BITUMEN CONSTRUCTION SERVICES (PVT) LTD
versus
TINPHIL INVESTMENTS (PVT) LTD T/A SKYVIEW
EARTHMOVING (PVT) LTD

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 17, 18, 19, 20 and 26 September 2018

**CIVIL TRIAL**

*C Rungwandi,* for the plaintiff
*T Goro,* for the defendant

CHIRAWU-MUGOMBA J: Going through the pleadings in this matter was akin to charting through the maze. It is an example of how "not to file pleadings" before carefully considering a matter. The plaintiff issued summons against the defendant on 24 May 2016 seeking payment of the sum of $20 140.00 being rental arrears arising from the hire of a Plant Bell Grader in terms of a lease agreement dated the 8th of July 2015; interest at the prescribed rate of 2% per month, calculated from the 21st of October 2015 to date of full and final payment both dates inclusive and costs of suit on a legal practitioner to client scale. In its plea, the defendant raised the point that the defendant was not properly before the court for want of a proper citation. Prior to the defendant filing its plea on 23 November 2016, the plaintiff had on 21 November 2016 filed a 'court application' for default judgement. On 24 November 2016, the plaintiff filed a notice of withdrawal of the 'court application' for default judgement. On 8 May 2017, the plaintiff filed a notice of amendment in which the citation of both the plaintiff and the defendant were amended. On the same date, the plaintiff filed its pre-trial conference issues wherein it included for the first time a claim for holding over damages despite such claim not being part of the summons and declaration. On 10 November 2017, the plaintiff and the defendant prepared a joint pre-trial conference minute wherein it was stated that the two issues for trial were as follows; - (1) Whether or not there were breakdowns between the periods 26th of July to the 12th of August 2015. If yes, whether

the plaintiff is entitled to charge for daily minimum hours for this period in terms of clause 4 of the agreement and (2) whether or not the plaintiff is entitled to payment of holding over damages for the equipment from the 12th of August 2015 to the 28th of August 2015 after termination. It is pertinent to point out that these issues were not as originally claimed in the summons and declaration and as an analysis of the evidence led will show, they were actually part of the facts in dispute and not necessarily the issues in dispute for purposes of trial. On 7 September 2018, the plaintiff filed a notice of amendment to substitute the initial claim of $20 140 to $ 21 350.36. An amended joint pre-trial conference minute was filed which reflected the issues for trial to be the following:

a. Whether or not the plaintiff is entitled to payment of $15 237.45 together with interest at the rate of 2% per month from the 21st of October 2015 to date of full and final payment?

b. Whether or not the plaintiff is entitled to payment of legal costs on a higher scale?

To note also from this amended minute is the fact that the plaintiff and the defendant agreed on certain issues the most important one being the fact that the defendant admitted owing $5750.36 from the second claim.

In its plea, the defendant stated that it was unlawful for the parties to agree to payment of interest at the rate of 2% per month. Further that plaintiff breached the terms and conditions of the agreement by failing to appoint competent operators to operate the machinery and that this was done by the defendant at its own expense. Contrary to the agreement and in breach, plaintiff failed to mobilise and demobilise the machinery to and from site and this was done at the plaintiff's own expense. The defendant denied liability for the statements of account in annexure B to the declaration and pleaded that the correct statements were signed by the plaintiff's personnel who were on the ground. The defendant denied owing plaintiff the sum of $40 278-54 or at all and put the plaintiff to the proof. The defendant stated that it was plaintiff who had breached the terms and conditions of the equipment lease agreement and as a result defendant had terminated the lease agreement. The defendant further stated that it had requested for a proper reconciliation to be done taking into account the breaches but this was not done. Further that it was the plaintiff which had demobilised plaintiff's property from the work premises.

