

POWER COACH EXPRESS (PVT) LTD
versus
MARTIN MILLERS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 22 February & 19 October 2011

B. Chidziva, for applicant
T. Mpofo, for respondent

GOWORA J: At the commencement of this matter Mr *Mpofo* moved for the condonation of the late filing of the respondent's heads of argument. Mr *Chidziva* was gracious enough to consent to the application which I then granted.

This matter is concerned with an application for leave to execute pending appeal. The history of the matter is as follows.

On 29 November 2009 the applicant caused summons to be issued against the respondent herein under Case No HC 7385/05 for delivery of 1 x 10 000 litres underground tank, 1 x 25 000 litre underground tank and 2 x 35 000 litre tanks or in the alternative payment of damages representing the replacements costs of the tanks. The matter proceeded to trial before BERE J who subsequently issued a judgment on 21 July 2010 in favour of the applicant herein. On 28 July 2010 the respondent noted an appeal against the whole judgment of the learned judge. This resulted in the applicant filing this application for an order granting it leave to execute against the judgment of BERE J.

The applicant's claim is premised upon an alleged breach of contract. It is common cause that on 31 May 2009 the respondent furnished the applicant with a quotation for the manufacture of one 10 000 litre underground tank, one 25 000 litre underground tank and two 35 000 litre underground tanks. In terms of the quotation delivery would be effected within one or two weeks of confirmation of the order or payment.

The applicant placed an order for the tanks on 31 May 2006 and paid a deposit of 60% of the quoted price. The balance was paid on 10 July 2006 when the respondent called upon the applicant to effect payment of the balance. It has never been disputed by the respondent that it was paid in full for the tanks.

It is also common cause that the respondent manufactured tanks which the applicant rejected because it alleged breach on the part of the respondent. The applicant contended that the parties had contracted for the fabrication of the storage tanks using 6mm steel plates. The respondent contended that the applicant had consented to a change of the specification and that in the result the parties had agreed to use plates other than the 6mm initially contemplated by the parties.

In his judgment BERE J found that the respondent had breached the contract. This is what he had to say in his judgment at pp 3-4.

“It is abundantly clear to the court that the contract in issue was between the plaintiff and the defendant and that the alterations allegedly made by the defendant as a result of the instructions of Muzondiwa (if any) were of no force and effect. If anything such conduct can only serve to confirm there was a clear breach of contract by the defendant.

In the absence of the evidence of Muzondiwa it is too far fetched to try and infer his agency to the plaintiff particularly in the light of the plaintiff’s clear evidence.

More importantly it is also clear that in the absence of the evidence of Muzondiwa the court cannot on a balance of probability accept that he authorised any attention to the contract entered into by the parties and that when he did so he was acting as an agent for Total Zimbabwe”

The learned Judge went further to quote from a report generated by Total Zimbabwe in which it was recommended that the tanks be rejected as they did not meet the required design specification in that 4.5 mm plate was used in their fabrication instead of the desired 6 mm plate.

It is not in dispute that after the tanks were rejected by the applicant and Total Zimbabwe the respondent disposed of them for value. It has offered reimburse the plaintiff price paid. The applicant has refused the tender of the price paid and, instead, demanded payment in damages reflecting the replacement costs of the tanks. This, the respondent has consistently refused to do.

The respondent has in the opposing affidavit stated that it had offered to refund the purchase price but that the applicant had not responded to the offer and the money had remained in the bank account held by the respondent until it was eventually eroded by inflation. It is further contended that had the applicant accepted the refund timeously the dispute between the parties would have long been settled and further that although the

applicant had initially sued for delivery of the tanks it had abandoned that and opted for damages. It is also contended that the delays were caused by the applicant in refusing to accept the refund.

Even though Total Zimbabwe was never a party to the proceedings in the trial court it is the case for the respondent that it is the former that introduced the applicant to the respondent. It is also suggested that because of the interest it had in the tanks it was Total that inspected the tanks and it was as a result of this interest that Muzondiwa inspected the tanks that the respondent contends that Muzondiwa authorized an alteration to the specifications of the material recommended for the manufacture of the tanks. It is in fact not in dispute that the applicant never inspected the tanks, the inspection being conducted by the employees of Total on whose behalf the applicant had contracted the respondent to manufacture the tanks.

The last issue was the sufficiency of evidence adduced by the applicant in relation to the quantum of damages being claimed by the applicant. The respondent was of the view that it was necessary to obtain quotations from more than one supplier within the region. It did not accept that D C de Souza was the only manufacturer of the tanks in question. Finally the respondent contended that the appeal was not frivolous.

