

AC CONTROLS (PRIVATE) LIMITED  
versus  
SABLE CHEMICALS INDUSTRIES LTD

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 12, 13, 14, & 18 October 2016 & 8 February 2017

### **Civil Trial**

*T Moyo*, for the plaintiff  
*Ms A Y Saunyama*, for the respondent

FOROMA J: The plaintiff sued the defendant for payment of the sum of \$236 520-45 together with interest from 18 November 2013 being the date of demand and costs of suit on a legal practitioner and client scale. The plaintiff's claim is in respect of the purchase price of goods sold and delivered to the defendant by the plaintiff pursuant to an order placed by the defendant. The defendant denies the plaintiff's claim and disputes that the goods delivered were purchased by it as it cancelled the order of the said goods the next day after placing the order. The defendant in the alternative avers that the goods were not delivered in terms of the order nor were they delivered within a reasonable time. To a large extent the essential factual background is common cause between the parties. What is in dispute though is the legal consequences of the agreed facts. As will be shown below the dispute relates to whether or not a contract was entered into with the defendant disputing that any binding agreement was entered into and the plaintiff contending to the contrary.

Details of what transpired between the parties is material in analyzing and thus ascertaining the existence of the agreement or lack of it. It will therefore be necessary to recount some of the evidence led at the trial.

Although in its summary of evidence filed for the purpose of a pre-trial conference the plaintiff indicated that it would lead the evidence of its General Manager one John Marima at the

trial the plaintiff led the evidence of two witnesses namely Mrs F Makumbinde and Tsungai Mukaratigwa. The defendant led evidence of three witnesses namely Knowledge Samhungu, Allan Manhanga and Fidellies Simiti.

In summary Mrs Makumbinde's evidence was that as Managing Director of the plaintiff, she was, at all material times aware of developments regarding the defendant's order for circuit breakers and was involved in negotiation with the defendant's representatives. After being informed that the defendant had placed an order for the purchase of two circuit breakers through an e-mail sent to one Andrew Kasheshe on 12 February 2013 and being aware of the urgency of the defendant's order from the information gained during negotiations, she instructed Tsungai Mukaratigwa to retrieve the order from Andrew Kasheshe's work e-mail and get onto processing it immediately. The processing of the defendant's order would not have waited the return to work of Andrew Kasheshe who was not in the office on 13 February 2013 as this was an urgent order. She learnt sometime in the course of the day 13 February 2013 that the defendant had sent through an e-mail to Andrew Kasheshe an instruction putting the order on hold. By then the order had already been placed with the plaintiff's overseas supplier who had confirmed that the circuit breakers had already been packed and was ready for shipment. She did not personally respond to the defendant's 'put order on hold' instruction although she indicated in her evidence that it (the order) could not be reversed. She contacted the plaintiff's overseas supplier to withhold dispatch of the circuit breakers and the supplier agreed to do so for a week. She however did not inform the defendant that the plaintiff's supplier was only prepared to hold for a week. Mrs Makumbinde testified that the circuit breakers were received by the plaintiff from overseas in early March 2013 but the plaintiff did not deliver them to the defendant nor did the plaintiff inform the defendant that the circuit breakers had been received in the country and that they were being kept at the plaintiff's premises. She further testified that she spoke to Engineer Chivonivoni of the defendant who informed her that the breakers were still required. During cross examination she indicated that she knew the influential officials and thus could by-pass some of the defendant's officials and directly contact those she considered were more relevant and influential in the business of the defendant. This explains why despite the request for a pro-forma invoice having been requested by one Simiti the pro-forma invoice was sent to Mr K Samhungu instead. The plaintiff's second witness was Tsungai Mukaratigwa whose

