ENGEN OIL ZIMBABWE (PVT) LTD

versus

LITHOTECH (PVT) LTD t/a FRAMEWORK MEDIA

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 30 & 31 October 2018 & 17 & 18 January 2019 & 18, 19, 20 & 21 March 2019 & 24

June 2020

**Civil Trial**

*T. S. Manjengwa* for the plaintiff

*G. Sibanda* for the defendant

ZHOU J: This is an action by the plaintiff for the recovery of a sum of US$41 909.37 from the defendant. The claim is based on an alleged undue payment made to the defendant by the plaintiff. The plaintiff’s case is that the defendant was paid the above sum of money in excess of the agreed contract price and in some instances for work which was not performed and materials which were not supplied. The defendant disputes the claim and states that the sums of money being claimed were for services actually rendered in terms of the agreement between the parties and were approved by the plaintiff’s local project manager, the South African based project manager and the other relevant authorities.

It is common cause from the evidence led that the parties entered into a written agreement in terms of which the defendant was to do work at ten of the plaintiff’s service station sites and one depot site. The contract was concluded pursuant to a tender which had been flighted by the plaintiff. The cost of performing the contract work was agreed based on it being rebranding work. It is common cause that the defendant ended up doing de-branding work as well. It is also common cause that in addition to the debranding work the defendant did some work which was not in the written memorandum of agreement. It is common ground, too, that the plaintiff made payments to the defendant consequent upon presentation of four payment certificates but objected to paying the amount contained in the fifth certificate. In addition to disputing the fifth certificate the plaintiff also questioned some of the payments made in respect of the first four certificates and therefore seeks to recover those which, according to it, ought not to have been paid.

Five issues were referred to trial. These are:

1. Whether the parties should be bound by the findings of the audit report?
2. What was the scope of work to be done by the defendant?
3. Whether or not there were any variations to the scope of work and the cost thereof.
4. Whether the plaintiff can query the payment certificates for the project.
5. Whether the defendant was overpaid.

This is one of many cases in which non-material issues are referred to trial because the litigants have not applied their minds to their pleadings, the bases of the claim and the grounds on which the claim is opposed. Other than alleging in the replication that the audit was agreed upon by the parties, the plaintiff never alleged that the defendant is bound by the findings made in the audit report. This statement was a response to the defendant’s averment that it had nothing to do with the alleged audit and that, among other things, it was a self-serving exercise. The participation of the defendant’s representatives in the audit exercise up to a certain time does not in any way amount to agreement to be “bound” by the conclusions made pursuant to the audit. After all, an audit is merely an investigation. No legal basis was established nor evidence led by the plaintiff to prove that the parties “should be bound by the findings of the audit report”.

The plaintiff led evidence from three witnesses. These are Servious Dzvimbo, Cremion Mapfumba and Audily Chatora. The defendant relied on the evidence of Martin Janhi, its managing director.

Servious Dzvimbo is employed by KPMG, a firm of chartered accountants, as a manager. He is a member of the Chartered Institute of Secretaries and Administrators and Certified Internal Auditors. He was involved in carrying out the forensic audit in respect of the work done by the defendant in terms of its contract with the plaintiff. A report was produced after the audit, exh. 1. His evidence was that the primary objective of the engagement was to ascertain if the work certified as having been done had indeed been performed, and to determine the initial work that was agreed to be performed as well as any extra work performed by the defendant outside the contracted assignment. A further objective of the audit was to establish the amount due in respect work performed in terms of the initial contract and the additional work. Visits were made to eleven sites, of which ten were service stations. One was a depot. Defendant sent representatives to two site visits but did not have a representative when visits were made to the other nine. In the review of the actual work done the witness and his team found that the defendant’s total claim exceeded the actual value of the work done. The defendant’s total claim exceeded the valuation by a sum of US$84 748.74. On the work as agreed upon in the contract the defendant charged a sum of US$73 411.40 against an agreed amount of US$67 995.40. On variation work, viz. extra work which was not included in the contract, the defendant claimed a sum of US$136 543.42, against a valuation of US$58 574.35. This resulted in a variation of US$77 969.07. In some instances the defendant charged for work which it had not done. An example was in respect of the Masvingo service station where the defendant charged for removing an old Caltex base yet the Caltex base was not removed. There were also no written approvals for some variations in the work done.

Cremion Mapfumba is the plaintiff’s managing director. He joined the plaintiff on 1 March 2012, a month after the plaintiff had purchased assets belonging to another oil company, Caltex. There was therefore need to rebrand the assets. The plaintiff put up a tender for the rebranding of the acquired assets. The defendant was one of many companies which were given the work. He is the one who signed the contract on behalf of the plaintiff. Stanford Chikwira, an engineer employed by the plaintiff signed as a witness. The defendant was represented by one Phil Makumbe. He queried a claim for payment submitted by the defendant after realizing that the amount paid was already more than the contract price. The parties then agreed that a forensic audit be conducted at the expense of the plaintiff. This was done. Subsequently the defendant failed to cooperate with the auditors. The forensic audit confirmed that the plaintiff had overpaid the defendant, hence the claim *in casu*. The total amount paid to the defendant was in the sum of US$179 708.64 while the value of the work done was US$125 206.09. The amount by which the defendant was overpaid would therefore be in the sum of US$54 502.55. The payments made to the defendant were as per the Certificates Numbers 1-4.

