

WOODTON ENGINEERING (PVT) LTD  
versus  
T.M SUPERMARKETS (PVT) LTD

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 20 January 2016 & 20 September 2017

### **Trial**

Ms *M.T Majome*, for the plaintiff  
*M.Tsuma*, for the defendant

PHIRI J: This is a matter in which the plaintiff issued summons against the defendant and claimed various amounts itemised in its declaration as follows:

- ‘(i) 24 714,77 being unpaid money for the construction of a new *deli* stores area.
- (ii) \$16 979,42 being unpaid money for the supply and installation of a full fire scope system
- (iii) \$17 801,42 being unpaid retention fee for electrical works
- (iv) Interest at the prescribed rate on the claims in (i), (ii), (iii) above from 31<sup>st</sup> July, 2014.
- (v) Costs of suit on a legal practitioner and client scale.

The plaintiff alleged in its declaration that the plaintiff and defendant entered into a contract for extensive engineering, refurbishment and conservation works at T.M. Supermarket Hwange Branch.”

The work was in two formats being the Civil Engineering works contract, water and plumbing system and Electrical works contract.

The works also included

- (i) the extension of the deli area
- (ii) Relocation of the new staff toilets and
- (iii) Construction of:
  - (a) additional deli stores
  - (b) the parcel bay
  - (c) generator shed and
  - (d) the new stores area

The plaintiff’s further alleged, in their declaration that:

“Upon completion of all the work the plaintiff submitted invoices that were paid except the invoice pertaining to the construction of the new stores area”. (See para 5 of plaintiff declaration).

In its plea the defendant averred that the plaintiff did a poor workmanship job on the Electrical Works contract which resulted in the defendant incurring damages in the sum of US\$56 482,40 as amplified in its counterclaim.

#### Defendant’s claim in reconversion

The defendants submitted that the plaintiffs and the defendants entered into various contracts for the defendant’s premises at Hwange Colliery.

The plaintiff won a tender to install certain electrical works and fittings and was appointed by way of a letter marked exh D4.

The defendants alleged that electrical inspections done in the presence of the plaintiff’s representatives found various defects on the aforesaid electrical installations and these were condemned.

The defendants also alleged that they engaged the plaintiffs to rectify the said defects but despite demand, the plaintiff failed, refused and or neglected to rectify the same.

The defendants further alleged that the owner of the building threatened to shut down the defendants operations at Hwange and the defendants engaged a team of electrical engineers and electricians to rectify the aforesaid defect.

The defendants alleged that they suffered damages totalling US\$56 482,40, and accordingly counterclaimed this amount as damages allegedly caused by the plaintiff’s failure to timeously attend to the defects noted by the inspectors.

Such is the nature and background to the dispute between the parties

#### The issues for trial

Both parties presented joint Pre-trial issues and these are they:

1. Whether or not the new storage area is valued at \$24 714,77?
2. Whether or not the plaintiff supplied and fixed a full fire scope system and if so what is its value?
3. Whether or not the plaintiff properly completed installation of the electrical works:
  - (i) if so how much it is entitled to?
  - (ii) if not whether or not defendant had any defects rectified and at what cost?

#### Withdrawal of claims by plaintiff

During the course of the trial the plaintiff withdrew the following claims.

(a) for \$17 801,42 being the claim for the retention fee for electrical works.

(b) for \$2 670,21 being 15% VAT on the retention fee for electrical works.

Effectively this means that the plaintiff's claim was restricted to the claim for:

(a) US\$24 714,77 in respect of the construction of a new deli stores area and

(b) US\$16 979,42 being the claim for the supply and installation of a full scope fire system.

### The trial

#### Plaintiff's case

##### Progress Sibanda

Was the first witness to be called by the plaintiff. He is an electrician.

He testified that he carried out an inspection for work carried out by the plaintiff. He however testified that he was not involved in the production of the report for T.M. He only became involved after the report was made.

His inspection was carried out on 12 April, 2014 and it only involved issues highlighted on a previous report and this inspection related to the "corrections that were made".

He testified that most issues that had been complained of or "brought forward were attended to except the "Earth leakage issue".

The purpose of this earth leakage issue was to protect the end user of gadgets such as stoves and cables for electrical irons.

He testified that he was not aware whether or not whether a "Certificate of completion was issued".

The purpose of the certificate was to confirm whether or not an inspection had been done properly.

On being asked the question that electrical installations were not done to standard he answered that he left before the certificate was issued. He left employment at the end of August 2014.

He testified that the certificate of inspection was supposed to be issued by his "bosses" who supervised him that is, the Foreman and the electrician.