evidence can be summarised as follows: he was instructed by Mrs Makumbinde to retrieve the defendant's purchase order from Andrew Kasheshe's work e-mail box. He received a telephone call from Mr Simiti to confirm that the order for circuit breakers had been put on hold through an e-mail sent earlier to Andrew Kasheshe by Mr Samhungu. He informed Mr Simiti that it was too late to do so as the order for the circuit breakers to their overseas supplier in Japan had already been placed and paid for. He had exchanged some correspondence via e-mail with Mr Samhungu in which he stressed that the plaintiff could no longer action their instruction to put order on hold as it was too late to do so and that the order to their overseas supplier had already been placed and paid for. No documents were produced though to show proof of payment of the overseas supplier for the circuit breakers. He actually testified that the call from Mr Simiti following up Samhungu's e-mail to Kasheshe only come after 2:00pm on 13 February 2013. He only checked the e-mail to Mr Kasheshe after 5:00pm. He could not provide the name of the Japanese supplier but ended up saying the supplier was EPL whose full name he could not give. Mr Mukaratigwa however said that as soon as he sent out his order via e-mail to the Japanese supplier he then rushed to the bank at about 8:00am to pay for the circuit breakers by telegraphic transfer. He had confirmed with the Japanese supplier that both the order and payment had been received and was also advised that the consignment had already been crated ready for dispatch. He accordingly considered that the defendant's instruction to put order on hold had come too late as the order had already significantly been processed to put it on hold.

The defence case was opened by calling Mr Knowledge Samhungu who was defendant's materials manager. He confirmed that the plaintiff's quotation was sent to the defendant in January 2013 even though initially he thought it was sent in February 2013. He also confirmed that the defendant sent the purchase order for 2 circuit breakers to the plaintiff by e mail on 12 February 2013 to one Andrew Kasheshe. Early in the morning at about 8:am on 13 February 2013 he sent an e-mail to Andrew Kasheshe advising the plaintiff to put the order on hold which he understood to be that plaintiff should not process the order until further notice from the defendant. He did not know that his e-mail suspension of the order did not reach Mr Kasheshe who was not at work on the date in question. Later on that morning he instructed his junior one Fidelis Simiti (the defendant's buyer) to phone the defendant to confirm receipt of the instruction to put the order on hold.

He also testified that Tsungai Mukaratigwa sent him an e-mail advising that the instruction to put order on hold had been overtaken by events in that the plaintiff had already processed the order. Despite this response by Mukaratigwa, Mr Samhungu sent plaintiff another e-mail reiterating the defendant's position namely that the order should be put on hold. It may be necessary to note that in one of the e-mails to plaintiff Mr Samhungu addressed plaintiff in the following terms:

“Going by what you are saying I think we can really appreciate that you had executed the order expeditiously. Kindly advise your supplier to hold until further notice. Remember that we still have to pay the 60 % (or negotiated) down payment on order for you to start processing the order. Unfortunately we still stand by our position that you put the order on hold of which we expect you to kindly observe with due respect. We should be able to revert to you during the course of next week.”

The down payment was never paid to plaintiff nor did defendant revert to plaintiff the following week or at all. He maintained that he did not see the pro-forma invoice that Mr Mukaratigwa claimed he sent to him. He was a poor witness who could not take the defendant's case further. But for the written evidence in the form of the e-mail exchanges between himself and the plaintiff's Mr Mukaratigwa he would have completely destroyed defendant's case. The defendant's second witness was one Allan Manhanga who was responsible for both the Engineering and Procurement Units of the defendant. His evidence was to the following effect. He confirmed that after the purchase order for 2 circuit breakers had been placed with the plaintiff it became necessary to cancel the purchase order as a result of a solution that had presented itself namely that one 12kv circuit breaker could with modifications be replaced with an 11 k circuit breaker. He testified that as far as he was concerned the instructions to plaintiff were to cancel the order which defendant did on 13 February 2013. He did not see the pro-forma invoice that Mr Mukaratigwa claims he sent to Mr Samhungu.

Mr Manhanga also testified that when the plaintiff delivered the 2 circuit breakers in October 2013 the defendant declined to accept delivery and invited plaintiff to collect it as the sale had not taken place since the purchase order had been cancelled. He maintained that the defendant had cancelled the purchase order and never expected to hear from the plaintiff concerning the circuit breakers after the cancellation.

