HH 110-03
HC 7384/00
BRIGHTPOINT (PRIVATE) LIMITED
versus
POSTS AND TELECOMMUNICATIONS CORPORATION
and
THE CHAIRMAN, BOARD OF DIRECTORS,
POSTS AND TELECOMMUNICATIONS CORPORATION
and
NET*ONE CELLULAR (PRIVATE) LIMITED
and
REWARD KANGI

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 6 August and 17 September, 2003

P Nherere **for applicant**
J C Andersen SC, **with him** ***E Matinenga*** **for respondents**

HUNGWE J: Applicant is Brightpoint Zimbabwe (Private) Limited ("BP"). There are four respondents who can conveniently be referred to as Posts and Telecommunications Corporation ("PTC"), or "Net-One".

Applicant seeks the following order -

1. The purported cancellation of the principal Agreement between PTC and the Applicant be and is hereby declared null and void;

2. **Consequently, lst and 3rd Respondents be and are hereby ordered to enter into a written Agreement with the Applicant, on reasonable terms and conditions as set out in the first consolidated draft Agreement being annexure '11' to the Application, within 14 days from the date of this order.**

3. **That the 2nd and 4th Respondents be and are hereby ordered to take all reasonable steps to ensure compliance with paragraph '2' of this**

Order, by the lst and 3rd respondents.

4. That the respondents jointly and severally the one paying the other to be absolved shall pay the costs of this Application.

The background to this application is that applicant is a provider of hardware and software and other services for a cellular mobile phone. The respondents operate a cellular network through Net*One. The applicant "BP" and Net*One are the main parties to this dispute.

On 17 April, 1998 Net*One expressed dissatisfaction with the performance by BP of the contract. It cancelled the agreement. BP takes issue with Net*One's right to so cancel the contract, hence this application.
In order to put the matter into perspective a chronology of events leading to this application is appropriate. It is as follows -
17 April 1998 The principal agreement is signed
December 1998 The installation and commissioning of the Call Control Platform

4 January 1999 First letter of complaint about the performance of the Call Control Platform
28 July 1999 Following several complaints Net*One advises that it would buy its own Call Control Platform
11 November 1999 Net*One advises that it is installing its own platform
21 January 2000 Net*One gives written notice of cancellation

2 March 2000 Final cancellation by Net*One
However thereafter the parties held two meetings and entered into further correspondence on the issue. The purpose of these meetings and correspondences were to vary the principal agreement so as to take into account the fact that Net*One would install and commission its own call platform. Between April and June 2000, a number of draft agreements were exchanged between the parties. The respondent's Board at a meeting on 31 March, 2000 had agreed to a variation of the principal agreement in terms of which Brightpoint's share of the revenue was to be reduced to 26%.

It was on that basis that the final version of the variation to the principal agreement was sent to the respondents. On 5 June, 2000, Net*One refused to implement the variation.

Net*One maintains that it is not obliged to enter into any other agreement with the applicant as the principal agreement was effectively cancelled due to the continued malperformance of the contract by the applicant.

The applicant seeks an order compelling the complainant to enter into a new agreement. Applicant speaks of this new agreement as a variation of the original agreement or the principal agreement as respondent calls it. Applicant seeks a further order that 2nd and 4th respondents be directed to ensure that there is compliance with Clause 2 of the order.

The respondents oppose the orders sought. They raise two main grounds for opposing the relief sought. They argue that they validly cancelled the contract due to applicants default.

They further argue that as the applicant does not rely on the invalidity of the cancellation of the contract for the relief sought, but rather on the subsequent draft agreement.

Applicant's case is that there was no breach of the contract such as to justify cancellation of the contract by the respondents. Even if there was such breach as would entitle the respondents to cancel the contract, the respondents had waived such right or, alternatively, the respondents were estopped from relying on the inadequacies in the Applicant's Call Control Platform as a ground for terminating the contract.

In any event, applicants' argument went, as the agreement envisaged severability and the respondents; complaints related only to the Call Control Platform, any right or entitlement to cancellation by the respondents ought to be restricted to that part of the contract and not the rest of the contract.

On that basis, the respondents purported cancellation ought to be declared null and void.

In response, the respondent says that the applicant has based its case on the new "agreement" and not the principal agreement. For that reason, as the new agreement cannot be binding unless it is signed, there is no basis upon which this Court could order

specific performance. On the contrary, the Court ought to uphold the decision of the respondent cancelling the contract as it was legally entitled to do due so following the various breaches committed by applicant. I understand the respondent to say that the applicant has accepted that the original or principal agreement between the parties was cancelled. The parties have since concluded another binding agreement which the respondent refuses to execute. The Court is urged to order respondent to enter into that agreement. Respondent argues that order to be binding, that subsequent agreement ought to have been reduced in writing and signed by both parties. As the subject agreement has not been signed by respondent, it is not binding and the Court ought not to grant the relief sought.

