SHEISAM CONSULTING (PVT) LTD
and
FRANCIS MASAWI
versus
ENERGY AND INFORMATION LOGISTICS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 12 June, 10 July 2017 & 10 January 2018

Trial

Ms *P Chigumba*, for the plaintiff
N Ruzengwe, for defendant

CHAREWA J: Plaintiff issued summons against the defendants claiming payment of €9 270 as fees due under a consulting contract, interest thereon at the prescribed rate, collection commission and costs on the legal practitioner and client scale.

At the commencement of the trial, the plaintiff abandoned the claim for collection commission and withdrew the claim against the first defendant and tendered his costs.

The trial therefore proceeded solely against the second defendant in the amount of €9 270 with prescribed interest thereon and costs on the higher scale.

The facts and background

The undisputed facts are that the parties entered into a written consulting contract whereby, plaintiff was required to provide resource mobilisation services and re-engineer the defendant's financial processes to make the business more viable.

In pursuance of this, the plaintiff obtained a letter of credit from an American company called Regutrade Inc (Regutrade) and issued by the Israel Discount Bank of New York, for which defendant paid the production fee of $6 034.52. Consequently, defendant entered into a Master Facility agreement with Regutrade governing the terms and conditions of the letter of credit.

The letter of credit was required in order for defendant to perform on a tender it had won to procure power quality analysers from Elspec Technologies Ltd of Israel (Elspec) and

supply them to Umeme Limited of Uganda (Umeme). The letter of credit enabled the manufacturer, Elspec, to manufacture and deliver the analysers to Uganda.

There is no dispute that Elspec manufactured the goods and shipped them to Uganda on the strength of the letter of credit aforesaid facilitated by plaintiff. Upon delivery of the goods in Uganda, Umeme was obliged to pay €185 400 to the defendant as the gross contract value, whereupon defendant was expected to pay to the plaintiff €9 270 as 5% of the gross contract value.

However, the goods could only be released to Umeme upon defendant making good on the value of the letter of credit in the amount of €133 488 due to Elspec. Therefore, because Elspec had not been paid by defendant in terms of the letter of credit, upon arrival at Entebbe Airport, the goods could not be delivered to Umeme. This state of affairs arose out of the fact that the documentation was incomplete because the bank issuer of the letter of credit, the Israel Discount Bank of New York and its corresponding bank in Israel, the Mizrahi Tefahot Bank Ltd of Israel, held on to the shipping inspection report as security for the letter of credit and eventually cancelled the letter of credit.

There is no serious dispute that the defendant failed to make good on the letter of credit or that performance on the contract was eventually facilitated upon an agreement being reached between Umeme and Elspec that Umeme should pay to Elspec directly the €133 488 that was due to it with the balance (on the gross contract value) of €52 000 being paid to defendant.

The dispute

Therefore upon plaintiff claiming payment of €9 270, being its 5% of the gross of €185 400 generated in terms of the consulting contract, the defendant refused to pay claiming that plaintiff had failed to supervise the entire tender transaction and thus breached the consulting contract resulting in defendant entering into a new procurement agreement which enabled the delivery of the goods to Umeme.

Plaintiff, on the other hand, claimed that it was entitled to payment as it facilitated the letter of credit which enabled the manufacture and shipping of the documents, and that the failure of delivery to Umeme at Entebbe was entirely due to defendant's failure to abide by the terms of the letter of credit. Besides, defendant never entered into a new procurement agreement.

The Issues

It seems to me therefore that the court is required to interpret the contract between the parties so as to determine whether it was merely a financial/resource mobilisation agreement

requiring plaintiff to mobilise the financial resources for the defendant or a logistics contract, requiring plaintiff to supervise the logistical processes necessary for the performance of the tender to Umeme; viz: ensuring that all necessary documentation was in place to enable delivery of the goods to the end user. And, whatever the contract was, at the end of the day, did plaintiff perform its part so as to be entitled to payment?

Parties' submissions

The plaintiff submits that its general obligations in terms of the consulting contract were to diagnose problems and propose solutions in the area of resource mobilisation (fundraising), process consulting, skills development and market access.

In the particular instance, the defendant had won a tender to supply 3 phase electricity analysers to Umeme but did not have the resources to perform on the tender. The agreement between the parties was therefore for plaintiff to secure funding to enable defendant to perform its tender obligations. The supplier, Elspec, would not manufacture and ship the goods without proof of funding for its processes. Plaintiff submits that it obtained the letter of credit which enabled Elspec to manufacture and ship the goods and was therefore entitled to payment in terms of the consulting contract.