Mr Fidelis Simiti's evidence basically was to the following effect:

- (1) He was the defendant's buyer and

- (2) In February 2013 he placed a purchase order for the 2circuit breakers with plaintiff on 12 February 2013 and
- (3) On 13 February 2013 Mr Samhungu instructed him to confirm with plaintiff that the instruction to put order on hold had which he (Samhungu) had sent earlier in the morning had been received.
- (4) That he did not believe Tsungai Mukaratigwa's indication that the order had already been processed and that therefore the instruction to put the order on hold had been overtaken by events.
- (5) He too did not see the pro-forma invoice which Mr Mukaratigwa claimed he had sent to Mr Samhungu.

Even though he had sent the request for a pro-forma invoice Mr Simiti corroborated Mr Samhungu's testimony that on a previous occasion plaintiff on receipt of a purchase order sent an order Acknowledgment even though for different reasons i.e. for approval by the end user i.e. defendant's engineering department. Mr Samhungu indicated that the Order Acknowledgment set out the final terms and conditions of the agreement together with specifications of the items to be supplied and that the defendant countersigned this document to formally confirm the sale.

At the pre-trial conference the following were agreed to be the issues for trial:

1. Whether a valid agreement came into place?
2. Whether the agreement was concluded by the defendants
3. Whether delivery by plaintiff was done in terms of the cancelled order.
4. Whether the defendant is liable to the plaintiff for payment of US\$236 520-45.

It is common cause that defendant approached various suppliers of 12 volt circuit breakers including plaintiff and requested that they quote for the urgent supply of 3 x 12 volt circuit breakers. The plaintiff in response to the request for a quotation quoted for 3 x 12 volt circuit breakers and that defendant considered that plaintiff was able to supply the circuit breakers at competitive prices. The defendant then engaged the plaintiff in order to discuss purchase of the circuit breakers. Meetings were held between the plaintiff and defendant at which negotiations were entered into to finalise the terms on which defendant would procure the

circuit breakers. The defendant eventually decided to purchase the circuit breakers from the plaintiff and placed an order as indicated herein above.

It is important to note that the quotation plaintiff gave to defendant had the following features:

1. The total purchase price for the 3 circuit breakers was quoted at \$365 820-69 vat inclusive which works out to \$121 940-23 each.
2. The purchase price was to be paid as follows: 30 % of the purchase price to be paid with the order and the balance to be paid in 60 days.

The quotation which was issued on 18 January 2013 contained the following important statements:

- (1) We would like to take this opportunity to thank you for your enquiry and we take pleasure in submitting our offer as indicated in the following section.
- (2) Our quote includes the following - Test Installation and Commissioning. Our quote includes the following commissioning tests - Electrical Mechanical. Under on site commissioning the following caveats is indicated “Our quote excludes the following Commissioning tests ..... Price Basis”. The above prices are inclusive of VAT

Delivery – Ex Factory Japan. Terms of Payment – We propose

- (a) 30% down payment with order
- (b) Balance to be settled over 60 days. Credit terms can be considered on application.

The quotation was produced at the trial as part of the bundle of the plaintiff’s documents.

On 12 February 2013 the plaintiff placed a purchase order for 2 carriage type circuit breakers whose specifications were detailed in the order. The important features of the Purchase Order are that:

- (i) The due date was the 28 June 2013
- (ii) Inco terms-Collection. Although the purchase order indicated under comment-collection the terms and conditions of purchase provide inter alia for delivery as follows :
- (3) All goods have to be delivered via Main stores receiving Section.
- (4) .....

- (5) Payment by Sable shall be 60 days net from date of invoice which shall not be earlier than date of dealing unless otherwise agreed in writing between Sable and the supplier. It is also important to note that in terms of the Purchase Order the order was for 2 circuit breakers each costing \$118 260-24 vat inclusive.

The purchase order was sent to the plaintiff via e-mail for the attention of one Andrew Kasheshe on the 12 February 2013. Early in the morning on the 13 defendant's material manager sent an instruction via e-mail to Andrew Kasheshe of plaintiff to put the order on hold. It is this instruction that eventually lead to the dispute which is the subject of this trial.

According to the evidence from the e-mail exchanges between the plaintiff's Mukaratigwa and defendant's Materials Manager (K Samhungu) on the instruction to put the purchase order on hold there was no common ground on the meaning to be attributed to the instruction. While Mr Samhungu believed that putting the purchase order on hold meant that the plaintiff should not proceed to process the order Mr Mukaratigwa seemed to understand that the order was being cancelled and for this reason send back a message that it was no longer possible to do so (cancel the order) as the order had already been processed in that the plaintiff's overseas supplier had already confirmed that the circuit breaks had been crated and were ready from shipment. Despite Mr Mukaratigwa's communication the defendant's materials manager insisted that the order had to be put on hold as had been conveyed on the 13 February 2013. Mr Samhungu considered that the instruction to Andrew Kasheshe to put the order on hold had been timeously communicated to Andrew Kasheshe who Mr Mukaratigwa indicated had not been at work that day hence the delay in accessing it as the e-mail in question was only accessed as a result of the follow up of the mail by the phone call made by Simiti (the defendant's buyer). There seems to have been no further communication between the plaintiff and the defendant over the issue of the circuit breakers even though in its last e-mail Mr Samhungu the defendants materials manager had promised to revert to the plaintiff the following week. It is useful to quote Mr Samhungu's communication per e-mail on the 14 February 2015 with Mr Mukaratigwa.

On 13 February 2013 Mr Samhungu despatched an e-mail to Mr Kasheshe of the plaintiff with the following message.

“Good day Mr Kasheshe - We confirm having sent the above attached order to yourselves. However could you please put on hold actioning/processing of that order until further notice from ourselves. Any inconvenience caused is sincerely regretted.”

*Ex abundante cautela* Mr Samhungu instructed Mr Simiti to phone Mr Kasheshe to confirm the receipt by Kasheshe of the put order on hold instructions.

When Mr Simiti called plaintiff he spoke the Mukaratigwa who informed him that it was too late to stop actioning the order as indicated above when Mr Simiti reported the response from Mukaratigwa to Mr Samhungu. Mr Samhungu sent the following e-mail to Mr Mukaratigwa

“Good day Tsungai “Regrettably the order is on hold as advised Mr Kasheshe yesterday morning. I personally sent out that e-mail. Simiti was only following up on mail by a call.”

On the 14 February 2013 about 9:24 am Mr Tsungai Mukaratigwa sent the following e-mail to Mr Samhungu - Good Day (Knowledge Samhungu).

“The first communication that we got was from Simiti. Unfortunately Mr Kasheshe was not in office yesterday (13/02/13). he will be coming back tomorrow by the time we received the communication I had already done all the paperwork our supplier has already confirmed that the breakers were crated yesterday and now ready for shipment.”

In response to this Mr Samhunga addressed an e-mail to Mukaratigwa whose content was as follows:

“Going by what you are saying I think we can really appreciate that you had executed the order expeditiously. Kindly advise your supplier to hold on until further notice. Remember that we still have to pay the 60% (or negotiated down payment) in order from you to start processing the order.

Unfortunately we still stand by our position that you put the order on hold of which we expect you to kindly observed with due respect. We should be able to revert to you during the course of next week.”

As indicated above this was the last communication to the plaintiff by Samhungu.

It is from the foregoing background that I have to establish whether a valid agreement came into existence between and the defendant.

Professor RH Christie in his book *The Law of Contract in South Africa* 2<sup>nd</sup> ed on p 21 says “In order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties” - easier said than done. Professor Christie on p 28 of his text book aforesaid addressing the matter - *The techniques of ascertaining agreement* says, “The .....most common, and normally the most helpful technique, for ascertaining whether there has been agreement true



or based on quasi-mutual assent is to look for an offer and an acceptance of the offer and quotes Solomon J in *Watermeyer v Murray* 1911 AD at 70 where the learned judge said “ every contract consists of an offer made by one party and accepted by another”. Once an offer is identified (made by one to another) it has to be accepted by the one to whom it is made for such offer to create a contract see also *Whittle v Henley* 1924 AD 138 at 148. An acceptance must be clear and unequivocal or unambiguous. This means that the acceptance must exactly correspond with the offer- *Joubert v Enslin* 1910 AD 6 at 29. It means that a conditional or qualified acceptance is not a valid acceptance. According to Professor Christie in his text book aforesaid says “Yes, but .....” does not signify agreement, so any attempt to vary the terms of an offer while purporting to accept it will normally best be described as a counter offer. As the agreement comes into existence when the minds have met/or are *ad idem* it follows that there can be no contract until the offeror knows that he and the offerree are *ad idem*. This means the acceptance of the offer by the offerree must be communicated to the offeror.

Having summarised the essentials of an agreement or contract above I proceed to determine whether the facts *in casu* reveal that a valid contract came into existence.

#### The Quotation of the Plaintiff of 12 February 2013

It is common cause that the quotation was given in response to defendants’ enquiry to plaintiff among others as to their ability to supply it with the circuit breakers and on what terms as to price and lead time for delivery etc. A response to such an enquiry i.e. providing a quotation makes the quotation an invitation to do business i.e sell on terms indicated. Until the purchaser decides to purchase on the terms per quotation no offer exists. The fact that the plaintiff referred to its quotation as an offer is of no moment as the period of delivery is a material term of the contract and the quotation did not address it. i.e the delivery period as time was of the essence. Besides the quotation would not have been accepted in its terms as in fact the defendant in its purchase order reduced the quantities and negotiated (downwards) the price per item and stipulated the delivery time period which clearly proves that the placing of the Purchase Order was a counter offer.

It is common cause between the parties that after giving the defendant a quotation the parties engaged each other in negotiations which resulted in the defendant securing a reduction in

the price of the circuit breakers per unit and the parties appreciated that the defendant wanted the circuit breakers supplied as a matter of priority. It would appear that in the negotiations the parties did not resolve the issue of the down payment required. This is apparent from the fact that whereas the quotation proposed 30% payable with placement of the order and the balance within 60 days the purchase order referred to the purchase price of the circuit breakers as being payable within 60 (sixty) days of invoicing or delivery. Besides, the quotation that the plaintiff gave to defendant had the following clause as to validity – “This offer remains valid for a period of 30 days from this date and subject to confirmation thereafter”. Quite clearly the negotiations did not themselves result in a contract as no evidence was led to suggest that other than the quotation and Purchase Order there was an agreement arrived at elsewhere on a different date.

As indicated herein above even if the plaintiff’s quotation were considered to be an offer as the plaintiff called it the fact remains that the defendant did not accept it as such. In fact by placing its purchase order containing a variation of terms and conditions stipulated in plaintiff’s quotation it means that the defendant did not accept such offer and made a counter offer to the plaintiff instead. Such counter offer had to be accepted by the plaintiff for a contract to come into existence.

This court finds that the defendant’s purchase order was an offer to the plaintiff. The next question to be answered is whether the said offer was accepted by the plaintiff? There is no evidence that the defendant’s counter offer was accepted by the plaintiff. The plaintiff did not communicate its acceptance of the offer to the defendant to confirm a meeting of the minds. It is significant to note that the defendant’s offer to buy the circuit breakers stipulated terms and conditions of purchase which the defendant expected the plaintiff to accept as the basis of the transaction. Whether or not the plaintiff intended to communicate the acceptance of the offer at any time after placing their own order with the Japanese Supplier does not matter as on 13 February 2013 before such communication of the acceptance the defendant withdrew its offer by instructing the plaintiff to put the order on hold (e-mail of the 13 February 2016 sent by Mr Samhungu to Kasheshe of the plaintiff). The position seems to be that the plaintiff may have prioritized the placing of the defendant’s order with the Japanese Supplier in light of the urgency of the order but by so doing before the communication of acceptance of the offer the plaintiff put the cart before the horse. In the circumstances I find that issue number one can only be answered

in the negative i.e no valid agreement came into place as between the plaintiff and the defendant as the defendant's order which was the offer had not yet been accepted by the time the defendant cancelled/withdrew its purchase order (offer) for the circuit breakers on 13 February 2013. It can be argued that the placement of the order with the Japanese supplier is proof of an acceptance of the defendant's offer by the plaintiff. That would not avail the plaintiff as it had an obligation to communicate its acceptance to the defendant. There are other indications that corroborate the fact that at the time the defendant put the purchase order on hold, no agreement had been reached between the plaintiff and the defendant. These are:

- (i) In his e-mail to Kasheshe putting the order on hold Mr Samhungu indicated as the defendants' last position that the putting the order on hold remained their firm position and that they were hoping to get in touch with the plaintiff the following week and yet the plaintiff did not do anything to remind the defendant that they were still waiting for their contact as promised.
- (ii) The plaintiff did not contact the defendant on receipt of the circuit breakers from Japan to remind the defendant that it had since received the plaintiff's circuit breakers. This attitude on the plaintiff's part is inconsistent with a party that had made such a significant financial outlay for the benefit of the defendant \$236 520-45 hoping to recover same at the earliest opportunity.
- (iii) Mrs Makumbinde's explanation for the plaintiff's inaction (in her testimony) is not convincing and is equally inconsistent with a party who ought to have appreciated the need to tighten the loose ends if the plaintiff then genuinely believed that it had a right to hold the defendant to the agreement by insisting on specific performance.
- (iv) An attempt to deliver the circuit breakers eight months later: The plaintiff's attempt to deliver the circuit breakers to the defendant eight months after the alleged agreement in the circumstances of the plaintiff's case is difficult to understand. The defendant was totally justified in assuming that the deal was off. The plaintiff's prolonged delay in delivery of the circuit breakers is not consistent with the conduct of a party who had no guaranteed assurance that the defendant would eventually pay for the goods.
- (vi) Besides if the plaintiff was alive and sympathetic to defendant's financial challenges the plaintiff would have been expected to raise the matter (delivery of circuit breakers) at the

expiry of 60 days period which in terms of the purchase order the defendant was expected to pay the purchase price and collect the goods purchased.

- (vii) The plaintiff's conduct post receipt of the e-mail instruction to put the order on hold is not reconcilable with the speed with which the plaintiff claims to have actioned the defendant's order without any down payment by the defendant.
- (viii) Although Mr Samhungu acknowledged in his evidence that the defendant was expected to pay 60% of the purchase price as a down payment with the order before the order could be processed, it is incomprehensible how the plaintiff proceeded to place an order for circuit breakers with the Japanese Supplier without any deposit.
- (ix) It is important to note that the plaintiff's case as summarised in the plaintiff's Summary of evidence filed on 25 September 2014 did not see the light of day at trial. Whilst the plaintiff in the summary of evidence indicated that the circuit breakers were ordered from suppliers in Malaysia, the quotation and evidence in court reflected that the supplier was Japan based. The discrepancies in the summary of evidence and the oral testimony by the plaintiff's witnesses were not reconcilable.

This court like Mr Simiti did not believe Mr Mukaratigwa's response to the telephone call by Simiti following up the e-mail instructing the placing of the purchase order on hold namely that the plaintiff had already got its Japanese Supplier to process the order i.e that the circuit breakers had already been crated and were awaiting shipment. No documents showing correspondence with the Japanese supplier of the circuit breakers was produced as proof that the Japanese supplier had already been paid at the time the instruction to put the order on hold was received. It is difficult to accept that the plaintiff proceeded to procure the circuit breakers from an overseas supplier (a transaction which required a heavy financial outlay) without any down payment by the defendant (a client whose financial standing was precarious to the plaintiff's knowledge.)

In the circumstances I find in favour of the defendant that the defendant withdrew its offer before the offer had been accepted by the plaintiff (for purpose of bringing into existence a valid and binding agreement).

Accordingly issue 3 and 4 can only be answered in the negative.

It is therefore ordered that:

- (1) The plaintiff's claim be and is hereby dismissed
- (2) The plaintiff is to pay defendant's costs.

*Tamuka Moyo Attorneys*, plaintiff's legal practitioners  
*Wilmot & Bennett*, respondent legal practitioners