

WALSAM PLUMBERS AND CIVIL ENGINEERING CONTRACTORS (PRIVATE)
LIMITED
versus
GLAUDINA HOUSING DEVELOPMENT CONSORTIUM

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2, 3 March 2017 and 9 August 2017 and
6 September 2017

Application for absolution from the instance at the close of plaintiff's case

B C Madanhi, for the plaintiff
H Mazarura with *I Ndudzo*, for the defendant

TAGU J: This is an application for absolution from the instance brought in terms of Order 11 Rule 79 (2) of the High Court Rules 1971 on the premise that the plaintiff has failed to prove a *prima facie* case.

The plaintiff issued summons claiming from the defendant payment of US\$10 740.52 being the balance due for work already done, payment of the sum of US\$417171.26 being damages due to plaintiff by defendant as a result of the cancellation of the agreement, interest thereon at the prescribed rate from the date of summons to date of full and final payment and costs of suit.

In its declaration which was supported by the evidence so far led by the plaintiff, on 16 February 2010 defendant contracted the plaintiff to do some plumbing work for it. The contract as shown on the written agreement annexed as Annexure "A" the total cost of the project was US\$585 507.50 payable in phases as and when each phase was completed. A 30% deposit was payable over three months on signing of the agreement while 40% was to be paid after laying of all pipes and 50% after water leashing and back filling. The project was expected to run for four months. The defendant however, contrary to the terms of the agreement only paid a deposit of US\$ 168 336.24 which was less than the 30% agreed

leaving a balance of US\$9 108.52 for sewer and water reticulation and a further US\$1 632.00 in respect of excavations.

It is common cause that the plaintiff commenced work. However, the defendant took issue with ill performance of the contract by the plaintiff. On 1 April the defendant then cancelled the contract.

At the pre-trial conference 5 issues for trial were agreed. At the trial the plaintiff gave evidence through its two witnesses a Mr Walter Nyamuzihwa the Managing Director and Mr Samuel Kapesu a plumber. At the close of the plaintiff's case the defendant made this application for absolution from the instance. The application was opposed by the plaintiff. The test to be applied in an application of this nature is well settled in our jurisdiction and elsewhere. The test can best be summarized as follows:

“If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution.”

See *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 at 552-553, *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 and *Gascoyne v Paul & Hunter* 1917 TPD 171.

At this stage I need not concern myself with the credibility or otherwise of the evidence of the plaintiff, unless of course, it is demonstrably clear that the plaintiff and or his witnesses palpably broke down under cross-examination. See *Ruto Flour Mills (Pvt) Ltd v Adelson* (2) 1958 (4) SA 307 (T) at 309D.

In my view the plaintiff need only to prove on a balance of probabilities its case.

In *casu* the summary of the plaintiff's evidence was that they entered into a water and sewer reticulation agreement with the defendant after beating the other contestants and winning the tender. They were paid by the defendant part of the deposit which was less than what they had agreed in the agreement. However, they commenced work and did to perfection the clearing of the land to mark trench lines, did excavations, bedding preparation and pipe -lying at all areas that were crossed by the roads. The defendant's engineers inspected the work done and wrote a letter of recommendation which it produced in its bundle of documents. However, the plaintiff told the court that the problem started when the defendant was now failing to supply materials on time and refusing to pay for the work already done. After engaging the defendant several times through letters attached in its bundle of documents for it to be paid for work done, the defendant failed to pay but made

several unfulfilled promises. What made the situation worrisome was that some of the defendant's members were now demanding bribes from the plaintiff such as a Mr Nyapadi and others who were now secretly calling the plaintiff to an office at Willovale office demanding 10% of what was due to the plaintiff on the pretext that they had facilitated the awarding of the tender to the plaintiff. Official meetings were supposed to be held at the site or at Kingdom Hall, at a Bank along Julius Nyerere Street. When Mr Nyamuzihwa on behalf of the plaintiff refused to pay the 10% bribe these corrupt officials of the defendant refused to pay plaintiff for work already done. Mr Nyamuzihwa then took up the matter with his lawyers who wrote to the defendant demanding payment. This angered the defendant who reacted by cancelling the contract. He said before the contract was terminated the defendant never at any time approached them complaining about poor performance of work.

He conceded that where the defendant's engineers asked them to make minor adjustments he did so to perfection and even corrected the errors made by these engineers and architects contracted by the defendant. He further conceded that his company is into plumbing and not civil engineering. He maintained that they were contracted to lay water and sewer main pipes and not to do civil engineering works. In the event that any civil engineering work was to be done, they would subcontract that work to civil engineers. The plaintiff therefore denied that they misrepresented to the defendant that they were into civil engineering although their company was registered as Walsam Plumbers and Engineering.

In my view the plaintiff managed to prove on a balance of probabilities that they were contracted to do plumbing work and not civil engineering work which work was certified well done by the defendant's engineers. What the defendant did was to face financial problems in securing materials in time as well as paying for the work already done. It seems the defendant was jolted into cancelling the contract because the plaintiff had taken the matter up with its lawyers. I say so because at no stage did the defendant complain of ill performance of work before they rushed to cancel the contract. The evidence of the plaintiff so far showed a *prima facie* case. The defendant has to be put on its defence to explain among other things its failure to supply materials in time, failure to pay for work done, reconcile their claim that work already done was ill performed vis-a- vis the letters of recommendations from their own engineers and why they terminated the contract without engaging the plaintiff in terms of the contract. For these reasons the application for absolution from the instance was ill taken and will fail.

In the result the application for absolution is dismissed and the defendant is put on its defence.

Guwuriro and Associates, plaintiff's legal practitioners
Mutamangira & Associates, defendant's legal practitioners