KERRIES ENGINEERING (PVT) LTD

Versus

HWANGE COLLIERY COMPANY LTD

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 10 & 11 NOVEMBER 2011; 22, 23 & 24 MAY 2012 AND 25 OCTOBER 2012

J James for plaintiff
V. Majoko for respondent

Civil Trial

KAMOCHA J: In this matter the plaintiff issued summons on 1 February 2010 claiming the following:-

1. $102 709,48 being the balance due to plaintiff from defendant in respect of hire of a crane for reward by defendant from plaintiff, which despite demand defendant refused or neglected to pay;
2. Interest thereon calculated at the rate of 60% per annum as agreed by the parties making a total of US$30 423,95 up to 31 December 2009;
3. Interest thereon at 60% per annum calculated from January 2010 up to date of payment;
4. Collection commission on the total sum collected; and
5. Costs on a legal practitioner and client scale.

On 16 November 2010 the parties attended a pre-trial conference before a judge where the issues for trial were formulated as follows:-

"1. Did the parties enter into a written contract on 24th April 2009?

2. Is annexure "B" a contract between the parties?

3. Was the contract between the parties for a period of 7 days?

4. Was the contract between the parties varied as set out in annexure "B1"?

5. Was the defendant indebted to plaintiff in the sum of US$167 709,48 or US$105 289,20 as at the 31st December 2009?

6. Is defendant liable for interest, legal cost and collection commission?

7. What rate of interest was charged by plaintiff's bankers at the relevant time?"

When the trial commenced the parties informed the court that the defendant had paid US$40 287 of the original amount claimed on 8 June, 2010. The payment reduced the amount of the claim to US$62 420,48 as the capital.

It is noted that the defendant has maintained from the on-set in its plea that its indebtedness to the plaintiff was in the sum of US$40 289,80. It is further noted that this admitted sum was calculated using the increased rate which came into effect on 26 June, 2009 as per the letter of the plaintiff dated 29 June 2009.

The parties were agreed that the facts of this case were largely common cause and what had to be done were the conclusions to be drawn from those facts. The parties were agreed that this matter could have been dealt with as a stated case.

Each party had four witnesses to testify on its behalf. The first witness for the plaintiff was Mr Donovan Keith Jones – "Jones" who is the managing director and effective owner of the plaintiff.

His evidence was that he had been approached by the buyer of the defendant one Mr Malunga for the hire of the plaintiff's mobile crane urgently. He initially refused to hire a crane to the defendant because of prior problems of failure to pay by Hwange Colliery Company Ltd the defendant.

However, a further approach was made to him. This time by a Colliery engineer one Mr Victor Rakabopa who pleaded with him and assured him that there was a new management in place at the Colliery and that the plaintiff would be paid timeously for the services rendered. He then acceded to the request to hire out the crane for one week but could extend the period of hire for 3 weeks if the need arose.

He stipulated that he required mobilization of the crane and payment for the one week hire up front. He made it clear that the crane would only be mobilized upon receipt of the said payment. Jones followed this with a letter of confirmation dated 21 April 2009 the day when the stipulation was made. The letter was addressed to the workshops engineer and was marked for the attention of Mr M. Malunga and is filed of record at page 11 of the main bundle of documents.

On 21 April 2009 Jones sent an offer letter to hire a crane to the defendant marked for the attention of Mr M. Malunga. The offer letter stipulated the hire charges as follows:

Monthly Hire @ US$25 760,00

Weekly Hire @ US$6 440,00

Daily Hire @ US$ 1 288,00

Hourly Hire @ US$ 160,00

Overtime hourly hire @US$ 184,00

Travel/kilometer @ US$ 3,00

The contract document was signed by a Mr A. Todd on behalf of the defendant on 24 April 2009. Jones highlighted what he regarded as important paragraphs in the contract document such as clause 13 which reads:-

"It is agreed that hire charges may be increased from time to time without notice. This applies to weekly and monthly hire charges."

Clause 9 of the offer letter deals with the crane rates being subject to monthly charges subject to one week's notice of the rate change.

Jones told the court that due to the depreciation of the US dollar and other major currencies and in particular the Rand he had to adjust the hire rates upwards as follows from 26 June 2009:-

"Weekly Hire @ US$8 050,00

Daily Hire @ US$ 1 610,00

Hourly Hire @US$ 201,00

Overtime Hourly Hire @ US$ 230,00

Travel/Kilometre @ US$ 3,75"

He explained that the effective date had to be backdated to 26 June 2009 because invoicing would be on 25 July 2009.

It was his evidence that he had expected the defendant to object within a month to the proposed rates if it was not happy with them. Since they did not raise any objection he had at least expected them to come up with some form of negotiation but that also was not forthcoming. The defendant did not even favour the plaintiff with a response. The plaintiff then concluded that the defendant was happy with the revised hire rates. Rightly so, this court observes:

He told the court that the document varying the hire rates was dated 29 June 2009 and was delivered to the defendant. He alleged that the defendant's finance manager Mr Liberty Musasa was well aware of it. But despite numerous communications by way of letters, e-mails, telephones and faxes, the defendant failed to pay plaintiff timeously, but just kept on promising to pay. That state of affairs prompted Jones to write a letter to the defendant on 22 July 2009 requesting for an urgent meeting to be held on Friday 24 July 2009 at 11:00 hours in Hwange. The purpose of the meeting was to discuss the continued hire of the crane and the lack of commitment by defendant to ensure timeous payment of hire charges.

He said the meeting did take place on 23 July 2009 Musasa's office instead of Friday 24 July 2009. Liberty Musasa attended the meeting although other employees of defendant did not attend. The issue of variation of rates was discussed. When Musasa wanted to know the reason for the rate variation it was explained to him that the increase was necessitated by the fall of US dollar against the Rand. Musasa expressed satisfaction with the explanation and never suggested that he would have any problem with the increase.

Jones said the main item for discussion was to find a way the defendant could come up with a payment plan to reduce its arrears. An agreement was reached at the meeting as follows:

> "1. At the end of August a fifty percent of all outstanding amounts are too *(sic*) be settled.
>
> 2. All current invoices i.e. July invoices thirty-five percent will be settled together with fifty percent of April, May and June 2009 amounts.
>
> 3. Thereafter every effort will be made to clear all outstanding amounts within two to three months i.e by the end of October or November 2009."

The defendant failed to honour the above resolution but pleaded to be given more time despite the fact that the amount owed had ballooned into a huge figure. The problem continued unabated with defendant making no commitment to payment.

On 13 October 2009 Jones held a discussion with Musasa who agreed to provide the following:

"1. A letter acknowledging Wankie Colliery indebtedness to our company currently in the sum of US$253 700,00.

2. An irrevocable letter of payment plan over the next four weeks being US$25 000,00 a week commencing 15th October 2009."

He followed the above agreement with a letter written on that same day marked for the attention Mr L. Musasa. In conclusion of his letter Jones declared that if he did not receive faxed copies of the above letters by close of business that day, he would have no choice but to withdraw their service with immediate effect.

Needless to say that there was not even an acknowledgement of the agreement by the defendant let alone honouring it. The figure snowballed to US$312 709,48 with no indication of how the defendant was going to liquidate the debt. The situation seemed hopeless and led Jones to address yet another letter to the defendant as follows:-

"09 November 2009

ATT: Mr L. Musasa

Dear Sir

Re: OVERDUE PAYMENTS

We refer to our letters of the 19th August 2009, 29 September 2009 and 13th October 2009, respectively, which seem to be ignored. We have made every effort to accommodate Hwange Colliery and resolve payment difficulties but without reciprocal intention from yourself. We cannot accept that your internal administration issues are the cause for non-payment; to this end we advise the following:

1. We demand payment of US$100 000,00 by latest 12 November 2009.
2. Should we not receive payment by the 12th November 2009 our services will be terminated forthwith.
3. Should payment not be made by the 12th November 2009 our attorneys will demand full settlement within ten days for the US$312 709,48 owed to our company.
4. We advise that we will not accept payment terms on demand from our attorneys.

It is unfortunate that we have to resort to legal means to resolve this problem but keep faith that you will respond positively to avoid this becoming legal.

Yours faithfully

Mr D.K. Jones
Managing Director

c.c. Project Engineer – Mr Victor Rakabopa"

Needless again to say the above letter was not responded to and its receipt was not even acknowledged. The situation did not improve as what defendant owed was not being paid. Jones then decided to write to the managing director of the defendant Mr Fred Moyo on 18 November 2009. The letter is filed of record at page 19 of the plaintiff's main bundle of documents and I do not propose to reproduce it here.

In summary Jones brought to the attention of the managing director the unacceptable manner in which the defendant company in particular the financial department was failing to pay for the services provided by the plaintiff company. He complained about the various options the plaintiff had proposed to resolve the issue which the defendant had not adopted. He then made a final demand of the following:-

(1) Payment of US$200 000 by latest 20 November 2009;
(2) Balance of US$87 708,48 by 30 December 2009;
(3) Failure to respond to 1 and 2 our last resort is to take legal action on the 23rd November 2009."

He said while the plaintiff company was still willing to continue business with Hwange Colliery it could not do so under the conditions which he described as being abusive.

Jones received the first reply in this matter from Hwange Colliery by way of an e-mail from Fred Moyo who professed ignorance of the issues since Jones had not raised them with him before as head of the institution. He suggested an amicable resolution of the issues. He promised to come back to Jones during the course of the following week.

Fred Moyo did not return to Jones as promised in his e-mail of Friday 20 November 2009. Jones had to send him an e-mail ten days later on 1 December 2009 reminding him of the failure to pay by his institution. Sadly, Fred Moyo was of no help either. Having reached the end of the tither Jones had to write the following to the managing director of Hwange Colliery:-

"11th December 2009

ATT. MR F. MOYO

Dear Sir

Re: Final Demand

It would appear that since our letter to you on the 18/11/09 and the several calls to you and your financial manager that our requests for payment are frivolous. Each time the writer speaks to yourself we receive a call from either your Projects Engineer or your financial manager, assuring the writer that payment will be made. In the period since the 18th we have received one payment of twenty-five thousand dollars only. We now have no alternative, having exhausted all efforts to obtain settlement but to advise you as follows;

We demand payment in full in the amount of US$217 709,48 (Two hundred and seventeen thousand seven hundred and nine dollars and forty-eight cents) for services rendered to Hwange Colliery between April 2009 and October 2009. Full payment to be effected by no later than 18th December 2009.

Please note after that date we will advise our attorney to proceed with legal recourse.

Yours faithfully
KERRIES ENGINEERING (PVT) LTD

MR D.K. JONES
MANAING DIRECTOR"

The latter of demand pushed the finance manager into action and he, for the first time wrote to the plaintiff company on 17 December 2009 promising to pay US$25 000,00 the next day which was the deadline. He undertook to pay another $25 000,00 in two weeks, if their cash flow permitted. That, of course, was too late too little and was clearly and rightly unacceptable to plaintiff in the circumstances.

It was Jones testimony that payments were not made in terms of the invoices raised but were just rounded off and had no correlation with the amounts on the defendant's own payment certificates.

Clause 7 of the letter dated 21 April 2009 stipulated that "crane hire to be paid together with any overtime charges within 7 days of invoice. Late payment will attract interest at our

current bank borrowing rates." Despite the above requirement the defendant never paid as agreed. In fact the plaintiff had received the last payment (of US$40 289) from defendant on 8 June 2010, 8 months after the contract was terminated.

He emphasized that all overdue accounts would attract interest at their bankers' current lending rate and any legal or collection charges due to default in payment would be for the hirer's account as per clause 11 of the contract document. Due to defendant's failure to pay in time, the plaintiff had to increase the loan it had with NMB bank, its current bankers from US$55 000,00 to US$90 000. The interest charges incurred as a result had caused plaintiff to incur interest charges which were to the plaintiff's great financial prejudice.

He was emphatic that he had made numerous telephone calls, e-mails and letters but it was never, never mentioned during the various forms of communication that the plaintiff's rates were not accepted. The first time he learnt that the rates were not accepted by defendant was towards the end of November 2009 when the crane had long been withdrawn.

This court has no hesitation in the light of the foregoing that the suggestion by the defendant that the rates were unacceptable was a hopeless after thought which ought to be rejected. The defendant even made some payments using the varied rates. This court makes a specific finding that the defendant accepted the varied hire rates right from the on-set.

Jones was cross examined at some length but his story remained as clear as he had narrated it. He impressed the court as a patient, mature and astute businessman whose evidence was given in a clear and straight forward fashion. The evidence was compelling and worth to be believed.

The next witness was an employee of NMB bank called Collen Chirume who has been working for the bank for 10 years and is now a senior manager in corporate banking at the Bulawayo branch.

He told the court that interest rates during the period 2009 and 2010 were as high as 55% per annum due to the tight liquidity of money in the economy and the cost of funds was high. At that time the loans were short term *id est* 30 days but would be rolled over to the next month with additional interest rates. Deposits by Zimbabweans were very low and would be withdrawn very quickly. Consequently, there was very little money available and lending conditions were difficult. It was his evidence that currently, however, loans were being advanced and payable over a period of 12 months. When the situation improved slightly in 2011 the interest rates went down to 42% per annum.

The witness said the plaintiff had a loan facility for $55 000 but was later increased to $100 000: that was a facility to enable plaintiff to draw down on funds made available to it, every 30 days. Each time plaintiff made a drawn down it was charged 4%.

Chirume's evidence in essence was that the plaintiff's loan facility attracted a total of 60% per annum. This court finds no reason why defendant should pay interest at the rate of 5% when the plaintiff paid 60%. Accordingly, this court holds that the plaintiff's claims for:

(a) $30 423,95 for the period up to 31 December 2009; and
(b) At 60% per annum calculated from 1 January 2010 up to date of payment are, without any doubt, justified.

The 3rd witness for the plaintiff was Davina Martha Porter a personal assistant of Jones, the first witness, since 2007. She was the one who actually did the letters, faxes and calls for Jones.

It was her evidence that in the light of past history with the defendant, due to its failure to pay in time, she sent invoices to the defendant in triplicate. As further precautionary measures, she also faxed them, then telephoned to confirm that the invoices were received. The person she was dealing with was one Jones Dube who was in charge of the payments to the plaintiff company. So she would address one invoice to Jones Dube and the other two to the accounts department.

Sadly each time she phoned about payment she would, invariably, be told that payment would be made the following week but that never happened as promised. At one point she personally went with a driver to deliver the invoices but that did not help either. When she received payment certificates from defendant they were inordinately late. For instance payment for services rendered as far back as July 2009 had their payment certificates only compiled in November 2009, some 4 months later. That is too late by any standard especially when regard is had to the fact that in terms of the offer letter all payments should have been made within 7 days of invoice.

This was a good witness who was clear in narrating her story and was not shaken under cross examination. She was worth to be believed and her evidence is accepted by this court.

Mgiyelwa Victor Ngwabi the crane operator was the last witness for the plaintiff. He drove the crane from Bulawayo to Hwange. On arrival he was met at the gate by Victor Rakabopa who told him to go and see a Mr Todd who was going to finalise everything. He went to see Mr Todd who indeed signed the contract.

The witness said he carried out his duties properly with all the necessary care that was needed in compiling time sheets which were in fact all verified by the defendant's employees as correct. There was no dispute as to the number of days or hours that the crane provided service for the defendant.

The defendant in paragraph 3 of its plea had challenged the number of hours the crane had worked but that was abandoned in cross-examination. This court makes a specific finding that the hours and days worked by the crane were properly recorded by Ngwabi and verified by Colliery employees.

The defendant's first witness was one Antony Bertram Peter Todd hereinafter referred to as "Todd". He has worked for the defendant for 23 years. His job was to run the plant, repairs and services. He signed the contract on 24 April 2009 although he had no authority to sign contracts on behalf of the defendant. He said when he did so he did not understand it to mean that he was signing a contract of hire. He thought he was signing a daily works order. He told this court that he had not checked the document that he was signing due to tiredness and that he was under stress. His story is clearly false and ought to be rejected. The contract he signed was clearly marked "Conditions for the Hiring of Plant, Equipment & Service".

Todd was not only an untruthful and unreliable witness but was also a dangerous employee who signed important documents without checking and verifying them. He signed documents which he did not understand. He admitted under cross examination that he did not do his job properly and was careless and inefficient. He is not worth to be believed.

Todd signed the contract on behalf of the defendant which held out that he had authority to do so. The defendant is bound by what Todd signed.

The next witness was Mzanywa Bahlangene who has been employed by the defendant since 2006. He is currently the divisional engineer for projects and services. His duties entail reviewing and evaluating projects and contracts. In April 2009 he was the sectional engineer responsible for projects. In that capacity he did part of the verification of payment certificates for the plaintiff. He alleged that in doing so he was using the rates agreed by the parties on 21 April 2009.

Bahlangene told the court that when the rates were varied from US$6 000 to US$8 000 he believed that the new rates were rejected by the defendant and the plaintiff was verbally advised accordingly. His belief was clearly preposterous in the light of so many letters written by the plaintiff to the defendant demanding payment for services rendered based on the new rates. He conceded that the defendant should have responded to those letters. He then cannot turn round and say he believed that the new rates were rejected. Even the managing director did not raise an objection to the new rates when Jones wrote to him demanding payment for the services rendered. This court has already held that the new rates were accepted by the defendant which was failing to pay because of its financial problems, cash flow problems in particular.

Bahlangene's evidence was that payment certificates were generated by his office and faxed to the contractor after they had been signed by the head of department. He conceded

that *in casu* the payment certificates were compiled after some time but pushed the blame onto the plaintiff for the delays. He alleged that the plaintiff frequently sent invoices to the wrong office. He was simply being untruthful on that point because Ms Porter clearly outlined the way she dispatched the invoices to defendant. He conceded that the defendant failed to pay within the stipulated 7 days of invoice and only paid when it did, months after the invoice.

Bahlangene was an unreliable witness and evasive for instance when asked;

"Q If one looks at payment certificates for April, May and June which were signed in August all on the same day – Were they according to the original invoice?

A It was backwards and forwards"

He was not worth to be believed and where his evidence conflicts with that of the plaintiff's witnesses I prefer their story to that of Bahlangene.

The defendant called Mr Victor Rakabopa as its third witness – herein referred to as Rakabopa. He joined Hwange Colliery in 2005 and is now the open cast mine manager.

In April 2009 he was the engineering services manager whose duties were to look after the entire engineering services for the company. The defendant, during that time urgently needed a crane for at least one week. In his representative capacity as engineering services manager he persuaded Jones who had been reluctant to make available the plaintiff's crane. Jones had been reluctant initially due to previous experience with the defendant of failure to pay for services rendered timeously.

With the full knowledge that Hwange Colliery at the time had cash flow constraints, Rakabopa hired the plaintiff's crane when the company had no money to pay for the services rendered. Yet he went on to mislead the plaintiff into believing that defendant's situation had improved when it had not.

Rakabopa was the one who signed any contract documents as head of department as such documents were only signed by the head of department or managing director. Consequently Todd who was a mere foreman at the open cast had no authority to enter into a contract binding the Colliery. The only binding contract was the one signed by him on 22 April 2009 which contained crane hire charges which were accepted by the Colliery.

He, however, was aware that defendant was obliged to pay plaintiff within 7 days of invoice. He was equally aware that payment of interest by defendant would be based on the plaintiff's bank rate of interest when borrowing. Notwithstanding its obligations, defendant was extremely tardy in making its payments.

Unlike Bahlangene, his evidence was that it was not possible for the defendant to miss plaintiff's invoice for 3 months or more. He further agreed that the letter of 29 June 2009, varying the rates was received by him a day or so after 29 June contrary to the defendant's denial in paragraph 2 of its plea. The defendant had denied ever receiving the document.

Like other witness who gave evidence for the defendant Rakabopa alleged that the increase in crane hire rates were not acceptable to the defendant. It was his assertion that he had made it clear to Jones that the new crane rates were not justified and were *ipso facto* unacceptable. Rakabopa cannot be taken seriously on that point because several letters were explicit and direct in that the plaintiff set exactly what was owed, what had been agreed upon between the parties and how payment was to be made; that the letters contained figures encompassing the new crane hire rates. This clearly needed an unequivocal response in writing that the new rates were unacceptable. Rakabopa's suggestion that the new rates were not accepted is hereby rejected.

On the question of payment certificates he agreed that they were made after long delays by the defendant and payment even took much longer to effect. When it was put to him in cross examination that only 5 payment certificates referred to old rates others did not. He conceded that all such certificates should have referred to the contract.

Although Rakabopa was a better witness compared to other witnesses he tendered to be evasive. For instance when asked if he had told his lawyer that he had received the letter of 29 June 2009 increasing the hire rates his reply was that he could confirm that he had received the letter. The question was repeated three times and his final answer was that his lawyer should answer that question.

Were his evidence conflicts with that of the plaintiff's witnesses this court prefers that of the plaintiff's witnesses.

The finance manager Liberty Musasa who has been employed by the defendant for three and half years was the last witness called by the defendant. He accepted from the on-set that the Colliery had problems with paying the plaintiff on time. He said payment were made by his office and believed that the amount agreed in terms of the agreement had been paid. He, however, was well aware the plaintiff still complained that it had not been paid in full basing its claim on the new crane hire rates which it alleged had been agreed to by defendant. He went on to say he, personally, was not aware of any agreement to charge rates as his office plays no role in the variation or negotiation for new rates. He denied seeing the letter of 29 June 2009 as he did not remember seeing it. This court has already found that the defendant received the letter and accepted the new rates.

Musasa tried to distance himself from the meeting scheduled for 24 July 2009 which was instead held on 23 July 2009. He was clearly being untruthful. This court accepts the story

given by Jones on that point. Consequently, Musasa's story that he did not recall being told the reasons for the variation of rates is false.

He confirmed receiving letters of 29 September 2009, 13 October 2009 and 9 November 2009 all marked for his attention demanding payment based on the new hire rates but never even made a single response protesting that the new rates were unacceptable to defendant. He accepted that the letters did merit responses. He further accepted that instead of protesting against the new hire rates all that defendant did in e-mails and various communications was to plead for mercy and to be given more time to pay as they had endless cash flow problems.

This court has found that the plaintiff gave the requisite notice of variation f the rates, which did not have a retrospective effect as suggested by the defendant, as the invoices were only compiled by 25 July 2009 – 4 weeks' notice.

This court finds that the defendant was less than candid when it denied in its plea that it had not received the letter of 29 June 2009 varying the hire rates.

It was also found by this court that the defendant did not respond to several letters from the plaintiff rejecting the new hire rates instead what it always did was to plead for more time to pay. Consequently this court concluded that the defendant had accepted the varied hire rates.

The court finds that the plaintiff has proved its claim for the sum of $62 420, 48.

This is a proper case where the defendant deserves the highest form of censure. The defendant entered into a contract to hire the plaintiff's crane with the full knowledge that it did not have the requisite funds for it. It sought to justify its fraudulent behaviour on the basis that it needed the crane urgently. Having been granted the indulgence by plaintiff it paid as and when it was convenient to it.

This court must show its displeasure for such conduct by an award of costs on an attorney and client scale.

In the result the order of this court is as follows:

It is ordered that the defendant pays the plaintiff:-

(1) $62 420,48 as capital;
(2) $30 423,95 interest for the period up to 31 December 2009;
(3) Interest at 60% per annum calculated from 1 January 2010 up to date of payment;
(4) Collection commission on the total sum collected; and
(5) Costs on a legal practitioner and client scale.

James, Moyo-Majwabu & Nyoni plaintiff's legal practitioners
Messrs Majoko & Majoko defendant's legal practitioners