MINING INDUSTRY PENSION FUND
versus
DAB MARKETING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 8 and 9 November and 29 December 2010

Civil Trial

K Kadzere, for the plaintiff
D Ochieng, for the defendant

KUDYA J: The plaintiff issued summons against the defendant out of this court on 17 March 2010 seeking an order confirming the cancellation of the agreement of lease between the parties. It also sought payment of arrear rentals from December 2008 to February 2010 of US$58 021-94 together with interest thereon at the prescribed rate calculated from 1 March 2010 to the date of payment in full, payment of holding over damages of US$7 100-00 per month calculated from 1 March 2010 to the date of the defendant's ejectment together with interest from the due date to the date of payment, the eviction of the defendant and any party claiming occupation through it and costs of suit.

The claim for arrear rentals was reduced by the sum of US$14 200-00 after Mr *Kadzere,* for the plaintiff, conceded in his submissions that the plaintiff did not have the legal basis for claiming rentals in foreign currency for the months of December 2008 and January 2009 when the local currency was the only legal tender for the payment of rentals. Mr *Kadzere* also conceded that arrear rentals were claimed for the period of four months that the defendant remained in occupation after the lease had been cancelled. The effect of these concessions was that the plaintiff sought judgment in the sum of (US$43 821-94 + US$28 400-00) US$72 221-94 together with interest at the prescribed rate from 1 March 2010. The last claim of eviction fell away.

On 19 May 2010, the defendant filed its plea and counterclaim against the plaintiff. In its plea it admitted liability in the amount claimed but averred that it was excused from payment due to the fact that the plaintiff was indebted to it in the sum of

US$196 250-00. In its counterclaim it averred that the plaintiff failed to maintain the external structure, including the roof of the leased premises, resulting in leaks developing on the roof in or about November 2008, which the plaintiff failed to repair as required by the lease agreement. The result of the failure was that the defendant was forced to shut down its trading divisions, Gulf Drug Company in December 2008 and Ryl Farm in October 2009. It averred that it suffered a loss of profits in the sum of US$196 250-00 being US$170 000-00 for 17 months of the period December 2008 to April 2010 with respect to Gulf Drug Company and US$ 26 250-00 from October 2009 to April 2010 by Ryl Farm. The latter loss was abandoned during trial leaving the total claim at US$170 000-00.

The plaintiff denied liability and averred that the leaks were from the gutters and not the roof. It averred that the defendant was negligent in failing to keep these gutters free from blockages as stipulated in the lease agreement. It further averred that as the area affected by the leaks was not used by the defendant it could not have suffered any damages.

The defendant, who had the duty to begin, called the evidence of three witnesses. These were its managing director Dr Neil Robin Deacon, a chartered structural engineer of over 40 years experience Duncan Hugh Cocksedge and its maintenance manager Alfred Chitambo. It produced a bundle of documents as exh 1. In addition the 25 originals of the photographs taken by Goodlaw Tafara Taruona on 28 January 2010 captured on pp 132 to 138 of exh 1 were produced by consent as exh 3 as was the original pharmaceutical batch book, exh 4, whose copies make up pp 14 to 65 of exh 1. The plaintiff called the evidence of the general manager of its estate agent Southgate and Bancroft, Meeting Gomba and produced a bundle of documents, exh 2. The main document in exh 2 was the lease agreement.

At the pre-trial conference that was held on 30 August 2010, the defendant admitted that it had an obligation in terms of clause 12 of the lease agreement to keep the gutters to the premises free from any blockages and accepted that it had the duty to begin. The issues that were referred to trial were:

1.1 Whether or not the plaintiff breached the terms and conditions of the lease agreement

1.2 If it breached them whether or not the defendant suffered damages as a result of such breach

1.3 The quantum of such damages

I proceed to deal with each issue in turn.