Mr *Mpofu* argued that the summons issued by the applicant in the trial court is fatally defective and no judgment could be based upon the same. He argued further that the defect was such that it could not be cured by evidence. He argued that Order 3 r 11(c) requires that a summons contain a true and concise statement of the nature, extent and grounds of both the cause of action and the relief sought. It was argued that in a claim for damages ordinarily the damages claim must appear ex-facie the summons and that a failure to comply with the rules in this regard renders the summons invalid. It was contended that this was a defect that could not be cured by evidence. Counsel sought reliance on the dicta of LORD DENNING in *Mcfoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 to the following effect:

“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The applicant herein claimed for specific performance, or alternatively damages. The amount being claimed was not indicated in the summons or declaration. According to the respondent damages for breach of contract are calculated as at the date of breach as such

damages would have been known as having been incurred already. This is the basis of the contention by the respondent that the summons was a nullity and not capable of condonation by the court. For purposes of pleading damages may be known as general otherwise referred as intrinsic or special known as extrinsic. As a general rule of pleading special damages have to be to be stated with particularity in a pleading. See *Holmdene Brickwork (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 where damages were defined as follows:

“General or intrinsic damages are those which flow naturally and generally from the kind of breach of contract in question. These may be claimed without particulars being given.

Special or extrinsic damages are those which are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach.”¹

A claim for unliquidated damages is normally brought by means of action and a plaintiff has to make the necessary averments in his pleading to found a claim for damages and to prevent a successful exception being raised. The summons must therefore contain sufficient particulars to enable the defendant to reasonably assess the quantum thereof. Therefore a distinction is made between general and special damages. Since general damage is presumed, it may apparently be pleaded without precise particularity.

Although not described as such by the parties the relationship between them was akin to that of a purchaser and a seller. The respondent was in the business of fabricating specialised tanks which it would provide on demand and according to specification. McKeurtan in his book on Sale 4th edition at p 217 where a plaintiff has claimed specific performance and in the alternative damages puts the time for assessing the value at the date of trial. The learned author states at para 8.1.8 p 105:

“In claiming specific performance the purchaser has elected not to crystallize his claim at the date of the seller’s breach by its reduction to money terms at that date, but to demand the very thing contracted for, and if he receives it to be satisfied with it, irrespective of intermediate fluctuations in its value. In other words he is content to treat the seller’s obligation to deliver the article as continuing and to take it with the value it may have (saving of course, questions of negligence, or accident while the seller is in *mora*) at the date of trial. It follows where the court awards him specific performance with damages failing delivery, that compensation is fixed in relation to

¹ At p 687D-E

the value of the article at the time of trial.” (See *Avery v Bowden* (1856) 26 LJQB 3, 119 ER 1119 which is authority for the proposition that the relevant date is the date of judgment and not *litis contestatio*.)

Where, however, the purchaser elects instead to claim damages in place of actual performance, his reimbursement depends upon the value of the thing he ought to have received, calculated at the date when he ought to have received it, or when the seller declines definitely to deliver it. His election to release the seller from the obligation to deliver and to claim in lieu of that a sum of money, crystallizes the claim both in nature and amount at the date of the seller’s breach of contract, and subsequent variations in the value of the article are immaterial). See *Stephens v Liepner* 1938 WLD 30 at 34; *Sam Hackner & Co v Saltzman* 1940 OPD 200 at 204

The learned author also states that a claim for specific performance or in the alternative damages gives the seller an election which lasts until he is judicially compelled to exercise it one way or another. If the seller chooses to tender payment before judgment he must tender an amount based on the then value of the item. See *Umlilwan v Beningfield* 1911 NPD 320; *Payn v Lokwe* 1912 EDL 33

See also *Mlombo v Fourie* 1964 (3) SA 350 (T), *Standard Bank of South Africa Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 and *Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 (2) SA 421(AD). In *Mlombo’s* case (supra) TROLLIP J opined at 357H:

“It now remains to fix the value of the cattle that were sold and which are still in the defendant’s possession. This being a vindicatory action the object in awarding the value as an alternative relief to the restoration of the cattle is to put the plaintiff in the same position, as far as money can achieve that, as he would be if the cattle were to be restored to him. The value of the cattle as at the date of trial must therefore be the correct measure of the monetary restitution. If that value is less than the value at the commencement of the proceedings or *litis contestatio* (whichever is the correct critical stage) it may be that such difference can be claimed as damages if the defendant is liable in law therefor, but as no such claim is made here, I need express no view on that aspect. That value is not necessarily the market value at that date.”

It is pertinent to note that even though before me *Mr Mpofu* submitted that the summons was null and void, the defendant had not excepted thereto. This is because the summons and declaration disclosed a cause of action. In *McKelvey v Cowan* 1980 ZLR 235 at BEADLE AJ (as he then was) stated:

“.....It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.”

In my view, the respondent cannot argue and in fact has never argued that there is no cause of action disclosed on the summons and declaration. The court then rightly, in my view, accepted the evidence adduced by the applicant as to the value of the tanks as at the date of trial. Whether or not the trial court was correct in condoning the failure by the plaintiff during the trial to seek condonation the alleged defect is not for me comment on as the trial court enjoys parallel jurisdiction with myself. That aspect would be dealt with by the Supreme Court. I have as a result not considered the authorities referred to by counsel in his extensive heads of argument. I cannot be seen to be reviewing a judge of the High Court even in comments. For my part, however, I see no defect on the summons and declaration.

