

ECONET WIRELESS (PVT) LTD  
versus  
ANTOLICE ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 7 June 2017 & 24 January 2018

**Civil Trial**

*S Mubvuma*, for the plaintiff  
*N Mukangagumbo*, for the defendant

FOROMA J: Plaintiff sued defendant for payment of the sum of \$20 020.00 being an amount due and owing to plaintiff in respect of the cost of certain recharge cards sold to defendant in terms of a written agreement. Although defendant eventually conceded plaintiff's claim it had initially disputed plaintiff's claim and counter-claimed for the payment of the sum of \$128 200.00 in respect of certain goods allegedly sold and delivered to defendant which defendant claimed it never bought or took delivery of but had been required to pay for them believing erroneously that it was owed same.

In response to the counter claim plaintiff denied that it had erroneously invoiced defendant and maintained that the payment had legitimately been received for recharge cards which it had sold and delivered to defendant.

As a result of the concession of plaintiff's claim by defendant only one issue remained for determination at trial which was couched in the following terms "Did plaintiff issue fraudulent invoices to defendant in the year 2011? As recorded in the pre-trial conference minute it was agreed

that the onus of proof on this sole issue was on the defendant which therefore had to assume the duty to begin. Both parties led evidence from a single witness each.

The defendant's witness was one Kudakwashe Garutsa who as it turned out plaintiff claimed was the defendant's official who took delivery of the recharge cards on the three separate occasions disputed by defendant. His evidence was briefly as summarised below.

On 28 January 2010 plaintiff and defendant entered into a written contract in terms of which plaintiff agreed to supply defendant with mobile phone recharges cards on the Econet cellular network on 7 day credit terms. The agreement of sale which was produced as exh 1 consisted of a Dealer Application form completed by defendant and a declaration by an official authorised by defendant both of which documents constituted an offer to do business. The terms of the agreement as recorded in exh 1 were the following:

- i) that any and all credit granted to be settled within 7 days of invoice
- ii) all purchases must be accompanied by an official order and if a telephone order was placed an official order had to be produced on collection of goods
- iii) a delivery note must accompany all goods delivered by Econet. There were other terms which constituted part of the agreement which do not warrant discussion here.

In the dealer application form there is a section which refers to authorization to collect stock on behalf of the dealer in respect of which defendant put forward two persons namely Antony Garutsa NR 08-249187 G 80 and Kudakwashe Garutsa NR 08-853284 J 80.

Kudakwashe Garutsa gave evidence that plaintiff debited the defendant with three invoices which defendant subsequently discovered it had not collected stock for neither had defendant placed an order for the stocks allegedly supplied. Thus although defendant paid for these invoices in the normal course of business on investigation defendant realised that it had incorrectly been debited with the cost of the said stock. It therefore sought a refund of the sum of \$128 200.00 being the sum total of the three invoices. The invoices in question were identified as follows

- 1) Invoice dated 27 April 2011 being Invoice Number 9839 for the sum of \$45 000.00
- 2) Invoice dated 24 May 2011 being Invoice Number 11273 for the sum of \$40 000.00
- 3) Invoice dated 6 June 2011 being Invoice No. 11908 for the sum of \$43 200.00

It is important to note that the invoices dated as above according to copies of invoices

produced during the trial by plaintiff slightly differ in amounts as follows-

- i) Invoice dated 27 April 2011 reflects a total of \$45 450
- ii) Invoice dated 24 May 2011 reflects a total of \$40 950.00 making a total of \$129 600.00 which is \$1400.00 more than the amount counter claimed by defendant.

Kudakwashe Garutsa also testified that defendant was claiming interest on the \$128 200 at the prescribed rate and costs of suit on the higher scale of attorney and client.

According to Kudakwashe Garutsa there initially were 11 invoices raised against defendant as an Econet dealer in terms of the agreement which infact were raised in error as a result of plaintiff's systems' malfunction. The standing arrangement in 2011 was that goods supplied had to be paid for within 7 days of invoicing as per dealership agreement aforesaid. It was also part of the understanding that in the event any invoices were queried by the dealer (in this case defendant) the dealer would be required to pay within the seven days per agreement while any queries were being verified on the understanding that any verified errors would be addressed through refunds or reversal of transactions in question.

The process of purchase of stock by a dealer involved raising a written order for the quantities of stock required. The orders would then be placed with a sales person who would generate a fiscal invoice in duplicate. The invoices would then be signed upon collection and the security guard would then stamp the two copies of the invoice. The security guard stamped both invoices to show that the dealer had indeed collected the goods per invoice and the dealer left the Econet premises with an original invoice. Obviously a stamped copy of the invoice was retained by plaintiff as evidence that the dealer had collected the goods per invoice. An invoice No. 21830 dated 19 January 2012 was produced as exh 2 to show what the invoice produced by plaintiff looked like. It is significant to note that exhibit 2 is signed in original ink on the left hand corner of the invoice with the following endorsement in long hand

Name: Kudakwashe Garutsa

ID. 08853284J80

Sign: (Signature is endorsed)

On the right hand side against the name and details of the person collecting the stocks purchase is a Shield Security stamp showing CHECKED by and a security guard endorses his signature and below the guard's signature as part of the stamp is provision for a date given as 19 January 2012 and the inscriptions on the stamp end with Tel and following is endorsed C099881456.

On top of the invoice is endorsed the following details in long hand;

STRIP – 60003030019-32518

TXT – 40061449498-9997

SOLID – 7590118001 – 18300

The rest of the invoice is printed matter part of which shows item number, description, quantity shipped, tax Unit Price and extended amount. The total at the bottom shows invoice total and tax total and also reflects any payments made and credits financial charges and outstanding balance as at the date of invoice *in casu* 19 January 2012 in USD showing 20 250.00 It is important to note that the outstanding amount in exh 2 is the total invoice value. According to K Garutsa's evidence the plaintiff did not permit defendant to purchase stock beyond the credit limit stipulated by plaintiff. He further testified that out of 11 queried invoices 3 which are the subject of the counter claim remained unresolved. Correspondence dating back to 13 March 2013 shows that defendant queried among other invoices the three invoices the subject of the defendant's counter claim highlighting that defendant had never owed plaintiff any amount in excess of the credit limit of \$32 400.00.

Defendant's case is premised on the following facts.

- i. it is not disputed that the credit limit imposed by plaintiff was \$32 400.00
- ii. according to the agreement dealership any and all credit granted is to be settled within 7 days of invoice.
- iii. All purchases must be accompanied by an official order (from the dealer *in casu* defendant).

It was defendant's evidence that defendant did not place any order for the goods the subject of the three invoices in dispute. Defendant also disputed having collected goods reflected in the

three disputed invoices as plaintiff never allowed defendant to exceed its credit limit. Despite demand for evidence that defendant had indeed placed an order for these goods per letter of 13 March 2013 and follow up reminders. Plaintiff never produced irrefutable evidence that defendant purchased the said stocks?

Kudakwashe Garutsa also disputed the signatures on the three invoices in dispute as not being his.

Plaintiff called one witness to testify in support of its defence to defendant's claim in reconvention namely that it had indeed supplied defendant with stocks on the three invoices in dispute and defendant had collected same. It is important to appreciate at this early stage of plaintiff's testimony that its witness Mr Mlungisi Dube was not in plaintiff's employ in 2011 when the three invoices allegedly were raised against defendant. Whatever testimony he gave has to be understood in the context of that background. Mlungisi Dube was employed by plaintiff as a credit controller since 20 April 2013 and his duties involved following up payments outstanding and due by dealers doing reconciliations of the dealers account balances and handing over debtors for collection.

He testified that plaintiff sold air time recharge cards on 7 days credit. He also testified that dealers on credit were subject to credit limits which limits were flexible and that dealers sometimes exceeded their credit limits by paying cash for the excess with the result that the credit limit will be the figure that will reflect on the invoice. He further testified that the dealers either collected their purchase order through the authorised persons who placed written orders on behalf of the dealers or placed orders telephonically. He also testified that the order number appearing on the invoice is an Econet generated number auto generated as the sales clerk processes a customer's order. He confirmed that Antolice (Pvt) Ltd (defendant) had a credit limit of \$32 600.00 and that plaintiff suspended its credit facility as a result of defaulting on two invoices in 2015.

