HH 173-03
HC 2917/01
DYNAMIT SECURITY ORGANISATION (PVT) LIMITED
versus
MR H E GRIMM
and
HEYWOOD HAULAGE & INVESTMENTS
and
INTERNATIONAL TRUCK SALES (PVT) LTD

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 8 October, 2003

Civil Trial

Advocate *H Simpson* for the plaintiff
Advocate *R M Fitches* for the defendant

HUNGWE J: The plaintiff company contracted with the defendant company to guard the latter's industrial premises and everything thereon. While the contract was still subsisting the defendant company addressed a letter to the plaintiff company cancelling the contract.

Plaintiff sued for damages arising out of wrongful cancellation of the contract, unpaid invoices and payment in lieu of notice of termination equivalent to the month. These claims were prayed for under two heads one being for $12 553,40 for damages for breach of contract and another for $300 000 for breach of contract. Despite this poor pleading the matter was referred to trial on the issues set out in the pre-trial conference minute dated 24 April, 2002.

At trial plaintiff called its Managing Director Mr Tendayi Masawa. He pointed out that the main grievance against the defendant was that its representative Mr Grimm had lured away two of his employees. That action by Grimm directly resulted in his company suffering damage. In his evidence he described how he and Grimm were known to each other before their respective companies entered into the agreement. According to him after he had proposed that he take on his security guards that had orally agreed. That oral agreement was for a 12 hour guard by one guard at the industrial premises of the defendant which would include 24 hours guard over the weekends. The date of the signature of the agreement is much later than the actual day of the agreement. He had left the copies of the agreement at defendant's office for Grimm's signature but they were not signed immediately.

One of the conditions of the contract was that defendant should not engage any of plaintiff's employees during the currency of the contract or within twelve months of leaving plaintiff's company in a similar capacity. When defendant cancelled the contract without giving the one month's notice as provided for in the agreement, he had

immediately enlisted the services of two of his guards, who to Grimm's knowledge had performed work at defendant's premises.

According to plaintiff the effect of the sudden departure by these two guards was devastating. A client's industrial property which one of the guards had deserted to join defendant was broke into. Suddenly they were landed with a $300 000 bill from this client, Govan's of Norton. Masawi blamed the manner by which defendant cancelled the contract and lured the two guards for this loss.

He sued for damages arising out of the alleged breach of terms and conditions of the contract. He specifically relied on clause 6 which is essentially a clause in restraint of trade. He gave a list of calculations of what it would cost to train a replacement of one guard.

Mr Hans Grimm gave evidence for the defendant. He accepted that he had contracted with plaintiff as reflected in Annexure A to the Declaration. In that document his signature appears as does Mr Masawi's. He however gave a different version as to how the document came to be signed. According to him, Masawi had approached him and asked him to take on his company's security guards. They had verbally agreed to plaintiff providing security at defendant's premises. He was not keen on signing up with plaintiff but plaintiff had brought the one page Annexure A document to his office and persuaded him to sign. At the time the discussion centred on the number of guards the time of guard duty and the times at which guarding services would be required. Costs would have been discussed but no other terms or conditions were specifically drawn to his attention.

He denied that Exhibit one which contains the conditions of business by the plaintiff was brought to his attention. He agreed that he would have read Annexure A which he signed and saw Clause 7 which refers to standard conditions.

As for how he decided to cancel, he described the events indicating breaches of the contract by plaintiff. Plaintiff did not dispute these. In fact it apologized for the breaches and offered explanations. He emphasised that breaches affected his private life, he decided that enough was enough and called for a meeting to which plaintiff did not respond. He then wrote the letter of cancellation.

Luke Mangwiro, his office manager, confirmed the version given by Grimm. He pointed out that he to, never saw Exhibit 1 but he witnessed Annexure A the agreement which Masawi brought for signature. He too confirmed the breach committed by plaintiff leading to the letter of cancellation. He admitted that defendant employed one of the guards who used to perform the contract duties under the plaintiff. Both say that he had come looking for work and was engaged on that basis.

Mr Masawi gave a clear impression that he had secured business with defendant due to the prior interaction he had enjoyed with Mr Grimm. The contract was concluded in a convivial atmosphere. It seems to me unlikely that in

that atmosphere the parties would have scrutinised one of the documents that are now said to be part of the contract. It may well have been that the other conditions were given to defendant at a later stage when the contract had already been concluded. At least, I am satisfied that by clause 7 defendant's attention was drawn to the conditions.

The fact that the defendant may not have read or had his attention successfully drawn to the standard conditions appears to me immaterial. That fact is that he had signed a document upon which was a clause that referred to yet other conditions. By signing it he became bound; *caveat subscripto.* He confirmed that he had read Annexure "A" which contains reference to the conditions.

It is the performance of the contract by both parties which should determine whether defendant was justified to cancel the contract. The contract was one for the provision of security services. In a way it is a contract whose performance require utmost good faith by the service provider's agents. If plaintiff's agents were suspected of pilfering on the next premises or defendant's premises, that would destroy the root of the contract. This in fact is one of defendant's allegations against plaintiff. Sometimes the guards were not dispatched or were not supervised. This could be the reason why Govans suffered a break in at premises guarded by plaintiff.

Cancellation for such breaches as that go to the root of the contract cannot be said to be unjustified. It would be a contradiction were the Court to hold that a party to a contract requiring *uberimae fidei* ought to have given notice of intention to cancel it. How then would the guard who has been suspected of stealing continue to guard the same premises that he stole from?

This must be the decision defendant had to take. Should he continue with plaintiff's contract when some of his guards were suspected of stealing from him? He decided to cancel.

He continued to employ one of the guards contrary to the provision of the contract. The question is however whether the damage occasioned by his employment of the guard or guards against the provision of the contract are not too remote, for the defendant to be liable for them. In this regard I am guided by the test as laid down in a line of cases discussed by GUBBAY CJ (as he then was) in *United Air Charters* v *Jasman* 1994(2) ZLR 341 (S).

The starting point is to decide whether the damages claimed are general or intrinsic damages which do not have to be specially pleaded or special or extrinsic damages which have to be expressly pleaded.

General damages flow naturally and generally from the breach of the contract. It is presumed by the law that when the contract was concluded, that such damages were actually foreseen or reasonably foreseeably by the parties and were thus within their contemplation.

On the other hand special damages were actually regarded in law as being too remote to be recoverable unless in the special circumstances attending the conclusion of the contract, it can be decided that the parties actually or presumptively foresaw that they would probably flow from its breach and thus, that it was within their contemplation (*per* GUBBAY CJ at (page 344)).

In order to ascertain what the parties actually contemplated or may be supposed to have contemplated, one would have to look to the subject mater and the terms of the contract itself and the circumstances known to both parties at the time they contracted.

Applying the above principles to the facts here, it could not be said that the parties at the time of concluding the contract could have reasonably contemplated the sort of damage now being claimed as a direct consequence of a breach by the defendant. In other words, there is no question of Mr Masawi actually foreseeing that if defendant were to breach the contract by employing plaintiff's guards defendant would be liable for the damages claimed.
The claim for $300 000 was premised on the breach of contract. In the evidence of Mr Masawi it became clear that the plaintiff's basis for claiming under the head was that as a

result of a guard deserting his point of duty at Govans of Norton plaintiff was held liable for the theft that then occurred. It now seeks satisfaction from defendant. In a document entitled "Plaintiff's Qualification of Damages" plaintiff proceeded to split the claim under this head to -

(a) $40 000 for costs to train two guards;

(b) $100 000 for direct and consequential loss to plaintiff to replace a stolen electric fan and diesel fuel from Govan's of Norton;

(c) $100 000 for direct and consequential loss to plaintiff by defendant's offering employment to the two guards.

This manner of pleading is bad. It deprives the defendant the opportunity to know the case he has to meet. It makes the declaration excepiable. It however confirms that the defendant could hardly have been expected at the time to have contemplated the damages as a probable result of a breach on his part of a condition of a contract of this nature.

It is not the sort of damages defendant could properly be held liable for. Defendant had however indicated its preparedness to pay the other claim of $9 918. However I am satisfied that there is no basis for the rest of the claim.

In the premises I will made the following order -

Plaintiff's claim is dismissed with costs.

***Mushonga and Associates* , plaintiff's legal practitioners**
***Lofty and Fraser* , defendant's legal practitioners**