It is the court's view that the evidence of this witness was not useful. He was found wanting on the question as to whether or not certificate of completion was issued. Similarly his evidence was also not clear and helpful as to whether or not the issues raised for trial in this matter were fully attended to.

Peter Tsuma

Also gave evidence on behalf of the plaintiff.

The court took Judicial Notice of the fact that this witness was in court when the first witness testified.

He testified that he was employed as a Technical Director for the plaintiff company. The plaintiff's company was awarded a contract to refurbish T.M. Hwange and the entailed Civil Engineering and Electrical Refurbishments works.

He testified in terms of the Civil Works the plaintiffs were contracted to:

“Replace tiling suspended ceiling in the trading area build a new bakery and new “Deli” and refurbish the receiving area. This involved giving a new roof and gutters and new windows in this whole area.

The witness also testified that plaintiffs were asked by the area/Branch Manager to do some extra work which involved relocating staff toilets by replacing ladies' toilets.

The other extra work requested was to “put a new storage area, the staff exist and file protection.”

His testimony was to the effect that the Civil Engineering works were paid for except, payment for the new storage area. The witness testified that the reason given for the non-payment was that the Branch Manager was on leave. The witness stated that the outstanding amount due was \$24 714,77.

Fire scope system

The witness testified that this part of the civil contract was being supervised by Van Guard Engineering and it entailed installations relating to water that supplied all fire hydrants. The witness testified that this contract was completed but however the plaintiffs failed to carry out hydraulic tests as they did not have the hydraulic pump. The engineer thus requested for an extension of the warranty which was operative. The letter of warranty was admitted into evidence as exh 7.

However the witness confirmed that this warranty had expired.

The defendants were invoiced for \$16 979-42.

Installation of lighting system

The witness testified this aspect of the contract entailed supplying lighting to all areas. He stated that electrical supplies in the trading area where completed.

He also testified that the plaintiffs completed the power reticulation in the trading area of the tills, the manager's office, the deli area, the butchery and the sofa-products area and the warehouse.

The witness also testified that they installed the main board which was interfacing with the transformer.

He stated that all this work was carried out whilst the shop was open for clients. In addition, defects which were raised by Hwange Colliery were attended to during work in progress.

The witness testified there were defects raised by defendants in so far as the lighting board. There were earth leakages in the system. This system was removed as "it was causing nuisance in the shop."

The plaintiffs maintained that they sent an e-mail to the Regional Manager, Mr Ncube, as regards this problem. The leakage was supposed to be rectified by the plaintiff's engineer.

All other defects raised by the defendant were rectified and some of these were covered by the warranty which had "not lapsed".

Under cross examination this witness testified that they were not claiming any costs for the provision or installation of a full fire scope as they did not install one. The witness agreed that the defendants should not have been invoiced for the provision of the full fire system.

The witness also testified that the defendants were not given a certificate of completion for the "five main ring" system which fell under the civil works. It was also noted under cross examination, that this witness could not remember the specific locations of the "hose raids" supplied.

The witness also confirmed under cross examination, that hydraulic tests to identify "leaks" were not done as there were no pumps.

#### Notice of withdrawal

This court takes judicial notice that as this witness was testifying the plaintiff filed a Notice of Withdrawal dated 28<sup>th</sup> October, 2015.

By this notice the plaintiff withdrew its claims (iii) and (iv) on the summons being the claims for \$17 801-40 and \$2 670,21 respectively.

#### Defendant's case

##### The Evidence of GIFT WESTON

The first witness to testify on behalf of the defendant was Gift Weston who stated that he is employed by the defendant as a Maintenance Manager. He is a qualified electrician.

He confirmed that the plaintiffs were awarded a project to undertake electrical and civil contract at T.M Hwange.

He testified that the storage area which the plaintiff constructed was not serving its purpose and was redundant. The area is being used for another purpose and not its original design because of several defects.

The major defect is that the new storage area leaks badly and was not meant to expose goods to extreme weather conditions. The area is currently being used for plastic storage yet T.M. Hwange already has another storage area.

He testified that an identified surveyor was engaged to assess the value of the work done and it was estimated to be US\$13 098-00. He testified that the defendants are prepared to pay that value.

The witness queried the plaintiffs' averments in its exh 11 wherein it talks of nine fire hose reels instead of the seven which were actually installed.

The witness further queried the plaintiffs allegations that it supplied 240 holding saddles used to anchor the seven hydrants. The correct number was 7. The plaintiffs admitted to this error.

The witness also was querying the non-certification of the work undertaken by the plaintiffs. For instance, the plaintiffs had to handover the firefighting equipment in the presence of the Fire Brigade whose role was by authenticate the work which had been done. No certificate was issued.

#### Defendant's counter claim

The witness testified on the basis upon which the defendant's counter claim was based.

He referred to exh D2 which was a summary of the 15 defects noted by the Hwange Colliery Inspector as regards the electrical installations.

The witness testified that he informed the plaintiffs of the defects in issue. He also confirmed that he sent correspondence to the plaintiff's Regional Manager in Bulawayo. The correspondence referred to was marked D4 (p43 to 59 of the Bundle of Documents).

The witness testified that the plaintiff failed to rectify the defects. He also stated that the plaintiff was "well informed" that failure to rectify the defects would result in the defendant engaging another contractor to rectify the defects.

The witness testified that from January, 2014 to December, 2014 the defendants experienced a heavy loss of revenue due to these defects. Shoppers were no longer walking

into supermarkets. It was dark and two air conditioners were periodically down due to electrical failure and defects in the “distribution board”.

The main distribution board is responsible for transmission of healthy signals to equipment and point of sale machines, that is the tills. Failure in the working of the main distribution resulted in malfunction equipment leading to loss in sales.

The defendants engaged their internal team to rectify these defects. The witness supervised the whole rectification process.

The witness testified that the defendants were claiming a total of \$54 482-40 broken down as follows;

(i) Mileage and transportation of materials costed \$35 84-00.

There were four return trips from Harare to T.M. Hwange Supermarket at the rate of 56 cents per kilometre. The defendants used a 5tonne truck and used the lowest possible rate to these charges.

(ii) Electrical material to rectify the defects costed \$39 981-10.

(iii) Labour costs from May to September, 2014 costed \$4 907-20.

The defendants had to pull out technicians stationed at their Harare workshops and deployed them to T.M. Hwange. These technicians spent 46 days in Hwange, and, the witness supervised then for a period totalling 9 days. Technicians were given US\$40-00 per day for accommodation and allowances.

The witness raised US\$50,00 for the 9 days out of town and accommodation allowance.

(iv) The accommodation and allowances summed up to \$8 010-00.

The witness testified that they did not make any claims for loss for revenue. The witness also testified that the main distribution board was replaced at \$16 192-00.

The witness also led evidence to the effect that the defendants attended to and rectified queries raised by inspectors. Item as such as leakage protection were attended to and wiring was redone. Old generator cables were also removed.

The witness further testified that electricians under the new storage area were condemned by the inspector, and, these were rectified by supplying and fixing materials so needed.

The general comment of the inspector was that the shop was exposed to danger.

Under cross examination, the witness testified that the new storage area constructed by the plaintiff was not serving its purpose. It was meant to be a water proofed area not subject to adverse weather conditions.

Moses Atson Simbarashe Gutu

Was the next witness to testify on behalf of the defendant.

He is a Registered Quantity Surveyor. He was engaged by the defendants and was responsible for the preparation of a Bill of Quantities for work to be undertaken at T.M. Supermarket. He prepared a Bill of Quantity and this was admitted into evidence as exh 30. He estimated that the estimated cost of the project would be \$13 098.59.

He testified that the roof construction at the premises in dispute were not done properly. He criticized the materials used for the roof and the gutter as it left the water stagnant. The roof was also leaking. Accordingly there “flushing” of the installation of trusses.

He testified that work was done on the doors, the “grill gate” and the concrete slab.

The new walls needed plastering and painting. The steel structures were not perfectly done and the joints were not properly welded and painted. They almost looked second hand.

Under cross-examination he observed that the building in dispute is not serving its purpose. His main focus were on the “building itself” and the new storage area.

Court’s analysis of the evidence

It is this court’s view that some of the issues in respect of the plaintiff’s claim were dispensed of during the course of the trial.

The plaintiff filed a Notice of Withdrawal of its claims for US\$17 801.42 and US\$2670.21 in respect of the electrical works allegedly undertaken at defendant’s premises.

In the court’s view, this sealed the plaintiff’s fate. It was an admission of the fact that the plaintiff had failed to fulfill the contract between the parties in respect of the electrical works.

The plaintiff however persisted in its claim in respect of what it alleged, was the construction of a new storage area.

This court finds that it incredible that the contract between the parties was verbal.

However it appears to be common cause, between the parties, that the contract between the parties was in two parts, namely what the parties referred to as:

- (a) The civil engineering works contract and
- (b) The electrical works contract

The withdrawal, by the plaintiff, in respect of its claim essentially limited the plaintiff to the first and second issues presented for trial namely:

- (1) Whether or not the new storage area is valued at \$24 714.77; and

(2) Whether or not the plaintiff supplied and fixed a full fire scope system and if so what is its value?

This court has already found that the evidence of Progress Sibanda was not useful at all and was found wanting as to whether or not a certificate of completion was issued. This evidence did not assist the plaintiff in the afore-raised two issue for trial.

Accordingly the outstanding issue related to the construction of the new storage area and provision of a full fire scope system.

The evidence of Peter Tsuma confirmed that the civil engineering works were paid for “except payment for the new storage area.”

The witness testified that in so far as the fire scope system was concerned, this contract was being supervised by Van Guard Engineering. However he testified that plaintiff’s failed to carry out hydraulic tests as they did not have hydraulic pumps to effect the tests. He testified that the engineer requested for extension of a warranty “exh 7” which had in fact expired.

#### Defendant’s counter claim

The issue of the new storage area and the full fire scope system was canvassed in the defendant’s counter claim.

Defendants contended that that plaintiff did not supply a full fire scope system and that the said works were not commissioned, certified or handed over to the defendant.

On behalf of the defendants it was submitted that the storage areas which the plaintiff constructed “was not serving its purpose and was redundant. See the aforesaid evidence of Gift Weston.

This court finds that indeed, there is sufficient evidence led which proves that plaintiff provided “substandard works at T.M. Hwange.”

The thread of e-mails admitted into evidence as exh D4 and most particularly what was submitted in defendant’s closing submissions at para 5.23 as follows;

“At page 47 of the defendant’s bundle of documents, defendant wrote to plaintiff:  
“Having agreed on the way forward to bring closure to this contract I am deeply concerned that you are continuing to refuse to co-operate in addressing all outstanding incomplete and substandard works---  
**--- if you fail to attend to these within the next 10 days we will be left with no option but to institute all the necessary measures to protect our rights and terminate the contract without further recourse to yourself.”**

There was yet another follow up e-mail from defendants to plaintiffs (see pages 45 – 46 of the bundle of documents in exh 4).

“--- you will note from the attached Electrical Inspection Report dated 29 January 2014 that the majority of the defects highlighted during 6 September 2013 inspection report have still not been attended to. This is not acceptable as it is not impacting negatively on our operations as we are now losing sales to the competition--- our image as T.M. is being adversely affected --- I am giving you a generous deadline of three weeks to 22 February 2014 to remedy all the defects after which your contract lapses. We will then have to use other contractors to complete any outstanding and substituted works and pay them from the retention funds. This deadline will also apply to the structural defects.”

This court therefore agrees that the plaintiff was placed in *mora* by the defendant’s two e-mails alluded to.

This court also agrees that the observations by the learned Author R.H. Christie in *The Law of Contract* of South Africa 3 ed at p 549 applies to this case---

“the obligations imposed by the terms of the contract are meant to be performed, and if they are not performed at all or performed late or performed in the wrong manner, the party on whom the duty of performance lay is said to have performed a breach of contract, in the first two cases, to be in *mora*, and in the last case, to be guilty of positive mal-performance.”

This court accepts that in evidence in chief and under cross examination plaintiff confirmed that there were substandard works performed.

This court also takes judicial notice of the fact that in accordance with the evidence of Gift Weston, on behalf of the defendant, an Independent Surveyor estimated the work done by the plaintiff to be US\$13 098.00 and it was testified on behalf of the defendant that the defendants were prepared to pay that amount.

This court accepts that the defendant led evidence to prove that defendants attended to and rectified the defects caused by the plaintiff.

The defendant was able to demonstrate that work was undertaken in terms of exh 7 D2. The costs of materials, labour and transport were outlined, and in the courts view, remain substantially unchallenged. The invoices so supplied by the defendants are accepted and considered reasonable in the circumstances.

Accordingly, this court finds that the plaintiff is liable to reimburse the defendant and put the defendant to the position it would have occupied had the contract been properly performed by the plaintiff.

Accordingly this court dismissed the plaintiff’s claim and upholds the defendants counter claim.

In light of the concession made on behalf of the defendant, this court upholds the fact that defendants are to pay the plaintiff the agreed sum of \$13 098.00.

Effectively this amount is to be deducted from the sum of US\$56 482.40 awarded in favour of the defendant in respect of its claim in reconvention.

It is accordingly ordered that plaintiff;

- (a) pays the defendant the sum of US\$43 384.40.
- (b) pays costs of suit on the ordinary scale
- (c) pays interest at the prescribed rate from the date of issue of the defendant's claim in reconvention.

*Jessie Majome & Co.* plaintiff's legal practitioners  
*Chinamasa Mudimu & Muguranyanga,* defendant's legal practitioners