The Respondents rely for that argument on clause 45.8 of the agreement. Respondent says that as the new "agreement" is not signed, it is not binding as it does not conform with the formalities set out in Clause 45.8 of the principal agreement.

The Respondent further argues that once the respondent installed its own call control platform, the original agreement became unenforceable. This was due to the fact that the consideration referred to in Clause 18.3 (45%) was for all the services provided, without a break down as to the revenue to be paid in the event of the installation of a new Call Platform.

It appears to me that the Court has to determine firstly whether the respondent's cancellation of the agreement was lawful. If it was, *caedit quaestio*. If it was not, whether the parties can be ordered to proceed to implement the whole or part of the contract.

The respondent warned of its intention to cancel the agreement by its letter of 21 January 2000 should the applicant fail to rectify the alleged breaches of the agreement within thirty days of receipt of that letter. That letter makes reference to applicant's letter dated 8 December 1999 wherein applicant made counter proposals in respect of the modification of the agreement between the parties. The need for modification arose as a direct result of the respondent having acquired its own Call Control Platform. Whilst the respondents say the acquisition of the Call Control Platform was direct response to the problems encountered with the applicants' platform, the applicant denies that was the sole reason. Applicant points out that the agreement provided for migration at some point, from that platform to the respondents' own platform.

Applicant denies that it was in breach of the contract as the problems raised by applicant were not breaches of specific provisions of the agreement.

The complaints raised by the respondent specifically related to three areas. There are -

a) the long set-up time

b) the lack of call line identification

c) inadequate customer care.

Applicant maintains that it took steps to rectify these problems but the causes of the long set up time remained unresolved. In any event the agreement did not define the acceptable set up time.

The correspondence between the parties from February to November, 1999 show that due tot of the persistent problems experienced with applicant's call platform, it was agreed between the parties that applicant's role in the agreement be limited to the distribution services only.

Both parties proceeded into negotiations on the applicant's role in a situation where the respondents installed their own platform. Indeed in November 1999 the respondents installed their own platform and advised the applicant as much. The respondents led the applicants down the garden path.

By its letter of 15 October, 1999 respondent advised applicant that as from lst December, 1999 applicant's role will be limited to the fulfillment and distribution of sim packs and recharge cards on the basis that applicant gets a 20% share of the revenue.

This was confirmed again in November, 1999 as well as February 2000 and March 2000. The respondent's letter dated 13 April 2000 Annexure FF also refers to a draft agreement. That agreement is about those aspects of the principal agreement relating to the fulfillment and distribution of the sim pack and recharge cards which respondent had indicated applicant would still produce in terms of the agreement..
Each party then produced its own version of the form the subsequent variation of the main agreement ought to look like. This scuttled negotiations. Respondent became impatient with the applicant and proceeded to engage other players into the game.
The applicant urges the Court to declare that the cancellation of their contract by respondent was unlawful therefore null and void and that respondent should consequently be ordered to sign the new contract on reasonable terms as appears in the draft attached to the papers as part of the record.

It seems to me that the parties were agreed that the platform supplied by applicant was not working well. There is also agreement that installation by the respondent of its platform was envisaged. It was in that regard provided in the agreement that the applicant will still provide the other services up to the end of the contract period in the event of respondent installing its own platform.

Respondent argues that once it installed its own platform the original agreement fell away completely as it was not capable of implementation since the gross revenue showing ratios used were for all the services. It did not serve the agreement that it contained a severability clause.

It is important that there is provision in the agreement of severability. It is clear to me that the agreement is severable. It has the capacity to remain on its own if the three distinct parts A, B and C are taken apart. If as has happened, the respondent installed its new call control platform Part A of the Contract ceases to apply. The parties can still continue with performance of their obligations in terms of the remaining parts. This was clearly intended to be the position by both parties.

Applying the test set out by GUBBAY CJ in *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 332 I am satisfied that the contract is indeed severable.

The problems which were relied upon by the respondent as constituting a breach of the contract manifested themselves as early as January 1999. The parties communicated over these problems resulting in attempts to rectify the same by the applicant. Respondent acknowledged that there had been improvement in the platform's performance generally at some point. There were offers to supply a new call platform by applicant. The offer was not taken by the respondent. Presumably because as it had resolved to install its own platform. It was entitled to do so under the agreement. After almost a year, the respondent seeks to use the same grounds as evidence of breach of the contract entitling it to cancel the contract. Has respondent not, by conduct, waived its right to seek cancellation of the agreement on three grounds?

It has been said of waiver -

> **"There is authority for the view that in the case of waiver by conduct, the conduct must seek no reasonable doubt as to the intention of the party surrendering the right in issue (*Smith* v *Nomberg* (1895)12 SC 295 at p 304; *Victoria Falls and Transvaal Power Co (Pvt) Ltd* v**

> ***Consolidated Langlaagte Mines Ltd* 1915 AD 1 at p 62) but in *Martin* v *de Kock* 1948(2) SA 719 (AD) at p 233 this Court indicated that the view may possibly require reconsideration. It set I think, a higher standard than that adopted in *Laws* v *Rutherford* 1924 AD 261 at p 263 where INNES CJ says -**
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> > 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, demanded to abandon it, whether expressly or by conduct, plainly inconsistent with an intention to enforce it'.'
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> **This accords with the test applied in *City of Cape Town* v *Kenny* 1934 AD 543 and was followed in *Collan* v *Rietfontein Engineering Works* 1948(1) SA 413 (AD) at p 436 and *Linton* v *Corser* 1952(3) SA 685 (AD) at p 695 (*cf Ellis and Others* v *Laubscher* 1956(4) SA 692 (AD) at p 702). In my opinion the law is correctly stated in these cases".**

In short, these cases show that a clear proof is required especially of tacit as opposed to express waiver. It has to be shown too that a person who is alleged to have waived his rights knew what those rights were. See *Gordon* v *AA Mutual Assurance Association Ltd* 1988(1) SA 398 (W).

The reasons for the approach is that waiver is a form of a contract, in which one party is taken to have surrendered his rights. As such there must be full knowledge of those rights and proof of intention to surrender the same. This can only occur where there is knowledge of both the facts and the legal consequences thereof.

In the present case with the history of the complaints by the respondent of the problems related to the Call Control Platform and the specific reference by respondent to cancellation in its letters to the applicant, it cannot seriously be argued that respondent was not aware of its rights in terms of the agreement to cancel or the legal consequence of failure to exercise that right.

By its own conduct as reflected in the correspondences, respondent is estopped from now seeking to rely on breaches that it had apparently been aware of.

I find that the Part A portion of the agreement was brought to an end by the

installation of the respondent's own platform. As such the contract ought to continue in force in terms set out in Parts B & C for its stated duration.

Indeed there were no complaints emanating from the performance of the contract by applicant in respect of the services set out in those two Parts.

It was argued that it was impossible for respondents to provide the services set out in Parts B & C of the contract because the platform installed by the respondent is not compatible with applicant's equipment. Whilst this was pointed out in some of the letters, it was not persisted with at the stage when the parties agreed that the revenue ratio be reduced to26%. It seems to me that that indicates that this was a surmountable obstacle for the applicant. If need be it would have to secure compatible equipment in order to fulfil its part of the contract. This must be an implied term of the contract between the parties.

Having come to the conclusion that the respondent waived its right to cancel the contract, it is my view that the subsequent negotiations which resulted in the two drafts were in fact variations of that agreement. These variations were necessitated by the fact that respondent having installed its own platform, the agreement as it stood could not be proceeded with. The applicant's role had consequently been reduced to that of services provided. That necessitated a review of the revenue sharing ratio and all that goes with the changed situation.
The difficulty that has exercised my mind all along was the propriety of this Court ordering the parties to either sign a given draft agreement or enter into negotiations.
In its trite that Courts cannot make agreement for parties nor claim they force parties to negotiate. Specific performance can in the discretion of the Court be ordered where it does not cause undue hardship to the party being so ordered, the Courts however prefer giving an award of damages when specific performance is difficult to decree.
In the present case, I must say that whilst a strong case has been made for an order of specific performance, I feel constrained by the persuasiveness of the view that to make such an order in the present case would amount to asking for the impossible. In the premises I am inclined to lay out what in my view would be the practical conclusion of this case. Again I am now stating what I was not asked to state. I was urged to give an order for specific performance which order was opposed. It seems to me that the real reason why this Court cannot make such an order is that it is up to the parties to negotiate terms of their contracts. The courts cannot do it. It is enough if I merely declare that the cancellation of the contract by the respondent was invalid at law and as such contract is still binding on the parties. It is up to the parties to sit and negotiate how to compliment it or if that it clearly no feasible what damages applicant is entitled to.

In the premises it is ordered as follows -.

1. The purported cancellation of the principal agreement between PTC and the applicant is hereby declared null and void.

2. The respondents are to pay the costs of this application.

***Coghlan Welsh & Guest* , appellant's legal practitioners**
***Kantor & Immerman* , respondent's legal practitioners**