R.T. CHIBWE t/a ROSS MOTORS P/L
versus
FAWCETT SECURITY OPERATIONS P/L

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 27 July, 31 October, 4 and
18 November 2005, 20 and 23rd March
and 26 July 2006

Mr *Chingore*, for the plaintiff
Mr *Magwaliba*, for the defendant

BHUNU J: The defendant is a security company which is in the business of offering security services to companies and members of the public at large. On the other hand the plaintiff is a private individual operating a transport business under the style of Ross Motorways.

On the 14th January 2004 the parties concluded the contract of service whereby the defendant was to provide security services at plaintiff's business premises situate at Stand Number 125/6 Guzha Township, Seke, Chitungwiza.

The specific terms of the written contract under clause 2 were as follows:

> "Whereas Fawcetts provides a Guard Service which the Hirer wishes to employ and Fawcetts and the Hirer have herefore agreed to enter into a contract for that purpose upon the terms and conditions which follow:
> Now Therefore The Contract Is Recorded as Follows:-
> Fawcetts undertakes to carry out in respect of the following premises:-
> Stand number 125/6 Guzha Township, Seke, Chitungwiza
> A Guard Service which shall be as follows:
> One Uniformed Dog Handler
> 6 p.m. – 6 a.m. (nightly)
> One Trained Patrol Dog
> 6 p.m. – 6 a.m. (Nightly)
> One Handheld Radio."

The plaintiff was to pay $1328 512.00 per calendar month for those services.

Clause 4 of the written contract incorporated the defendant's standard conditions of contract of which paragraphs 1, 2, 3 and 4 constituted disclaimer and limitation of liability conditions in favour of the defendant.

Paragraphs 1, 3 and 4 are relevant to the dispute that has arisen between the parties. They provide as follows:-

> "1. Fawcetts shall not be liable to the Hirer for any loss or damage sustained by it as a consequence of any wrongful act or omission of Fawcett's employees unless such act or omission was wilful or grossly negligent and was committed in the course of the employment of the employee concerned.
> 2. .....
> 3. Fawcetts shall not be liable for any loss attributable to any delay or failure by Fawcetts to carry out its services by reason of riots, lock-outs, labour disputes, weather conditions, traffic congestion, mechanical breakdown or the condition or obstruction of any road or from any cause beyond Fawcetts control. Notwithstanding the aforegoing, Fawcetts shall do all in its power to overcome any delay or obstruction encountered by it.
> 4. If despite the aforegoing Disclaimers, Fawcetts is legally liable to compensate the Hirer, its liability, shall be confined to claims which are notified in writing to Fawcetts at its Head Office within 30 days of the happening of the event and shall be limited to a sum not exceeding $10 000 000.00."

The facts which give rise to the dispute at hand are to a large extend common cause. The undisputed facts are that the plaintiff is a bus operator. At the guarded premises he kept a wide range of vehicle spares and equipment.

On the night of the 29th March 2003 the defendant's employee one Leonard Mangwiro was guarding plaintiff's premises. He had with him a trained guard dog and hand held communication radio as stipulated in the contract of service between the parties.

It so happened that sometime that night Leonard fortuitously fell asleep on duty while he was fast asleep he was accosted by armed robbers who jumped over the durawall. The immobilised him and disabled his communication radio before letting loose the guard dog to feast on the plaintiff's chickens at the premises.

The intruders then burgled the premises and stole property valued at $12 480 852.00 as at that date. The value of the same property has since ballooned to $4 744 515 138.00 as at 26th March 2006 due to rampant inflation.

Leonard was the only eye witness who testified before this court. The events of that night can therefore best be told by him. This is what he had to say:-

> "I had a dog and a radio. The purpose of the dog was to disturb thieves in the event of an attack. If I happened to doze off or fall asleep the dog would awaken me in the event of disturbance.
>
> I would use the radio to make a report in the event of any disturbance or the control would use the radio to communicate with me checking if anything will have happened at the premises or to check on my alertness.
>
> Normally control would raise me on the radio as and when they desired to know the situation at the premises. On average they would raise me nearly after an hour or so. They would not spent more than 2 hours before raising me.
>
> When this incident happened the checks by our corporals were not done though I expected them to do the checks. Normally they were supposed to check on us after every 2 to 3 hours. They would visit us between 3 and 4 times per night.
>
> I had worked for 2 days that week and during those 2 days noone came to check on me.
>
> On this night control did not raise me on radio. The corporals did not check on me.
>
> I was expecting the corporals to check on me.
>
> I believe when this incident started I was fast asleep."

Leonard proceeded to tell the court that he was then tied and blindfolded. This was around 12 midnight. The burglary took 2 to 3 hours. During all that time the trained dog did nothing. It did not even bark nor attack the thieves.

At around 3 a.m. he contacted Fawcetts Masasa Control and Z.R.P. St Marys. Despite being contacted control did not react to the emergency. It did not sent the reaction team as was the norm. The blitz team which checks on guards only arrived at the scene after 5 p.m. long after the police who had no motor vehicle but traveling on foot had already attended the scene of crime within 15 minutes of being raised.

In conclusion Leonard had this to say:-

> "The burglary took a very long time. During that period Fawcetts should have raised me. If they could not get a response they were supposed to check on me or during the 3 to 4 hours the corporals in the area should have visited me. Nothing of the sort happened.
>
> Normal procedure was not followed. If this had happened we would have managed to disturb the burglars and the burglars would not have managed to take away their loot."

Leonard knew what he was talking about because previously he had managed to ward off robbers while guarding the plaintiff's premises at Number 75 Simon Mazorodze Road.

Under cross-examination he was adamant that had he been awake he would have been able to fend off the thieves with defendant's assistance. He was asked:-

"Q. If you had not slept were you going to be able to fend away the intruders?

A. Yes.

Q. So you neglected your duty and your negligence caused plaintiff's loss?

A. I cannot say I was negligent because I did not deliberately sleep.

Q. A guard is expected to sleep during the day so as not to sleep on duty?

A. Yes but one falls asleep because at that time it is expected that one should be asleep.

Q. Are you saying the theft occurred because the Fawcetts Company did not follow procedure if they had the property would not have been stolen?

A. If Fawcetts had followed procedure we would have been able to avert this event.

Q. Was the loss due to you falling asleep or Fawcetts failing to follow procedure?

A. It was a combination of both."

The veracity of Leonard's evidence is confirmed by exhibit 2 the observation book referred to as the O.B. book. In that book the corporals who check on the guard on duty are supposed to sign and record their observations after each visit. A perusal of the book shows that during the period under review no entries or signatures were made by any supervisor.

Noone from Fawcetts gave evidence to say that apart from their guard falling asleep the necessary procedures were followed.

Sergeant Major Edson Rwizi an employee of the defendant gave evidence on its behalf. He has 18 years experience. He was the officer-in-charge of the defendant's Chitungwiza Branch at the material time.

It was his testimony that he was not on duty on the night in question. He only reported for work the following morning only to learn of the burglary from the O.B. book. He then proceeded to the scene arriving at around 8 a.m. He received a report from Leonard the guard on duty. He confirmed that there had been a burglary from his own observations.

In his testimony Sergent Major Rwizi corroborated Leonard's evidence to the effect that on the night of the burglary there had been no supervisors checking on Leonard. This is what he had to say:-

> "Yes there was no Corporal who was on patrol on that day because there is a Corporal that fell ill on that day and so his duties were to be taken over by the one who was on duty.
>
> The rules stipulate that Corporals should patrol four times per night.
>
> The purpose of the patrols is to check whether or not the guard is alert and alive and to check whether or not the guard would have encountered any problem.
>
> Our policy is that the guard should raise us after every 30 minutes.
>
> It was the guard who was supposed to raise us on radio. If he did not the base radio centre would then raise the guard.

> If the guard was not reachable the base centre would then raise the Corporal who would also be having a radio. If they failed they would then raise our Masasa Office. Masasa Office would then dispatch a duty officer.
>
> I cannot remember whether all these things were done on this day."

It is needless to say that the Sergeant Major is faining ignorance. The sobber truth is that laid down procedures were never followed. Had this occurred it would have been well recorded and documented in the OB book. The OB book for the plaintiff's premises reflects that it was last signed on the 21st of March 2003.

Above all, this witness further confirmed Leonard's evidence to the effect that had proper procedures been followed, then the burglary could have been averted. This is what he had to say:-

"If radio communication had been maintained the theft could have been prevented.

> The blitz team brings reinforcements such that had the thieves been in the vicinity they could have apprehended them. It is a quick reaction team."

