JOHN SWAY MUGADZAHWETA
versus
AZVIRIBASI NENGOMASHA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 14 September 2009 and 16 January 2013

Civil Trial

V Muza, for the plaintiff
Defendant in person

HUNGWE J: The plaintiff claims for damages for breach of contract arising to an oral agreement entered into between him on one hand and the defendant on the other; interest at the prescribed rate together with costs of suit. At the pre-trial conference the issues were identified as:

(a) Whether the plaintiff paid the defendant the full amount required for the construction of a pre-cast wall around his immovable property.
(b) Whether or not the defendant is in breach of the agreement.
(c) Whether or not the plaintiff is entitled to restitution, and if so, the quantum thereof.

The trial proceeded on the evidence of the two parties involved. The onus lay on the plaintiff in respect of all the issues. For his part the plaintiff's evidence amounted to the following:

He entered into a verbal agreement with the defendant in terms of which, upon payment of the full price required for the construction of a pre-cast wall, commonly called a "durawall," the defendant would commence construction and complete such construction by 30 January 2008. Plaintiff paid, over time, various amounts by bank transfers, cheques and cash, amounts totalling ZW$2,300,000,000-00. The defendant failed to construct the pre-cast wall of the quality

which the parties had agreed and acknowledged his failure in writing to do the job within the agreed time frame. He agreed to compensate the plaintiff for the breach.

According to the evidence led by the plaintiff, the defendant used poor quality materials in the process of construction, such that the pre-cast wall would collapse before the side under construction was completed. What led to this, the evidence showed, was that the cement-to-sand ratio used in the manufacture of the panels was so weak that the panels would not bear their own weight upon being fitted into the frame. It became clear to the plaintiff that the defendant had neither the capacity to carry out the agreed work nor the ability to do so. Despite several written undertakings to complete the work within agreed times, the defendant failed to do so. In the end it was quite apparent that the defendant was not up to the task. The plaintiff sued for breach of contract.

The defendant's evidence was that he had not failed to complete the work. He insisted that it was due to the plaintiff's impatience that led to the collapse of the agreement. He claimed that he had put up a greater part of the pre-cast wall and prayed that the claim be dismissed. Had the defendant anticipated that the plaintiff would produce photographic images of the site in question he would not have insisted on denying certain of the plaintiff's claims in his pleadings.(See Ex 10). The plaintiff demonstrated that between the two parties the plaintiff's version is to be believed when he says the defendant had failed to carry out his obligations in terms of the oral and written undertakings by the defendant.

I am therefore satisfied that he was in breach of the agreement to construct a pre-cast awall.

The defendant contended that the plaintiff had not put him in funds sufficient to complete the construction of the perimeter pre-cast wall. What the plaintiff paid, according to the defendant's contention, was only a deposit. He was prevented from completing the construction because the plaintiff claimed that the workmanship was of poor quality and thereafter ejected the defendant from the site. In these circumstances the defendant contends that the plaintiff cannot lawfully claim the full amount of the construction of the perimeter wall. Upon being ejected from the site, the defendant claims that he made a tender for payment but this was rejected. The plaintiff claimed and demanded payment in United States dollars at a time when only the Zimbabwe dollar was legal tender.

At the close of his case, the plaintiff appeared unsure regarding the amended claim which now sounded in foreign currency. Mr *Muza* who appeared for the plaintiff, went out of his way to demonstrate why an award in foreign currency was justified in all the circumstances of this case. In his closing submissions, Mr *Muza* relied on the principle that an innocent party is entitled to an order of specific performance or, if that is not possible, and award of damages, in so far as that would put the innocent party in the position he would have been had the breach not occurred. In the present case, specific performance is not possible because, first, the defendant had failed to perform in terms of the contract. As such the remedy of specific performance is not appropriate. Secondly, the defendant had, at the time of hearing, disbanded his pre-cast walling business which had, like other businesses at the time in Zimbabwe, suffered an economic collapse.

It seems to me that the principle applicable in the present matter should be that which would put the plaintiff in the position he would have been had no breach occurred. In a case in which an owner, who had no option but to complete a contract which the contractor had left unfinished, thereafter sues the contractor for damages for breach of contract, damages should be assessed by reference to the cost actually incurred by the owner in completing the work. *Prima facie* this is the amount which, in all the circumstances, is required to bring about *restitutio in integrum*, and the owner is only to be deprived of the full cost incurred if by his conduct, judged objectively, is found, on a preponderance of probabilities, to be unreasonable. The onus of proving that the owner acted unreasonably in incurring all or some of the costs of completing the contract rests upon the contractor. Whether it was reasonable for the owner to approach a single contractor only, or whether he should have obtained quotations from a number of other persons before seeking the completion of the work in hand, must necessarily depend upon the particular circumstances of each case. *Reid* v *L S Hepker & Sons* (*Pvt*) *Ltd* 1971 (2) SA 138 (RA).

In both contract and delict the basic aim of an award of damages is to bring about, as far as possible, *restitutio in integrum* - see *Livingstone* v *The Rawyards Coal Co*., (1880) 5 A.C. 25 at p 39, and *De Jager* v *Grunder*, 1964 (1) SA 446 (AD) at p 456. Clearly, if the plaintiff is not awarded the full amount he paid in order to complete the contract, he will be out of pocket and will, accordingly, not be restored to the position he would have occupied had there been no breach by the defendant. What this principle speaks to is the requirement that the damages be

measured by the actual cost incurred by the plaintiff in order to complete the construction of the pre-cast wall after he ejected the defendant from the site. The issue therefore is whether the plaintiff has proved the cost to him to complete the project. Unfortunately he has not. All that the plaintiff has done is to produce and rely on quotations of what it might cost to re-do the wall. What is required however is more. The plaintiff is expected and required to prove that he has since had to complete the project and that he had incurred a given extra cost attributable to the breach by the defendant.

The plaintiff conceded that what he had paid the defendant amounted to 75% of the actual cost to put up the structure. One must also give credit and make appropriate deductions for the posts left in *situ* by the defendant as depicted in exh 10. The plaintiff did not raise any complaint regarding the quality of these upright posts. What value to attach to these up right posts can only be a matter of rough estimation as both the defendant and the plaintiff did not provide sound mathematical basis to apply in arriving on the values thrown around during trial. At the end of the day it is difficult, on the evidence to say that the plaintiff has, on a balance of probability, proved his case. I say this because I am of the firm view that exact and definitive values are capable of establishment. In all the circumstances I am unable to say that the plaintiff's case has been proved.

In the result I grant absolution from the instance.

Muza & Nyapadi, plaintiff's legal practitioners