CONSCIOUS MATIVENGA
versus
LAFARGE CEMENT ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 25 March & 10 August 2022

Civil Trial

Mr *P Mutukwa*, for plaintiff
T Rusinahama Rabvukwa, for defendant

MHURI J:

On 3 November 2020 plaintiff issued summons against defendant claiming US$100 000 or its Zimbabwe dollar equivalent at the official Reserve Bank rate, interest on the claimed sum and costs of suit.

The claim was for compensatory damages for loss of business and profits due to the delayed delivery of 600 bags of Supaset cement by defendant which plaintiff had duly paid for. At the trial, plaintiff led evidence from himself only and closed his case whereupon defendant then applied for absolution from the instance.

Defendant's case was that plaintiff dismally failed to make a case against it which deserves a reply.

Defendant referred to the test enunciated in the case of

Charter v *Jarman* 1994(2) ZLR 341(S) to wit

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which the court, directing its mind reasonably to such evidence could or might (not should or would) find for him."

TSANGA J also put it succinctly in the case of
Mucal Enterprises
v
Steward Bank HH 198/15

that

> "Where a judicial officer has no doubt in their mind from the evidence submitted, then by all means absolution should be granted. The key issue for consideration therefore is whether sufficient evidence has been placed before the court upon which the court might find for the plaintiff."

In *casu*, plaintiff's case is that his claim for damages arises from a breach of contract by defendant when it failed to deliver 600 bags of cement which he had paid for.

(To substantiate his claim for US$100 000-00 damages, plaintiff submitted that in a worst) case scenario he would sell a minimum of 2 loads (1200) per month. The profit would be 6%. In two weeks he sold 36 bags. The next purchase would be 636 bags and by the end of the month he would have 72 bags as his profit. His opening stock the next month would be 672 + 6% and that would give him US$ 100 000-00 for the period of 2 years.

The facts that are common cause are that, plaintiff was retrenched from defendant's employment. On 3 August 2016 he entered into a franchise agreement with defendant where he was to sell cement in defendant's franchised containers. The agreement was later terminated. Plaintiff made a payment of US$600-00 for the delivery of 600 bags of supaset cement.

Defendant did not timeously deliver, resulting in civil proceedings being instituted in the Magistrate's Court. Defendant was ordered to make delivery of the 600 bags or reimburse plaintiff the sum equivalent to the retail cost of the 600 bags. The Magistrate's judgment is extant. Plaintiff submitted correctly so in my view that in commercial transactions time is of the essence and because of the late delivery he lost profits he could have earned.

Plaintiff referred to the remarks echoed in the case of:

Victoria Falls & Tvl Power Company Ltd
v
Consolidated Langlaate Mines Ltd 1915 AD 122

to the effect that

> "the sufferer must be placed in the position he would have occupied had the contract been performed, so far as that can be achieved by payment of money and without undue hardship to the defaulting party"

and submitted that the issue is not just whether he is entitled to US$ 100 000-00 but rather whether he is entitled to any damages at all.

The general principle is that he who makes an affirmative assertion whether plaintiff or respondent bears the *onus* of proving the facts so asserted.

Nyahondo v *Hokonya & Ors* 1997 (2) ZLR 457(S)

Plaintiff has the burden to prove on a balance of probabilities that he would have earned US$100 000-00 profit during the period in question. In a bid to discharge this burden, plaintiff merely demonstrated some scenarios without producing documentary evidence to support his case.

To say in a worst case scenario I would sell a minimum of 2 loads per month and make 6% profit is not enough proof.

The following exchange under cross examination tells it all;

Q. "Proof that you made US$100 000-00 in 24 months

A. I did not bring bank statements

Q. What type of records do you keep

A. At each site, it has its own records. I have my own when I collect the cash.

Q. How do we know you made $100 000-00

A. I thought the Lafarge statements would show.

Q. Why is it that you want defendant to prove damages on your behalf.

A. Because they are more authentic than my own."

Clearly from the above plaintiff failed to prove his damages. No records of income and expenditure were produced. No bank statements were produced. To want to rely on defendant's statements is akin to shifting the *onus* unto defendant to prove his case.

Plaintiff's claim being for damages in the amount of US$100 000-00 and plaintiff having failed to prove the claim, defendant must be absolved from the instance.

It is therefore ordered that, the application for absolution from the instance be is hereby granted with costs

Mashizha & Associates, plaintiff' legal practitioners
Rusinahama-Rabvukwa Attorneys, defendant's legal practitioners