

DR GERHARD PETER LUNG
versus
MANDY MARGARET MAJONI

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE 26 and 27 April 2017

Civil Trial

I Chiwara with T.A Chiurayi for the plaintiff
E Jera with M Chigudu, for the defendant

MUNANGATI-MANONGWA J: The plaintiff Dr Lung a specialist dental surgeon with 30 years experience has approached the court seeking payment of \$21 035-00 for services rendered to the defendant at her instance and request. The defendant on her part admits that indeed she sought services from the plaintiff but the money is not yet due as the plaintiff did not accomplish the mandate.

The following facts are common cause: the defendant was a patient of one Dr Chironga and it is Dr Chironga who referred her to the plaintiff. It is not in dispute that the work to be done on her teeth was complex as it involved harvesting of bone, bone grafting to provide suitable implant sites and placement of implants. In a letter to Dr Lung dated 6 February 2014, Dr Chironga explained how the defendant required rehabilitation of her dentition to improve function and aesthetics. It is not in dispute that this procedure was to assist Dr Chironga in the performance of a pre-prosthetic treatment.

Parties are agreed that Dr Chironga accompanied the defendant to Dr Lung for the initial consultations. X-rays were taken and both doctors discussed and informed the defendant as to what had to be done to achieve the desired results as per her request. It is also not in issue that a quotation was immediately produced by Dr Lung which showed 4 (four stages) of treatment and the cost thereof which would be \$22 660-00. The quotation which is part of a bundle of

documents which was prepared by both parties was presented by consent as part of a bundle of documents marked exh 1. It is also not in issue that the defendant has not paid a single cent for the treatment for reasons to be explained later. Parties are agreed that apart from the work that the plaintiff was to do alone he was also to do further work with Dr Chironga and ultimately Dr Chironga was to finalise the process on his own. Dr Chironga could not proceed because; the stage in which Dr Lung and him were to work together, with Dr Lung supplying certain materials was never reached.

PLAINTIFF'S CASE

In his claim the plaintiff alleges that he did all the stages that he had quoted the defendant for. Although the initial quotation was for \$22 660-00 the ultimate bill came to \$21 035-00 which he is claiming. He states in his evidence that after a consultation with the plaintiff and Dr Chironga, the defendant orally agreed to the performance of the procedure after being given the quotation. The quotation in itself indicated that "payment is requested immediately after treatment." Whilst he had indicated that the 4 (four) stages of treatment would be done at intervals, he decided to do the surgery and whole process at once after cutting open the bone and realizing that the quality and strength of the bone was good for proceeding with the whole procedure. This was to minimize infection and save the patient from recurrent excruciating pain every time the procedure is done. He then proceeded to perform the whole procedure. He also told the court that he explained to the defendant that after the surgery no further surgery would be necessary and the defendant agreed to the whole process being completed in one go.

He gave detailed evidence on how he had to harvest bone from other parts of the body. He was able to do bone grafting and placement of implants in the upper and lower jaws. Although in his provisional plan he had split the treatment (just the surgery and reconstruction) into 4 stages, he combined everything indicating that stage II would have been performed if the treatment was in 3 stages. It was his evidence that he always strives to do the surgery in as few steps as possible to minimize infection complications and additional suffering. He maintained that he had fully explained this to the defendant and always does this to every patient. He maintained both in evidence and cross-examination that his receptionist Mr. Kanyembo (now late) had given the defendant the quotation which she agreed to after the initial x-ray but before the procedure. Further she was advised that payment would be due immediately after treatment.

Although the quotation related to US\$22 660-00, she was informed the final cost would be more or less and this defendant clearly understood especially that payment was required immediately after treatment.

To demonstrate this point, the plaintiff informed the court that, the defendant came up with different excuses when asked about payment. The reasons being, that she had transferred the amount but there was a clerical error, she was to drop the cash at the surgery and even asked the plaintiff to write a letter to her employers requesting payment. The plaintiff produced an invoice for the work done and he meticulously explained each item as regards the work done, the materials supplied and each and every cost thereof justifying the amount of \$21 035-00. It is the plaintiff's evidence that after the procedure he gave the defendant a claim form and the invoice, both documents are part of exh 1 reflecting the amount of \$21 035-00 and are both dated 17 March 2014, the date of the surgery. The plaintiff maintained in his evidence that the defendant knew that the debt was due immediately and the plaintiff had reiterated same in a letter of reminder dated 19 April 2014. Having done his surgical part, the plaintiff insisted on defendant meeting his claim.

Defendant's Case

The defendant gave evidence that due to the complexity of the dental procedure she required, her own doctor suggested that they enlist the services of Dr Lung. Together they proceeded to Chinhoyi where the two consulted with Dr Lung. An X-ray was taken resulting in a quotation for the requisite work to be done by Dr Lung which was broken down to 4 stages to be done periodically. She admits to having been given the quotation, and to the fact that the two doctors explained the contents of the quotation. She gave evidence that she agreed to the procedure but in her pleadings and indeed in evidence she alleges that only stage 1 of the plaintiff's quotation was effected.

This stage involves placement of first part implants on 4 teeth, 2 being on the upper right jaw, 2 on the upper left plus bone harvesting and grafting. She thus contended that the cost for that stage would be \$12 660-00. It was her evidence that as only the first stage of treatment was rendered and it took 4 hours, payment was not due since the plaintiff had not gone through the whole process. She denied that all the stages that had to be done by the plaintiff had been done at

once. The defendant further denied that she was informed during and after surgery that all the stages per the plaintiff's mandate had been carried out. The defendant confirmed that when she went for her checkups Dr Lung confirmed that she was healing well and on the last appointment of 7 April 2014 she was asked to return after 4 weeks. She only went to Dr Lung's surgery in July 2014 to request for a letter to her employer indicating the fees that had to be paid to Dr Lung. In her evidence she states that Dr Lung had sent her a letter for the total amount but she queried why, when parties had agreed that payment was to be effected when all stages had been done, including the stage by Dr Chironga. The defendant told the court that she then went to Dr Chironga and after being x-rayed a letter was written to the plaintiff indicating that lids to the implants were lost. Same is an exhibit being a letter of 8 December 2015. The defendant denies being given an invoice and avers that she only saw the document when served by the Sheriff. Under cross-examination the defendant admitted that the doctors had charged separately and Dr Chironga had indicated his fees in a letter of 10 February 2014 after the visit and consultation with Dr Lung. On being confronted with evidence that work had also been on the lower left and lower right jaws which work was to be done under stage 3 of Dr Lung's quotation she ultimately admitted that work had been done, although she did not know of it.

Analysis

In spite of all the medical jargon pertaining to dentistry, I found this case to be a simple and straight forward matter the decision of which hinges on credibility. As submitted by Mr. *Chiwara*, for the plaintiff, in weighing the balance of probabilities the court could follow a simple and clear path by considering that:

There were three clearly defined stages of 3 separate treatments: In summary these were (i) the surgical treatment to be done by Dr Lung (ii) the pre-prosthetic treatment to be done by Dr Lung and Dr Chironga and (iii) the prosthetic treatment by Dr Chironga alone.

I find this to be correct as it is not in dispute that Dr Lung, the plaintiff was to do the surgical performance first (in whatever stages), the second phase would be a short procedure done by both Dr Lung and Dr Chironga and ultimately the last phase by Dr Chironga. It is the first phase which is in contention. Dr Lung gave his evidence very well on the pre-examination of defendant which included the taking of x – rays. He was clear as to what had to be done and as

confirmed by the defendant he explained all the procedures. Whilst he expected to do his treatment phase in stages, he decided to do it at once after cutting open the bone and finding same to be healthy to do the whole procedure at once. He duly explained the reasons why it was desirable to do so, to avoid complications of infection and avoid unnecessary pain to the patient. Apparently the defendant in her evidence also indicated that she had exclaimed that if the surgery (by Dr Lung) was to be in 4 stages she would suffer more. The logical conclusion is that she was informed and fully aware that the whole surgical part by Dr Lung was to be done once. The attempt by the defendant to maintain that only one stage under Dr Lung's treatment schedule was performed was clearly disproved as there is evidence which the defendant ultimately acceded to which shows that work was done on the lower jaw yet on the quotation such work would have been on stage 3. Further the x-ray which the defendant herself supplied which was taken in India when stitches had to be removed in that country as she could not make it to Dr Lung, clearly shows that work had been done on both the lower and upper jaws. The letter by her own doctor, Dr Chironga also referred to implants on the lower jaw. This serves to vindicate the plaintiff in as much as he claims to have attended to the whole procedure at once.

Evidence of separate charges by the two doctors concerned contained in separate documents also points to the fact that each doctor was to be paid as per the service rendered.

Notably the defendant does not dispute receiving the quotation and consenting to the procedure being undertaken by Dr Lung. She admits to seeing the endorsement "payment is required immediately after treatment", but sought to say she understood this to mean after full treatment by the two doctors. This cannot be true as treatment was being rendered by Dr Lung as per the quotation she had been handed. In that regard the submission by the defendant's counsel that the claim was brought pre-maturely cannot stand. Moreso, in the letter of demand which the defendant acknowledges receiving dated 19 April 2014, there was re-iteration that payment was due immediately after treatment.

I find the plaintiff to be an honest and upright surgeon who had the interest of his patient at heart. He chose the best suited procedure for his patient which minimised risk of infection and unnecessary pain. It is not disputed that he used approximately \$18 000-00 for the purchase of consumables or materials used in the surgery. This figure does not only appear in the letter that

was e-mailed to the defendant but also in the letter that was later hand delivered at the defendant's house.

The same figure was mentioned as \$18 500-00 of private funds used, in the letter to the defendant's employer as requested by the defendant, dated 11 July 2014. The plaintiff had treated the defendant in good faith only to be let down by the defendant who to date has not paid a single cent.

I find the defendant to have known the procedures that were carried out by Dr Lung although she sought to feign ignorance. She also sought to deny knowledge of the invoice. Dr Lung was clear that an invoice and a claim form were handed to her on the day the procedure was carried out being 17 March 2014 and I accept that as the truth. If it were not so, the reminder of April 19, 2014 would not be worded thus and the letter to the defendant's purported employers, of 11 July 2014 as per her request. The latter document clearly stated that until payment of US\$22 635-00 was made, Dr Lung was not to proceed any further. His explanation which I accepted was that the US\$22 635-00 included his \$21 035-00 plus his further fee and materials to be given to Dr Chironga during second phase of treatment. The argument by the defendant's counsel that the reference "before I can proceed further" meant the treatment as per the stages on the quotation was not complete is without basis in the face of the rendered explanation by the plaintiff. As the plaintiff stated, all the surgical process was complete. What he was to do with doctor Chironga would be covered by the difference between the two figures and the amount included material for Dr Chironga.

Dr Lung was able to justify every item on the invoice and I particularly noted that what was placed as stage IV on his quotation under code 98:758 which pertained to placement of second part implant was not charged for, and is not on the invoice. I find that the plaintiff was able to prove on a balance of probabilities that he indeed did or performed his part and was entitled to payment in the sum of US\$21 035-00, which he further proved was due immediately after the operation.

Of note is the fact that despite acknowledging that Dr Lung rendered (as per her understanding) only stage 1 of the 4 phases in the quotation to the amount of US\$12 660-00 on 10 February 2014, the defendant has neither paid the amount or tendered same into court as per r 144 order 22. I seek to borrow from the sentiments expressed by MATHONSI J in the case of

*African Banking Corp of Zimbabwe v PWC Motors (Pvt) Ltd*¹ which whilst referring to commercial cases conversely applies in *casu*, wherein he stated thus:

“I find it utterly deplorable that business people are very quick to receive money from banks undertaking to repay on certain terms, when they have expended the money and enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and refuse to pay. As they say, the time to pay the piper has come.”

Equally, people cannot enjoy services, benefit therefrom and refuse to pay. The tenets of commerce demand that service be paid for. As the plaintiff has been able to prove that he rendered services in good faith, he performed his own part of the contract, equally the defendant has to meet her obligations by paying the amount that is due.

In the result, it is ordered as follows:

1. The defendant shall pay to plaintiff the sum of US\$21 035 being the amount owed to the plaintiff for dental services rendered.
2. The defendant shall pay interest at the prescribed rate of 5% per annum calculated from 17 March 2014 to date of full payment.
3. The defendant shall pay costs of suit.

Coghlan, Welsh & Guest, plaintiff's legal practitioners
Moyo and Jera, defendant's legal practitioners

¹ 2013 (1) ZLR 376 (H)