(1) NICOZ DIAMOND INSURANCE LTD
versus
CLOVGATE ELEVATOR COMPANY (PVT) LTD

(2) CLOVGATE ELEVATOR COMPANY (PVT) LTD
versus
NICOZ DIAMOND INSURANCE LTD

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 23, 24, 25 26 January 2018 & 7 February 2018

Civil Trial

K Kachambwa, for the plaintiff
Ms V A Dzingirai, for the defendant

HUNGWE J: These two matters were consolidated at the pre-trial conference held before CHITAPI J on 7 March 2017. At that conference, a joint pre-trial conference was agreed upon. At trial the parties agreed that the first matter be treated as the main matter and that the parties be referred to as the plaintiff and defendant in that matter during trial of both matters in the consolidated trial. It was also agreed that the real issues be further reduced to three as follows:

(1) What were the terms of the verbal agreement between plaintiff and defendant?
(2) Did the Plaintiff or defendant breach the terms of the agreement?
(3) If either is in breach, what remedy is the innocent party entitled to?

Plaintiff led the following evidence from its treasury manager, Elisha Makwarimba and Lloyd Chipungu, an elevator technician from Global Lifts (Pvt) Ltd ("Global Lifts"). Elisha Makwarimba testified as follows. In June 2014 one of the two Otis Gen 2 elevators at plaintiff's building situated at 30 Samora Machel Avenue, Harare, broke down. At the time Eleco Elevator Company ("Eleco"), which had installed the two elevators, was contracted to

service the elevators but had failed to repair this elevator. As word filtered into the industry, plaintiff was inundated with offers to fix this lift from other companies including the defendant. Eventually, in a meeting held in July 2014 between defendant and plaintiff's management, defendant promised to fix the elevator as it had the expertise to do so. A month before, defendant had been allowed to assess the elevator and had produced a report which was submitted to and considered by plaintiff. Defendant pointed out that it can only attend to fixing the elevator on condition that it was, at the same time, awarded the service contract, which at the time was held by Eleco. Plaintiff terminated the Eleco service contract. It then entered into a service contract with the defendant in September 2014. The terms of the repair contract was not in writing but it was agreed that, on the basis of its expertise, defendant would submit the list of any spares that defendant required to effect repairs to the elevator. The cost of labour would only be paid to the defendant after the elevator was functional. Pursuant to this agreement, defendant submitted a list of items which it required to repair the elevator. The first list comprised of an inverter board and a motor board. Defendant intimated that the inverter was malfunctioning. The defendant was advised, at the time of submission of the quotation for the parts that the quotation would be submitted to management for approval and the process would take about a week. The quotation was paid. It was around US$3000.00. The parts were delivered and fitted but still the lift would not work. Defendant then advised that the parts they had ordered were not the cause of the malfunctioning of the lift. It was the encoder that caused the problem. Could they buy it? They paid for the encoder which was fitted, but still the lift remained out of service. Defendant then advised plaintiff that these parts were not the cause of the malfunction of the elevator. They asked if they could move the elevator's motor to Kaguvi building where they were similar elevators under their care. After they moved the motor and tested it, they advised that the motor was not turning. Further, since the traction belt and guide shoes needed to be replaced, defendant suggested that a new motor, guide shoes and traction belt be procured. Plaintiff requested that they submit three quotations for the same for consideration and approval by its Board. Defendant complied and submitted the list comprising of an elevator motor, traction belt and guide shoes ("the elevator parts") on 8 December 2014. Defendant undertook, on submitting the quotation, to deliver the elevator parts three weeks from the date of receipt of payment into their South African account. The parts would be supplied by their sister company in SA, so a direct payment would facilitate early delivery. Defendant confirmed receipt of the

US$20 662.47 in that account on 21 December 2014. After three weeks of this date plaintiff expected delivery of the elevator parts. Defendant failed to deliver three weeks from 21 December 2014. When persistently quizzed by plaintiff, defendant gave one excuse after another. It was then that defendant advised that the parts were being sourced from China. Plaintiff handed over the matter regarding defendant's failure to deliver the elevator parts to its legal practitioners. They immediately wrote to defendant on 30 May 2014. In response to the correspondence from plaintiff's legal practitioners, defendant on 1 June 2014, claimed that the delay in processing payment by plaintiff had resulted in an exchange loss. Defendant also claimed that the annual shut down and dispute over the handling of the shipment by its agents had contributed to the delay. It asked for an extension of time to the end of June 2014 when it hoped to have delivered the consignment. Plaintiff threatened to sue should defendant not keep the promised delivery date. Defendant again failed to honour that date. True to its word, plaintiff sued over the failure to deliver.

At the pre-trial conference in HC 7126/16 plaintiff learnt, for the first time, that defendant was claiming payment of US$10 697.62 for work done. That invoice, according to plaintiff was never delivered to it. In any event, plaintiff disputed that payment for work done was due since the defendant had not completed the repair works. Payment for work done was conditional upon the satisfactory completion of the repair works which the defendant had failed to deliver on. Up to the date of hearing, defendant had not delivered. Plaintiff had to hire the services of another party. That party, Global Lifts, successfully repaired the elevator after plaintiff procured yet another elevator motor and the other accessories for which the defendant had been fully paid but which defendant had failed or neglected to deliver. Plaintiff in HC 800/17 counter-claimed for the extra elevator parts (US$3 269.45) which it had to purchase in order for Global Lifts to effect repairs; and the labour costs (US$2 700.00) charged by Global Lifts to re-assemble the dismantled elevator before they could trouble-shoot at the commencement of their contract.

Lloyd Chipungu of Global Lifts confirmed that they were contracted by plaintiff in June 2014 to repair an elevator at 30 Samora Machel Avenue, Harare. They found the elevator in pieces and had to re-assemble it before they could trouble-shoot. They discovered excess spares at the site. This was an indication that the previous service provider had engaged in trial and error hence the procurement of unnecessary spares. He also testified that the motor had signs that it had been dropped from a height thereby displacing the fixed

magnets from their original position. This explained the uneven turns on powering it. They had to replace the motor together with the traction belt and guide shoes. These parts were procured from Namibia. They only billed the plaintiff after a third party, NSSA, statutory authority, certified the elevator for use. This was their practice. The whole process took them about four months. In their diagnosis, they established that it was the charging contactors which had resulted in the malfunctioning of the elevator. They attributed the motor malfunction to a possible human error resulting from impact upon it falling from a height. They had learnt that at some point, the motor had been taken to a different site. In their opinion, the dismantling of the elevator was unnecessary. All diagnostics could be done on site with the motor mounted in its position. In their view the previous service proceeded on a trial and error basis hence they could not identify the problem.

Plaintiff's managing director, Collin Jeche gave evidence for the defendant. He was involved in his company's dealings with the plaintiff. The thrust of his evidence was that in June 2014 defendant entered into a verbal repair contract with the plaintiff. They would identify components that required replacement. Plaintiff would secure and provide funding for the necessary purchases. In doing so, they would submit three quotations to plaintiff's management who would arrange payment for the quoted items. Defendant conducted the repair works on the basis that the plaintiff would provide funding for the identified components. Defendant bought the parts upon plaintiff making the necessary disbursements. His company decided on an approach in which different components of the elevator were stripped and diagnosed. The faulty ones were identified and plaintiff paid on presentation of the three quotations as agreed. They fitted the components bought and continued with work. When they got to the repair of the motor, they provided the requisite three quotations for the elevator motor, the traction belt and the guide shoes. He disputed the plaintiff's claim that they did not disclose that they were sourcing the parts from China. He said they had specifically pointed out that the motor would be imported directly to South Africa where it would be tested by Otis Elevators in order for the warranty to be validated. Although they expected payment on presentation of their quotation, payment only came though after a week when both their local and South African operation had gone on annual shut-down. They could not act on the payment until 4 January 2015. They had promised delivery of the goods three weeks after payment but the incidence of the Chinese New Year holidays had impacted on their lead time. Upon the parts' arrival in Zimbabwe, the Reserve Bank of Zimbabwe