Plaintiff through M Dube produced copies of three invoices the subject of dispute. M Dube insisted that based on the trading practice of plaintiff there is no doubt that defendant purchased and collected the stocks per the three invoices the subject of defendant's counter claim. He also testified that the original invoices were taken by defendant and he had access to duplicate invoices left with dispatch. As a result of the complaint raised by defendant M Dube went back into their records and found invoices produced as exh 7, 8 and 9 (the three disputed invoices) and cross

checked them with the dispatch book as a result of which he confirmed that the defendant had actually collected the goods in each of the three invoices in dispute. He checked the dispatch book for the period 24 March 2011 to 17 September 2011 for Econet Bulawayo which covered the transactions in dispute. These records are kept in the custody of the Dispatch team. In the said Dispatch Book are entries in relation to the invoices in dispute recording horizontally the following information: date of transaction, dealers name, invoice number, order number (Econet generated as indicated herein above). Quantity of Universal strip, serial number, quantity universal \$5, serial number quantity universal TXT, Serial Number Quantity Universal \$2 Serial Number Quantity B5 pack 2.5g. there is then a gap Between columns 18-27 after which are the following Columns Dealers Name, Dealers I.D. No, Dealers Signature and Security Signature. It should be noted that on each 2 pages of the Dispatch book are columns horizontally spread occupying 32 columns from invoice number to security signature recording in each line a single transaction categorized in terms of the columns aforesaid.

The photocopy of the Dispatch Book was produced by consent and was sent to the court file after the close of evidence. A perusal of the Dispatch Book confirms M Dube's evidence that the disputed invoices were entered into that book and each entry is signed in the dealer's column. The said dispatch book also records the dealer Antolice (Pvt) Ltd in respect of the dates when the disputed invoices were allegedly transacted and goods collected. A pertinent observation should be made. The column headed Dealer's Signature is not wide enough to reflect a dealer's signature in the same way a dealer may have signed on the invoice. This may make it difficult to compare the signatures of the dealer for purposes of confirming or otherwise disputing the signature without the benefit of a questioned documents examiner. Be that as it may Mr Dube concluded that on the basis of a comparison of the invoices and the Dispatch Book entries in respect of the three invoices he was satisfied that defendant purchased and collected the stock reflected as purchased by reference to the three disputed invoices. The conclusion reached by Mr Dube has presented me with challenges given the admitted factual background to the parties' relationship including certain common cause facts as I will demonstrate below.

The following matters should be noted

- (a) While each of the three invoices appear to reflect that K Garutsa signed each of them K Garutsa disputes signing any of the said invoices.
- (b) Although the identity details of the person appearing to be signatory to the 3 invoices is 08853284J80, in the Dispatch Book only one entry out of the 3 dealers' identity entries is correctly captured. The other 2 are recorded as follows –invoice dated 27 April 2011 the Dealer's identity in the Dispatch Book is recorded as 08833284J80 and on invoice dated 24 May 2011 the dealers identity is also recorded as 08833284J80. Neither plaintiff nor defendant commented on this discrepancy and how K Garutsa could have incorrectly captured his identity number is difficult to comprehend.
- (c) Although the plaintiff admits that dealers' official orders (written) were kept in the Dispatch Teams' custody the plaintiff did not discover them and no explanation was given for the non-discovery of the official orders placed by defendant kept by plaintiff.
- (d) The defendant's witness K Garutsa testified that he took the defendant's finished order book for the relevant period to the plaintiff's Credit control for inspection but not a single copy of any of the 3 disputed invoices' orders was found in the said order book and M Dube did not dispute this evidence.
- (e) The defendant did not effect discovery of its completed order books and plaintiff did not take in steps in terms of the High Court Rules Order 24 r 162 and 165 to compel defendant to effect their discovery despite plaintiff having always appreciated that defendant disputed ordering the said stocks and that the finished order books could easily have proved the preparation of such orders.
- (f) Contrary to the plaintiff's position per plaintiff's plea to defendant's claim in reconvention that defendant maliciously raised a counter claim as a ploy to delay settlement of the plaintiff's claim for \$20 020.00, defendant had infact raised a red flag regarding the disputed invoices as a far back as 13 March 2013 before M Dube even joined plaintiff's Credit Control Department on 20 April 2013. See para 2 of the plaintiff's replication where the plaintiff replicated in part in the following terms  
“The purported defence stating that the plaintiff “generated fraudulent invoices is completely denied and is entirely frivolous, vexatious and a *mala fide* attempt by the defendant to escape its contractual obligations.”

