

TIMOTHY CURTIS JACKSON  
versus  
ZIMBABWE NATIONAL WATER AUTHORITY

HIGH COURT OF ZIMBABWE  
MAKONESE J  
HARARE, 24 October 2011

*D. Mwonzora*, for plaintiff  
*J. Dondo*, for defendant

MAKONESE J: This is an application for absolution from the instance by the defendant at the close of the plaintiff's case. The defendant contends that there is no need to call the defendant to rebut the plaintiff's claims because there is no evidence that has been placed before the court to rebut.

The facts of the case are relatively narrow. The plaintiff Timothy Curtis Jackson is a commercial farmer who at the material time was leasing Ruya Ranch Farm from one Mr Nyamupfukudza for the purposes of commercial production of tobacco and maize amongst other crops. The plaintiff and defendant entered into a contract whereunder the defendant undertook to supply the plaintiff with 250 megalitres of raw water per year. Under the said agreement the plaintiff agreed to purchase water from Amanda Dam situated in the district of Mt Darwin within the Mazowe catchment area for the purposes of irrigation.

The plaintiff alleges that based on the said agreement with the defendant he cultivated 90 hectares of tobacco but that in breach of the agreement the defendant refused or neglected to supply the water as agreed resulting in loss of a tobacco crop to the plaintiff amounting to US\$4 371 000.

The defendant denies liability and contends that in terms of the agreement between the parties the plaintiff was at his own expense supposed to install devices for the abstraction of the water at agreed points and keep and maintain the installation for pumping raw water. The defendant states in its plea that the onus was upon the plaintiff to abstract water and that the defendant had always made the water available to the plaintiff. The defendant went on to state that it was the plaintiff who failed to abstract water from Amanda Dam and that the defendant had nothing to do with the plaintiff's failure to abstract the allocated water.

In terms of clause 19 of the agreement between the parties the following is provided:-

“That ZINWA shall not be responsible for any loss or damage sustained by the consumer arising out of any failure, restrictions or suspension of supply of water or from floods, storms or viz major: or other cause whatsoever, other than, that occasioned by the wilfull act or omission or any negligence of its staff acting in the course of and within the scope of their employment”.

The plaintiff led evidence to the effect that when he tried to abstract water from Amanda Dam as provided for under the agreement he was prevented from doing so by A1 resettled farmers who claimed that the water level in the dam was so low that there would be no adequate water for their livestock. The plaintiff also produced documents which showed that meetings were held with stakeholders in a bid to find a solution to the problem but there was no breakthrough. Plaintiff also testified that the defendant ought to have ensured that there was sufficient water in the dam when he signed the agreement.

The plaintiff contends that as a result of the defendant’s failure to avail the water for irrigation purposes as provided for under the agreement the defendant should be held liable for damages arising out of the loss of the tobacco crop and other consequential damages. The issue of liability on the part of the defendant becomes problematic if one has regard to the provisions of clause 3 of the contract which provides as follows:-

“That subject to the availability of water, ZINWA agrees to supply to the Consumer during the subsistence of this Agreement the Consumer’s allocation, but the question of the availability of the water shall be determined by the Chief Executive Officer whose decision shall be final. Subject to the provisions of the Water Act, in the event of a shortage of water in any supply period water supply may be reduced for any purpose according to the water allocation procedures, adopted by the Catchment Council Concerned. Zinwa shall take all reasonable steps to provide water required by the Consumer, but it does not guarantee any particular quantity or quality of water nether shall Zinwa be responsible in any manner whatsoever for any shortage in quantity or quality ...” (the emphasis is mine).

The question that therefore has to be decided at this juncture is whether the defendant might or could be held liable for any loss or damage occasioned by the failure by the plaintiff to abstract water from Amanda for irrigation purposes. It is not in dispute that the plaintiff’s tobacco crop failed as a direct result of lack of water from Amanda dam. The agronomist’s report shows that the plaintiff could have pumped water from an alternative source, namely Askala dam but it would appear the costs of doing so would have been too high.

It is important to note that in another report prepared by the agronomist in September 2010 the plaintiff was advised that he should ensure that he got enough irrigation water because the dam was very low in water level. In the same report it was observed that the

plaintiff had held several meetings with Zinwa officials and Government officials to try and solve the water issue and it had been agreed that the plaintiff should draw water from Katanya Dam. It is not clear why this option was not pursued.

I must decide whether the plaintiff has placed before the court sufficient evidence to warrant the defendant to be placed on its defence. I am guided by several decided cases on the issue of an application for absolution from the instance at the close of the plaintiff's case:

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In the case of *Eckem William Sithole v PG Industries (Zimbabwe) t/a the African Timber Co. (Pvt) Ltd* HC 1341/00 his Lordship NDOU J cited the case of *Supreme Service Station (1969) (Pvt) Ltd vs Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR p1 where the following principles were established:-

“The test, therefore is down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that this is the sort of mistake a reasonable court might make ... a definition which helps not at all ... rules of procedure are made to ensure that justice is done between the parties and, so far as possible courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of the defendant, and the plaintiff has made out some case, to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance”.

In my view the litmus test in applications for absolution from the instance at the close of the plaintiff's case is whether the plaintiff has established a *prima facie* case against the defendant and whether there is evidence that has been placed before the court upon which a reasonable court might give judgment against the defendant. Put in another way the court must decide whether at the close of the plaintiff's case the plaintiff has led sufficient evidence which needs rebuttal by the defendant. If the evidence is not adequate the defendant does not have to open its case because there would be no evidence to rebut.

I have also examined the case of *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZRL 151 (SC), where DUMBUTSHENA CJ, held:

“that question is whether the plaintiff has adduced evidence upon which a reasonable court could or might find for the plaintiff”.

I have closely examined the evidence led by the single witness who was the plaintiff in this case and despite having a lot of sympathy with the situation the plaintiff found himself

in I am not satisfied that he placed sufficient evidence before the court to establish a case against the defendant. In the first instance the defendant made the water available to the defendant, It was for the plaintiff to pump water from Amanda dam but there was not enough water and the A1 resettlement farmers would not allow the plaintiff to draw water because in their view there was insufficient water for the their livestock. The plaintiff was therefore prevented by third parties from abstracting water from the dam. The plaintiff did not seek to enforce his rights against the third parties by obtaining an interdict against them. In the second instance in terms of the agreement between the parties the defendant did not guarantee the availability of water (clause 3 of the agreement). The matter is however settled by clause 19 of the agreement which provides that the defendant was not responsible for any loss or damage sustained by the plaintiff arising out of any failure to supply the water.

In the circumstances, I am satisfied that the plaintiff failed to establish that the defendant had any case to answer. Even if the court were to be generous to the plaintiff and allow him to proceed with his claims against the defendant the plaintiff still faces a serious hurdle on the issue of damages. The plaintiff has simply not led any evidence at all to sustain his claims. The plaintiff's loss arose out of failure to irrigate 90 hectares of a tobacco crop. It became apparent, however that only 50 hectares had under irrigation and that the claim was wrongly premised. There was no attempt at all by the plaintiff to place before the court any further evidence in support of the claim for damages. In reality the plaintiff put down a set of figures not supported by any evidence and in my view this deficiency cannot be cured by placing the defendant on his defence. The plaintiff's case on the aspect of damages falls far short of what is expected and no reasonable court may find against the defendant in that respect.

I am therefore satisfied that the application for absolution from the instance at the close of the plaintiff's case should be granted in favour of the defendant with costs.

*Mwonzora & Associates*, plaintiff's legal practitioners  
*Chinamasa, Mudimu & Dondo*, defendant's legal practitioners