NEBULA AGENCIES (PVT) LTD
versus
FRENCH & SMITH T/A CUSTOMS SERVICES

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 29 June & 9 November 2022

Opposed Application

R Masinire with D Matondera, for the applicant
O Marondedze with D Machekana, for the respondent

TAGU J: This is an application for specific performance coupled with damages arising from non-performance by the Respondent on its part after the Applicant fulfilled its obligations.

FACTUAL BACKGROUND

The facts of the case that are not disputed if one takes into account the papers filed of record are that the Applicant imported Pre-Painted Galvanized Iron (PPGI) sheets that it uses to manufacture roofing sheets. Applicant then enlisted the services of the Respondent to do port clearance and transportation of the said sheets from the port to the premises of the Applicant in Harare. There was never any dispute or misunderstanding as regards the parties obligations in the contract. The Applicant met its side of the contract through paying the Respondent amounts that are not in dispute. The Respondent went ahead and cleared the said sheets and proceeded to ferry them from Beira Port to Harare. However, the Respondent's vehicle transporting the sheets got involved in an accident sometime before Marondera on its way to Harare, resulting in the sheets getting damaged beyond use for the Applicant. The Respondent informed Applicant of the accident. There was never any doubt nor dispute regarding where the loss lied. Respondent acknowledged and started efforts to replace the damaged sheets. No issue of contracting the liability out and the Respondent wishing to assist ex gratia was never raised. This accident happened sometime in March 2021. Respondent would update the Applicant on progress towards acquisition of replacement sheets and Applicant would also make demands for performance. All the communication exchanges are filed of record. Not at any time was there a dispute regarding

parties' obligations or liabilities. After all patience by the Applicant ran out due to Respondent's non-performance Applicant then sought assistance from its Attorneys who wrote another letter of demand. At this stage Respondent engaged Legal Practitioners AB & David, Lawyers for Business and Projects in Africa. Respondent either on ill-advice or the Legal Practitioner did not take full advice made an afterthought and for the first time started denying liability. The Respondent started alleging that the goods were lost in transit and Applicant was made aware of this. That the Respondent contracted out of liability for any loss of goods at the time the parties concluded the agreement. That the Respondent's efforts to assist Applicant in recovering its loss was a gesture made purely *ex gratia* and as a means of preserving business relations and should not be interpreted in no way as an admission of any liability. Respondent further, after being served with summons alleged that there are material disputes of facts necessitating leading of viva voce evidence and that the relief sought by Applicant is incompetent because damages should have been claimed in the alternate to specific performance.

The issues to be decided in this case are simple and straight forward. These are whether or not there are disputes of facts necessitating use of action procedure instead of application procedure. Whether or not the parties contracted out of liability, whether or not Respondent's efforts to assist Applicant in recovering its loss was a gesture made *ex gratia,* and whether or not the prayer is defective in that damages were not claimed in the alternative.

A perusal of the papers filed of record tell a full story. On page 28 is a letter of demand by the Applicant dated 12 November 2021. This is not a demand for ex gratia payment. Had it been so, this was an opportunity for the Respondent to correct position but it did not. Page 29 is the response by the Respondent dated 18 November 2021 where in the Respondent advised the Applicant that its insurer FBC had communicated through their broker that they were proposing a 50 per cent settlement of the claim value and if it is paid it was going a long way in meeting full repayment value since a deposit of US$7 500.00 and proceeds of the damaged coils to the sum of US$4 200.00 had been received, making a total of US$11 700.00 which had been put aside for this purpose. In that letter there was no mention of contracting out or ex gratia. There was consensus on what the parties were agreeing. This conduct is not characteristic of ex gratia. Further, on page 46 Annexure "B" there is an e-mail dated 15 January 2021 purportedly from the Respondent to the Applicant. This document was never received by the Applicant. The Respondent through this

document said it advised the Applicant that it does not provide insurance. I perused the document and nowhere does the Respondent say it does not provide insurance.

From the trail of communications between the Applicant and the Respondent before they engaged a legal practitioner, the Respondent never denied but acknowledged liability. There are no dispute of facts warranting the Applicant to proceed by way of action instead of Application. Oral proceedings are not necessary and action proceedings will not add anything. The Application is adequate. The Respondent only deviated at the time they sought legal representation and the denial of liability is however incongruent with the communications between parties. The courts have had the opportunity to hear objections for the motion approach where a party alleged the existence of dispute of facts. In *Musevezo* v *Beji & Anor* HH 268-13, MAFUSIRE J stated that a dispute of facts must be real and not fanciful. There should exist genuine dispute of facts which should not be an afterthought. In the present case the disputes of facts exist in the Respondent's imagination and are an afterthought.

Whether or not the prayer is defective, it must be noted that the Applicant is praying for two distinct things that are not mutually exclusive. In terms of the contract entered the Respondent is *in mora* for performance and should perform, hence the prayer for specific performance. An order for specific performance will purge the Respondent's mora but will not address the damage the Applicant has suffered due to the delay in performance. In this case damages are in addition to specific performance not as an alternative. The claim for damages for delay in performance and claim for specific performance may be combined and both awards made. See *Silverton Estates Co.* v *Bellevue Syndicate* 1904 TS 452; *Rhodesia Cold Storage and Trading Co. Ltd* v *Liquidator Beira Cold Storage Ltd* (1905) 2 BAC 253 at 267, *Bray and Edwards* v *Rhodesia Consolidated Ltd* 1911 SR 60.

The Respondent on the other hand maintained that one cannot claim both specific performance and damages. Its contention being that damages must be claimed as an alternative to specific performance. In support of its contention that the remedy of specific performance is available for breach of contract the Respondent relied on the case of *Chiarelli* v *Bouna Inv. (Pvt) Ltd* (2015) ZWHHC 678 where it was said:

> "Specific performance is an extraordinary equitable remedy that compels a party to execute a contract in terms of the precise terms agreed upon. It is an order which grants the applicant what he bargained for in the contract. A valid contract must exist between the parties and the party seeking specific

> performance must have substantially fulfilled his obligations in terms of the contract. A party may also be granted the relief if he has offered to do or is ready and willing to do all acts that were required of him to execute the contract according to its terms."

In this case the Respondent submitted that there was no valid contract in respect of liability as there was no consensus ad idem and parties were to reconvene and decide as to who bears liability which was never done. I have already highlighted pointers that shows that there was a meeting of the minds and that Respondent was liable.

In my view there is nothing anomalous or illegal about a prayer for both specific performance plus damages. The circumstances at hand are such that both are necessary. The issue of having them in the alternative depend on the circumstances of each case, and is not the case here. The Applicant is not saying perform or pay damages. Applicant is saying perform plus pay damages you caused by delaying performance. Generally, the court is aware that one may claim specific performance and in the alternative damages, but this depends as I said on the circumstances of each case. In a situation where both are claimed and the result is that the applicant is overpaid, then damages are claimed in the alternative. In the present case the Applicant is praying for two distinct things that are not mutually exclusive, and does not lead to Applicant being overpaid.

At law damages arising out of a contract differ from those under delict in that damages for breach of contract are not intended to recompense the innocent party for loss but to put that party in the position it would have been in if contract had been properly performed. See (*Trotman* v *Edwick* 1951 (1) SA 443 (A) 449B-C). A litigant who sues on a contract does so to have his bargain. In *Victoria Falls and Transport Power Co. Ltd* v *Consolidated Langlaate Mines Ltd* 1915 AD 1 22 it was stated that the sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done without undue hardship to the defaulting party.

The Applicant in its summons and declaration is claiming USD$39 307.91 for breach of contract. It produced a three phase quantification schedule based on accounting procedures justifying amount claimed as Annexure "U". The Respondent accepted the first phase of the Applicant' computation of damages and suggested that the other two phases are unrealistic and are a result of thumb sucked figures plucked from the air given the fact that at the time business transactions were affected by the COVID-19 Lockdowns. Respondent requested to be presented with historical profits or returns from ZIMRA.

In this case the Applicant submitted that had the Respondent performed properly in terms of the contract, from the date of the breach to date the Applicant would have turned stock around three times and made a profit of US$39 307.91 as shown on the computation sheet Annexure "U" attached to the Court Application. The computations were not controverted by the Respondent so they stand un-assailed. There was nothing of substance to object to the computations nor the granting of these damages. The Respondent just made wish wash general comments without really attacking the Applicant's computations. Loss of future profits is not historical, it is prospective. The argument by Respondent that they be presented with historical profits or returns from ZIMRA is a misdirection. The damages the Applicant is seeking are as a result of its expectation interest which can only be protected by putting the Applicant in the position it would have been if the contract had been properly performed. In the result the Applicant's application will succeed.

IT IS ORDERED THAT

1. That the Respondent deliver seven (7) rolls of Pre Painted Galvanised Iron within 7 days of service of this order.
2. That the Respondent pay USD$39 307.91 (Thirty Nine Thousand Three Hundred and Seven Dollars Ninety One Cents) as damages suffered by Applicant due to the Respondent's non-performance.
3. That Respondent be and is hereby ordered to Pay costs of suit on an attorney –client scale.

TAGU J:……..

Masinire & Chakabva, applicant's legal practitioners
AB & David, respondent's legal practitioners