It insists that its role was not to supervise the logistical processes or ensure actual delivery of the goods. Once it facilitated the financial wherewithal, its obligation was discharged.

The defendant, on the other hand, submits that plaintiff breached the consulting contract in that it did not supervise the tender performance process to its conclusion: that is, the delivery of the goods to Umeme and is therefore not entitled to payment. According to defendant, plaintiff was entitled to payment for sourcing, transporting and delivery of the goods, including supervision of other service providers involved in the transaction right up to the end.

The law

Clearly, there is a total disconnect between the parties on their understanding as to what their contract entailed.

It is settled in our law that courts do not make contracts for parties. And where a contract has been reduced to writing, the basic principle of the *caveat subscripto* rule is that parties are bound by the ordinary meaning of what they have appended their signatures to.[1] The court is

[1] *Burger v Central African Railways* 903 TS 571 @ 578.

therefore generally confined to relying on the provisions of the contract where a contractual dispute arises; otherwise the value of written contracts will be eroded.[2]

Consequently, a contract must be interpreted, either literally, through its ordinary grammatical meaning[3] or contextually in that words in a contract must be read within the entire context of the contract so as to take consideration of the apparent scope and purpose of the contractual provisions.[4]

Therefore, it is only where a contract is totally ambiguous, having looked at its literal and contextual meaning, that the court may import into it an unexpressed provision which derives from the common intention of the parties as inferred from the surrounding circumstances and which the parties expressly failed to agree on. The sole purpose of this is to give efficacy to the contract in the business sense.[5]

Analysis

The contract entered into on 24 December 2014 between the parties is quite specific as to the services that the plaintiff was required to provide to the defendant (see p. 8 of Exhibit 1 or Exhibit 5). These are described as follows:

> "The client hereby retains the consultant, and the consultant agrees to perform consulting services for the client (collectively "the services") including but not limited to:
> Selling the following:
>
> 1. Process consulting-reengineering your **financial processes** (*my emphasis*) to ensure that the business becomes efficient, effective, profitable and sustainable.
>
> 2. Resource mobilisation, and in particular **financial resources** (*my emphasis*) needed as part of the business development, operations and growth."

The parties had dealt with each other prior to this contract. And it seems to me that this consulting contract was a general framework within which plaintiff was required to provide consulting services to defendant. Hence, the contract is so worded as to include other services apart from these two.

However, it seems clear to me that this particular contract was then specifically resorted to pursuant to the defendant winning the tender to supply 3 phase electricity analysers to Umeme, and finding that it did not have the financial resources to perform the tender. Exhibit

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[2] *Johnson v Lean* 1980(3) SA 927 @937. See also *Duplesis v Nel* 1952(1) SA 513
[3] *Total SA Pty Ltd v Bekker* 1992 (1) SA 617 @ 625
[4] *Melmoth Town Board v Marius Mostert* (Pty) Ltd 1984 (3) SA 718 @ 728.
[5] *Regate v Union Manufacturing Co* [1918] 1 KB 592

4 is proof that defendant tried, on its own to re-engineer its financial resources in order to perform on the tender and failed. It thus required plaintiff to re-engineer its financial processes and to raise the financial resources to enable it to do so.

No request for logistical services was ever made to plaintiff by defendant. No proof has been produced of such a request on the documents or in the testament of its witness. Rather, defendant seems to rely on the fact that plaintiff did in fact follow up and give advice on logistical processes to suggest that this then became a term of the contract. However, in the face of the plaintiff's witness's explanation that service over and above contractual requirements is part of its customer care culture, I cannot read such conduct as becoming a term of the contract.

Defendant interprets clause 3 of the consulting agreement on "Capacity of the consultant" to mean that "supervision of services" meant supervision of the entire process and other service providers. It is my view that this interpretation is totally misplaced and results from a non-contextual interpretation thereof, arising out of cherry picking a few phrases out of their context. The clause in fact speaks of "all services performed by the consultant", and in my view it is **these** services which the consultant must supervise, not services rendered by other service providers.