The plaintiff and the defendant each called one witness and the evidence can be summarised as follows:-The plaintiff led evidence through its acting General Manager

Gilbert Marebe. Before assuming the office of General Manager in March 2017, he was the plaintiff's Finance Director. His evidence was to the following effect. The plaintiff and the defendant entered into a written agreement in terms of which the plaintiff leased to the defendant a grader for use in a project in Hippo Valley. The lease agreement was signed on the 8th of July 2015 although the grader was already on site in Hippo Valley. The plant hire was at a rate of $80 per hour and outside normal working hours the rate was to increase by 10% meaning that it would cost $88 per hour. The contract also provided that there would be a minimum charge of six hours per day in the event that the grader may have not been used or had been used for less than six hours per day. The minimum hour condition could be waived if the defendant reported a breakdown. The terms of payment were that the defendant was to make payment within a period of 14 days after being presented with an invoice and if the amount remained outstanding, it would attract interest at the rate of 2% per month. The plaintiff was seeking payment of the sum of $15 237. 45 being outstanding payments from a balance of $40 258 less a set off figure of $18 928 and other agreed payments. The figure was based on three invoices being numbers 2892, 2893 and 2894 which were supported by progress claims indicating the hours. The witness disputed the fact that they had appointed incompetent operators as claimed by the defendant. A calculation of the figures in court however revealed that the amount outstanding was actually $15 600 and not $15 237.45. The witness averred that the major dispute relates to the issue of standby hours which according to him are the minimum hours charged when the grader is not working or works for less than six hours. The defendant did not report any breakdowns to the plaintiff and hence the charges levied. The hours charged were based on daily returns signed by the plaintiff and the defendant's representatives based on the hours. The witness admitted that they noted that there were breakdowns from the 23rd to the 25th of July 2015. From the 26th of July 2015, there were no daily returns since the plaintiff's personnel had been moved from the site at the insistence of the defendant on the basis that they were incompetent. The defendant terminated the contract on 12 August 2015 via email which was contrary to the written lease which required seven-days' notice period. The grader was only returned to the plaintiff on 29 August 2015 and due to this, the plaintiff was entitled to charge the defendant based on a minimum charge of six hours. Under cross examination, the witness conceded that the plaintiff ought not to have charged for the breakdown dates of 23-25th of July 2015 and hence the claim on the second invoice should be reduced by $1360 representing 17 hours of non-use since on 25 July 2015, the grader was billed for a hour of use. The second invoice should

therefore be reduced from $23 912 to $22 552. After this concession, the disputed amount was reduced to $14 240.36. The witness admitted that the defendant disputed part of invoice number two and the whole of invoice number three.

The defendant led evidence through one Phillip Nherera who is a director of the defendant. He gave a history of the relationship between the defendant and the plaintiff in respect of leasing equipment to each other. The plaintiff's holding company Gombe Resources (Pvt) Ltd had hired an excavator from the defendant and upon failure to pay, they defendant then hired the grader. He confirmed the charge of $80 per hour and the fact that the grader was on site on or around the 19th of June 2015. He admitted that the defendant was not disputing claim number one but part of claim number 2 and 3 was in dispute. He averred that there had a different understanding of the meaning of stand-by hours and also that they could not pay for the time when the grader was broken down. He stated that standby hours are approved by the site supervisor after being generated by the operator. Daily returns for 1-25 July 2015 were available but the second invoice included standby hours which were not provided for in the daily returns. He gave a history of the gradual breakdown of the grader which at one point they had to have repaired as the contract allowed minor service. The defendant could not attend to the major breakdown which caused the grader to completely stop functioning on 25 July 2015. The witness stated that the plaintiff's operator actually drove the grader away on 26 July 2015. He averred that the plaintiff's personnel left the site on 25 July 2015 after being instructed to leave by the plaintiff. Under cross examination the witness stood by the defendant's plea except in relation to the part on incompetent operators. He stated that the defendant was not in dispute of the interest claimed as long as it was charged correctly.

This matter turns on whether or not the defendant breached the contract and if so, what relief is the plaintiff entitled to. The fact that the parties reduced the lease agreement of the grader into writing places this matter within the realm of the parole evidence rule. In *Marquard and Co* v *Biccard* 1921 AD 366 @373, SOLOMON JA adopted one of the best known English formulations of the rule:

> "The rule of the law of evidence upon which he relies is nowhere more clearly stated than by Lord Denman in the well -known case of *Goss* v *Nugent* (5 B and AD 54)-'By the general rules of the common law if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract".

The purpose of damages for breach of contract is to place the wronged party in a position that s/he would have occupied had the contract been performed in so far as that can be done by the payment of money and without undue hardship to the defaulting party. See *Victoria Falls and Tvl Power Co Ltd* v *Consolidated Lnaglaagte Mines*1915 AD 122.

