund of this amount which had gone towards labour costs.

The three issues referred to trial upon which this court is asked to make a decision were captured as follows:

1. Whether the defendant ever concluded a contract with the plaintiff in January 2013for the supply of full time technicians at the defendant's site in Hwange for 200 hours per month during the months of March, April and May 2013, for the purpose of attending to the servicing of the defendant's machinery.
2. Whether the defendant is indebted to the plaintiff in the sum of $41 400.00 arising from such contract.
3. Whether the plaintiff is entitled to claim interest on the said sum of US 41 400.00 *a tempore morae* from the 4th of February 2014.

Whether a contract was ever concluded

Mr *Jori*'s view was that the purchase order was no more than an invitation to treat. *Business.dictionary.com* describes a purchase order as follows:

> "A buyer generated document that authorises a purchase transaction. When accepted by the seller it becomes a contract binding on both parties.
>
> A purchase order sets forth descriptions, quantities, prices, discounts, payment terms, dates of performance or shipment, other associated terms and conditions, and identifies a specific seller. Also called order."

Where a purchase order is accepted it becomes binding upon the parties especially when goods are delivered. In his evidence, Mr Chirombo emphasised that the provision of the technician could not be taken as the fulfilment of the contact since he was already on site at the time of the purchase order. Even if one accepts that the purchase order was not the basis of the contract, still, in ascertaining whether or not there was an agreement the issue in practice is indeed said to go beyond whether there was an offer and an acceptance. This is because it may not be possible to reduce all statements made by the parties that led to their agreement, to an offer and an acceptance. Also, whether or not there has been an agreement between parties is not based what the parties may have intended in their heads but whether

[7] HH 601/15.

that agreement is expressed in an "outwardly discernible manner". Hawthorne and James Pretoruis[8] explain this reality as follows:

> "Traditionally it is taught that a contract comes into being by way of a clearly discernible offer followed by a clearly discernible acceptance of the offer. The offer is an invitation which is addressed by the one party to the other to create a specific obligation (or specific obligations) and the acceptance is a positive (affirmative) answer by the party to whom the invitation was directed. It must, however, be emphasised that the reduction of a contract to an offer and acceptance is a theoretical construction. Legally an offer and acceptance is not required for a contract to come into being - what is required is that there must be agreement between the parties - and in practice it is often impossible to reduce all statements made by the parties during the prolonged negotiations between them to an offer and acceptance.[9]"

I find the above synopsis particularly apt to the facts *in casu* in that the issue of a full time technician can certainly not be reduced to whether or not there was an offer and an acceptance in terms of the purchase order. Since everything is not solely dependent on a firm offer and acceptance as also rightly pointed out in the cases that Mr Magwaliba referred to, then ultimately in this instance, whether or not there was an agreement depends on the facts as whole surrounding the supply of the technician. The facts which led to the provision of a full time technician have been contextualised. With or without the purchase order, the evidence of Mr Chiromo himself was that Macatoo had more than sufficient work to keep the technician busy on a full time basis. The hours that he deemed constituted full time - that is the 200 hours per month which he stated in the purchase order, were provided by him on behalf of Macatoo. These hours are certainly within range of what constitutes a full time service on a month's basis even without the purchase order.

It was not disputed by Mr Chiromo that he was aware of the $ 60.00 per hour for labour that pertained under the ad hoc arrangement. The point which Macatoo seems to miss is that it was not looking for an ad hoc arrangement as that had failed dismally according to its own averments. It undoubtedly wanted someone full time. It must also be appreciated that from Mr Chiromo's own evidence that even when Macatoo cancelled whatever contract or arrangement it says it had with Bell, it still employed on a full time basis the technician who was already servicing it.

Fundamentally, even if the technician was already in place at the time of the purchase order Macatoo must therefore at the very minimum have expected to pay for the services of a full time technician, hence the indication of the hours it was prepared to pay for. It is

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[8] L Hawthorne & C-J Pretorious *Contract Law Case Book 3rd ed. (Cape Town: Juta) 2010*
[9] Above at p 75

therefore a fair assumption that behind Macatoo's quest for a price for a full time technician was to get a lower price than the $60.00 an hour, in view of the increased hours that the technician would now be available. To the extent that no formal agreement was eventually entered into for the year, this was most likely because the reduced price would only be applicable for a long term contract, which Macatoo did not wish to commit to. In fact if he was already in place then asking for a start date must have been linked to whatever date the full time "reduced rate" which Macatoo had been hoping to get would apply. It stands to reason that the applicable rate for a full technician which was $60. 00 per hour was what remained applicable for a full time technician on site for a maximum of 200 hours a month when Macatoo did not sign the one year contract. Materially, it is not in dispute that a technician was supplied on a full time basis and this is key. It could only have been this contract of the provision of a technician on a full time basis deemed by Macatoo to amount to 200 hours a month that it was terminating.

I therefore find that the payment of US$ 41 400.00 for the months of March, April and May for labour charges is due and owing, less whatever may still need to be credited to Macatoo's account for any payments it may have made for labour charges on an ad hoc basis. I do not find that the costs on a higher scale are justified under the circumstances of the case, given that what led to ventilation of grievances in this court emanated from a lackadaisical approach to invoicing.

Accordingly, it be and is hereby ordered as follows:

1. Defendant to pay the sum of US$ 41 400.00 being the amount due and owing by the defendant to plaintiff arising out of the contract defendant entered into with plaintiff in January 2013 for the supply by plaintiff of a full time technician at defendant's site for 200 hours per month for the months of March, April and May 2013.
2. Interest thereon *a tempore morae* from the 4th of February 2014 being date of demand.
3. Costs of suit.

Atherstone and Cook, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners