EX-COMBATANTS SECURITY CO
versus
MIDLANDS STATE UNIVERSITY

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare, 28 June 2006

OPPOSED APPLICATION

Mr Muskwe for the applicant
Mr Morris for the respondent

MAKARAU J: After hearing argument in the above matter I dismissed the application with costs and indicated that my reasons would follow. I now set them out.

On 25 October 2004, the applicant filed a court application seeking an order compelling the respondent to pay to it a sum of $96 410 250 being damages for lost income over three months, the sum of $83 215248-75 being arrear fees for services rendered and the sum of $52 500 000 representing damages suffered as a result of the alleged breach of contract.

In the founding affidavit, it was alleged that the applicant had a contract with the then Gweru Teachers' College for the provision of security services. The contract was allegedly concluded on behalf of the college by the Ministry of Higher and Tertiary Education. Whilst the contract was duly signed by both parties, the applicant was not furnished with a signed copy. When the respondent was established in 2000, the applicant and the Ministry of Higher education were operating in terms of the alleged contract. It was further alleged that the respondent took over all the rights and obligations of the College including the contract between the applicant and the Ministry. On 27 July 2004, the respondent gave notice to the applicant that it was terminating the service contract with effect from 31 July 2004. In term of the written but unsigned agreement between the applicant and the Ministry, the notice period provided was a period of 3 months. As a result of the breach by the respondent in this regard, the applicant suffered damages as claimed as it had 40 guards on sight who were earning $437 000 per month. Due to the termination of the contract, the applicant had to pay each one of them 3 months salary in lieu of notice. A statement

of account was attached to show the arrears in charges for services rendered. Further, it was alleged that had the contract not been terminated, the applicant would have earned the sum of $ 32 136 750-00 per month over 3 months, representing the notice period.

The application was opposed. In the opposing issue, the date upon which Gweru Teachers' College ceased to exist was put in issue. The alleged contract between the appellant and the Ministry of Higher and Tertiary Education on behalf of the respondent was denied. The respondent further alleged that it was a creature of statute and did not take over the rights and obligations of Gweru Teachers' College as that was not provided for it the statute creating the university. Regarding the provisions of security services by the applicant at the university, it was alleged that the parties were in an oral agreement that was renewed on a monthly basis. It was further allegedly agreed between the parties that the contract between the parties would be terminated once a proper tender had been floated and awarded. A tender was floated in June 2004 and the applicant participated but was unsuccessful.

The damages allegedly suffered by the applicant and the arrear charges were denied and the applicant was put to the proof thereof.

Applicant filed an answering affidavit wherein it reinforced its earlier position, thereby in my view, bring into clearer focus the numerous disputes of facts arising from the affidavits. For instance, the date when Gweru teachers' college ceased to exist became hotly contested and the fact that some other security company provided services to the respondent from January to December 2000 was denied " in *toto*", to use the applicant's language. An attempt was made to explain how the respondent allegedly took over the contract between the applicant and the college and the suggestion that the contract between applicant and the respondent was a monthly oral contract was also denied.

With the papers between the parties in this state, Mr. *Muskwe* moved for an order in terms of the draft or as a fall back position, that the matter be referred to trial on account of the disputes of facts. Mr *Morris* for the respondent sought to deepen the disputes of facts further by arguing that the applicant did not have a contract with Gweru Teachers' College as alleged that the respondent allegedly took over. I was thus being called upon to find on a balance of probabilities whether or not the parties

had an oral contract for the provision of security services by the applicant on the terms that it alleged.

Time and again this court and the Supreme Court have decried the practice by some legal practitioners to use motion proceedings for matters that ought to proceed by way of trial. (See *Masukusa v National Foods Ltd and Another* 1983 (1) ZLR 232 (HC); *Bervcorp (Pvt) Ltd v Nyoni and Ors* 1992 (1) ZLR 352 (S)).

The remarks by DOWLING J in *William v Turnstall* 1949 (3) SA 835 at 839 have not lost their instructive edge despite the passage of time. He had this to say:

> "I agree, however, that the courts must today recognize that in contemporary practice any dispute, save matrimonial causes and claims for damage, but not excluding money counts, may be decided by motion proceedings in an appropriate case. it is, however, not possible to visualize all the contingencies that may arise in relation to such cases, and I am of the opinion that the court should, even when it is clear that there is no bona fide dispute of fact, reserve to itself s discretion, where the respondent objects to this form of procedure and it is reasonably possible that he may suffer prejudice in some form or another through its use, to deny the applicant the use of motion procedure in cases where *rauw actie* would normally be the appropriate remedy."

That the court has a discretion to refuse an applicant the use of application procedure where in the view of the court the use of the procedure will lead to an injustice, is in my view undisputable. This discretion is part of the inherent powers that the court has not over its own procedures to avoid injustices. Our courts have adopted the approach that they will be robust and try and do justice between the parties and resolve matters brought on application procedures even where disputes of fact manifest "always provided that (the court) is convinced there is no real possibility of any resolution doing an injustice to the other party concerned". (Per GUBBAY JA in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 2987 (2) ZLR 338 (S)).

The resolution of the dispute without doing an injustice to the other party appears to me to be one of the prime considerations in allowing or disallowing the use of application procedures.

It thus presents itself clearly to me that a claim based on an alleged oral agreement whose terms are disputed cannot be resolved on the basis of affidavits without doing an injustice to one of the parties. A disputed oral agreement, by its very nature, existing as it does in the memories of the contracting parties, cannot be proved other than by a comparison of the credibility of those in whose memories the

agreement resides. Such an agreement can only be established by the word of those witnesses whose words the court believe.

It further presents itself clearly to me that application procedure is inappropriate to allege and prove a disputed oral agreement as a resolution of the matter on the basis of the affidavits will lead to an injustice as the advantages inherent in a trial will be lost to the court.

Further, a claim for damages arising from an alleged breach of contract, unless the damages are pre- set and agreed to between the parties, should not be brought on application procedure. A claim for damages by its very nature always puts in dispute the quantum of damages that are due to the applicant even where the defendant has not defended the matter.

While a claimant may quantify their damages, the assessment of such damages is done by the court on evidence adduced and on principles of law applicable for that claim and on a comparative basis with decided cases. Thus, the monthly payments that were being made as between the parties in the form of service charges for instance, while forming the basis of the claimant's quantification may not necessarily be the amount of damages actually suffered after assessment by the court.

It is trite that the fundamental rule in regard to the assessment of for breach of contract is to place the plaintiff in the position he would have been had the contract been properly performed by the defendant, so far as this can be done by the payment of money and without causing undue hardship to the defendant. Thus, in assessing damages that will achieve this end, the court will have to asses the actual value of the loss to the plaintiff amid considerations of efforts made by the plaintiff to mitigate his loss and the reasonableness of the amount in relation to the prevailing market values.

It further appears to me that since damages for breach of contract involves some degree of speculation as to the position that the plaintiff would have occupied but for the breach, an opinion of the plaintiff, such speculation cannot be tested and adopted by the court as its own opinion without it being subjected to examination and cross examination. For the court to merely accept the speculation of the plaintiff as given on the affidavits without testing it may work an injustice on the other party.

The assessment of damages for breach of contract involves an investigation by the court into the financial position the plaintiff is in on account of the breach and the position he would have been had there been proper performance of the contract. (See *Victoria Falls & Transvaal Power Company Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1. and *Lavery & CO v Jungherinrich* 1931 AD 156). The assessment also involves an investigation as to whether the alleged damage flow naturally from the breach or was reasonably within the contemplation of the parties. These are not matters of fact alone but involve a degree of conjecture and clairvoyance on the part of the court.

Due to the nature of the exercise that the court has to go into, it is in my view undesirable and inappropriate that such be done outside a trial.

Thus, in my view, an applicant wishing to claim damages for breach of contract other than pre-set damages, must always be aware that there is a dispute regarding the quantum of damages and should err on the side of caution by launching an action rather than filing an application.

In casu, the applicant sought to prove the terms of a disputed oral agreement and damages for breach of that agreement in application proceedings. Such damages included loss of gross income for 3 months and the salaries paid to a number of guards over an equal period. The measure of such damages was not established on the papers.

In my view, this was clearly inappropriate for the reasons I have given above. It is for these reasons that I dismissed the application with costs on the turn.

Muskwe & Associates, applicant's legal practitioners.

Dzimba Jaravaza & Associates, respondent's legal practitioners.