In any event, I am not convinced that supervision of other service providers or providing logistical support with respect to the Umeme tender was part of these "other services" for the reason that these are specific processes requiring specific skills and capacities which the contract cannot have possibly envisioned. For instance, it is not shown that plaintiff had the requisite capacity or skills to supervise manufacturing activities of Elspec, shipping agents or inspectors of 3 phase electricity analysers. And even if it did, it is not shown on what legal basis plaintiff could supervise a company in Israel in the manufacture of the goods, or supervise a shipping agent appointed by the manufacturer or supervise the carrying out and provision of a pre-shipment inspection or carry out the logistical tasks required to release the goods at Entebbe when plaintiff was not part of the contracts with all these other service providers.

The issue of pre-shipment inspection effectively became the bane that made the release of goods at Entebbe and thus delivery impossible. Upon plaintiff mobilising the necessary financial resources to enable the manufacture and shipment of the goods to Uganda, the goods were ultimately stuck at Entebbe Airport and could not be released to Umeme because the pre-shipment report was not availed. Consequently, the Israel Bank of New York cancelled the letter of credit which had enabled the manufacture and shipment of the goods. And this outcome

was occasioned by defendant itself failing to make good on the terms of the letter of credit in accordance with its contractual obligation thereof, and of which, plaintiff was not party.

Further, defendant itself entered into a supervening contract, the Master Facility Agreement (p. 20-27 of Exhibit 1 or Exhibit 7), which does not admit of a third party supervising the processes between defendant and Regutrade or Express Trade Capital Inc, the facilitators of the letter of credit, except in so far as plaintiff could only give advice to defendant and write emails to follow up on the issuance of the letter of credit. It seems to me therefore that in seeking to import unexpressed terms into the contract, regard must be had to the possibility of performance of such terms, within the context of the consulting agreement. On what basis could the plaintiff have ordered a pre-shipment inspection and demanded the report thereof when the Master Facility Agreement prescribing this did not recognise plaintiff's standing in the process?

To read into the contract that plaintiff was obliged, merely on the basis that the contract envisaged the provision of "other services" by plaintiff, to have facilitated the pre-shipment inspection and the provision of the report to enable release of the goods to Umeme is tantamount to creating a new contract for the parties. I am loth to do so as such interpretation goes directly against the express grammatical and contextual tone of the contract.

In any event, the contract is quite clear in its terms that I really do not discern any ambiguity necessitating any importation of any different interpretation other than what is grammatically and contextually apparent. The plaintiff was required to provide services in re-engineering defendant's financial processes and in mobilising financial resources. The question therefore is, did plaintiff do so to the extent that it is entitled to payment in terms of the contract?

I am of the view that the plaintiff did successfully re-engineer defendant's finances and resources to enable it to perform on its tender with Umeme, given that the letter of credit it facilitated with Regutrade was used to manufacture and ship the goods to Uganda. (See Exhibit 1 p.28-34 or Exhibit 6). I therefore do not find it incredible that plaintiff would expect payment even if the contract between Elspec and defendant fell through. It was not plaintiff's obligation to ensure the successful conclusion of that contract. Plaintiff was only obliged to mobilise the resources necessary for the contract to be performed, and which it did.

Nor do I find it of any moment that plaintiff continued to assist defendant even after completing the financial re-engineering. It seems to me that that is only indicative of a company with the interests of its customer at heart.

There is absolutely nothing in the contract justifying defendant's assertion that plaintiff was obliged to supervise the "end to end" transaction as detailed at paragraph 3[b] of its closing submissions. Rather, I tend to agree with plaintiff that in trying to read into the contract the obligation to provide logistical support, defendant is in fact seeking to vary the terms of the contract.

It is also quite clear that the pre-inspection certificate which scuppered the entire transaction was occasioned by the defendant's breach of the Master Facility Agreement. In terms of clause 3 thereof, the defendant was supposed to make payment to the issuing bank of the Letter of Credit the value of that letter of credit in the amount of €133 488, to enable the issuing bank to release all the shipping documents including " all bills of lading, inspection certificates and the like". Pending such payment, the clause provides that the issuing bank shall be entitled to retain all related credit documents and shall have a first lien thereon and on the goods as security. Because defendant failed to make the wire transfer for the value of the letter of credit, the issuing bank withheld the issuance of the inspection certificate, and subsequently cancelled the letter of credit.

Clearly therefore, any breach was occasioned by defendant itself vis-a-viz its Master Facility Agreement with Regutrade. As a result, plaintiff is entitled to payment of its 5% value of the transaction. However, the question is: what was the value of the transaction? Plaintiff asserted that it is €185 400 and therefore its 5% due is €9 270. €185 400 was predicated on the gross value payable to the defendant by Umeme.

It is not in dispute that at the end of the transaction Umeme paid a total of €185 488 made up of €133 488 paid directly to Elspec as due to it for the goods it supplied, and €52 000 paid to defendant. It is also not in dispute that defendant ought to have received $42 462 and thus received €9 270 which ought to have been paid to plaintiff. This was confirmed by the defendant's sole witness both under cross examination and re-direct.

This witness further confirmed that defendant in fact did absolutely nothing to ensure delivery to Umeme. Rather, it was Elspec and Umeme which made the necessary arrangements to make delivery possible. The witness proffered no proof of any alternative arrangement that defendant had to do to ensure delivery to Umeme. In fact he stated that the goods were eventually delivered on the direct interface between Elspec and Umeme alone. The end result originally intended was thus achieved without any effort from defendant.

He also confirmed that the goods were only manufactured and shipped to Uganda on the strength of the Letter of Credit facilitated by plaintiff. He further confirmed that the letter

of credit was not cancelled at defendant's instruction but because of defendant's failure to comply with its terms.

Defendant's witness further confirmed that plaintiff was not party to the contracts with Umeme or Elspec and had no basis to supervise such. He also confirmed that defendant's contract with plaintiff was never terminated for breach thereof. In fact, under re-examination, the witness stated that the defendant approached the plaintiff for this particular transaction only to obtain a letter of credit to enable three things to happen: the manufacture of the goods, their transportation and their delivery.

In the premises, since the plaintiff did obtain the letter of credit, which formed the financial resources required to enable the manufacture and shipping of the tender materials, I have no option but to find that plaintiff is entitled to its fee and that defendant should be ordered to pay it.

Costs

Plaintiff sought costs on the higher scale in its summons. However, during the trial and in its closing submissions it proffered no justification why such costs should be awarded. I therefore find no reason why I should order higher costs.

Disposition

In the premises it is hereby ordered that:

1. The plaintiff's claim is allowed.
2. The defendant be and is hereby ordered to pay to the plaintiff €9 270 and interest thereon at the prescribed rate from invoice date to date of payment in full.
3. The defendant shall pay the plaintiff's costs of suit on the ordinary scale.

Lawman Chimuriwo Attorneys at Law, plaintiff's legal practitioners
F.G. Gijima and Associates, Defendant's legal practitioners

List of Exhibits admitted into the record

1. *Exhibit 1*: Plaintiff's Bundle of Discovered Documents
2. *Exhibit 2*: Purchase Order from Umeme Limited (p.10 of Defendant's bundle)
3. *Exhibit 3*: Quotation from Elspec for €133 488 for supply of 36 G4430 Blackbox dated 31 July 2014 (p.14 of Defendant's bundle)
4. *Exhibit 4*: Letter of Credit issued by Standard Chartered Bank of Uganda in favour of defendant on 22 July 2015 (p.11 of Defendant's bundle)
5. *Exhibit 5*: Consulting Contract between the parties (p.3 of Defendant's bundle)

6. *Exhibit 6:* Letter of Credit issued by Israel Discount Bank of New York on the application of Express Trade Capital Inc. and in favour of Elspec for the loading/dispatch from Israel and transportation to Uganda by 23 December 2015 of G4430 Blackboxes(p.10 of Defendant's bundle)
7. *Exhibit 7*: Master Facility Agreement between defendant and Regutrade Inc dated 28 September 2015 (p.19 of Defendant's bundle)
8. *Exhibit 8*: Invoice by Regutrade dated 28 August 2015 for fees of €6 034.52 for Letter of Credit valued at €133 488 (p.17 of Defendant's bundle)
9. *Exhibit 9*: Proof of payment exh.8 dated 17 September 2015 (p.10 of Defendant's bundle)
10. *Exhibit 10*: Rejection Of Letter of credit by Israel Bank of New York sent on 6 November 2015 on the discrepancy in the papers that the original pre-shipment inspection certificate was missing from the (p. 52 of Defendant's bundle)
11. *Exhibit 11*: Cancellation of Letter of Credit and shipping documents by Mizrahi Tefahot Bank Ltd of Israel on 24 December 2015 (p.91 of Defendant's bundle) on advice of Elspec that payment will be effected outside the terms of the letter of credit.