REPORTABLE (23)

BRENNAN'S DIESEL SERVICES (PVT) LTD
v
TENDA BUS SERVICES (PVT) LTD

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & OMERJEE AJA
HARARE OCTOBER 16, 2012

E *Morris,* for the appellant
T Chiturumani, for the respondent

GOWORA JA: After hearing counsel in this matter we allowed the appeal with costs. We indicated that our reasons would follow. These are they.

The facts of this matter are that on 16 February 2010, the appellant issued summons claiming:

> "1. Payment of the sum of ZAR 17353.00 being an amount due and owing by the Defendant to the Plaintiff in respect of services rendered and materials supplied by the Plaintiff to the Defendant at the latter's special instance and request in repairing a number of fuel pumps on Defendant's behalf during December 2008 and which sum, despite demand, Defendant has failed or refused to pay;
>
> 2. Interest thereon at the prescribed rate from the 27th January 2010, being the date of demand, to the date of final payment;

3. Costs of suit."

The appellant, as its name suggests, provides service in the repair of diesel fuel pumps. The respondent is a registered public service transport operator. It is common cause that the appellant had on several occasions prior to December 2008 done business with the respondent.

On 19 December 2008 the respondent's representative took two fuel pumps to the appellant's premises for repair. The appellant's personnel stripped and examined each of the pumps. After the fuel pumps were opened up a quotation for the work to be done in the sum of ZAR 24 000 was given to the respondent's representative orally. On being informed of the quotation, the respondent requested the appellant to repair the two diesel pumps and offered to pay the cost of the repairs in instalments of ZAR 2000.00 per month to which the appellant agreed. A job card was then opened for the repair. The parts fitted to each pump are listed at the back of each job card. The pumps were repaired and collected by the respondent's employees on 30 December 2008.

Subsequently the appellant sent two invoices to the respondent for ZAR 9000 and ZAR 15 000. The respondent paid a total sum of ZAR 6 647 and refused to pay the balance. The appellant issued summons for recovery of the same. The matter proceeded to trial at the conclusion of which the court *a quo* issued the following order:

"1. The defendant is absolved from the instance.

2. The Plaintiff shall pay the Defendant's costs of suit."

It is against that order that the appellant now appeals on the following grounds namely:

1. That the learned judge misdirected himself by absolving the respondent from the instance on the basis that the value of the spares and the labour costs had not been proved when such proof is only necessary under the *Actio Legis Aquilia* to prove that damages claimed are fair and reasonable;
2. That the learned Judge misdirected himself in failing to find that the appellant's charges for work done had been accepted by the respondent who had made part payment towards them in acknowledgment of its acceptance;
3. That the learned judge erred in failing to take into account that the respondent's witness in cross examination admitted owing the appellant the balance outstanding; and
4. That the learned Judge misdirected himself in failing to find that the respondent had established no defence to the appellant's action at all and that the entire defence had been an abuse of court process.

Dealing with the second, third and fourth grounds of appeal, the evidence of the appellant's witnesses that a quotation for the repair of the two pumps was given to the respondent who then instructed the appellant to carry out the repairs was not disputed. The respondent's witness Mr Mungwari, did not deny liability to pay the invoiced sum and, as has been noted above the dispute as to whether the amount owed was to be paid in foreign currency or in Zimbabwe dollars was resolved by the court *a quo* in favour of the appellant. The evidence presented on behalf of the appellant established that the respondent did not

challenge the invoices that were generated by the appellant, which invoices reflected that the invoiced sum was to be paid in South African Rand at the rate of R 2000 per week. The unchallenged evidence of the appellant was that the respondent actually paid part of the total invoiced sum of ZAR 24 000.00 in Rand. Over the period extending from 14 January 2009 to 31 December 2009, the respondent had paid an amount of ZAR 6 647. In my view, it would be disingenuous for the respondent to contend on these facts that there was no contract for the payment of the invoiced sum. As to the currency of payment, the learned judge disbelieved the respondent and found as a fact that the parties contracted for payment in foreign and not local currency. In this regard the court *a quo* said:

> "Mr Mungwari was adamant that he did not enter into any agreement to pay in foreign currency with the plaintiff. He prevaricated on whether or not the debt was paid out in local currency or in foreign currency. He exhibited confusion in some of his responses … it seemed to me that he confused other repairs that were paid in local currency … my assessment of the credibility of the witnesses is that plaintiff's witnesses gave their evidence very well in regards to the schedule of payments found in exhibit 3."

The above facts established that there was a valid contract between the parties for materials supplied and services rendered in the repair of two diesel pumps and that the contract price was agreed at ZAR24 000-00. By failing to pay the outstanding balance the respondents were in breach of the contract. The appellant, as the injured party, having performed its obligations in terms of the contract, was entitled to demand specific performance thereof by the respondents. This is what was claimed in the summons.

I turn to ground one of the grounds of appeal.

The terms of the contract having been established, what the learned Judge in the court *a quo* had to consider was whether or not both parties to the contract had performed in terms of their

respective obligations under the agreement. It is trite that contracts freely entered into should be enforced. Contrary to this principle, the learned judge found that the appellant had not proved the value of the repairs to the pumps. This was irrelevant to the claim before the court. This is what the learned judge had to say:

> "Thus even though the defendant agreed to pay for the value of repairs in rands on 19 December 2008 and the plaintiff dispatched to it the invoice for the repairs on 30 December 2008, the plaintiff has failed to prove the value of the repairs. It did not call evidence from its buyers or store man to establish the value of the spares and its mark up. It did not lead any evidence on how labour costs were calculated from its workshop personnel. All we have are global figures that have not been explained."

It was submitted on behalf of the appellant that what was being claimed was a simple contract price, and that the respondent had agreed to discharge its indebtedness to the appellant at the rate of ZAR 2000-00 per week. Mr Mungwari admitted before the court *a quo* that some payments were made in reduction of the invoiced sums although he was unable to state how much had been actually paid by the respondent.

It was further contended on behalf of the appellant that the learned judge in the court *a quo* fell into error by confusing delictual damages with contractual damages and that the *actio legis aquiliae* is not applicable in the circumstances of this case. In *Amler's Precedents of Pleadings,* 4 Ed, the learned author states that:

> "The *actio legis aquiliae* enables a plaintiff to recover patrimonial loss (including a purely economic loss) suffered through a wrongful and negligent act of the defendant … Liability is dependent upon the wrongfulness of the act or omission of the defendant".

In the *aquilian* action, damages are awarded as compensation for patrimonial loss, and are measured by the pecuniary loss, actual or prospective sustained by the plaintiff. The

measure of such loss is often referred to as the *interesse*, which is the difference between the present value of the plaintiff's patrimony and the value which it would have had if the act complained about had never happened. In assessing the level of damages to the corporeal property of a plaintiff the court has to apply a practical method of such assessment and in most cases the plaintiff has to establish what is referred to as 'the reasonable cost of repairs. In *Heath v Le Grange* 1974 (2) S.A. 262, the onus resting upon a plaintiff to prove damage was confirmed by THERON J thus:[1]

> "….It appears to me to stand to reason that, if on the pleadings the onus of establishing his damages has been placed on the plaintiff and he chooses to attempt to prove the patrimonial loss sustained by him by reason of the collision not by producing appraisements of the pre-collision and post-collision values of his vehicle but by producing evidence of what it cost to have repairs done to it, he cannot discharge the onus resting upon him save by proving both that the repairs were necessary and that the cost thereof was fair and reasonable. That this is correct not only follows from what was stated in the judgment of *Scrooby v Englebrecht* but has been accepted in an impressive number of decisions of our Courts since the Scrooby case, some of which have been mentioned in the course of this judgment and at least two of which (*de Witt v Heneck, supra and Paarl Transport Services v du Toit*, supra) are decisions by two-Judge Courts of this Division."

Clearly the *actio legis aquiliae* is not the cause of action with which the court was seized. The appellant did not premise its cause of action on it. The appellant's claim is not for damages arising from delict. In its summons it claimed payment of a specified sum as being due and owing in respect of services rendered and materials supplied under a contract concluded between the parties and fully performed by the appellant on the one hand and partially by the respondent on the other.

[1] At 266H-267C

We accept, as correct, the submissions made on the appellant's behalf by counsel that this was a simple action for a contract price and that the parties had agreed to settle the contract price at the rate of ZAR 2000-00 a week for a period of one year. What the appellant sought in the court a quo was an order that the respondent pay a specified sum of money. An order for the payment of a sum of money in terms of a contract is in fact an order for the enforcement of the contract. In *Jacobs v United Building Society* 1981 (4) S.A.37 NESTADT J, described a claim for payment in terms of a contract in the following terms:[2]

> "Our law draws a clear distinction in relation to the remedies available on breach of contract between specific performance and damages. The former is performance by the person obliged in the very terms agreed upon (Wille Principles of South African Law 6th ed at 381); the latter is a substitutionary performance, the object whereof is to make good the plaintiff's patrimonial loss caused by the defendant's breach of contract. When a creditor under a contract in terms whereof payment is a sum of money due sues for it, this is a claim *par excellence* for specific performance. I have never heard of such claim being put forward in the form of or labelled damages and I entertain no doubt that it would be wrong to do so."

The learned Judge in the court *a quo* absolved the respondent from the instance on the basis that the appellant had failed to prove the value of the parts used in the repair of the pumps. It is clear that in so doing he fell into error and treated the claim as if it were one for delictual damages. What was before him was a claim for specific performance by the respondent of the contract that the parties had verbally concluded. The nature of the contract itself may have confused the Court and caused it to misdirect itself but the claim was clearly stated as one for payment of the sum agreed and for which sum, in the face of the undisputed facts and the findings of credibility made in favour of the appellant by the court a quo, no further proof was required by the appellant. The learned Judge ought, therefore, to have given judgment in favour of the appellant.

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[2] At 39CE

Accordingly the following order will issue:

1. The appeal is allowed with costs.

2. The judgment of the court *a quo* is set aside and substituted with the following:

   (a) The defendant shall pay to the plaintiff the sum of ZAR 17 353.00 together with interest thereon at the prescribed rate with effect from 27 January 2010 to date of payment.

   (b) The defendant shall pay the costs of suit.

ZIYAMBI JA: I agree

OMERJEE AJA I agree

Atherstone & Cook, appellant's legal practitioners

T K Hove & Partners, respondent's legal practitioners