("RBZ") held on to a payment in favour of their agent resulting in failure to ensure the release of the goods. When the plaintiff's lawyers requested the documentation confirming that RBZ indeed held such payment and the importation documents, the witness stated that they had furnished the documents and the names of the official at Zimbabwe Revenue Authority ("ZIMRA") handling the importation. He confirmed that they had the elevator parts at their warehouse. They had not delivered these because the plaintiff refused to take delivery. In any event plaintiff had engaged another service provider. The agreement was, according to the witness, that they would bill the plaintiff for work done at the completion of each stage of the repair works. They had not raised any charges until December 2015 as the work was still in progress. He admitted that the defendant owed plaintiff value for the parts they held. Defendant would be able to reimburse plaintiff upon the disposal of the parts. The witness maintained that plaintiff owed defendant in the labour expended up to the time when the contract was cancelled. The time sheets in exhibit 17 were proof of work expended on the repair of plaintiff's elevator for which it was liable in the sum of US$10 269.45.

Defendant's second witness, Mohamed Murenja, gave evidence on the specifications of the Otis Gen2 which is the model in issue in this matter. His evidence, in its material respect appeared to me to be unfavourable to the party who had called it. For example, he was quite categorical that in any repair job involving other elevator models, these have a self-diagnostic controller that helps the technician to identify the fault faster. In the case of this model, it does not use this system. One uses an Otis Test Tool. It performs the functions of a self-diagnostic controller. The defendant, in its trouble-shooting exercise, did not use this tool. In my view this matter ought to be decided on the credibility of the respective witnesses of the parties. I make this observation in light of the fact that the issues revolve around the terms of a verbal contract. In deciding what the terms of that contract were, I must of necessity rely on what the witnesses say were the terms. In doing so, he court applies the same rules of construction when determining the terms of an oral contract as it does when interpreting a written contract. However, in an oral agreement there is no written document to guide the court. It therefore has to assess the credibility of the parties' respective witnesses carefully before making a finding on any of the issues before it.

In assessing the credibility of witnesses the court generally is guided by several factors. A range of factors must be taken into account in assessing a witness's credibility. In

Hees v *Nel* 1994 PH F11 MAHOMED J, had this to say on the subject of assessment of credibility:

> "Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony which often is a relative condition to be compared with the quality of the evidence of the conflicting witness. His consistency both within the context and structure of his own evidence and with the objective facts, his integrity, his candour, his age, his capacities and opportunities to be able to depose to the events he claims to have knowledge of. His personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively to communicate what he intends to say and the weight to be attached and the relevance of his version against the background of the pleadings."

I proceed to analyse the witnesses' evidence in respect of the issues before the court and make specific findings on each of the three issues in the process.

(1) What were the terms of the verbal contract between the parties?

The parties both agree that they entered into a contract for the repair of an elevator. For the defendant, Ms *Dzingirai* contented that the agreement to repair the elevator was closer to a building contract than to a service contract. Mr *Kachambwa*, for the plaintiff, argued that this was a service contract. He held the defendant to the admission made in the pleadings where there was agreement that the parties entered into an agreement to repair an elevator. He pointed to the general rule that issues had to be framed in the pleadings. See *F & I Advisors (Edms) Bpk en ander* v *Eerste Nationale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 SCA) at 524H- 525B/C

As defendant pleaded its case as based on a repair contract, it cannot now resile from the admission. It is clear to me that the correct interpretation of the agreement between the parties is that this was a service agreement, specifically one of letting and hiring of repair services.

I come to that conclusion for the following reasons.

There is ample authority that a contract of letting and hiring of work is *locatio conductio operis*, a species of *locatio conductio.* The piece of work, *opus*, is let out; the person who does the work is the *locator*, while the *conductor* is the person for whose benefit the work is performed and who pays the remuneration. *Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 433. In this species of *locatio conductio*, the position of the parties is somewhat reversed, but the locator is not a servant but an independent contractor. A person who undertakes to produce a given result for another person, if he, in the manner of doing the

work, is not under the under the control or orders of the other person, is said to be an "independent contractor." He is his own master and is not a servant of the person for whom he does the work. See *Colonial Mutual Life Assurance* (*supra*), *Fisk* v *London & Lancashire Insurance Co* 1942 WLD 73; *S* v *AMCA Services (Pty) Ltd* 1962 (4) 537 (AD).

In identifying the essential characteristics and range of application of the *locatio conductio operis*, Zimmermann states that the essential characteristic of *locatio conductio operis* was that one person undertakes to perform or execute a particular piece of work and he promises to produce a certain result. Very often, he says, there was a physical object to be worked on. He gives the following examples; clothes to be cleaned or repaired, cloth to be produced from wool, jewels to be engraved, a ring to be made, a house to be built.

> "The decisive feature of all these transactions is that the customer was not interested in the services or the labour as such, but in the product or result of such labour. Indeed, he usually was not even interested in whether the conductor performed in person or whether he drew on the assistance of his employees. The conductor was responsible for producing the result: how he did it was usually up to him." At p394 of **"The Law of Obligations:** Roman Foundations of the Civilian Tradition by Reinhard Zimmermann, 1996: Oxford University Press.

In *Southampton Assurance Co of Zimbabwe Ltd* v *Mutuma & Another* 1990 (1) ZLR 12 (HC) SMITH J stated at p 16 A-G:

> "In *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) the court considered what was meant by the term 'contract of service' in a particular statute. That term was construed as being equivalent to a common law contract of service. JOUBERT JA, who delivered the judgment of the court, analysed the distinction in Roman Law and in Roman-Dutch Law between *locatio conductio operarum* and *locatio conductio operis*, the former being the letting and hiring of personal services and the latter being the letting and hiring of a particular piece of work or job to be done as a whole. Then after referring to the "supervision and control" test enunciated by DE VILLERS CJ in MacDonald's case supra he said at p 62:
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> > 'In so far as the above dictum of DE VILLERS CJ regards the presence of the employer's right of supervision and control over the employee as an indispensable requirement for the existence of a contract of service *(locatio conductio operarum)* as distinct from a contract of work (*locatio conductio operis*) it must with due respect be qualified. The presence of such a right of supervision and control is indeed one of the most important *indicia* that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work. Cf *DeBeer* v *Thomson & Son* 1918 TPD 70 at 76; AVBOB's case, supra, at 456C. Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole *indicium* but merely one of the *indicia*, albeit an important one, and that there may also be other important *indicia* to be considered depending upon the provisions of the contract in question as a whole.

> In many cases it is comparatively easy to determine whether a contract is a contract of service and in others whether it is a contract of work but where these two extremes converge together it is more difficult to draw a border line between them. It is in the marginal cases where the so called dominant impression test merits consideration ….'

As far as common law is concerned, just as the parties may make a binding contract of service in any way they like, so they may make it for a period they like. Once a service agreement has been concluded, the date of commencement is the date of the contract, unless there is an agreement or usage to the contrary effect, or unless the matter has been left for later agreement. *Potchefstroom Municipal Council* v *Bouwer NO* 1958 (4) 382 (T). The duration of the contract must be ascertained from the clear intention of the parties. In deciding this factor, the court looks at all the circumstances of the case. Generally, the courts are reluctant to device the terms to a parties' contract. However, where it must do so, the court calls upon the aid of implied terms of a particular type of contract. In *Alfred McAlpine & Son (Pty) Ltd* v *Transvaal Provincial Administration* 1974 (3) SA 506 A at 531 the court explained and articulated how terms are implied in the context of a contract such as in the present case in the following terms:

> "In legal parlance the expression 'implied term'.,, is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law from without. Indeed, terms are often implied by the law in cases where it is by no means clear that the parties would have agree to incorporate them in their contracts. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense 'implied term' is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts, it is *naturalium* of the contract in question."

(See also *Van Immelzeel & Pohl and Another* v *Samsncor* Ltd 2001 (2) SA 90.

The parties executed a contract of service as a precondition of the verbal agreement to repair the lift. To repair is to put something that is damaged, broken, or not working correctly, back into good condition or make it work again. Although the parties had not fixed the remuneration due to the defendant for the repair job, from the circumstances of the case, one can conclude that it would be subject of a later agreement after the job was done. The duration of the contract, in that sense would have been a reasonable time in the circumstances. The plaintiff made demands for the delivery of the spares when it became clear that these had not been imported and delivered in terms of the agreement. By so doing,

plaintiff placed the defendant *in mora*. I am, in these circumstances, unable to agree with the defendant's contention that the parties had agreed that payment for labour would be in phases or monthly. First, the defendants' witnesses contradict each other as to the terms of payment for the labour. Collin Jeche was adamant that it was agreed that the defendant would bill plaintiff after each phase was complete. Paul Mapepa, who claimed to be the person in charge of billing at defendant's, insisted that the billing was monthly and this coincided with completion of phases. When it was put to both of them that they only billed plaintiff once not twice, they each gave different explanation why, for seventeen months, plaintiff had not been billed until December 2015. It is highly improbable that someone entitled to regular payment would work for one year and five months without demanding payment. Clearly, they were both not being truthful in this respect. On the other hand, the evidence from the plaintiff was that trade usage in the industry was that a service provider would give a quotation for labour before commencement of works and would be paid upon completion of the repair job. Lloyd Chipungu confirmed this trade usage. The defendant's witnesses were less than impressive on too many material respects. I therefore believe plaintiff's witnesses where there two versions contradict. Following upon this finding, I am of the view that the industry trade usage that accords with the probability in this case is that payment for repair to an elevator would only be due when that elevator was functional. I therefore find that the terms of the contract were as follows:

(1) Plaintiff and defendant entered into a verbal contract in terms of which defendant was to repair plaintiff's elevator at 30 Samora Machel Avenue, Harare.
(2) Plaintiff would pay for any parts defendant would require to effect these repairs.
(3) Payment for labour would only be due upon completion of the repair works.
(4) Such repair would be undertaken within a reasonable time, with appropriate skill and diligence.

(2) Did plaintiff or defendant breach the terms of the verbal agreement?

Plaintiff submitted that defendant breached the material terms of the agreement in two respects. First, defendant failed to repair the elevator and secondly failed to deliver the elevator parts for which it had received payment. Makwarimba testified to two instances in which the defendant requisitioned plaintiff to buy certain elevator parts on the pretext that those spares were malfunctioning on the elevator. Once these were replaced, the elevator

would be functional. First, it was the inverter which plaintiff was asked to pay for, but after it was fitted, the elevator would not work. Defendant then said it must be the encoder. This was bought and fitted but still the elevator did not function. Defendant then identified the elevator motor as the chief culprit in all this. When plaintiff paid for the elevator parts forming subject of the main action, the defendant failed to deliver. The spare parts were paid for. As a result, plaintiff placed itself in a situation where it could not perform the contract of repair. When pressed to perform on the delivery contract, defendant dithered from one explanation to another. Although defendant undertook in writing that it would be in a position to deliver the parts by the end of June 2015, not only did it fail to do so by that date but it had, up to the last date of this hearing, not been able to tender delivery, let alone repair the elevator.

The defendant raised four defences in explanation of its default;

(a) Plaintiff's payment was made and received late;
(b) Defendant, as a result suffered foreign exchange loss in rand;
(c) The Chinese New Year made timeous performance impossible;
(d) Its own dispute with its shipping agent resulted in the consignment being caught up thereby preventing delivery.

Clearly, these excuses do not, for once, serve as a defence in contract. They do not amount to supervening impossibility, even if they were true. Even if there was delay in payment by the plaintiff; defendant was hard put to explain why up to date, there had been no tender of delivery of the parts which it claimed on 4 January 2016 would be ready for delivery in three weeks. Defendant also failed to explain non-delivery of parts which it claimed were in its possession. It also failed to explain why it failed to produce import documents to assist plaintiff acquit a foreign payment in terms of Zimra statutory requirements when required to do so. Defendant failed to explain satisfactorily why there was purchase of excess spares.

The amount of contradictions in the defendant's case, in my view only serve to demonstrate how far defendant was prepared to go to cover up its incompetent execution of the contract.

There was a reason why plaintiff appointed defendant to repair the elevator. After Eleco had failed to fix the elevator, defendant came along. It gave out that it had the ability and skill to do the job. Defendant had professed to possess special knowledge and skill to do

the work. They had a technical director of forty-six years of experience in the type of elevators in use at 30 Samora Machel Avenue, Harare. This claim by the defendant must have swayed plaintiff to award defendant the contract. The defendant disappointed. It failed to fix the elevator. Such failure is *prima facie* evidence of breach of contract. Plaintiff called evidence on this issue. Besides the bare denials from defendant's witnesses, this court heard nothing from the defendant in the form of evidence in rebuttal.

In any event and most importantly, the defendant was aware that plaintiff would allege poor workmanship. Indeed, it called a technician whose evidence was damning as against defendant. From Chipungu's testimony, the court knows that it was not necessary to have removed the motor from its mounted position on the elevator; the court learned too, that the presence of excess functional spares indicates that defendant adopted a trial and error approach towards the repair of the elevator. It had negligently handled the removal and transportation of the motor to and from Kaguvi Building resulting in the damage from a possible drop of the motor. In spite of the nature of this evidence, defendant did not call anyone from its group of technicians involved in the repair of the elevator or the movement of its motor from 30 Samora Machel Avenue to Kaguvi Building. No explanation was given for this failure. This also calls for an adverse inference to be drawn especially where the technicians were available and defendant has failed so dismally to refute the plaintiff's claim; see *R* v *Phiri* 1958 (3) SA 161 (A); *Elgin v Fireclays Limited* v *Webb* 1947 4 SA 744 (A).

On the evidence and documents before me, I am of the view that the plaintiff has succeeded, on the balance of probabilities, in demonstrating that the defendant did not perform their professional duties properly; with due skill and diligence expected in terms of their contract with the plaintiff and were therefore negligent. Defendant's negligence caused the plaintiff to suffer damages measured by the cost of the unnecessary purchases made on the unsound advice given by defendant. I find, too, that the plaintiff did not breach the terms of the agreement when it effected payment in favour of the defendant's South African account on 15 December 2014. The invoice submitted to plaintiff, with instructions and giving the bank account number, did not specify the date by which payment ought to have been made. Had this been of importance, defendant would have easily indicated as much to plaintiff. In any event, plaintiff was anxious to get the elevator repaired. It did not exhibit any dilatoriness in its payment of the requested amount.

As for the defendant's claim of US$10 697, 62 for work done, I am unable to find that this was due and payable under the agreement. As I have demonstrated above, this was a contract of hiring of work, *locatio conductio operis.* By its very nature, the performance of the contract included the achievement of a specific result, which, in this case, was the delivery of a working elevator. Clearly, payment for the work done to achieve this objective, was conditional upon a successful repair job. This explains why defendant never submitted any claim for work done over a period of one year five months. What gives a further lie to the claim that payment was due on a regular basis is the contradiction in the evidence led on this very crucial aspect of the defendant's case in HC 800/17. The witnesses could not agree on what constitute a unit of labour, or whether the time sheets submitted wholly or partially supported the claim. Jeche said a unit of labour is made up of six hours; Mapepa said it was eight hours. Jeche said that each time sheet represents the hours spent on the elevator by defendant's crew; Mapepa testified that one would need to deduct those hours spent on different locations by each technician as reflected on each sheet before coming up with the true number of hours spent at plaintiff's elevator over the entire seventeen months. They could not agree on the rate applicable during the time. Jeche said the rate was US$40 per hour but had been discounted in favour of the plaintiff to US$18 per hour. Mapepa denied any such discount stating that in fact this was their normal rate. At the end of the day the evidence led in proof of the claim is rendered unreliable especially if regard is had to my earlier finding that payment was only due on the successful completion of the job. Consequently, I find that the claim was not proved.

(3) If either is in breach, what remedy is the innocent party entitled to?

Plaintiff's claim in HC 7126/16 is for the reimbursement of the sum of US$20 662, 47 which it paid over to the defendant for the procurement of three items; namely the elevator motor, the traction belt and the guide shoes. These items were not delivered. The defendant does not dispute the fact of non-delivery. It merely offered improbable explanations which do not amount to defences at law. This claim must succeed.

Plaintiff made a counter-claim in HC 800/17 under two heads. The first head in the counter-claim was in respect of the cost of the unnecessary spares parts which defendant negligently caused it to buy when such was not necessary for the professional repair of the elevator. It did not claim for those parts that were fitted on its elevator. This claim is for US$3 269, 45. Plaintiff also claimed, under the second head, for the payment of the sums of

money it paid to Global Lifts. Global Lifts raised charges raised labour charges in connection with the re-assembling of the elevator before it could assess and trouble-shoot in terms of the contract. It charged US$2 700, 00 for the task. Plaintiff seeks reimbursement for this cost. It alleges that it was put out of pocket as a result of the negligent performance of the contract by the defendant. Defendant denied that it was liable to reimburse plaintiff for the costs it incurred as these were necessary for the repair of its elevator. As for the excess spares, defendant argues that plaintiff got value for money since it now has in stock spares that it will use in future. Defendant claims that it brought the cost of re-assembling the elevator upon itself as defendant was still able and willing to fulfil the contract.

I find these submissions by *Ms Dzingirai* most surprising. Defendant displayed a high degree of incompetence in the performance of the contract which entitled the plaintiff to cancel the contract. It is trite that in contract, where one party commits a breach, the innocent party is entitled to a remedy. As to what the remedy should be, the election is for the innocent party to make.

The analysis of general and special damages for breach of contract are to be found in the famous British case of *Hadley* v *Baxendale* (1854) 9 Exch 340. A careful and searching analysis of the rules with regard to general and special damages is to be found in the judgment of the English Court of Appeal in *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1942] 2 KB 528 at 539-540. ASQUITH J said:

> (1) It is well settled that the governing purpose of damages is to put the party whose right have been violated in a position, as far as money can do so, as if his rights have been observed… This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable. This, in contract at least, is recognized as too harsh a rule. Hence,
> (2) In cases of breach of contract the aggrieved party is only entitled to such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
> (3) What was reasonably foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
> (4) For this purpose, knowledge "possessed" is of two kinds; one imputed the other actual. Everyone as a reasonable person is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley* v *Baxendale.* But to this knowledge, which the contract-breaker is assumed to possess whether he possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss recoverable.

The learned judge continues to adumbrate on factors that attract the foreseeability requirement as a prerequisite for special damages. Suffice it to say that where there has been a breach of a vital term of the contract, the party injured thereby is entitled to cancel the contract and in such a case he may be entitled to claim substitutionary damages. But he may prefer to claim restitution, as plaintiff *in casu* has decided to do, and in addition such restitutionary damages as are required to put him in the same position as if he had never contracted. In some circumstances restitution coupled with restitutionary damages provides the only effective relief. In *Hoets* v *Wolf* 1927 CPD 408 the defendant employed the plaintiff, an architect, to prepare plans of a house not exceeding one thousand seven hundred pounds in cost, but the plaintiff prepared plans for a more expensive house. Unaware of this breach the defendant employed a quantity surveyor to take out quantities, and paid him for his services. As the plans and quantities were useless to the defendant, he was held to be entitled to cancel the contract and was therefore excused from paying plaintiff's fees, and in addition, he was awarded by way of damages the amount fruitlessly expended in paying the quantity surveyor. The defendant was thus restored to the same position as if he had not contracted.

In *casu,* plaintiff seeks only that which would place it in the same position as if it had not contracted with the defendant. I am unable to disallow such a claim in all the circumstances of this case. In my respectful view, plaintiff could have claimed more had it been possible to quantify the consequential damages it suffered as a result of the failure to repair the elevator within a reasonable time.

Consequently I make the following order:

(1) The cancellation of the verbal agreement between the parties be and is hereby confirmed.
(2) Defendant be and is hereby ordered to pay to plaintiff the sum of US$ 20 662.47;
(3) Defendant be and is hereby ordered to pay to plaintiff the sum of US$3 269.45;
(4) Defendant be and is hereby ordered to pay to plaintiff the sum of US$2 700.00
(5) Defendant be and is hereby ordered to pay interest on the aforementioned amounts of US$20 662.47; US$ 3 269.45 and US$2 700 at the prescribed rate of 5% per annum from the date of summons and counter-claim to the date of payment in full.
(6) Defendant's claim in HC 800/17 be and is hereby dismissed with costs.
(7) Defendant be and is hereby ordered to pay plaintiff's costs of suit.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Chivore & Partners, defendant's legal practitioners