

FCS CONSTRUCTION (PVT) LTD
versus
PACMELT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 10 October 2017

Trial

B. Ngwenya, for the plaintiff
F. Chinwawadzimba, for the defendant

FOROMA J: This is an application for absolution from the instance at the close of the plaintiff's case which the plaintiff has opposed. The plaintiff is a Construction Company. It was engaged by the defendant to render certain construction services to defendant's property at 110 Swan Drive Alexandra Park Harare namely making certain additions and alterations to an existing dwelling and erecting a boundary wall and modifying the gate as per detailed drawings. During the performance of the contract a disagreement arose between the parties which in terms of the provisions of the agreement had to be submitted to arbitration for resolution. As a result of what the plaintiff claims to be unauthorised use of the plaintiff's work force and tools to complete the works that were outstanding the plaintiff sued the defendant for damages as follows:

- “(i) \$3 290-00 being 13 days that the defendant allegedly used the plaintiff's workforce and
- (ii) \$45 00-00 loss of business for continued unauthorised use of plaintiff's tools and workforce.”

The defendant defended the plaintiff's claim pleading that it did not use the plaintiff's tools and workforce.

The following issues were agreed at the pre-trial conference –

- “(1) Whether or not the plaintiff's tools were used by the defendant
- (2) Whether or not the plaintiff's workforce was used by the defendant.
- (3) Whether or not the plaintiff is entitled to the quantum of damages sought.”

The damages sought as indicated herein before were \$45 000-00 for loss of business and \$3 290-00 for workforce overtime on weekends and holidays.

At the trial the plaintiff called 3 witnesses namely Mr Felix Fikile Zimba, Ngano Mpofu and Emiel Murwira and closed its case. The defendant at the close of plaintiff's case made an application for absolution from the instance on the basis that the plaintiff had failed to lead evidence establishing a *prima facie* case in that:

- “(i) despite claiming that the plaintiff had a schedule showing how the damages were computed no evidence on how the damages had been arrived at was produced.
- (ii) There was no evidence to show that the defendant used the plaintiff's workforce and tools
- (iii) that the plaintiff was not prevented from removing its tools or equipment and accordingly the failure to avail itself of its tools was due to its (plaintiff's inaction and not a result of any interference intervention or prevention by the defendant.)”

In summary the following was the plaintiff's testimony adduced from the plaintiff's

Witnesses:

- “1. When the dispute was referred to arbitration the contract was stayed (suspended) and the plaintiff's tools remained at the contract site pending resolution of the dispute by arbitration.
2. Plaintiff complained to E Murwira who was the Project Architect and therefore project Manager that the defendant was using the plaintiff's workforce and tools despite the pending arbitration.
3. Ngano Mpofu was responsible for the plaintiff's tools pending arbitration.
4. When Mr Zimba instructed the plaintiff's workers through N Mpofu to stop working at the project pending arbitration they did not pay heed except Ngano Mpofu who left the project and tools in the control of the plaintiff's workers.
5. Murwira testified that he did not have any power or authority to prevent the plaintiff from moving its tools or stop the plaintiff's workers from working on the project pending finalisation of the arbitration process.
6. Plaintiff did not pay the plaintiff's workforce for the period they worked at the project in defiance of the plaintiff's instruction to desist as they were paid by the defendant.
7. Mr Zimba could not remove the tools as he was prevented by Mr Murwira even though Mr Murwira disputed this very strongly claiming that he had neither power nor authority to issue instructions to the plaintiff's workforce as that was plaintiff's prerogative.
8. No evidence substantiating quantum of damages was led despite Mr Zimba claiming while on the witness stand that he had prepared a schedule with details of such evidence.

9. That defendant at the conclusion of the arbitration process engaged another contractor to complete the outstanding works.
10. On completion of the arbitration process i.e payment to plaintiff by defendant of the arbitration award the contract between plaintiff and defendant was fully discharged.”

The test for absolution from the instance at the close of the plaintiff’s case was laid down in the case of *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 at 409 G-H in the following terms

“When absolution from the instance is sought at the close of plaintiff’s case the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. See also *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173 This implies that a plaintiff has to make out a prima facie case. In the sense that there is evidence relating to all elements of the claim to survive absolution without such evidence. In *Herbestein and Van Winsen’s* textbook *Civil Practice of the High Court of South Africa* 5th ed Vol 1 the learned authors make the following remark – ‘In deciding whether or not absolution at the close of the plaintiff’s case should be granted the court, must assume that in the absence of very special considerations such as the inherent unacceptability of evidence adduced the evidence is true.’”

In casu clearly the court cannot accept the plaintiff’s evidence that the plaintiff was prevented from recovering its tools for the following reasons:

(i) Ngano Mpofo testified that he was in charge of the tools at the time that Mr Zimba instructed that the plaintiff’s workers stop working at the project and they refused. If Mr Zimba had instructed that Ngano Mpofo to remove the tools from the project Ngano Mpofo would have easily done so as he was the one in charge of those tools and not the defendant.

Ngano Mpofo also testified that the plaintiff’s workers deliberately disobeyed the instruction from the plaintiff not to work as they appeared to be keen on working not because defendant commanded them to the contrary. Besides Murwira discredited Mr Zimba’s testimony by testifying that he did not prevent plaintiff from collecting the plaintiff’s tools neither did he have the power or authority over the plaintiff’s tools. This court is not convinced Mr Zimba’s testimony can stand against that of the other 2 witnesses called by the plaintiff.

In the circumstances the court does not prefer the evidence of Mr Zimba to that of the other plaintiff’s witnesses.

The plaintiff’s case has been be devilled by its own undoing. The plaintiff sought to adduce evidence which instead of corroborating the key witness actually contradicted it. As a

result of the contradictory evidence presented it is not possible to say that the plaintiff has made out a *prima facie* case against the defendant. No such *prima facie* case can be said to have been proved on contradictory versions. The court at this stage does not have to assess and evaluate the plaintiff's evidence against itself.

The plaintiff has not produced evidence which established the basis of the quantum of damages.

The plaintiff's first witness testified that he had a schedule showing how he arrived at the \$45 000,00 and \$3 290-00.

No such schedule however was produced and with regard to the \$3 290 the plaintiff's conceded whether correctly or not that his work force was paid by the defendant for services rendered.

In the circumstances there is no evidence on which the aspect of quantum damages can be regarded as established for purposes of making a finding that a *prima facie* case has been established.

In the circumstances I find that the plaintiff has not made out a *prima facie* case which warrants placing the defendant on its defence after close of the plaintiff's case.

I accordingly grant the defendant an absolution from the instance with costs.

Chinawa Law Chambers, plaintiff's legal practitioners
Gunje Legla Practice, defendant's legal practitioners