It is therefore remiss of the defendant to stubbornly fasten onto its defence that the theft was unavoidable as this clearly goes against the grain of evidence proffered by its own employees.

The evidence before me establishes beyond question that the burglary was facilitated by the defendant's failure through its employees to fulfil its part of the bargain. Its conduct in this respect amounts to non-performance of its part of the bargain as opposed to mere defective performance of its obligations under the contract.

Plaintiff paid for the service of the defendant's guard. The guard however did not perform his duties as he decided to fall asleep. He was therefore not guarding the premises when the burglary occurred.

The plaintiff had also paid for the services of a trained dog. The dog was equally useless. It took no action when approached by the burglars. It

did not awaken the sleeping guard nor challenge the intruders. On the contrary it was happy to feast on the plaintiff's chickens.

The defendant's employees who were supposed to supervise and check on the guard reneged on their duties and did not check on the guard.

The plaintiff had also paid for the services of a communication radio. The radio was never put into good use to avert the disaster.

Even after being notified of the burglary the defendant's Head Office did not react to the emergency promptly or at all. They adopted a casual and disinterested approach to the whole incident. They only arrived at the scene long after the police and the plaintiff had already attended to the scene.

In the circumstances of this case there is no inkling of doubt that the defendant's conduct amounts to gross dereliction of its obligations under the contract if not total non-performance of its contractual duties.

It is clear on a proper reading of the disclaimer clauses that they do not protect the defendant against gross negligence. Gross negligence is tantamount to wilful non-performance of one's contractual duties and obligations. See *Rosenthal v Marks* 1944 TPD 172 at 180. In that case gross negligence was described in the following terms:-

> "Gross negligence (*culpa lata crussa*) connotes recklessness on entire failure to give consideration to the consequences of his action a total disregard of duty."

That description fits the defendant's conduct during the period under review. It is therefore inconceivable that any law would seek to protect the defendant against liability in circumstances where its conduct is tantamount to wilful non-performance of its contractual obligations. This is for the simple but good reason that the defendant's conduct constitutes a fundamental breach which goes to the root of the contract.

I think it is now settled law that where a party to a contract is in fundamental breach of the contract he cannot hide behind the veil of disclaimer and limitation of liability clauses.

The principle found expression in the words of HENNING J in the well known case of *Hall – Thermotank Natal Pty v Hardmen* 1968 (4) SA 818 at 835 F-G. In that case the learned judge observed that:-

> "In spite of the emphatic language in the exemption clause in this case it appears to me that the parties could hardly have intended that the plaintiff would be exonerated from liability if it failed to perform its obligations at all, or if its performance proved useless or if it committed a breach going to the root of the contract."

This is the sort of breach which KORSAH JA had in mind in the case of *Transport and Crane Hire (Private) Limited v Hubert Davis and Co. (Pvt) Ltd* when his Lordship had this to say:-

> "I think breaches of this nature constitute fundamental breaches because they constitute performance which is useless for its intended purpose."

It is needless to say that the defendant's breach in this case fits squarely the above description. That being the case it cannot avoid liability on the basis of the stated disclaimer and limitation of liability clauses.

Having said that I now turn to consider the quantum of damages. It is trite that the object of an award of damages is to put the judgment creditor in the same position he would have been had the breach not occurred. That is to say he must be placed as far as money can in the same position he would have been had he other party properly performed his part of the bargain.

The plaintiff issued summons on the 21st November 2003 claiming $12 480 852.00 being the replacement value of the stolen property as at that date together with interest at the prescribed rate and costs of suit.

Owing to rampant ran away inflation the plaintiff has had to amend his claim twice. On the 2nd November 2005 he amended his claim to $530 092 350.00 with the defendant's consent. He subsequently amended the same claim to $4 744 515 138.00 on the 16th March 2006. Despite the second amendment being vigorously opposed by the defendant I granted the amendment having regard to the current high inflationary realities.

The onus however lies squarely on plaintiff's shoulders to establish the quantum of his loss in this regard. To this end the plaintiff produced quotations from various suppliers. He gave evidence without contradiction that since the first amendment prices had continued to skyrocket.

The defendant was unable to suggest or furnish any proof that such goods could be found cheaper elsewhere thus the only reliable monetary value before this court is as provided by the plaintiff.

The defendant knew all along that it was being sued for the replacement value of the stolen property. It knew all along that in these abnormal high inflationary times the longer it takes to replace the stolen property the more it would be called upon to pay, yet it deliberately elected to buy time by tendering a frivolous and vexacious defence in circumstances where it was clearly liable owing to its gross negligence. Negligence in itself is a delictual wrongful act. The defendant's obligation under the contract was to preserve the stole property for the plaintiff's benefit. It therefore stands to reason that in the event of the defendant being delictually or contractually liable for the loss and in the absence of any fault on the part of the plaintiff, the defendant is liable to restore the lost property to the owner at its own expense regardless of the cost. It is also pertinent to note that it is not the property which is increasing in value but money which is losing value in these hyper inflationary times.

In resisting the plaintiff's claim the defendant sought to rely on the case of *Parish v King* 1992 (1) ZLR 216(S). In that case and at page 255 MCNALLY JA had this to say:-

> "On the other hand the starting point of our law of delict seems to be that delictual damage is calculated as at the date of the delict."

It is pertinent to note that the learned judge of appeal was careful not to lay down a hard and fast rule. The learned Judge of appeal only set down the date of the delict as the starting point. There being no hard and fast rule each case must of necessity be determined according to its own exigencies and prevailing surrounding circumstances.

Because of the current hyper inflationary economic environment our courts have been gradually gravitating towards recognizing and taking into account the prevailing economic realities in assessing the quantum of damages.

In the case of *Reza v Nyangani* 2001(1) ZLR 202(s) at page 206 where plaintiff's claim was based on unjust enrichment MCNALLY JA had occasion to remark as follows:-

> "If one were simply to add up Reza's expenses in 1992 and 1993 one would come to a ridiculously low figure given that the cost of building materials has escalated enormously. We are dealing here with an equitable remedy. This gives the Judge a very wide discretion."

Having said that the appeal court proceeded to make an award based on a recent evaluation.

That case was followed by the case of *Jiawu Manufacturer v Mitchell Cotts Freight Zimbabwe (Pvt) Ltd* HH-104-03 which case is on all fours with the case at hand. In that case the plaintiff's 102 television sets went missing in a bonded warehouse owing to the negligence of defendant's employees. The plaintiff later amended its claim to take into account inflation. In assessing the quantum of damages the learned judge after surveying a number of authorities observed that:-

> "What seems to be intended in these cases is that damages are assessed or calculated by means of a formula in which the date of breach or termination of the contract, depending on the circumstances is important. The date of breach is important but the amount to be awarded, the amount assessed or calculated, can only be determined at a later date. From the evidence before me, the television sets were selling at $2 000.00 at the time that it was discovered that they were missing. The amended value was $8 000.00 each .....
>
> Given the state of our economy it is difficult for parties to give replacement costs with some measure of precision."

Having said that his Lordship proceeded to make an award which took into account, inflation and made an award based on the amended valuation.

By so doing he sought to place the plaintiff in the same position he would have been had there been no breach.

It has been submitted that the plaintiff was under a legal duty to mitigate his loss. That much is not in dispute. The plaintiff gave uncontroverted evidence that in an attempt to mitigate his loss he took it upon himself to replace the lost items with limited success. He was however unable to replace some of the items. The mitigation explains why he was able to keep his business running thereby not suing for loss of profit.

If the defendant thought the plaintiff could have done more to mitigate his loss the onus was on it to suggest how else he could have mitigated his loss. See *Geoffrey Nyaguse v Mkwanise Estate (Pvt) Ltd* SC 34/2000. The defendant has dismally failed to discharge that onus.

In quantifying his claim the plaintiff relied on recent quotations from apparently reputable dealers. The prices were not contested. He stated without contradiction that owing to the prevailing economic circumstances most dealers are unwilling to furnish customers with quotations. This is understandable in circumstances where prices are highly unstable and constantly changing due to hyper inflation.

In the result I come to the conclusion that the plaintiff has established his claim as amended. It is according ordered:-

1. That the defendant be and is hereby ordered to pay the plaintiff the sum of $4 744 515 138.00 (Four Billion Seven Hundred and Forty Four Million Five Hundred and Fifteen Thousand one hundred and thirty eight dollars.
2. Interest at the prescribed rate and
3. Costs of suit.

Chingore and Garabga, the plaintiff's legal practitioners
Magwaliba, Matutu and Kwirira, defendant's legal practitioners