I turn then to question of the award of relief in foreign currency. Counsel accepts that the court has the right to award damages sounding in foreign currency but that the court can only make such an award if the award truly expressed the plaintiff's loss. He argues further that it is an issue which must be pleaded and that the court cannot take judicial notice of the issue. I was referred to *Local Authorities Pension Fund v F & R Travel Tours & Car Sales (Pvt) Ltd* HH 90/10. I have already dealt at length with the election by the plaintiff to quantify his loss and have found that in the circumstances it was not inappropriate for the quantification to have been done at the date of trial. It will serve no purpose in my view to revisit this aspect. I also do not see the relevance of an exchange rate in this matter. The quotation presented to court was in United States dollars and there is no suggestion that the court undertook a process of conversion from the Zimbabwe dollar to United States dollars.

The contention is made that the law is not settled. I fail to understand the logic behind the submission. The applicant received an award in damages sounding in money. The respondent does not deny contracting with the plaintiff for the manufacture of the tanks in question. It was paid the contract sum in full. The tanks it manufactured were rejected by the applicant. It did not reimburse the applicant the amount paid under the contract. It sold the tanks and consumed the proceeds. Even at the trial it did not prove that it had in its bank account any funds to pay to the applicant in reimbursement of the contract sum.

The requirements for an application for leave to execute pending appeal are as follows:

- (i) The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal, if leave to execute were granted;
- (ii) the potentiality of irreparable harm or prejudice being sustained by the respondent if leave to execute were refused;
- (iii) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has not been noted with the bon fide intention of seeking to reverse the judgment but for some indirect purpose, for instance, to gain time or harass the other party; and
- (iv) where there is the potentiality of irreparable harm or prejudice to both Appellant and Respondent the balance of hardship or convenience as the case may be. See *Masimbe v Masimbe* 1995 (2) ZLR 31 (S).

In 2006 the applicant paid a quoted sum to the respondent for the fabrication of tanks. The respondent fabricated tanks which the applicant rejected. The respondent went on to sell those tanks and did not account to the applicant for the proceeds of the sale. It is very clear on these facts which party suffered prejudice and which party continues to suffer prejudice. Even though at the trial the respondent's witness intimated that it had offered to refund the applicant, it was never established that it had the funds and was in a position to refund the purchase price. In my view the applicant has established that there is potential prejudice to be occasioned to itself.

The approach taken by Mr *Mpofu* was that the applicant can only suffer harm if the application is not granted and the appeal itself is hopeless. He contended that if the appeal has merit then the grant of the application would result in the respondent suffering harm especially if one has regard to the nature of the claim.

The question then is if the appeal is *bona fide* and has good prospects of success. The success of the appeal was grounded on the contention that the summons was defective. That has been dealt with above. The other issue in contention was that Muzvondiwa had played a pivotal role in the manner in which the parties dealt with each other. It was contended that if Muzvondiwa was an agent of the applicant then he had the power to cause the alteration in the specification for the fabrication of the tanks. It was part of the evidence that Muzvondiwa was employed by Total and not the applicant. It was also part of the evidence that the respondent had written to the applicant on 25 September 2006 advising that the tanks had been fabricated according to the specifications. Assuming, as contended by the respondent that the specifications had been altered through the agency of Muzvondiwa surely the

respondent would have stated that the tanks had been fabricated using the material recommended by Muzvondiwa. Instead reference was made to the 6mm plate as being the source of the material used in the fabrication. Given the stance taken by the applicant throughout that Muzvondiwa was not its agent it was incumbent upon the respondent to have adduced evidence to substantiate the allegation that he had authorised the alteration in the specifics. He who avers must prove. The respondent averred but did not prove the alleged role of Muzvondiwa.

I cannot accept the contention by the respondent that there was no need to call Muzvondiwa as his role could be inferred from the surrounding circumstances. If the respondent is to be believed his actions caused a complete departure from the material terms of the contract agreed to between the parties. The tanks had to be manufactured using a specific size of steel sheet. Muzvondiwa altered this allegedly on behalf of the applicant, thus changing the nature of the items being manufactured. His evidence as to whether or not this occurred, whether he was acting on behalf of the applicant or some other party would have assisted the court in resolving the dispute. The tanks were rejected for the sole reason that the wrong material was used. To that end whatever role Muzvondiwa played it was necessary that he be called by the party relying on his alleged actions. This, the respondent failed to do. Clearly the applicant has prospects of success on the appeal. The respondent does not. However if there is the potentiality of irreparable harm to both parties the balance of hardship or convenience clearly dictates that the applicant will suffer greater hardship if the order by BERE J is suspended through the noting of the appeal.

In the premises the application succeeds and an order is issued as follows:

IT IS ORDERED THAT:

1. Leave to execute against the judgment of BERE J under Case No HC121/10 dated 21 July 2010 be and is hereby granted.
2. The respondent is ordered to pay the costs of this application.

Kantor & Immerman, applicant's legal practitioners

Mtombeni, Mukwasha, Muzawazi & Associates, respondent's legal practitioners