

SHOMET CONSTRUCTION (PRIVATE) LIMITED  
versus  
CLOVER METAL FINISHERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 19, 20 June and 11 October 2017

### **Civil Trial**

*M. I Mutero*, for the plaintiff  
*P Kashiri-Chiyangwa*, for the defendant

TAGU J: Most of the facts in this matter are common cause. The plaintiff and the defendant entered into a verbal agreement for the services of galvanization of the plaintiff's gutters by defendant. The material term of the agreement was that the defendant was supposed to do galvanization of the gutters by way of bright zinc galvanizing to protect the gutters from agents of weather and avoid oxidation and rusting. The plaintiff paid to the defendant the sum of USD5 314.00 [Five Thousand Three Hundred and Fourteen United States Dollars] for the services of galvanization. In breach of the agreement the defendant did zinc electroplating which was unsuitable for the purpose intended for the gutters resulting in oxidation and rusting of the gutters. The plaintiff was then forced to seek alternative services for re-galvanizing of the gutters. The plaintiff suffered damages to the amount of USD12 777.28 [Twelve Thousand Seven Hundred and Seventy United States Dollars and Twenty Eight Cents] in removing, sandblasting, galvanizing and re-installing the gutters. The plaintiff sued in contract and the claim is opposed by the defendant who argues that it was contracted to do bright galvanizing for decorative purposes only and not to prevent oxidation.

The issues for trial were agreed as follows:

1. Whether or not there was breach of contract for galvanizing of plaintiff's gutters, by malperformance or sub-standard performance by the defendant;
2. Whether or not plaintiff suffered damages as a result of malperformance or sub-standard performance of contract by the defendant to the sum of USD12 777.28

(Twelve Thousand Seven Hundred and Seventy Seven United States Dollars and Twenty Eight Cents); and

3. Whether or not defendant is liable to pay the plaintiff the said sum of USD12 777.28 (Twelve Thousand Seven Hundred and Seventy Seven United States Dollars and Twenty Eight Cents).

The plaintiff led evidence from three witnesses. Mr Munemo Mudzamiri the plaintiff's Engineering Manager told the court that the gutters in question were to be used at the service station. He said the terms of the contract between the plaintiff and defendant were that the defendant would coat the gutters through bright zinc galvanizing to prevent them from rusting because the gases exhaled at the service station can react with paint and it would quickly peel off. The purpose of galvanising was to protect from oxidation for at least six years. However, the paint used by the defendant was not suitable for the purpose and the gutters started accumulating rust after two months from the date they were galvanised by the defendant.

The second witness was Jethro Mazenge the Managing Director of the plaintiff. He confirmed that the gutters were already rusting after only two months after galvanization. The defendant had been contracted to galvanize the gutters to protect them from all agents of weather, corrosion and rusting. He produced several exhibits showing the expenses they incurred in having the gutters redone by another engineer. The total came to USD12 777.28 which the plaintiff was now claiming as damages. He refuted the defendant's stance that the invoices produced were not proof of payment. According to him the invoices acted as receipts and after payments on the strength of the invoices they were not given receipts. The amount was inclusive of transport costs.

The last to testify was Engineer Tawona Mtungwazi who had 20 year experience in the field. He testified to the effect that it was unusual for gutters to be used to transport oil and that there is no way they could have been used for indoor purposes. According to him the gutters developed rust within two months after galvanization because they were not sufficiently galvanized. All these witness were not shaken during cross examination.

The defendant led evidence from two witnesses. The first was Birukai Murumbi a counter Salesman for the defendant company. This witness boasted of 10 year experience in galvanizing yet he evinced ignorance and innocence of the practice, terms and processes of the engineering field since he only possesses O'Level General Science and his highest level of education is Ordinary Level. His evidence was restricted to saying the purpose of bright zinc

galvanization is twofold, that is, decoration and to counter rust. He did not inspire confidence to the court.

The last witness for the defendant was Munashe Madambi. He said he holds an Advanced National Certificate from Harare Polytechnic. While admitting that the gutters were to be used at a service station he maintained that the gutters rusted after two months of galvanization because they were not placed indoors. No legal wizardry is needed to confirm that a service station is by no means an indoor place. They are just no doors at a service station. The only credit to him was that he had experience as a Polytechnic College Lecturer which had no relevance to the case at hand. Generally he was a poor witness who produced no documentary proof.

The court found that the plaintiff managed to prove its case on a balance of probabilities and is entitled to the relief it sought as damages due to the fact that the gutters started rusting after two months of galvanization due to poor workmanship and they had to spend an extra USD 12 777.28 on repairs.

It is trite that the purpose of damages for breach of contract is to place a party in a position he could have been had the contract been performed. See *Patel v Greek Films (Pvt) Ltd* 1989 (2) ZLR 311 (S) and *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* 1988 (1) ZLR 60. According to R.H. Christie in *The Law of Contract in South Africa*, 2<sup>nd</sup> ed, Butterworths, Durban 1991:

“Unlike damages for delict, damages for breach of contract are normally not intended to recompense the innocent party for his loss, but to put him in the position he would have been if the contract had been properly performed.”

In the present case the plaintiff had to engage other engineers to redo the galvanization. As explained by Engineer Tawona Mtungwazi after the corroded gutters were removed and replaced the gutters have not rusted ever since.

In the result I make the following orders:

IT IS ORDERED THAT:

1. The defendant shall pay damages to the plaintiff in the sum of USD 12 777.28 (Twelve Thousand Seven Hundred and Seventy Seven United States Dollars and Twenty Eight Cents) together with interest at the prescribed rate of 5% from 27<sup>th</sup> of February 2015 being date of final demand to date of full payment.
2. Costs of suit on the higher scale of legal practitioner and client.

*Sinyoro and Partners*, plaintiff's legal practitioners  
*Thodhlanga & Associates*, defendant's legal practitioners