Audily Chatora is a Quantity Surveyor by profession. He was engaged to scrutinize the contract in terms of which the defendant was employed to do work for the plaintiff to examine the variation provisions thereof and to evaluate the work done by the defendant. He was also supposed to value the variations that were authorized in terms of the contract. He assisted the forensic auditors to prepare the findings and present them in a report. He stated that some of the work for which the defendant had been paid or claimed payment had not been done. He gave the example of Masvingo where a claim for rebranding the canopy had been made yet the canopy had not been rebranded and, also, in respect of which the defendant had claimed for hiring equipment to demolish the previous base yet that base was still intact at the time that the witness went to assess the work. In other instances the defendant exaggerated the amount of materials used, such as cables. In some instances the rates charged for hiring equipment were not proved by documentary evidence. In the absence of evidence on the prices of some of the materials the witness went into the market to consider the market prices and used these to assess the value of the materials used. During cross-examination he detailed the process by which the work done was certified prior to payment being made to the defendant. The process was that the contractor would make its claim for payment after which International Quantity Surveyors would issue the payment certificate. The plaintiff would then pay on the basis of the payment certificate issued. Local engineers and the project manager based in South Africa had a role to play in the certification process. He stated that the contract allowed for variations to take place although there was another clause which made it a fixed sum contract. These were conflicting positions according to this witness. De-branding work was treated as a variation. He stated that the payment certificates were interim and could be revisited. Only a final certificate once settled could not be revisited. During his work the defendant was represented at three sites, namely, Widcombe, Chegutu and Kadoma.

Martin Janhi, the managing director of the defendant, stated that the defendant responded to the plaintiff’s tender for rebranding and debranding of its sites. The defendant was, however, awarded the tender for rebranding only. Pricing schedules were given by the plaintiff. It had fixed prices. However, during the training which was offered by the plaintiff the defendant was also given debranding price schedules. Defendant was allocated ten service stations and one depot to do rebranding. If the work to be done was not in the contract the defendant would submit a quotation for it and only perform the work after being given the authority to proceed by the plaintiff. He stated that all payments received by the defendant from the plaintiff were based on payment certificates approved by the plaintiff and its agents. The work done included both rebranding and debranding. He stated that the only service stations at which they attended for the purpose of the audit were Wadcombe and Masvingo. The failure to attend at the other sites was because the plaintiff had reneged on its earlier undertaking to meet the transport costs of the defendant’s representatives. He stated that the defendant was not involved in the appointment of the auditors and never agreed to be bound by their findings. All the variation work done was agreed upon and approved by the plaintiff through its representatives. During cross-examination the witness stated that the contract signed required any variations in the contract to be in writing. He stated that in some instances approvals of variations were given verbally while in other instances they were written. He also stated that the certificates of payment constituted written approval of the variations. According to him Certificate No. 5 was the final certificate.

The onus is on the plaintiff to prove its case against the defendant on a balance of probabilities, see *Zimbabwe Financial Holdings* v *Mafunga* 2005 (2) ZLR 289(S).

**Whether the parties should be bound by the findings of the audit report**

The onus is on the plaintiff to prove the legal or factual basis upon which it is alleged that the parties should be bound by the conclusions made in the audit report. No such legal or factual basis was alleged either in the plaintiff’s declaration or in evidence. In fact, as highlighted above, the declaration does not even make an averment to the effect that the parties should be bound by the audit report. Even in the replication the plaintiff merely alleges that the audit was agreed upon. But agreement to have a forensic audit undertaken is not the same as agreeing to be bound by its findings. The agreement to be bound by the audit’s findings has not been proved by evidence. If anything, the audit was clearly commissioned by the plaintiff which appointed the audit firm. The defendant did not participate in most of the investigations leading to the report. Its witness challenged most of the conclusions reached in the report. The plaintiff’s witness, Servious Dzvimbo, admitted that the lack of participation by the defendant’s representatives left a lot of issues relative to the work done unexplained. There is a dispute as to whether the defendant participated in visits to only two sites as alleged by its witnesses or to three sites as suggested by one of the plaintiff’s witnesses. Nothing turns on this dispute because such participation or lack thereof does not prove agreement to be bound by the conclusions of the auditors. On this issue, the plaintiff has failed to discharge its onus.

**The scope of work to be done by the defendant and whether there were variations thereto**

Issues two and three are intertwined. In determining the variations the court would need to determine the agreed work first. There are inconsistencies in the plaintiff’s case. The written agreement contained in a letter dated 24 August 2012 which was signed on behalf of both parties refers only to “Re-branding of existing service station”. The plaintiff’s first witness, Servious Dzvimbo, asserted that the contract was for rebranding of the plaintiff’s sites, but admitted in cross-examination that the defendant did perform de-branding work. The plaintiff’s managing director, Cremion Mapfumba, testified that the contract awarded to the defendant was for the rebranding of the plaintiff’s service stations and that any variation which was not written down was not part of the contract. He denied that the defendant performed any de-branding work. When confronted with evidence of such work he changed his position and suggested that it was an issue of “semantics”. Audily Chatora testified that indeed there was de-branding work which was performed which he treated as variations. It was accepted as work done. Significantly, in para 3 of the plaintiff’s declaration there is a specific allegation that the defendant was engaged “to debrand and rebrand ten of the plaintiff’s service station sites and a single depot site”. The inconsistencies in the plaintiff’s pleadings and evidence discredit the plaintiff’s case, such that the court cannot rely on it save to the extent that it is admitted by or is consistent with the evidence of the defendant.

Defendant’s evidence given through its managing director was coherent. From that evidence, what is clear is that although the written agreement referred to rebranding work, the work it did covered de-branding as well. That work was authorized by the plaintiff through the relevant functionaries, and has been accepted by the plaintiff, and paid for save for certificate No. 5, which remains outstanding. The written contract details the procedures for a payment certificate to be issued and how the payment should be done. The plaintiff did not lead evidence to suggest that these procedures were not followed when the payments were made for the work done. In relation to the alleged overpayments the audit report on its own could not prove these because, as was admitted by the plaintiff’s witness, it did not have the benefit of getting explanations from the defendant’s representatives about the work done. On the failure of the defendant to attend at some of the sites with the auditors, both parties agree that this was caused by a dispute over the financing of the costs for the defendant’s representatives. Although he stated that he gave an instruction for a budget to be prepared in respect of the defendant’s expenses, Cremion Mapfumba did not lead evidence that such a budget was prepared and, more significantly, that funds were availed to the defendant for that purpose. Martin Janhi gave evidence, which was not challenged, that he telephoned Mr Chikwira about transport but the latter advised that Cremion Mupfumba had given an instruction that the defendant’s representative should not be given transport to the sites.

Unlike the evidence of the plaintiff’s witnesses which was very general, Martin Janhi, the witness for the defendant, gave detailed evidence pertaining to the work done at every site and where the auditors were mistaken. For instance, in respect of Waddcombe, the witness’s evidence that the auditors failed to pick that there was a variation on the canopy was not challenged. He explained, and was not challenged, that the auditors misunderstood the variations pertaining to the work on the cables. In relation to the Chegutu site, the witness testified on the need to hire an electrician and the charges which arose therefrom, a factor which was unknown to the auditors when they prepared their report. The establishment fee to get the electrician to the Chegutu site was $510 as per the schedules provided by the plaintiff. $760 was for buying the new cable and relaying it to the site. This evidence was not challenged. The auditors valued the work at $655, thereby ignoring the establishment fee and the quoted fee. In respect of the work at the Kadoma site the dispute related to the variations as opposed to the originally tendered work. The witness’s evidence was that there were five variations. There was no denial that the work was done. However, the auditors reduced the price from the $3 740.44 charged by the defendant to $1 250. Even though the plaintiff had authorized the defendant to do the work of demolishing an old Caltex sign after being given a quotation for it, the agreed figure was reduced in the audit report. A reduction of $2 490.44 forms part of the claim. There were many such arbitrary reductions of quoted prices by the auditors. On the Gweru site the auditors also arbitrarily reduced charges on the variation work done by the defendant even though, according to the defendant’s witness, quotations for that work were approved by the plaintiff’s representatives before the work was done. This trend was followed in respect of the other sites such as Nkulumane, Bulawayo depot, Masvingo, and Nissan Clover in Bulawayo. What is significant in all these cases is that where the auditors reduced a quoted price which had been settled by the plaintiff they produced no evidence before this court to show that the values which they imposed were the market values. There are no quotations from the suppliers which are attached to the figures in the audit report. Yet the alleged overpayments form the basis of the claim. In any event, it was not open to the plaintiff to challenge the figures after the payments had been made on the basis that they had found out that there were cheaper prices elsewhere. The plaintiff had to live with its bad bargain.

**Whether plaintiff can query the payment certificates and whether the defendant was overpaid.**

The basis upon which the plaintiff questioned the payment certificates is that the defendant was overpaid. In other words, the plaintiff’s case is that the amounts stated in the certificates were inflated. It is therefore difficult to understand how these two were treated as separate issues. As pointed out above, no proof of overpayment was tendered. The basis of alleging the overpayment is the audit report which has been shown to be inaccurate. Some of the values ascribed to work done and materials supplied by the auditors appear to have been thumb-sucked as there is no documentary evidence to support them. In any event, as shown above, once the plaintiff agreed to pay those figures after being provided with quotations it could not renege on the agreement merely because it made a poor bargain.

**Conclusion**

In all the circumstances, the plaintiff failed to prove its claim. In the result, IT IS ORDERED THAT:

1. The plaintiff’s claim is dismissed.
2. Plaintiff shall pay the costs.

*Wintertons*, plaintiff’s legal practitioners

*Mbidzo Muchadehama & Makoni*, defendant’s legal practitioners