GOODWOOD HOTELS (PVT) LTD
t/a CUTTY SARK HOTEL
versus
DAVID HUNZVI
and
3 APPLE INTERNATIONAL (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 7 & 8 March, 6 & 7 April & 14 September 2022

CIVIL TRIAL

T Magwaliba, for the plaintiff
S Munyemeki, for the 1st and 2nd defendants

MANZUNZU J :

1. **INTRODUCTION**

The plaintiff instituted summons against the defendants as far back as 2014 seeking the eviction of the defendants from room 10 at Cutty Sark hotel (the hotel) in Kariba and holding over damages equivalent to the rental of the room. The defendants' defence is that they derive their right to stay in the plaintiff's property as they are owed consultancy fees by the plaintiff. The defendants raised a counterclaim for payment of outstanding fees.

2. **PLAINTIFF'S CLAIM**:

a) Plaintiff's case

In summary, the plaintiff's case as laid out in the pleadings is that it is the owner of the property known as Cutty Sark Hotel (the Hotel) situate in Kariba. In June 2010 the parties agreed that the defendants will occupy room 10 at the hotel while they rendered services to the plaintiff for a potential development project. The period of their stay was determined by the need of their services. In September 2010 the plaintiff decided not to undertake the intended project hence the defendants were advised to vacate the room or else they were to pay for their continued stay. The defendants did not vacate the room consequent of which were served with a written notice to vacate on 3 May 2011. Nevertheless they did not vacate to the extent that by July 2013 the defendants had accrued a debt of $34 545 an amount now being claimed by the plaintiff together with holding over damages of $39.22 per day from 1 August 2013 to date of eviction.

b) Defendants' case

The defendants accept that the plaintiff owns the hotel and confirm an arrangement for the occupation of the hotel room by the defendants which according to the defendants was a deluxe room not room 10 where they ended up being. Room 10 has been described as having no economic value. The defendants claim the plaintiff breached the consultancy agreement by its failure to pay fees which were due. Further if there were any rentals due they must be set off against the outstanding fees due by the plaintiff. The defendants raised a counter claim.

3. **COUNTER-CLAIM**

a) **Defendant's case**

The defendants allege that on 26 May 2010 the parties entered into an agreement in which the defendants were to render professional and consulting services to the plaintiff in the planning and management of plaintiff's expansion project at the hotel. The project which commenced on 1 June 2010 was intended to run up to a maximum of five years. As a result the parties agreed the defendants will relocate from Harare to Kariba to occupy a room at the hotel. The defendants occupied a deluxe room at the hotel before it was taken away under the guise of renovation.

According to the defendants, the project, as per agreement, was in two stages; the planning stage and management or development stage. The defendants were to produce a working paper. It was a term of the agreement that the studying, conceptualization and planning would involve consultative work with the result that the whole plan document be approved by the Municipality of Kariba. Diagrams were to be lodged with the Surveyor General and Department of Physical Planning. Further terms of the agreement were that the payment of fees were in two stages; at the end of the planning stage and after completion of the project. Defendants admit receipt of US$1 592 as a monthly allowance and not part of the fees.

Defendants further allege that despite the deliverables in the form of a project plan document and diagrams, the plaintiff purportedly terminated the agreement in September 2010 and did not tender fees for the services rendered. The parties engaged in negotiations to resolve the apparent conflict but with no amicable outcome at the end. What now stands as a counter claim by the defendants was lodged as a suit in

HC 9023/11 before the same was consolidated with HC 3910/14 under order of this court on 9 May 2018 under case number HC 1102/18.

The defendants claim a total of US$2 880 776 for professional fees and other related matters.

b) **Plaintiff's case**

In response to the counter claim the plaintiff says the concept for the project was one by the plaintiff and the defendants were to carry out the technical work and obtain town planning approval for the proposed development. The other terms of the agreement in respect to the stages of the project and its conceptualization and planning are denied by the plaintiff.

The plaintiff says the amount of US$1592 paid to defendants was for obtaining the approval required. Plaintiff denies receipt of any project plan document instead alleges the defendants elected not to proceed with the development. The last point taken by the plaintiff in defence of the counter-claim is that it is bad at law in that there was no written agreement in compliance with the Architects (Conditions of Engagement and Scale of fees) By-Laws SI 829/1980.

3. ISSUES

At the pre-trial conference the parties agreed that the following issues be determined by the court in respect to the plaintiff's claim:

(i) Whether or not the defendants have any lawful right to remain in occupation of the room?

(ii) What damages, if any, has plaintiff suffered?

(iii) Is plaintiff entitled to the eviction order?

In respect to the counter-claim the parties agreed on the following issues;

(i) What were the terms of engagement between plaintiff and first or second defendant?

(ii) What amount, if any, is due and payable to defendants by the plaintiff pursuant to services rendered by the defendants?

(iii) Whether or not plaintiff's claim in reconvention is bad in law for failure to comply with the Architects (Conditions of Engagement and Scale of fees) By-Laws SI 829/1980?

4. THE EVIDENCE

The defendants who were the first to present their case led evidence from one witness, David Hunzvi (David) who is also the first defendant and director with the second defendant. The plaintiff also relied on the evidence of one witness, Andrew Henderson (Andrew) who is a director with the plaintiff.

I will now revert to the issues and the evidence led in that respect.

a) Eviction

It is common cause that the plaintiff is the owner of the hotel under which room 10 occupied by the defendants is situate. Andrew's evidence was that in June 2010 the defendants were offered a room at the hotel to stay in as long as their services were required by the plaintiff. When time came for them to move out in September 2010 the defendants refused to go. Despite several efforts to cause the defendants to leave, the witness said they refused hence this action for eviction.

The law in relation to *a rei vindicatio* is settled. A litigant who brings a *res vindicatio* is required to satisfy the following requirements,

(1) that he/she is the owner of the property

(2) that the property is possessed by the possessor

(3) he is being deprived of the property without his/her consent.

Once an owner has proved that he/she is the owner of the property held by a possessor, the onus shifts onto the possessor to show an entitlement to continue holding onto the property. A possessor must raise a defence recognizable at law for the continued possession of the property.

In *Chetty* v *Naidoo* 1974 (3) SA 13, the court remarked:

> "The owner may claim his property wherever found, from who-so ever is holding it. It is inherent in the nature of ownership that possession of the *rei* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio,* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res,* the onus being on the defendant to allege and establish any right to continue to hold against the owner" (emphasis added). See also S*tanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262 (HC). *Hwange Colliery Company* v *Tendai Savanhu,* HH 395/13."

David in his evidence in chief did not explain why defendants refused to vacate plaintiff's hotel. It only came out during cross examination that it was because the defendants claimed the plaintiff owed them professional fees. Assuming such fees were owed, there was no attempt by the defendants to explain how such will give rise to a right to remain in the plaintiff's property e.g. where one claims a right of lien. At mot the defendants' evidence only showed that the defendants had a claim against the

plaintiff. The defendants failed to show any right to continue hold to the property against the owner's consent.

A right to evict the defendants has been proved.

b) <u>Damages</u>

The issue as agreed to by the parties at pre-trial conference is; "What damages, if any, has plaintiff suffered?" It was agreed the onus to prove the damages was on the plaintiff a position further confirmed in paragraph 8 of plaintiff's summary of evidence in the following words; *"Plaintiff will give evidence in relation to the damages suffered…."*

Andrew's evidence was that there was a pro-forma invoice for the period 1 August 2011 to 5 July 2013 for $34 545 which includes the amount for the period October 2010 to August 2011. The rate used per day is $35 the amount the witness confirmed in evidence was the same rate at which holding over damages are charged. While David in his evidence disputed the room was worth that much, he produced no evidence to prove the room had no economic value because it was condemned for human habitation. Surely if such condemnation had come from Council he should have produced such report.

While the plaintiff has proved damages against second defendant the same cannot be said of the 1st defendant who at all times was a representative of the second defendant. The plaintiff had dealings with the second defendant through 1st defendant its representative.

c) Was there a contract between the parties:

The first issue to resolve in the counter claim is to determine if there was an agreement between the parties, if so, the terms thereof. David says there was an agreement between the parties for the defendants to provide professional services and yet Andrew was adamant that there was no agreement either written or oral between the parties.

The evidence adduced before the court show more of a probability of the existence of an oral agreement. But then will such an agreement be valid in the face of the Architects (Conditions of Engagement and Scale of fees) By-Laws SI 829/1980 which compel for written agreements. David's evidence was clear on this aspect, he said the work he did was that of a land develop and not architectural work. That was not challenged and it settled that point.

David said he was a land developer and architect. The hotel was not doing well as a result he said he was invited to see if he could propose a concept. When plaintiff accepted the concept he was invited on site to work on the project. He then crafted terms and conditions for providing professional services in a document dated 25 May 2010 before he submitted to the plaintiff a draft written agreement. Everything was done as he represented the second defendant. At all material times he was dealing with one Sadie Lambourn (Sadie) who he genuinely believed was plaintiff's agent.

Andrew denied Sadie was plaintiff's agent although she is known to him and had made certain proposals for the development of a school at the hotel. It was not denied Sadie was instrumental in introducing defendants to the plaintiff.

The role played by Sadie with the knowledge of the plaintiff can only be described as one of principal and agent. When Andrew was asked in evidence in chief if there was a written agreement between the parties, his response was that he asked Sadie for the document to be drawn but nothing was done. In fact, the constant communication between Andrew and Sadie over the role played by the defendants for the plaintiff implies Sadie was plaintiff's agent. As one can see from the evidence, Andrew retracted from the arrangements made through Sadie because his brother who is a co-director could not agree on the cost pegged at 18%. His fear was on the cost of the project which he said was not disclosed. He wanted a disclosure of the set targets and costs of the project. He insisted on the absence of an agreement without calling the evidence of Sadie whom he fronted to communicate with the first defendant. This is despite the fact that he could not refute the evidence of David on the alleged role Sadie played on behalf of plaintiff.

While Andrew denied there was an agreement between the parties, the plaintiff's own pleadings point otherwise. The plaintiff's declaration to the summons says the defendant was to provide certain services to the plaintiff and this is why the defendant was accommodated at the hotel. In the summary of evidence the plaintiff confirmed the existence of an agreement. Part of para 2 and 3 states:

> *"...*Plaintiff engaged the services of the first defendant… First defendant was required to provide planning services and in particular the preparation of a planning report, topography and cadastral mapping for the purposes of obtaining town planning or sub-divisional approval for the proposed development. Plaintiff will deny the first defendant was engaged for any other service apart from this."

While David says he insisted on a written agreement, the parties did not get to signing one. He through Sadie made written proposals for the agreement to the extent of drawing a draft agreement. Although no agreement was signed the plaintiff did not reject his proposals, he then assumed an oral agreement was concluded on his proposed terms hence he commenced work. He said between June and September 2010 he carried out the following work;

- Research for all legal papers
- Carried out feasibility study
- Did topographical survey
- Subdivided the property
- Sought for stakeholders buy-in i.e. with Council and Department of Physical Planning
- Sought for permit for property owners to commence construction
- Provide materials for market development.

The witness also said he then submitted the report up to planning stage. He said he submitted his proforma invoices for professional fees and none were paid. He acknowledged payment of $1592 for out of pocket expenses.

If indeed the parties had no agreement, why would the plaintiff allow first defendant to work on the project, and why would plaintiff offer the defendants a room from which to work from. And more importantly why would plaintiff plead that:

> "First defendant was required to provide planning services and in particular the preparation of a planning report, topography and cadastral mapping."

Such services, in my view, can only be in pursuance of an agreement. Andrew's evidence was that they asked defendants to do a pre-work report of what was to be done and the cost. When asked why plaintiff in the pleadings said they engaged the defendants' services, he retracted and said it was an error without further explaining how the error came about.

It is highly probable that the parties had verbal agreement based on the conditions set out by the first defendant. When the defendants started raising invoices of the work done, the plaintiff then terminated the agreement and claimed defendants had no mandate. Sadie was a key witness plaintiff was expected to call. In the absence of her evidence the probability remains in favour of the defendants.

Andrew does not deny that the defendants prepared a planning report though he claims was never brought to his attention. When one looks at the email communication between Andrew and John Houghton the hotel manager, one can discern that they are not merely conversing about a pre-work (proposal) because they are talking about pushing the documentation through Council for approval. One wonders why defendants would need up to four months to do just a proposal. It is probable the four months were spent on the work as stated by the defendants. The plaintiff is liable to pay for the services rendered by the defendants.

David was taken to task at cross examination that he was not a qualified architect. It is not necessary to determine that point because the work done with fees claimed is not architectural work. The work at planning stage is one any land developer can do.

An attack was made as to why the planning report is said to be a product of the second defendant and Archiplan an architectural consultants company when in fact Archplan has in a letter dated 24 March 2022 dissociates itself from this report. David's evidence was that he consulted with Archplan hence their recognition in this report. Such evidence of their contribution, he said, is part of his documents locked in a room by the plaintiff. The defendants therefore challenge the correctness of the letter written and discovered during the course of the

trial. No evidence was led from a representative of Archplan. David insisted they gave their input otherwise why give them the credit.

The defendants have proved on a balance of probability that they did some work for the plaintiff within the scope of the verbal agreement between the parties. The question is now, "What amount, if any, is due and payable to defendants by the plaintiff pursuant to services rendered by the defendants?"

d) The amount plaintiff is to pay the defendants;

The amount claimed by the defendants is a total of $2 880 776-00. The question is how the defendants arrived at this figure. There is a breakdown of this figure in the declaration. David's evidence was that the planning professional fees were charged at 10% of the total gross land value which at the time stood at $8 858 750.00. This means 10% of this amount is $885 875.00. There was little or no elaboration in David's evidence in chief in support of the other breakdown of the amounts in the defendants' claim. Some of the explanations only came out during cross examination. There was no clear evidence how the defendants claim their entitlement to the other sub-headings. Even out of pocket expenses were not proved. The same goes for breach of contract, pain and suffering, loss of business, etc.

The parties' claims succeed to the following extend.

DISPOSITION

1. An order be and is hereby granted for the eviction of the defendants and all those claiming title or interest through them from room 10 Cutty Sark Hotel, Nzou drive, Kariba.
2. The second defendant be and is hereby ordered to pay the plaintiff the sum of $34 545.00 together with interest thereon at the prescribed rate per annum from 1 August 2013 to the date of full and final payment.
3. The second defendant shall pay to plaintiff holding over damages calculated at the rate of $35 per day from 1 August 2013 to the date of final eviction.
4. The plaintiff shall pay the second defendant the sum of $885 875.00 together with interest thereon at the prescribed rate per annum from 1 October 2010 to the date of full and final payment.

5. The amount which the second defendant is due to pay to the plaintiff shall be set off against the amount due in favour of the second defendant.
6. Each party to pay its own costs.

Atherstone and Cook, plaintiff's legal practitioners
Mapaya and Partners, first and second defendants' legal practitioners