(g) Each of the three disputed invoices exceeded substantially the defendant's admitted credit limit. The suggestion by Mlungisi Dube that the credit limit was not religiously enforced is clearly speculative. In fact K Garutsa vociferously denied it. At some point Mlungisi Dube suggested that the credit limit was subject to relaxation at the request of the defendant and yet not a single instance was cited to show that the parties had agreed to an increase of the defendant's credit limit. One of the defendant's bone of contention was that it never exceeded its credit limit. In this regard the letter dated 13 March 2013 aforesaid made this point and evidence no response was given to refute it or suggest that the credit limit had been exceeded by mutual consent. See *Johnson v Lean* 1980 (3) SA 927 at 937.

It should be appreciated that the law stipulates that when a party has signed a contract he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. As a matter of policy the law prescribes that when a contract has been entered into freely and voluntarily the court has an obligation to enforce it thus emphasizing the sanctity of contracts. Where one party seeks to respect and observe the sanctity of a contract and the other to the contrary attempts to move away from the principle the court should firmly find itself on the side of the obedient – see *Book v Davidson* 1903 T 571 at 578.

In his response to questions put to him by the court M Dube conceded that in his investigation of the complaints by the defendant he overlooked the condition that the defendant was required to place written orders for the goods invoiced on the 3 disputed invoices. He also admitted that the defendant was denying both ordering the goods or collecting the goods in question and these were not resolved.

The plaintiff did not dispute with the defendant that in terms of the agreement between the parties there could be no delivery or invoicing of goods purchased without an official order.

Although plaintiff's witness suggested the Dealer Manual provided for circumstances when dealers could exceed their credit limits no such dealer manual was produced despite denial of its existence by the defendant's witness.

During the trial it was conceded by the plaintiff's witness that the plaintiff's employees could abuse the customers (dealers) credit facility as happened.

The plaintiff also argued that the defendant did not prove that no stock was ordered and that this could have been done by producing the 2011 order book. This aspect has been dealt with herein above. The plaintiff has the onus to prove that it invoiced goods on the disputed invoices against defendant's official orders in compliance with the agreement by producing the copies of orders they acted upon. There is no onus on a party to prove a negative. Indeed the plaintiff appreciated that the order book could have easily put the matter to rest and yet it did not compel its discovery nor did it discover the official orders placed with it by defendant. The plaintiff seems to take comfort in the exhibit 7, 8 & 9 (copies of invoices) as read with the Dispatch Book as proof that the defendant collected the goods invoiced. This elusive comfort ignores (a) that the signatures on the disputed invoices are disputed and (b) that the mere existence of the documents cannot completely dispel the possibility that the plaintiff's employees could have abused the defendant's credit facility to defendant's prejudice.

The sum total of the observations including the foregoing comments do not establish on a balance of probability that the defendant collected- goods per disputed invoices – this in particular if it is born in mind that the plaintiff's employees Morgan Majange was found guilty of abuse of a dealer's credit facility. In the circumstances I find that the plaintiff did not prove on a balance of probabilities that the defendant was lawfully charged for goods invoiced per disputed invoices. The plaintiff has not been able to explain the basis on which the defendant was invoiced with purchase of disputed stocks in the absence of proof of official orders of the said stocks as well as evidence of any relaxation of the credit limits in all the three disputed transactions. Payment for the said invoices within the 7 days credit terms cannot be conclusive evidence that the defendant collected the goods as it was common cause that the plaintiff's policy in the event of a query was investigation of the query as insistence on resolution of a query before payment could well result in a breach of the 7 day credit term which could expose a dealer such as defendant to a suspension on account of breach of the credit supply agreement.

In the circumstances I find that defendant has proved its claim on a balance of probabilities. Subject to plaintiff's right of set off in respect of the admitted claim of \$20 020.00. I make the following order.

It is ordered that plaintiff pay

(1) Defendant US\$128 200.00.

- (2) Interest at the legally prescribed rate with effect from the 10 October 2015 being the date the defendant's claim was filed to date of payment.
- (3) That the plaintiff pays the costs of suit.

*Mtewa & Nyambirai*, plaintiff's legal practitioners  
*Zimudzi & Associates*, defendant's legal practitioners