Whether or not the plaintiff breached the terms and conditions of the lease agreement

The parties executed the 35 page lease agreement of Stand 3358A of Harare Township commonly known as Blumberg House in Graniteside Harare ("the leased premises") on 29 June 1999. It was common cause that the defendant had been leasing the premises since 1965 until it moved out at the beginning of July 2010. The defendant carried on the business of manufacturing pharmaceuticals, confectionaries and cosmetics at the leased premises. At its inception under Brian James Deacon, the managing director's father, the plaintiff purchased Gulf Drug Company (Pvt) Ltd, Alex Lipworth (Zimbabwe) Ltd and Ryl Farm (Pvt) Ltd and consolidated their operations into its business model. These companies ceased to trade but were not liquidated because the defendant decided to use their respective brand equity. The result was that though the companies exist, they do not carry out any trade and do not hold any assets or incur any liabilities. The financial statements for the defendant prepared by Enerst and Young for the year ended 31 July 2004 demonstrated that group financial accounts were not prepared because the company's subsidiaries had no assets and liabilities and did not trade. They were merely treated as subsidiaries in line with international accounting best practices.

It was common cause that the manufacture of pharmaceuticals requires pristine conditions that prevent contamination. The defendant's operations were governed by stringent regulations issued by the Medicines Control Authority of Zimbabwe (MCAZ) and the World Health Organization. Food products and cosmetics and toiletries were governed by separate regulations which while requiring high quality control measures also emphasized the eradication of contaminants. It was agreed that the relationship

between the parties was a happy and cordial one for thirty-six years. Most problems were resolved through discussion and correspondence. The relationship began to deteriorate from December 2001 until the defendant left the premises at the beginning of July 2010. The deterioration was graphically captured in Dr Deacon's letter to Southgate and Bancroft of 15 January 2010 in which he wrote:

> "While the landlord has finally undertaken to repair the leaking roof and gutters after nearly a decade of complaint, this maintenance only began on the 4th January 2010. Consequently the building is in very poor state of repair and certain areas are totally unusable due to the potential damage from rainwater. You are reminded that contamination from external environment was a consideration in our cessation of manufacture of pharmaceuticals on the premises."

Apparently, in December 2001 the plaintiff's agent had replaced some gutters at the premises and left the roofing sheets damaged a subject of complaint by Dr Deacon's predecessor in a letter of 21 December 2001. On 8 February 2007, 29 October 2007, 1 February 2008 and 16 April 2009, Dr Deacon further wrote to Southgate and Bancroft lamenting the failure by the plaintiff to fix the leaking roofs and gutters. In the letter of 16 April 2009 the defendant expressed the fear that its pharmaceutical manufacturing licence was liable to cancellation due to the contamination caused by the leaks. It was common cause that this was the only letter that was ever responded to by the property managers on 19 May 2009. In that letter Southgate and Bancroft indicated *inter alia* that the parties had "talked about maintenance and repairs sometime last year but as you should remember the environment obtaining last year was not good for anything. Last year was a write-off. It is against this background that we are saying pay for rentals now so that we can plough back income into the betterment of the property."

While the plaintiff placed the extent of the leakages in issue, it was clear from the evidence of Dr Deacon that at first the leaks were confined to specific points but with time they just mushroomed up indiscriminately. The defendant took avoiding action to prevent contamination by moving around its operations to those areas where there were no leaks. It could not move out without the approval of the regulating authority whose bureaucratic delays would take between 3 to 12 months. The plaintiff eventually voluntarily ceased pharmaceutical manufacturing. The mandatory pharmaceutical batch

book that it was obliged to keep covering the period January 2000 to August 2010 demonstrated that the defendant ceased the manufacturing of pharmaceuticals and confectionaries from the premises in July 2008 and July 2009, respectively.

It was common cause that the basis for attributing liability to the plaintiff was found in clause 12 of the lease agreement, which simply states that "the landlord shall keep all main walls and roofs in good repair." The factual dispute raised by the plaintiff against liability was that the leaks took place in the gutters and not on the roof.

The defendant called the evidence of the 76 year old chartered structural engineer Duncan Hugh Cocksedge. He qualified as a structural engineer in 1969 at a college in the United Kingdom whose name he could not recall. He became a chartered structural engineer in 1972. In 1980 he became a partner in Markensson and Smallwood which later became Markensson and Cocksedge. He was involved in designing factories, structural steelworks and reinforced concrete buildings that cover the Harare skyline. He viewed the leased premises a few days before he testified. The substructure has a concrete framework in laid with bricks while the superstructure has a saw-tooth roof with south facing vertical glazing. The roofing sheets are of corrugated iron with a shallow slope of 17 degrees. The sections of the roof are supported by structural steel spanning across the building for 15 to 20 metres. On the lower part of the roof and adjacent to the vertical glazing runs the main 3mm mild steel plate box gutter which transports water from the roofing sheets. It has a girth of 800mm to 1 200mm. Three gutters are found on each bay. These are called internal gutters and are different from external gutters which most buildings have at the end of the eaves projecting over external walls. These internal gutters prevent water from penetrating the building and are held by structural steel pillars from within the building. If they were not there, water would flow from the roofing sheets into the factory space inside the building. He indicated that the internal box gutters were part of the roof even though they were made of different materials from the roofing sheets. In his experience the life span of a gutter depended on its maintenance. Such maintenance involved the use of emery paper to remove rust and thereafter coat the gutter with bitumen paint. He suggested that the life span would be extended by coating the gutter with bitumen every five years. He was familiar with the Graniteside industrial area

and opined that factories close to the leased premises emitted chemicals that discharged acids into the atmosphere that in turn contributed to the corrosion of the gutters.

Other than taking issue with his failure to remember the college he attended in Chelsea England in 1969, his evidence remained unscathed during cross examination. When Meeting Gomba testified for the plaintiff he agreed that the internal gutters were supported by steel reinforcement pillars built inside the building. He stated that estate agents did not regard internal gutters as part of the roof. His knowledge and experience did not extend to the technical field of structural engineering. He was not an expert in roofs as was Cocksedge. I am satisfied from the expert evidence of Cocksedge that internal the gutters from their location and function are part of the roof.

In any event, the evidence of Alfred Chitambo, the workshop and maintenance manager of the defendant who boasted 38 years of experience on the job established that the defendant religiously cleaned the gutters of any sand and other debris to prevent any blockages. Gomba attempted to dispute this by averring that he had received reports from the experts who repaired the gutters after the defendant left the premises that the internal gutters were clogged by sand. His evidence of what he alleged were the contents of the document, in the absence of the production of the document, was inadmissible in terms of s 27 (3) (b) of the Civil Evidence Act [*Cap 8:01*].

Lastly, the probabilities support the defendant's case that the leakages that occurred in the internal gutters were caused by wear and tear for which the plaintiff bore the responsibility of keeping at bay. The letter of 21 December 2001 from Dr Deacon's predecessor demonstrated that the plaintiff did replace some gutters in December 2001. The letters of Dr Deacon in 2008 and 2009 demonstrated that the defendant looked up to the plaintif to keep the gutters in good repair. The response to his letter of 16 April 2009 of 19 May 2009 demonstrated that the plaintiff accepted that it had the responsibility to keep the gutters in good repair but pleaded economic hardship for its failure. That the duty fell on the defendant to keep the gutters in good repair was also established by Chitambo who stated that the plaintiff had actually repaired the gutters in 1990 and 2000 by in-laying them with bitumen membrane to prevent corrosion. He further stated that

from 2005 the plaintiff religiously dispatched contractors and artisans to inspect and quote the cost of repairing the gutters but failed to carry out the necessary repairs.

The cumulative effect of the evidence of Dr Deacon, Chitambo and Cocksedge showed on a balance of probabilities that the internal gutters are part of the roof and were kept in a state of disrepair by the plaintiff.

I find that the plaintiff had the duty to keep the internal gutters in a state of good repair. Through its failure to do so, it breached the lease agreement it had with the defendant.

If it breached them whether or not the defendant suffered damages as a result of such breach and the quantum of such damages

Page 66 of exht 1 represents an extrapolation from the pharmaceutical batch book of seven products manufactured by the defendant at the leased premises and at the new premises from 2000 to 2010. The seven products listed were gulf gripe mixture, menthies cough syrup, glucopect suspension, super zestamin multi-vitamins, menthies lozenges, and energen glucose and darrolyte tablets. In 2008 the defendant did not produce any glucopect or super zestamin but produced fewer batches for the other five products. In 2009 it produced a reduced number of menthies lozenges and energen glucose and did not manufacture any batches of the other five products. It did not manufacture any products from the leased premises in 2010. Dr Deacon calculated the total batches for each product produced over the ten year period from 2000 to 2009 and divided it by ten to calculate a yearly average. He estimated the cost of production of each batch in United States dollars by interpolating the existing cost structure at its new premises of each product range and multiplied the estimated cost by the yearly average to calculate the gross value of the lost production. He opined that the cost structure of existing sales was the same in United States dollars as in the preceding ten years. He then deducted the salvage value of work in progress to arrive at the loss suffered by the defendant. He calculated the loss from the seven products at US$197 925-00. He deducted the profit mark-up of 15% and arrived at an estimate of US$168 236-25 which he rounded off to US$170 000-00. While Dr Deacon equated this amount to the defendant's turnover, it seems to me that it would actually represent the defendant's total expenditure. Dr Deacon

stated that the defendant ceased the manufacture of pharmaceuticals in July 2008. It continued to manufacture confectionaries until July 2009. It suffered loss from the failure to produce the pharmaceuticals. Even though there was no production of pharmaceuticals for the period from July 2008 to April 2010, a period of 21 months; the defendant claimed damages for breach equivalent to 12 months of lost production. This was firstly because the defendant did not claim lost production for the period from July 2008 to the end of November 2008, secondly it abandoned the claim for December 2008 and January 2009 because the multicurrency regime had not yet come into being, thirdly it abandoned lost production for three of the months of the multicurrency regime in order that its estimated figure would accord with its yearly average computation. The use of turnover as a basis for calculating the loss of profit suffered after the repudiation of an agency of sale was approved by INNES CJ in *McCullough & Whitehead* v *Whiteaway & Co* 1914 AD 599 at p.630, a local case which went on appeal to the Appellate Division in South Africa.

I agree with Mr *Kadzere*, for the plaintiff, that Dr Deacon failed to show the nature of the loss suffered by the defendant. While the plea referred to the US$170 000-00 as the loss of profits, I understood Dr Deacon to equate it with the total expenditure that the defendant would have incurred in the manufacture of pharmaceuticals had it not mothballed its operations. He did not lead any evidence on how he arrived at the estimated cost structure of the defendant's existing operations at the new premises. He simply plucked some figures from the air. The assessment of compensation for breach of contract is question of fact. The defendant failed to lay out the facts that would have established its loss. In the *McCullough & Whitehead* case, *supra*, INNES CJ relied on the evidence led by accountants to calculate the measure of damages due to the respondent. The defendant's case cried out for the evidence of similar financial experts. It is clear to me that the defendant does have such evidence at its disposal but simply failed to utilize it.

It seems to me that the defendant's plea was not framed with an eye to the relevant and applicable remedies for breach of contract. The purpose for damages for breach of

contract is succinctly set out by Christie in *The Law of Contract in South Africa* 3rd ed p 601 thus:

> "Unlike damages for delict, damages for breach of contract are normally not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed."

The evidence on the amount of damages that was led by Dr Deacon set out the number of batches the defendant would have manufactured over a period of twelve months of the twenty-one months that it was not in production. He purported to assign the present value of each batch produced at the new premises to batches that would have been manufactured for similar products had production not ceased. He did not provide proof of the present values he assigned to each batch. But even if he had proved the present values, his computations would not have represented a fair and reasonable loss incurred by the defendant for the reason that there were expenses included in the present value that would not have been suffered by a non-producing factory. I have in mind such overheads as water, energy, labour, transport and advertising. The costs that the defendant would have continued to suffer, which would not have been absorbed by the sale of its products, would have been those for the labour that it retained, necessary maintenance and storage of raw materials at hand and unfinished products. It may have suffered other expenses outside the production process itself such as relocation and re-establishment costs. In addition it would have suffered loss of profits. These expenses and losses would have constituted the natural and probable consequences of the breach.

The defendant failed to establish the amount of the contractual damages that it suffered. Accordingly, the plaintiff is granted absolution from the instance.

The plaintiff's claim

The plaintiff claimed for confirmation of the cancellation of the lease agreement, arrear rentals, holding over damages and interest on these amounts at the prescribed rate. The defendant averred that it was excused from paying the rentals by reason of the indebtedness incurred by plaintiff in breach of the contract of lease. The evidence led by Dr Deacon and Chitambo established that the defendant stopped the manufacture of pharmaceuticals in July and not in December 2008 as pleaded. It continued to use part of

the premises to manufacture confectionaries until October 2009 as pleaded or July 2009 as shown in the pharmaceutical batch book. Mr *Wochieng,* for the defendant, contended that the defendant was entitled to an abatement of rent during the period in which the premises were not fit for the beneficial occupation or use for the purpose of its business. He relied on clause 24(b) of the lease agreement. Clause 24 (a) and (b) state that:

24. Destruction or partial destruction of premises

"a) In the event of the premises or any part thereof being destroyed or so damaged by fire, explosion, wind, flood, riot or insurrection, Act of God, or any other cause whatsoever other than the act, default or negligence of the tenant or its employees, contractors, agents, licensees or invitees to such an extent as to deprive the tenant entirely of the beneficial occupation or use of the premises for the purpose of its business, the landlord shall not on that account terminate this lease but the landlord shall be entitled within one month of the damage or destruction to notify the tenant that it intends to rebuild the premises and thereafter the landlord shall forthwith commence and carry out as expeditiously as is reasonably possible the reconstruction and repair of the premises so as to make them available for occupation by the tenant. During such period as the tenant is deprived of beneficial occupation, no rental shall be due to the landlord. Should the landlord not notify the tenant of its intention to rebuild as set out herein then the lease shall be deemed to have been terminated without any liability whatsoever arising against the landlord by the tenant or any employee, contractor, agent, licensee or invitee of the tenant.

b) Partial damage

In the event, however, of the premises being only partially damaged by any occurrences aforesaid, this lease shall continue in full force and effect save that the tenant shall be entitled to abatement in rent during the period in which the premises may not be wholly fit for occupation. In the event of the parties being unable to agree, the amount of the abatement shall be determined by an arbitrator or arbitrators nominated by the president of the Real Estate Institute of Zimbabwe, the decision of the arbitrator or arbitrators to be final and binding on the parties hereto. The provisions of this clause shall not prejudice any claim that the landlord may have against the tenant where the destruction of or damage to the premises is occasioned by the act, default or neglect of the tenant or any employee, contractor, agent, invitee or licensee of the tenant."

It is clear from clause 24 that it was within the contemplation of the parties that the defendant was excluded from paying rentals in whole or in part in the event that the

premises became unsuitable for the purposes of its business. Until July 2009 when the lease was cancelled, the defendant had partial beneficial use of the leased premises for its business operations. From July or December 2008 to July or October 2009 it was entitled to pay a reduced rental and not the whole amount of US$7 100-00 per month. It was not entitled to pay any rental from the date that it completely ceased using the premises for the production of its confectionary or cosmetic operations. The plaintiff was notified of the need to effect repairs to the internal gutters but it did not do so. In terms of clause 24, the plaintiff could not sue the defendant for non-payment of rentals when it had not repaired the gutters.

The difficulty that confronts the plaintiff is that it is entitled to an unknown amount of rentals for the period from February 2009 to July/October 2009 when the defendant stopped all production. The plaintiff has failed to establish the amount of rentals that it is entitled to. Until the amount is established either by consent or by arbitration, the plaintiff cannot succeed in its claim. The claim for the confirmation of the cancellation, based as it is on the non-payment of an unknown amount of rentals, cannot be sustained.

Accordingly, the defendant is absolved from the instance.

In regards to costs, since neither of the parties has succeeded in its claim, it is only fair and just that each be ordered to meet its own costs.

It is accordingly ordered that:

1. In the claim-in-convention, the defendant is granted absolution from the instance.
2. In the counter-claim, the plaintiff is granted absolution from the instance.
3. Each party shall pay its own costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners