

SCOTIA STEEL PRIVATE LIMITED
versus
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 31 October 2017 & 21 November 2017

Trial

N. Chikono, for the plaintiff
T. Marume, for the defendant

DUBE J: The plaintiff claims payment of \$119 113, 50 arising from a contractual arrangement to supply a jet machine to the defendant.

The plaintiff's claim is based on the following facts. Sometime in 2011 the defendant flighted an advert in a newspaper inviting tenders for the supply of a high velocity jet machine. The plaintiff's tender for the supply of the machine was accepted by the defendant. On 18 July 2011 the plaintiff and the defendant entered into an agreement for the supply of a new jet machine. The plaintiff would supply the machine and the defendant would pay a deposit for the machine and it would later finish up the payment. In breach of the agreement, the defendant made an arrangement with its bank to pay the deposit but subsequently stopped the payment and hence the plaintiff was not paid. The defendant has failed to pay for the machine. The plaintiff seeks an order for payment of \$119 113, 50 being the value of the machine.

The defendant defends the claim. It denies the existence of an agreement between the parties for the supply of the machine. The plaintiff's tender was never accepted by the defendant and hence no contract ensued.

The court is required to determine the following issues:

1. Whether or not there existed a lawful or valid agreement between the plaintiff and defendant
2. Whether or not the plaintiff performed any of the obligations of the alleged agreement.

The plaintiff called Ernest Paul Muzenge Zhou as its witness. He is the head of finance for the plaintiff. He testified as follows: Sometime in May 2011 the defendant advertised a tender through a newspaper for acquisition of a high pressure jet machine. The plaintiff submitted its tender. The plaintiff's was verbally advised of the tender and later advised by the town clerk, through a letter that it had won the tender. In addition, the plaintiff was shown minutes of the procurement committee which showed that it had been awarded the tender. A stores requisition was generated by the plaintiff in the sum of \$119 113, 50. The defendant did an electronic transfer of funds, [RTGS], from their bank account to defendant's bank account for \$59 556, 75 and the defendant was given a copy. The plaintiff proceeded to source the machine from South Africa on the basis that the defendant had paid the deposit. The plaintiff paid ZAR475 00, 00 to Mundisy Holdings (Pty) Ltd the supplier, towards purchase of the machine. It would clear the balance upon payment by the defendant. It then became apparent that the defendant's RTGS was not coming through and it followed up the payment. The plaintiff was given assurances that the contract was still valid and that payment would come through by the town clerk. The town clerk expressed regret over the delay which they attributed to the financial position of the defendant but promised to pay. The money never came through.

He testified under cross-examination that the plaintiff's representatives were orally advised that they had won the tender and the defendant was given a letter confirming the tender after a meeting with the town clerk. He insisted that the former town clerk wrote a letter to the defendant confirming the tender.

The defendant called Godfrey Tanyanyiwa as its sole witness. He was once employed by the defendant as its town clerk. He never advised the plaintiff's officials that they had won a tender for supply of the jet machine. He never gave them copies of the minutes of the procurement committee meeting and requisition for the purchase of the machine. He could not have given them the minutes as they are internal documents of council and they are not given to the public. He had no reason to give them to the plaintiff. The procedure for advising participants of outcomes of tender procedures involved him communicating the council decision and quoting the council resolution. There was no reason to give verbal communication when he was required to put things in writing.

He denied generating a letter dated 22 July 2017. The signature is not his but resembles his own signature. The person who authored it failed to copy his signature. The signature is different from his usual signature. He never did the letter of 4 October 2017. acknowledging indebtedness. The signature is not his. The letter head used is different from his usual

letterhead. The logo is dark shaded. He discounted the documents as having been authored and signed by him claiming that they did not emanate from him, are fake and he did not sign them.

Under cross-examination, he confirmed that the tender invitation for the supply purchase of the machine was flighted. He does not remember whether the plaintiff participated in the tender and the person who won the tender. He insisted that he did not sign the questioned documents. He denied that he authored the letter confirming that the tender had been awarded to the plaintiff. He refused to confirm whether or not the minutes of procurement board were authentic, preferring that the question be answered by the defendant. He did not dispute the existence of a contract between the parties choosing to indicate only that he did not generate the letter disputed. He refused to speak on behalf of the defendant. He could neither deny nor confirm that the stores requisition came from the defendant. He could also not confirm whether the RTGS in favour of the plaintiff was processed by the defendant.

The plaintiff insisted on enforcing the contract whilst the defendant contended that there never existed a lawful or valid agreement between the parties. The defendant submitted that the acceptance of the tender was never communicated to the plaintiff and hence the offer made by the plaintiff was never accepted. The issue before the court is whether the parties entered into an agreement to supply a jet machine, if so, whether the defendant breached the said agreement.

The agreement challenged is one that arises in the aftermath of a tender process. *R H Christie Business Law in Zimbabwe* at p 38 says the following of such contracts,

“A call for tenders will, unless worded in a most unusual way, be interpreted not as an offer, but an invitation to submit offers, and each tender is an offer which the person who called for tenders may accept or reject at will.”

See also *National and Overseas Distributors Corporation Ltd v Potato Board* 1958 (20) SA 473 (A), *Fraser v Chalmers (SA) Pty Ltd v Cape Town Municipality* 1964 (3) SA 303 (C).

An invitation to tender constitutes an invitation to treat. Once an interested party makes a tender, the tender constitutes an unconditional offer to enter into a contract. No binding contract comes into being until the tender is accepted. The tenderer is not bound to accept the tender. As soon as a tender has been accepted, a contract ensues. A contract may be formed notwithstanding that the parties may not have reduced the contract into writing. A contract arising out of a tender process is no different from any other contract. The same principles of

offer and acceptance governing a contract are applicable to tenders. The contract is to be interpreted in the same manner as any other ordinary contract.

The defendant called for tenders to which the plaintiff responded. The defendant submitted a tender which constitutes a valid offer. The plaintiff submitted that the defendant accepted its tender and produced letters purportedly signed by the defendant's former town clerk, an acknowledgement of debt and minutes of procurement board meeting that indicate that the plaintiff's tender was accepted. Although the defendant's former Town Clerk challenged the authenticity of signatures on the letters and other documents, the defendant did not call any handwriting expert to analyse the disputed signatures and give a report. The defendant sought to rely on the evidence of the witness alone to show that the letters were not written by him and the signatures not his. Whenever a writing or signature is disputed, it is desirable that a litigant who challenges such writings engage the services of a handwriting expert who will do comparisons of the handwriting with standard writings and make findings on the writing. The challenge on the signatures cannot stand in the absence of expert evidence to support the assertion that the letter and acknowledgement of debt were not done by the witness.

I did not believe Mr Tanyanyiwa when he said that he did not write and sign the letters accepting the plaintiff's tender. The former town clerk did not impress the court as an honest and reliable witness. He exhibited a selective memory. He chose what to and what not to tell the court. This was all done in a tender to save his own skin. He reportedly left the defendant's employ amid allegations of malpractice. He clearly was on a mission to try and clear his own name with his former employers. He understandingly was not going to admit that he disclosed confidential information in council minutes and wrote the letters hence decided to distance himself from the documents. He refused to comment on any other aspect regarding the tender except his signatures. He was careful not to conflict with the defendant. He refused to comment on whether the plaintiff participated in the tender process or won the tender. He did not deny that the plaintiff won the tender or that a contract existed between the parties. He failed to advance the defendant's position that there was no contract for the supply of the machine. He was unable to say who won the tender and yet he was still in the system. The town clerk knew how the tender was flighted and processed and sought to deliberately mislead the court. What was interesting on the former town clerk's evidence is that he refused to be drawn into commenting on the existence or otherwise of the contract when it was clear that he was in office at the time of the tender. All he could confirm was that the tender was flighted. He would not comment on the RTGs and stores requisition. The witness was generally uncooperative and

the court did not find him convincing enough. Ultimately, the defendant's version of the conduct of the tender process and its outcome is not known. It was incumbent upon the defendant to call witnesses from council to come and shed light on whether the plaintiff participated in the tender, its outcome, the RTGS, requisition done in favour of the plaintiff and correspondence urging the plaintiff to continue to source the machine.

The defendant did not raise any challenge regarding the acceptance letter in its plea. It simply speaks to the stores requisition which it avers does not show if there was an agreement. In its summary of evidence, it fails to challenge the letter of acceptance and the town clerk's evidence is not summarised. The challenge to the acceptance letter is clearly an afterthought.

Evidence led reveals that a tender was flighted followed by the defendant's tender. The defendant's advert constitutes an invitation to treat and the tender takes the place of an offer in a contract. The defendant's acceptance of the tender is in the form of the acceptance letter of the tender is confirmed by the minutes of the procurement board. The acceptance of the tender is an unequivocal acceptance of the defendant's offer. The defendant later undertook and guaranteed to pay the plaintiff for the machine. I did not believe Mr Tanyanyiwa when he said that he did not do the letters accepting the tender. He was unable to explain why requisition and a payment would be made if the tender was not accepted. He would not say who it is who won the tender. The inference to be drawn is that he wrote letters accepting the plaintiff's tender and the plaintiff won the tender. The agreement was not reduced into writing even though the tender documents provide for one. In *Command Protection Services (Gauteng) (Pty) Ltd v South African Post Office Limited* (214/12) [2012] ZASCA 160, the court said the following of contracts entered into by parties after acceptance of a tender,

“It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further Negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked *animus contrahendi* because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-E; *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 567A-C).

The court relied on sentiments expressed in *Alstom Equipments* at 92E for the criterion as to whether the facts of a particular case indicate the one and relied on sentiments expressed by CORBETT JA at 94 E as follows:

“Whether in a particular case the initial agreement acquires contractual force or not depends Upon the intention of the parties, which is to be gathered from their conduct, the terms of the Agreement and the surrounding circumstances.”

In *Levy v Banket Holdings (Pvt) Ltd* R&N 98 the court relied on the remarks made in *Collen v Rietfontein Engineering Works*, 1948 (1) SA 413 (AD) where the court said the following of conduct of a party in a contract,

“In considering whether a contract is concluded between two parties, a court is not interested in the state of mind of the parties considered in the abstract. It must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said or done.”

A court seeking to determine whether a contract was entered into and concluded between parties is required to do more than just look at the minds of the parties. It is required to examine the conduct of the parties in the aftermath of the said agreement to determine whether the parties intended to be bound by the contract. Where it is evident that the terms of the contract were adhered to in the sense that some of the terms of the contract were performed and the contract partly performed, it becomes clear that the minds of the parties were *ad idem* when the contract was concluded between them and that the parties intended to be bound by the contract.

In this case, a written contract would simply serve as a formality as all the terms of the contract had been agreed to. The contract entered into was not conditional upon consensus being reached and the involvement of further negotiations as there were no outstanding issues between the parties. It is clear from the conduct of the parties after the acceptance of the tender that the parties intended to be bound by the contract. The absence of a written contract does not take away the fact that a valid and binding contract was entered into. The intention of the parties was evidently that the acceptance of the tender would lead to a binding contract.

The defendant did not reduce the contract into writing presumably because it required the machine on an urgent basis. The following facts which were not disputed reveal that the agreement acquired contractual force and the parties intended to be bound by the agreement. A requisition was made in the plaintiff's favour resulting in the plaintiff making arrangements to source the machine and paying a deposit for it. No explanation was given regarding why the defendant would be placing an order if the tender had not been awarded to the plaintiff. It

subsequently wrote letters to the plaintiff urging it to treat the order for the machine with urgency due to disease outbreaks .There is no reason why the defendant would write and give such instructions to the plaintiff if it had not won the tender. Arrangements to pay the deposit were made though the payment did not go through. By its act of taking steps to pay the deposit required, it becomes clear that the defendant was complying with the terms of the contract and hence took steps to perform the contract. It intended that it be bound by the contract it entered into. There would have been no need to make any arrangements for payment if the tender had not been awarded to the plaintiff. After the plaintiff started making follow ups for payment, the defendant confirmed its indebtedness and pledged to pay when the situation improved. The steps taken by the defendant in the aftermath of the tender, conveyed to a reasonable person in the position of the plaintiff that the defendant accepted its tender and expected to be bound by the contract it entered into. By its conduct, the defendant exhibited that it had accepted the plaintiff's tender. The defendant's constraint seems to be lack of resources and that is of no concern to this court.

The plaintiff did its part of the bargain by placing an order for the machine and paying for it. It is prepared to deliver the machine once payment has been done. The plaintiff's evidence which was not rebutted shows that it participated in the tender and its tender was accepted. A valid and binding contract for the supply of a jet machine was concluded upon council's acceptance of the defendant's tender. By failing to live up to the terms of the contract it entered into, the defendant breached the contract.

The defendant's case was poorly prosecuted. I did not get the impression that the defendant had thoroughly prepared its case or that it was seriously pursuing its case. The RTGS and the stores requisition went totally unexplained. Out of sheer clumsiness, the defendant failed to call any official from council to give evidence regarding how the tender was conducted, its outcome and the aftermath of the tender process. It was the responsibility of the defendant to call evidence to disprove the existence of a contract and it failed to do so. This is a classic example of a case that ought to have been resolve at pre-trial conference and should not have been referred to trial. Consequently, the plaintiff's version that it won the tender is probable.

In the result it is ordered as follows:

1. The defendant is to pay to the plaintiff \$119 113.50.
2. Interest on the said amount at the prescribed rate.
3. Costs of suit.

Ngarava Moyo and Chikono, plaintiff's legal practitioners
Matsikidze and Mucheche, defendant's legal practitioners