The defendant admitted that it has not made any payment to the plaintiff even for the admitted figure of $5750. 36. Clause 5 of the lease agreement covers the issue of payment and also includes set off of a debt owed By Gombe Resources (Pvt) Ltd to the defendant. By failing to pay even for the admitted amount, the defendant is in breach of the written contract. The defendant stated that it was not disputing claim number one in the sum of $6430. 54 but did not tender proof of payment of that sum to the plaintiff and again this places the defendant in breach of the lease agreement.

From the evidence led, it is clear that the plaintiff and the defendant differ on part of claim number 2 and the whole of claim number 3. It is therefore important to scrutinize these two claims in relation to the written lease agreement. According to the agreement, the rental rate to be paid as set out in clause 4 is as follows:-

> "4. The rental rate to be applied during normal working hours shall be US$80 per hour; DRY RATE, excluding VAT. Outside normal working hours, a 10% surcharge on the rental rate shall be applied. The property shall be hired out for a minimum of six (6) hours per day, a minimum amount which can only be waivered (*sic)* only if the lessee has reported that the property has experienced a breakdown."

The agreement defines normal working hours as hours that are calculated during standard working hours namely Monday to Friday between 0730 hours and 1730 hours. Outside normal working hours is defined as hours that fall within the scope of a public holiday, Saturday or Sunday. It also includes hours that occur during a standard working day after the hours of 1730 hours.

With respect to the terms of use, clause 8 of the agreement states as follows:

> " 8. The property shall be operated by a competent operator appointed by the lessor. The starting and ending times as it relates to the operation of the property and standby times shall be recorded in the lessor's logbook and plant daily return sheets shall be signed as provided by the lessor's representative, by the lessee after every shift."

The evidence led indicates that daily returns were available for the first claim and in relation to the second claim at least up to the 25th of July 2015. The defendant disputed part of the second claim in relation to standby hours and the whole of the third claim. It is pertinent to note that the agreement did not define standby hours. The Oxford dictionary defines standby as, "readiness for duty or immediate deployment". The Cambridge dictionary

defines the word to mean, "To be waiting and ready to do something or to help". The Collins dictionary defines the word to mean, "Ready to be used when needed".

The parole evidence rule is not cast in stone but allows external evidence to be admitted to give meaning to words- see *Old Mutual Property Investments* v *Metro International (Pvt) Ltd and Anor* HH-53-06. According to the plaintiff, standby hours refers to the minimum hours charged where plant has not worked or has worked less than six hours. According to the defendant, standby excluded the period when the grader was not working and this then relates to part of the second claim and the whole of the third claim which was based on standby hours. The second claim being invoice number 2893 shows the number of hours billed including the 'outside normal hours' claims. The progress claim showing the hours finds support in the written lease in its definition of normal working hours and outside working hours. Clause 4 is also very clear that the grader was to be hired for a ***minimum (my emphasis)*** of six hours per day. This also supports the meaning of standby hours as defined by the plaintiff. The defendant's major bone of contention was that the grader stopped working on 25th July 2015 but there is no proof as to when exactly the breakdown occurred. An email addressed by the defendant to the plaintiff dated the 12th of August 2015 does not indicate the date of the alleged breakdown. Another email addressed by the defendant to the plaintiff dated the 5th of August 2015 states as follows, *We are going to make payment for the first clain (sic) then the second will be done after confirmation.* The plaintiff as stated earlier conceded that a sum of $1360 was to be subtracted from the sum of $23 912 on the second invoice leaving a balance due of $22 552. It is my finding that the plaintiff proved its claim for the stated amount beyond a balance of probabilities.

The basis of the plaintiff's third claim is purely in relation to standby hours since the grader was not working according to the defendant and also that it was only returned on 29 August 2015. The plaintiff and the defendant were not agreed as to who terminated the lease first but what is clear is that the grader was only returned on 29 August 2015. On 4 August 2015, the defendant addressed an email to the defendant stating that, ***"Please note that there are no standby costs for a faulty grader".*** During cross examination, the defendant's witness was taken to task on the meaning of a faulty grader. He explained that a faulty grader is one that is not able to perform duties mechanically. On the other hand under- performing means that it cannot perform what it is tasked to do and it can operate and this depends on the reason for the fault. Fault eventually leads to breakdown. It was put to the witness that fault and underperforming do not render the grader inoperable to which he responded that it depends

on the nature of the fault. He conceded that despite being 'faulty', the grader was still operating but below capacity if regard was had to the hours until finally on 23 July 2015, it stopped working. The email referred to above does not state that the grader had broken down but that it was faulty. This is unlike the email by the defendant to the plaintiff dated the 12th of August 2015 which stated clearly that the grader had broken down. This then meant that the plaintiff was now aware of the breakdown and in terms of the lease, there was supposed to be a waiving of the charges as from the 13th of August 2015. The plaintiff averred that they charged for August 2015 period because as long as the grader had not been returned, it was on the minimum six hours per day charge. The plaintiff not having its grader meant that it could not use it or lease it to other persons. On the other hand, the defendant's view was that the plaintiff was not supposed to get paid since the grader had broken down. Clause 8 of the contract as already outlined envisaged payments to be effected based upon daily returns signed by both the plaintiff and the defendant's representatives. Both the plaintiff and the defendant's witnesses confirmed that the plaintiff's personnel left the site on 26 July 2015 though they were not agreed on the circumstances of the departure. In the absence of daily returns for August 2015, the plaintiff cannot claim any payment.

The legal question in relation to the third claim becomes this- can the payments for the period from the 1st to the 28th of August 2015 be said to have been in the contemplation of both parties (the contemplation principle) given the fact that the grader was returned on 29 August 2015? These damages fall into a special category of damages – see *Shatz Investments (Pty) Ltd* v *Kalovyr-nas* 1976(2)SA 545 and *BAT Rhodesia Ltd* v *Fawcett Security Organisation (Salisbury) (Pvt) Ltd* 1972(2)RLR 22 (G). It is clear from the authorities that the relevant time is the making of the contract and not the committing of the breach. Such damages must be alleged in the pleadings and established by evidence. Perhaps this is what the plaintiff meant by 'holding over damages' but they were not pleaded in the summons and declaration. The parties never contemplated a situation where the personnel of the plaintiff would not be available to confirm the daily returns. The plaintiff cannot therefore succeed on the third claim. The total amount due to the plaintiff therefore is $10 054.36 calculated as follows:

Claim number one (not disputed) = $ 6 430 .54

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|---|---|
| Claim number two (reduced) | = $22 552[1] |
| **SUB-TOTAL** | = $ 28 982.54 |
| Less Gombe Holdings Debt (as per signed lease) | = $ 18 928.18 |
| **TOTAL** | = $10 054.36 |
| **TOTAL DUE** | **= $ 10 054.36** |

The issue of 2% interest per month in the event of default was not canvassed in great detail. The plaintiff merely stated that the contract stipulated that interest at the rate of 2% per month was payable in the event that the defendant did not pay after 14 days of being invoiced. The plaintiff's witness was not cross examined on the issue of interest. As stated already, the defendant's averment was that it was not in dispute of the interest claimed as long as it was charged correctly. The witness was never asked to explain what they meant by this. S 4 of the Prescribed Rates of Interest Act, [*Chapter 8*:*10*] provides as follows:

> "If a debt bears interest and the rate at which interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise. (Emphasis added).

In *Chikomo* v *Yehudah* HH-29-12, MAVANGIRA J (as she then was) stated as follows:

> "In *casu* the rate at which interest is to be calculated is governed by agreement as reflected in the acknowledgment of debt. The respondent cannot therefore, in my view find any escape from the applicants' claim for 25% interest as this is based on or governed by the agreement between the parties."

The defendant agreed in the signed lease to the payment of interest at the rate of 2% per month in the event of default. The defendant admitted that it had not paid any money to the plaintiff in settlement of the debt even for amounts it admitted owing.

The plaintiff sought costs on a higher scale against the defendant. It is trite that costs are always at the discretion of the court. There is nothing in this present case to justify awarding costs on a higher scale. The defendant actually managed to reduce part of the plaintiff's second claim and the whole of the third claim.

[1] The sum of $5750.36 was partly admitted by the defendant for claim number 2 and is therefore part of the $22 552

In the result, it is ordered as follows:

1. The defendant be and is hereby ordered to pay plaintiff the sum of $10 054.36 with interest at the rate of 2% per month calculated from the 21st of October 2015 to the date of payment.
2. The defendant shall pay costs of suit.

*Matsika Legal Practitioners,* plaintiff's legal practitioners
*Mbidzo, Muchadehama, Makoni,* defendant's legal practitioners