MINING INDUSTRY PENSION FUND v DAB MARKETING (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & MAKARAU JA
HARARE, MARCH 6 & AUGUST 8, 2012

Advocate T Mpofu, for the appellant
Advocate D Ochieng, for the respondent

MAKARAU JA: This is an appeal against the judgment of the High Court sitting at Harare, handed down on 29 December 2010 in which the trial court absolved the defendant, now the respondent, from the instance, and also absolved the plaintiff, now the appellant, from the instance on the counter-claim, against which absolution the respondent has noted a cross appeal.

In its grounds of appeal, the appellant raised five grounds. These are:

1. That the learned Judge erred in law and in fact by granting the respondent absolution from the instance despite the fact that the respondent had already admitted the appellant's claim and such admission having been properly made by the respondent. The learned Judge therefore erred in law and in fact by coming to a conclusion contradicting such admission.
2. That the learned Judge misdirected himself by holding that the gutters to the leased premises form part of the roof.
3. That the learned Judge further erred at law and in fact in concluding that the appellant had a duty to keep the gutters to the leased premises in a state of good repair in light

of the fact that the respondent had already admitted that it had the duty to keep the gutters free from blockages.

4. That the learned Judge erred at law by not dismissing the respondent's counter-claim after having found that the respondent had failed to lead evidence to show the nature of the loss it allegedly suffered.
5. That the learned Judge erred in failing to appreciate that the respondent was never authorised by the appellant, which authority the respondent was obliged to seek in terms of the lease agreement, to carry on the business of manufacturing pharmaceuticals and as such could not claim an abatement of rent when it ceased manufacturing pharmaceuticals.

On its part, the respondent raised four grounds in the cross-appeal. These are:

1. That the learned Judge erred in finding that the respondent had failed to show the nature of the loss it suffered.
2. That the learned judge further erred in finding that the respondent had not proven the quantum of its loss.
3. That, alternatively, having found that loss had in fact been suffered by the respondent on account of the appellant's breach; the learned judge erred in not proceeding to assess the quantum thereof after the respondent had led all the evidence that it could.
4. That the learned judge erred in finding that the evidence of financial experts was necessary for the assessment of the respondent's loss, and further erred in presuming that such evidence was at the disposal of the respondent.

The facts

The facts giving rise to this appeal are largely common cause. I summarise them as follows.

The respondent company was initially founded by one David Abraham Blumberg from whose initials it derives its name. Then it was operating from Bulawayo. On a date not material to this appeal, the current directors of the respondent purchased the entire shareholding in the company and relocated the company to Harare where it operated from premises owned by the appellant, and which forms the subject matter of this appeal.

The company was initially a marketing business, marketing and importing foreign goods. At some later stage, the respondent started purchasing small manufacturing businesses which it absorbed under the common roof to broaden the portfolio of the products it marketed. Thereafter, it continued as a manufacturing business. As at the date of the trial in the court *a quo*, it had a number of manufacturing units or divisions which however did not have separate accounts or labour force as these, together with the assets of these operating units, belonged to the respondent.

As at the time of the suit in the court *a quo*, the respondent was in the business of manufacturing registered medicines, cosmetics, toiletries, food products and confectionary. All these were manufactured from the leased premises.

The manufacture of registered medicines is done under the authority of the Medicines Control Authority of Zimbabwe. In the manufacture of medicines, the prevention

of contamination during the manufacturing process is a priority. It is part of the licensing conditions upon which one is permitted to manufacture licensed medicines.

According to a floor plan of the leased premises the area where medicines and cosmetics were manufactured was separated from the areas where food was processed by a dividing wall. This was deliberately done to minimise the possibility of contamination during the manufacture of the medicines and the processing of the food stuffs and confectionary.

Certain issues arose relating to the maintenance of the leased premises. The first communication from the respondent to the appellant was in 2000 when the roof of the building developed some leaks. The leaks started after the appellant had engaged some workers to replace the guttering. The leaks soon spread from the boardroom to the factory and into the administration block. Communication to the appellant over the issue did not, for various reasons, yield any result. The respondent, however, remained in occupation of the premises and worked its way round the problems as best it could.

From 2007 the respondent would move its products and materials to areas that were not leaking. The respondent also moved all its materials on pellets so that they could be fork lifted to dry places easily and also be shielded from flooding.

On or about 8 February 2007, the respondent notified the appellant that the leaks were aggravated and that they were now predominantly in the warehouse and stores area. The first leaks emerged over the raw materials store area and the primary packaging area. As a result of these leaks, the respondent wrote to the appellant advising it that the leaks

had rendered a considerable portion of the rented premises unusable and had resulted in significant damage to products and raw materials. There was no response to this advice. By October 2007, the leaks had extended into the manufacturing area, particularly the drugs mixture manufacturing and tableting areas.

The respondent then demanded reconsideration of the rent payable for the premises as portions of the premises were now no longer usable due to the leaks and the potential damage to both products and raw materials.

In 2008, the parties met to discuss the issue of the repairs to the leaking roof and a review of the rentals payable for the premises.

Once the leaks spread to areas that were meant to be sterile, the respondent stopped manufacturing medicines in the premises in or about December 2008. Whilst it could have moved to other premises, this would have been a costly exercise and would have entailed fresh licensing by the Medicines Control Authority of Zimbabwe. It however continued with the processing of food and confectionary, using the same machinery.

In July 2009, the respondent ceased manufacturing confectionary. At the beginning of 2010, repairs to the leaking roof commenced.

In March 2010, the appellant issued summons against the respondent claiming an order confirming the cancellation of the lease agreement between the parties, payment of the sum of US$58 021,94 representing arrear rentals, an order ejecting the respondent from

the leased premises, holding over damages at the rate of US$7 100,00 from 1 March 2010 to date of ejectment and costs of suit. It was alleged in the appellant's declaration that the respondent had breached the lease agreement between the parties by failing to pay rentals for the period December 2008 to February 2010, thereby accumulating the arrears claimed in the summons. It was further alleged that the agreed rentals for the leased premises was the sum of US$7 100 per month, also giving rise to the claim for holding over damages at that rate per month.

The suit was defended. In its plea, the respondent however admitted that it was indebted to the appellant on the grounds alleged and in the amount claimed. The respondent proceeded to plead that it was excused from paying the amount of the appellant's claim because the appellant was allegedly indebted to it for damages which it claimed in the counter-claim filed with its plea. It prayed for judgment on the main claim to be stayed until there was judgement on the counter-claim.

In its counter-claim, the respondent alleged that in terms of the lease agreement, the appellant was required to maintain the external structure, including the roof of the premises. In breach of its obligations, the appellant failed to repair the roof of the premises forcing the respondent to shut down its operations in December 2008. The respondent further alleged that as a result of having to shut down its operations, it lost profit in the sum of US$196 250, which it claimed from the appellant.

At the trial of the matter, the parties agreed that the onus to begin rested with the respondent in view of its plea, which was an admission of liability and in essence a

consent to judgement. The respondent led evidence from three witnesses. In rebuttal, the appellant called the evidence of a single witness whose testimony was not accepted by the court wherever it conflicted with that of the respondent's witnesses.

On the basis of the evidence before it, the trial court proceeded to find that the appellant had breached the terms of the lease agreement by failing to keep the gutters in a good state of repair. Having established liability, the court however agreed with counsel for the appellant that the respondent had failed to show the nature of the loss that it suffered and which flowed from the established breach. On the basis of that finding, the Court proceeded to absolve the appellant from the instance on the counterclaim.

Regarding the main claim, the Court also absolved the respondent from the instance.

During closing addresses, it was contended by counsel on behalf of the respondent that the respondent was entitled to an abatement of rentals for the period during which the premises could not be used for the manufacture of pharmaceuticals. The trial Court, after citing in full the portion of the lease agreement that provided for abatement of rent in the event of destruction or partial destruction of the leased premises, upheld the contention and held that the respondent was entitled to pay reduced rentals during the period it had limited use of the premises and was further not obliged to pay any rentals for the period after it ceased production all together. Based on this reasoning, the trial Court further found that consequently, the appellant was entitled to rentals in an amount "unknown" for the period that the respondent was entitled to a rebate in rentals. Thus, the reasoning of the trial

court proceeded, absolution from the instance had to be ordered as the appellant had failed establish the amount of rentals that it was entitled to.

The main appeal

As stated above, the appellant's claim was for the cancellation of the lease agreement, payment of the arrear rentals, holding over damages and the eviction of the respondent from the leased premises. To this claim, the respondent filed a plea in which it accepted liability in full.

It is pertinent at his stage to record that during the trial, the appellant however conceded that $14 200,00 of the arrear rentals was not due and payable as it represented rentals when only the local currency was legal tender. Judgment was thereafter sought in the remaining sum of US$72 221,94.

The issue that arises in this appeal is whether or not, where a claim has been admitted by a defendant in full, and the plea is not amended to withdraw the admission, the defendant can be absolved from the instance on the basis of insufficient proof of the claim.

A formal admission made in pleadings cannot be ignored by the Court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus where liability in full, as in *casu*, is admitted, no evidence is permissible to prove or disprove the defendant's admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the Court in that where it is not withdrawn, it is

binding on the Court and in its face, the Court cannot allow any party to lead or call for evidence to prove the facts that have been admitted. (See *Rance v Union MercantileCo Ltd* 1922 AD 312 *Gordon v Tarnow* 1947 (3) SA 525 (AD; *Van Deventer v de Villiers* 1953 (4) SA 72 (C);*Moresby-White v Moresby-White*1972 (1) RLR 199 (AD) at 203E-H; 1972 (3) SA 222 (RAD) at 224; *DD Transport (Private) Limited v Abbot* 1988 (2) ZLR 98 and *Liquidator of M& C Holdings* (*Pty*) *Ltd v Guard Alert* (*Pty*) *Ltd* 1993 (2) ZLR 299 (HC).

Section 36 of The Civil Evidence Act [*Cap. 8.01*] provides for admissions in civil litigation as follows:

> "(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.
> (2) Subject to subsection (3), in determining whether or not any fact in issue in civil proceedings has been proved, the court shall give such weight to any admission proved to have been made in respect of that fact as the court considers appropriate, bearing in mind the circumstances and manner in which the admission was made.
> (3) **It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings.**
> **(4) It shall not be competent for any party to civil proceedings to disprove any fact admitted by him on the record of the proceedings.**
>
> Provided that this subsection shall not prevent any such admission being withdrawn with leave of the court, in which event the fact that the admission was made may be proved in evidence and the court may give such weight to the admission as the court considers appropriate, bearing in mind the circumstances in which it was made and withdrawn." (The emphasis is mine).

Applying the above provision and the cases cited to the facts of this appeal, it appears to me quite clearly that it was not necessary for the appellant to prove the amount of the arrear rentals as this had been formally and fully admitted by the respondent. Put differently, the appellant did not bear any onus to prove the amount of the arrear rentals and thus could not have failed to discharge an onus that it did not bear. Absolution from the instance, which should only be granted when a party fails to establish a *prima facie* case, was

thus not competent in the circumstances of this matter. In my view, the trial court erred by not only imposing an onus when the law provided for none, but by proceeding to hold that the appellant had failed to establish the amount of the arrear rentals when the formal admission by the respondent was by law conclusive of the issue.

It is clear from a reading of its judgement that the trial court was side-tracked into inquiring whether or not the respondent had the obligation to keep the gutters to the building in a state of repair and whether or not it failed to do so, thus rendering the premises unsuitable for the purposes of manufacturing pharmaceuticals and confectionary. This was a wild goose chase. Having admitted the claim for arrear rentals in full, the respondent had cast away its competence at law to disprove its liability. It was no longer competent for it to argue that it was entitled to abate the rentals for the period that it could not use the premises.

In summary therefore, in terms of s 36 (4) of The Civil Evidence Act, it was not competent for the respondent to lead any evidence to disprove an admission that it had made without first withdrawing the admission. Such evidence, being at law incompetent, was inadmissible. It was a further error on the part of the trial court to place any weight on incompetent and consequently inadmissible evidence and to use such as the basis of its decision to absolve the respondent from the instance.

In coming to the above conclusion, I am aware that in *Canaric N.O. v Shevil's Garage* 1932 TPD 196, GREENBERG J was prepared to assume that there are instances where and when a court may go behind an admission and give a finding of fact at variance with an admission made on the pleadings. The learned Judge was of the view that a court may

only do this where it is clear after a full investigation that the admission is contrary to the facts and where injustice would result from an adherence to the admission.

Whether or not the orbiter by GREENBERG J, correctly reflects the law of this country is not an issue before me and is therefore not one that I need to decide. However it is clear that the criteria he set out has not been satisfied in this case. In particular it is noted that the trial court did not make any attempt to reconcile the admission made by the respondent in its pleadings with the evidence that it purportedly relied on to grant absolution from the instance. Thus, there was no finding by the Court that the admission was contrary to the facts and that to allow the admission to stand against the facts would lead to an injustice. It would appear to me again with respect, that as it proceeded, the trial court became oblivious of the admission made and proceeded to determine the matter on the basis of the incompetent evidence before it and without in anyway attempting to assess whether adherence to the admission would result in an injustice.

On the basis of the above, there is therefore no basis in *casu* for disturbing the admission made by the respondent. Firstly, the parties proceeded to curtail the proceedings in the court *a quo* on the basis of the admission made by the respondent. By consent, the appellant was relieved of the duty to open the trial and of the need to lead any evidence to prove the respondent's indebtedness. Secondly, the respondent made a conscious choice to counterclaim for damages instead of specifically pleading abatement of rentals in terms of the lease agreement. No attempt was made to amend the pleadings to withdraw the admission that had been made before the trial ended even after counsel for the respondent had advanced the argument that respondent was entitled to abate the rentals. Further and more importantly in my view, the issue of the respondent's right to abate the rental was never pleaded. No

evidence was led to show the degree to which the respondent was entitled to an abatement. The issue was not raised by the respondent in evidence but came in almost as an afterthought when counsel was addressing the Court in response to a question that had been put to appellant's counsel by the Court on the meaning of a clause of the lease agreement that had neither been pleaded nor relied upon by any of the parties. It was then that respondent's counsel submitted that because the leaks rendered most of the leased premises unusable, the respondent was entitled to a total remission of rent until the leaks had been stopped.

The decision to upset a validly made admission on the basis of an after-thought submission by counsel for the respondent was in my view an error by the trial court warranting the setting aside of its judgment.

On the basis of the foregoing, the appellant's appeal must succeed on the first ground of appeal. It thus becomes unnecessary in my view that I deal with the other grounds of appeal raised by the appellant in its notice of appeal. The order granting respondent absolution must be set aside.

I note in passing that in view of the fact that the respondent voluntarily left the leased premises sometime in 2010, the appellant appears to be no longer seeking an order cancelling the lease agreement and holding over damages as these two prayers have been omitted from the notice of appeal.

The cross-appeal

The respondent sued the appellant in the court *a quo* for damages in the sum of US$196 250,00 arising out of breach of the lease agreement. It was the respondent's contention that the appellant failed to keep the roof of the leased premises in a state of repair resulting in leaks developing forcing the respondent to close down its operations. As a result of the cessation of its operations, the respondent alleges that it suffered loss of estimated profits in the sum claimed. During the trial the respondent abandoned part of the claim in the sum of $26 250,00 leaving the total amount claimed in the sum of $170 000,00.

The trial court found that the appellant was indeed in breach of the lease agreement in that it failed to keep the roof in a state of repairs. Its finding in this regard cannot be impugned.

Whilst not making a definitive pronouncement on the matter, the trial court appears to have made the further finding that the failure by the appellant to keep the roof in a state of repair led directly to the loss of profits suffered by the respondent upon it ceasing to manufacture the licensed drugs or alternatively, that such a loss was in the contemplation of the parties when they concluded the lease agreement. The trial court, however, found that the amount claimed by the respondent and proved by the respondent through evidence, did not represent the lost profit but the total expenditure that the respondent would have incurred had it not ceased operations. Again I cannot find a basis for faulting this finding.

It is trite that damages for breach of contract are calculated to place the plaintiff in the position that he/she would have been in had there be no breach. Put

differently, where a party sustains loss by breach of a contract, he/she is, as far as money can do it, to be placed in the same position as if the contract had been performed. The law in this regard has not changed since the decision in *Victoria Falls & Transvaal Power Company Limited v Consolidated Langlaagte Mines Limited* 1915 AD 1 which has been followed ever since in this jurisdiction.

Applying this trite principle to the facts of the appeal, the respondent was entitled to be placed in the position it would have been in had there be no leaks in the roof of the leased premises. In other words, the respondent was entitled to damages for loss of the income or profit it would have raised had its operations continued. This is essentially a claim for lost profit and not a claim for loss of earning capacity.

It further appears to me to be settled law that loss of profit following breach of contract is an assessable loss to be proved by evidence and should not be confused with loss of future earning capacity, which calls for compensation for diminished earning capacity and is assessed as general damages. (See *Santam Insurance Company Limited v Paget* 1981 ZLR 73). Put differently, damages for lost profit following breach are to be proved and cannot be presumed. They must be capable of some arithmetical calculation and cannot be assessed by the Court from nothing.

The record shows that the respondent, in attempting to prove the lost profit, led evidence of the manufacture of every single batch of product that the respondent manufactured from the year 2000 to the date of trial, including confectionaries that could still

have been manufactured in the "unsterile" premises. The evidence also included trial batches that could not have had any economic value as they were not meant for sale.

The nature of the evidence led on behalf of the respondent for lost profit is aptly described by the trial court in its judgment in the following terms:

> "Page 66 of exhibit 1 represents an extrapolation from the pharmaceutical batch book of seven products manufactured by the defendant at the leased premises and at the new premises from 2000 to 2010…… Dr Deacon calculated the total batches for each product produced over the ten year period from 2000 to 2009 and divided it by ten to calculate a yearly average. He estimated the cost of production of each batch in United States Dollars by interpolating the existing cost structure at its new premises of each product range and multiplied the estimated cost by the yearly average to calculate gross value of the lost production… He then deducted the salvage value of work in progress to arrive at the loss suffered by the defendant. He calculated the loss from the seven products at US$197 925-00. He deducted the profit mark-up of 15% and arrived at an estimate of US $168 236-25 which he rounded off to US$170 000-00. While Dr Deacon equated this amount to the defendant's turnover, it seems to me that it would actually represent the defendant's total expenditure."

From the above, it is clear that the respondent tendered evidence to prove the possible cost of lost production. What was required of it was to prove the lost profit over the years. With respect, it appears to me that the respondent's evidence was not led with an eye to the relevant law which requires actual proof of damages for lost profit. Evidence placed before the court tended to show a general loss and not the actual lost profit.

I agree with the trial court that the respondent could have led evidence of the profit that it was making each month prior to the cessation of manufacturing due to the leaking roof and from such evidence, the Court may have been better placed to assess damages which in its opinion, would meet the justice of the case.

In the result, the cross–appeal by the respondent must fail. The respondent failed to discharge the onus on it to place before the Court sufficient facts from which its loss could be calculated and the trial court, generously in my view, granted absolution from the instance.

Disposition

1. The main appeal is allowed with costs.
2. Paragraph 1 of the order of the court *a quo* is set aside and the following substituted:-

   "Judgment is entered for the plaintiff and against the defendant in the sum of US$72 221,94 together with interest thereon at the prescribed rate reckoned from 1 March 2010 to date of payment in full".
3. The cross–appeal is dismissed with costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners