BOC ZIMBABWE (PVT) LTD
versus
PESKET TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 12, 26 & 27 June 2017 & 27 September 2017

Trial

Mr T Tandi, for the plaintiff
Ms N Pirimukai, for defendant

CHAREWA J: Plaintiff's claim against the defendant is for refund of $22 400 being the deposit it paid for work which defendant was contracted and failed to perform, interest and costs.

The defendant disputes the claim and tenders payment of $4 270. It did not file a counterclaim for the difference of $18 130.

The facts and background

The agreed facts are that on 9 October 2012, the parties entered into an agreement whereby the plaintiff hired defendant to supply equipment and personnel to dismantle from Gweru, transport to and reinstall it in Mutare, a double jacket 32 tonne oxygen tank, measuring 23 metres in length and 3 metre in diameter. The equipment hired comprised 1x35 tonne crane, 1x45 tonne crane, 1x50 tonne crane and 1x low bed 4 axle trailer. The round trip permutations were Harare-Gweru-Mutare-Harare.

There is no dispute that plaintiff's Mr Chasakara inspected, at defendant's premises, the equipment hired and adjudged defendant to have capacity to supply equipment suitable for the purpose.

The total contract value, including the necessary manpower, was $32 000 of which plaintiff paid a 70% deposit of $22 400 aforesaid on 15 October 2012.

There is thus no dispute as to the existence of the contract between the parties and its terms, or that the deposit was paid in terms thereof. Nor is there a real dispute that only two

cranes and 1 lowbed trailer were supplied. Further, there is no dispute that plaintiff stopped defendant from carrying out the work.

The dispute

The plaintiff asserts that only two cranes were supplied, rather than three as contracted with the result that they did not have capacity to lift the tank. Further, the flatbed trailer that was supplied was not fit for the purpose, the flat bed being much shorter than the tank to be transported. In addition, defendant proffered no proof of regulatory compliance both for the equipment and the manpower. While accepting that it's Mr Chasakara inspected the equipment, plaintiff avers that this was merely to confirm that defendant actually possessed equipment of the required capacity to do the job, and not for purposes of compliance with regulations as he was not authorised to do that.

Consequently plaintiff stopped the defendant from carrying out the work and cancelled the contract as performance thereof would have been dangerous as well as damaging to the tank. Since no work was carried out plaintiff is therefore entitled to a refund of its deposit.

On its part, the defendant argued that plaintiff's Mr Chasakara inspected the equipment and hired it upon satisfaction therewith and that the specifications of the equipment where in consonance with the contractual requirements, and were thus fit for the purpose. Further, defendant avers that it complied with the law. Therefore, plaintiff was not entitled to prevent defendant from carrying out the work without cancelling the agreement or making any demand to rectify any alleged breach. Consequently, no refund is due to plaintiff as the deposit it paid was meant to cover the cost of mobilising the equipment from Harare to Gweru, food, allowances and accommodation for defendant's staff as well as other administrative charges.

If any refund was due, it was only $4270, the balance after defendant deducted $18130 which was due to it for mobilisation costs.

The issues

The issues synthesised at the pre-trial, may be summarised as follows:

i. Whether the defendant breached the contract between the parties, and if so, whether the plaintiff was or is entitled to cancel the contract;
ii. Whether the defendant is liable to the plaintiff and if so, in what amount?
iii. Who should pay the costs of suit and on what scale?

Plaintiff's case

The plaintiff called only one witness, Tawanda Nherera, its safety and loss manager, whose responsibility is to ensure safe carriage of operations in accordance with the

requirements to safeguard the safety of the public and the environment as well as ensure that plaintiff suffers no unnecessary loss.

He testified that the plaintiff stopped the defendant from carrying out the contract because of several safety issues as follows:

1. In terms of the contract three cranes were required: 1x35 tonne crane and 1x45 tonne crane to hold the tank in place with the 1x50 tonne crane doing the lifting. The defendant only supplied the 35 tonne and 45 tonne cranes as evidenced by plaintiff's bundle of documents entered into the record as exh 1, p 5 of which is plaintiff's "occurrence book" showing that the two cranes were recorded as having been booked into plaintiff's premises. The 50 tonne crane never arrived at plaintiff's premises and without it, the 35 tonneS and 45 tonne cranes were not fit for the purpose as they did not have the capacity to lift the tank. This was because these two cranes would have to be used to lift the tank, leaving no crane available to hold it in place. Secondly, the two cranes lacked the capacity to lift 30 tonnes, let alone 32 tonne. And finally, they did not have sufficient height to reach the lifting lugs at the top of the tank even if they were lifted to full boom. The conversion chart at p 7 of exh 1 informing of the load that could be lifted by the boom refers.
2. Secondly, Mr Nherera testified that defendant never supplied 1x low bed 4 axle trailer with the requisite length to carry a 23 metre oxygen tank. Rather, defendant supplied an 18 metre long flatbed truck, (as appears in plaintiff's occurrence book at p 5 of exh 1). The witness further testified that according to safety regulations the tank to be dismantled in Gweru, transported to and installed in Mutare is a specialised piece of equipment with an outside vessel, a vacuum, and an inside vessel, which, according to Ministry of Transport requirements, must have an overhang of less than 5 metres otherwise the tank would break with devastating consequences, filled as it is with 32 tonnes of compressed oxygen.
3. Thirdly, the witness asserted that, by failing to produce inspection records of its equipment, defendant did not comply with the law, specifically s 23 (a) of the *Factories and Works (General) Regulations* RGN 263 of 1976 which requires inspection records of equipment prior to use and which inspection must be carried out by qualified and authorised persons.

4. Finally, Mr Nherera averred that s23 (r) of the same regulations requires operators of the equipment to produce proof of competence to operate such appliances, which defendant's personnel did not do.

Therefore, the witness summarised, because the defendant supplied : a) a flatbed trailer which was too short, b) two cranes which could not safely lift the tank; and c) failed to provide proof of compliance with the law; the plaintiff could not grant defendant the Certificate of Safety to allow it to carry out the job. In plaintiff's view, there was a real possibility of an unsafe act which could have resulted in destruction/breakage of property, injury or death to persons with resultant closure of plaintiff's factory by NSSA in addition to reputational damage.

These issues were duly communicated to the defendant which then left the site without carrying out any work.

The plaintiff produced and entered into the record, without any objection from the defendant, and as exh 1, the relevant bundle of documents in support of its averments including

i. the purchase order generated by the plaintiff,
ii. the *pro forma* invoice from the defendant quoting the purchase order number and describing the scope of work, equipment to be supplied as well as the cost breakdown justifying the total invoice value of $32 000.
iii. the proof of payment of 70% of the invoice value in the amount of $22 400 as deposit
iv. defendant's tax clearance certificate
v. extract of plaintiff's occurrence book showing the equipment supplied by the defendant
vi. metric conversion table
vii. conversion chart informing of the load that can be lifted by the boom to guide the crane operator, and
viii. checklist in terms of RGN 263 of 1976 to ensure compliance with the law to allow issuance of the Safety Certificate a duly signed copy of which defendant was never issued with as it was not compliant.

Contrary to defendant's submissions, Mr Nherera denied that plaintiff ever inspected the equipment as fit for the purpose as it is not an approved inspection authority, such inspection being within the purview of NSSA and Ministry of Transport. Rather, he averred that plaintiff merely checked whether defendant had capacity to do the job. He disputed

defendant's entitlement to the deposit or $18 130 or any part thereof in that defendant simply did not comply with the contract and provided no proof of any money spent on 6 workers. He put into dispute the defendant's statement at p 13 of exh 1 as being a document created in 2015 for purposes of litigation and which is contrary to the purchase order and invoice agreed between the parties at the onset of the agreement in 2012. He also discounted the documents at p 14-15 of exh 1 as being irrelevant as they related to other work and other companies with no relationship to the current contract between the parties.

The witness allowed that possibly defendant could be entitled to $3 666.80 for mobilising and demobilising the two cranes which were part of the contract, from Harare-Gweru-Harare, but asserted that this concession was merely for humanity's sake as the two cranes were useless without the 50 tonne crane and were thus inadequate to meet the contractual requirements. He disputed that defendant despatched the third crane because defendant was on site for two weeks and that crane never arrived, when it could not possibly take two weeks for it to travel from Harare to Gweru.

The figure of $3 666.80 was arrived at after carrying out precise mathematical calculations based on actual mileage travelled *viz-a-vis* the total invoice value for the cost of hiring three cranes from Harare-Gweru-Mutare-Harare which was $11 000 versus the mobilisation of two cranes Harare-Gweru-Harare. The witness insisted that the plaintiff could not make a concession with respect to the low bed truck that defendant supplied as it was not fit for the purpose.

The witness averred that defendant does not appear to have been committed to perform its contract since it brought non-compliant equipment. In his view, he would have expected that the 50 tonne crane which had the capacity to lift the tank would have been dispatched first.

He asserted that plaintiff was justified in preventing defendant from carrying out the work with non-compliant equipment as plaintiff's business must operate in strict compliance with safety measures since the manufacture of specialised explosive gases is so dangerous that public access around plaintiff's factory is barred between 6am and 6pm.

The witness gave his testimony in an impressively logical and clear manner. He showed an appreciation and knowledge of what he was talking about. He was not shaken in cross examination.

The plaintiff closed its case after the witness's testimony, whereupon the defendant applied for absolution. However the application was withdrawn as it was clearly based on a misconception of the evidence adduced by the plaintiff.

Defendant's case

In its defence, the defendant called two witnesses.

Mr Leonard Manhanhanha, defendant's Managing Director, testified that he was not involved in the contract but only *heard* that plaintiff had hired equipment and that a lowbed and two cranes were despatched on the very same day of hire. He also heard that plaintiff's Mr Chasakara had instructed that two cranes should be sent first to dismantle the tank and that while in the process of dismantling the tank, plaintiff stopped defendant's staff.

He testified that he did not know why defendant had been stopped from doing the work, particularly since defendant had previously done business with plaintiff and in full compliance of the law and safety requirements.

He averred that since it was plaintiff who made it impossible for defendant to carry out its contractual obligation, defendant was entitled to the cost of mobilising its equipment to Gweru and demobilising it back to Harare, including staff and administrative costs in the amount of $18 100.

Under cross-examination Mr Manhanhanha confirmed that only the two 35 and 45 tonne cranes were despatched to Gweru. He also confirmed that the cranes did not have the requisite inspection records and that his staff did not have the necessary certificates of competency as required by law. He further confirmed that defendant was never issued with plaintiff's Safety Certificate to entitle it to dismantle the tank and conceded therefore that this meant that it was possible the tank was never dismantled.

Finally he confirmed that after being stopped from carrying out the work on safety concerns and even thereafter, defendant never tendered performance in accordance with the contract and the law.

Throughout his testimony, quite apart from his obvious lack of first-hand knowledge of what had transpired, (evidenced by his prefixing his testimony with the words "I heard") Mr Manhanhanha was quite evasive and did not take responsibility for any failures by defendant but placed all responsibility on his managers.

Defendant's last witness was its then Operations Manager, Mr Cleopas Watambwa. He advised that he was in charge of the contract between the parties on behalf of defendant. He claimed that the low bed trailer and 35 tonne crane were despatched on day 1, the 45 tonne crane on day 2 and the 50 tonne crane on day 3. He denied that NSSA had any role in the inspection of the cranes or that defendant was stopped from carrying out the job because of its failure to adhere to the contract and to safety and regulatory standards, but that work was

stopped because of in-house friction between plaintiff's safety and engineering departments. He confirmed that he never travelled to Gweru and is not privy to what transpired there.

He confirmed that the three cranes had to work as a unit, and not individually, but could not explain how two cranes despatched on two different dates arrived at plaintiff's premises at the same time, or how the third crane never arrived.

He admitted that the low bed trailer defendant dispatched was 18 m long and thus 5 m shorter than the tank, but claimed this was perfectly acceptable

Finally he confirmed that defendant never tendered performance after being stopped from carrying out the contract on safety concerns nor took any steps to address those concerns.

My general assessment of this witness was that, save for his testimony which confirmed the plaintiff's position, he was evasive and argumentative. I formed the opinion that he was not credible.

The defendant closed its case after Mr Watambwa's testimony.

Objections to defendant's documentary evidence

During Mr Manhanhanha's testimony, defendant sought to introduce and enter into the record its bundle of documents in support of the witness's averments. However the plaintiff objected on the grounds that

1. The authenticity of the documents at p 2,3, 5, 6 and 7 of defendant's bundle were questionable as they were not signed, were not originals or contemporaneous with the period in dispute and involved companies which were not before the court.
2. Besides, it is common knowledge in the industry that the company which allegedly produced the document at p 6 only hires out 35 tonne cranes and cannot possibly attest as to the rates of hire for 45 and 50 tonne cranes
3. Further, the document at p 4 did not clarify which of defendant's premises was burnt down, thus seriously eroding its probative value.
4. In addition the document at p 1 was inadmissible as it was not generated in the normal course of business in the performance of the contract between the parties, but was prepared specifically to meet the present claim[1].
5. In any case, the law of evidence provides that for documents to be produced into evidence, they must be identified by a witness who is the writer, and must be addressed to the parties before the court.[2]

[1] S14(20 Civil Evidence Act [Cap 08:01]
[2] Hoffman & Zefferth: The South African Law of Evidence, 4th ed p389. See also s11(a) Civil Evidence

The court found favour with the plaintiff's objections to defendant's documents with the result that no documentary evidence was submitted in support of the defendant's case.

Analysis

i. Assessment of plaintiff's case

I have already alluded to the fluidity of the plaintiff's witness's testimony and how he was not shaken under cross examination. The plaintiff's case was redolent with clarity, logic and well supported with documentary evidence. I have no qualms accepting that the plaintiff's version is a credible representation of what transpired, including the admission that plaintiff prevented defendant from carrying out the contract because of safety concerns and non-compliance with the law.

ii. Assessment of defendant's case

On the contrary, the defendant's case was fraught with challenges. Firstly, its witnesses contradicted each other. Mr Manhanhanha confirmed that only the low bed trailer, 35 tonne and 45 tonne cranes were despatched to Gweru. Further, Mr Manhanhanha claimed that the low bed trailer, 35 tonne and 45 tonne crane were despatched on the same day. In addition, Mr Manhanhanha testified that the 35 tonne and 45 tonne cranes were despatched to Gweru at plaintiff's instruction to dismantle the tank.

On the contrary, Mr Watambwa asserted that all the equipment in the agreement was despatched to Gweru, with the low bed trailer and 35 tonne crane being despatched on day 1, the 45 tonne crane on day 2, and the 50 tonne crane on day 3. He never alluded to any specific request by plaintiff for the despatch of only the two smaller cranes to dismantle the tank. In fact Mr Watambwa was quite clear that the three cranes were required to work together as a unit, exactly as stated by plaintiff's Mr Nherera.

Mr Manhanhanha appreciated the requirement to comply with safety requirements and conceded that because no Safety Certificate was ever issued by plaintiff, it was possible that defendant's staff never dismantled the tank. Contrarily, Mr Watambwa insisted that work was done though he never went to Gweru to verify this.

To compound the inconsistencies in the defendant's case, Mr Manhanhanha confirmed that defendant's cranes did not have the necessary inspection records to show that they were fit for the purpose and defendant's staff also did not have the necessary certificates of competency. Yet Mr Watambwa insisted that the cranes had the necessary fitness inspection

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Act [Cap 08:01]

reports, even though he could not explain who was to issue these reports since he had denied that NSSA was involved in the process. In any event, these reports were never discovered or produced.

There were also glaring gaps and illogic in the defendant's witnesses' testimony.

Mr Watambwa claimed that the 18 metre low bed trailer complied with Ministry of Transport requirements for an abnormal load but offered no proof thereof. There was never any proof of despatch of the 50 tonne crane or its arrival in Gweru. Nor did defendant's witnesses explain how equipment despatched on different dates arrived on the same day.

Mr Watambwa averred that the work done included dismantling the tank from the top, but could not explain how a tank mounted to the ground could be dismantled from the top. Nor could he explain how cranes whose extended boom could not reach the top of the tank could have been used to dismantle the tank from the top.

He claimed that half the deposit paid by the plaintiff was for mobilisation of the equipment but could not clarify how mobilisation could take up more than half the entire contract price in contradistinction with the pro-forma invoice which put such cost at $11 000 and for the entire contract including mobilising the cranes to Mutare and demobilising them to Harare.

I found the defendant's witnesses contradictory, unconvincing and untruthful and have no hesitation in discounting their evidence in *toto*, save where it chimes in with the plaintiff's.

iii. Did defendant breach the contract and if so, was plaintiff entitled to cancel it?

That only the low bed trailer, 35 tonne and 45 tonne cranes were despatched to Gweru when according to defendant's own witnesses the 50 tonne trailer was necessary for the cranes to operate as a unit is obviously a material breach of the contract which entitled plaintiff to cancel the contract.

To compound the breach, the low bed trailer itself was admittedly 5 metres shorter that the tank to be carried. Defendant was not able to show that plaintiff was incorrect in asserting that Ministry of Transport requirements required that the overhang should be less than five metres. This is more so when regard is had to the fact that Mr Watambwa in particular exhibited singular ignorance of the requirements of RGN 263 of 1976 in that the equipment ought to have been inspected and a report produced by properly authorised personnel and that its personnel ought also to have had the required certificates of competency.

Mr Watambwa went further to concede that defendant did not even have the Ministry of Transport's permit to move the abnormal load which extended 5 metres beyond the flatbed trailer.

Further, while the contract terms did not unequivocally so provide, it is my view that it is an implicit term of any contract that any service provider contracted to provide services within the scope of its specialty is obliged to do so in accordance with the law and the standard requirements in its area of expertise. The failure by the defendant to ensure that its staff had the necessary certificates of competency or that its equipment had the required inspection reports amounts to a breach of contract entitling plaintiff to resile therefrom. After all, the failure to abide by the regulations had the effect of making it impossible for plaintiff to issue defendant with the necessary Safety Certificate to enable performance on the contract.

As plaintiff's counsel aptly put it, the defendant tendered defective performance which was akin to hiring and paying a bus to travel to Gweru only to realise as you are about to board the bus that it is not registered to carry passengers and the driver is not licensed.

I am of the further view that defendant's conduct did not accord with the content of its contractual duty as it could not and did not do all that it was obliged to do.[3] I note that both witnesses for the defendant confirm that after the defendant was stopped from carrying out the contract, it never sought to rectify the safety concerns in order to tender performance. I can only conclude that the plaintiff was right in its assessment that defendant was not seriously committed to carrying out the work.

In the premises I find that the defendant materially breached the contract between the parties. Consequently the plaintiff was entitled to cancel it.

iv. Is defendant liable to plaintiff, and if so, in what amount?

It is trite that an innocent third party is entitled to reject improper performance and claim a sum of money in lieu of performance. And where there is defective or non-performance of a contract the innocent party is entitled to contractual damages to put it financially in the same position it would have been had there been no breach.[4]

In the instant case, the plaintiff is merely saying to the defendant, "I had paid you $22 400 as a deposit for you to carry out the work we agreed on. You failed to do so properly in accordance with the law and our contract. Therefore return my money."

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[3] JW Wessels, *Law of Contract in South Africa* 2nd ed @2118. See also Joubert, *Law of South Africa,* Vol 5, 1978 @219

[4] Joubert (*supra*) @220 & 243. See also P Visser & JM Potgieter, *Law of damages,* Juta 1993 @288

I find this to be an extremely generous position for the plaintiff to take and firmly believe that plaintiff is entitled to a return of its deposit in full. This is because the defendant's conduct does not indicate any serious attempt to carry out the work. Rather, what defendant did seems to me to have been meant merely to secure the contract and prevent plaintiff from contracting anyone else until defendant was good and ready to carry out its obligations at its convenience. This is because:

1. Defendant failed to mobilise the full equipment necessary to carry out the job as contractually agreed.
2. The defendant failed to ensure that its equipment complied with regulatory requirements by having the necessary inspection reports.
3. The defendant failed to ensure that its staff, operating its equipment, also complied with regulatory requirements by having the necessary competency certificates.
4. The defendant failed to obtain the necessary permits to allow it to transport the plaintiff's oxygen tank.

While the plaintiff may have been prepared to allow the defendant $3 666.80 for the cost of mobilising two cranes to Gweru and back to Harare, I find that there is no legal basis for me to grant any such order. This is because the defendant has not filed any counterclaim at all for whatever it felt it was entitled to including the withholding of part of the deposit in the amount of $18 130. In any event, even if the counterclaim had been filed, I would have been hard pressed to justify any payment for obviously inappropriate and inadequate equipment which defendant mobilised.

It seems to me this is a clear case of a party intent on benefiting from its own mal-performance of a contract which the court cannot countenance.

In the premises I find that the plaintiff is entitled to a refund of its deposit in the amount of $22 400.

v. Who should pay costs and on what scale?

Ordinarily, costs follow the cause and on the ordinary scale. However, the court always has discretion to order costs on the higher scale upon appropriate justification therefor. Higher costs are justified, among other reasons, where

1. The general conduct of a party is so unjustified and unnecessary as to warrant punitive costs[5], and/or

[5] Mutasa v Nduna NO & Ors 2009 (2) ZLR 278

2. The litigant's conduct is deserving of censure[6].

It is apparent, from the admissions and concessions made by its witnesses that defendant had absolutely no defence to plaintiff's claim for a refund of the deposit it paid. It totally failed to supply the equipment it admitted was necessary to perform the contract. The equipment it supplied was incapable of discharging its contractual obligation.

The defendant did not even attempt to file a counterclaim for retention of a portion of the deposit, perhaps because it was aware that it had failed to comply with the terms of the contract and the regulatory requirements necessary to carry out that contract.

Indeed the defendant was advised on 29 March 2016 that its defence to the claim was untenable, but obdurately persisted with such defence thus causing the plaintiff to incur unnecessary costs and wastage of the court's time.

Further, the defendant has not, at any time, made any effort to tender performance in terms of the regulatory framework and the contract, or even to ensure that its offer to pay $4 270 is made in terms of Order 22.

Throughout the trial proceedings, defendant's conduct was obstructive and deserving of censure. It initially sought a postponement which was denied, and subsequently sought to delay the trial by making an unjustified application for absolution. When this failed, the defendant sought a postponement at the close of the plaintiff's case on the basis that its witnesses were in Kariba and the Democratic Republic of Congo. When the postponement was denied, and the trial resumed the following morning, those witnesses were surprisingly available.

The effect of the totality of defendant's general conduct is that it merely intended to waste time and frustrate the plaintiff. Clearly such conduct calls for censure. Accordingly an award of costs on the higher scale is an appropriate reprimand to ensure the defendant desists in future from such unjustifiable conduct.

Disposition

Consequently, the plaintiff's claim succeeds and the defendant be and is hereby ordered to pay

a. the sum of $22 400 being refund of the deposit paid by plaintiff

[6] Nexbak Investnents & Anor v Global Electrical Manufacturers & Anor 2009 (2) ZLR 270

b. Interest thereon at the prescribed rate from the date of summons to date of full and final payment
c. Costs of suit on a legal practitioner and client scale

Kantor & Immerman, plaintiff's legal practitioners
G Machingambi Legal Practitioners, defendant's legal practitioners