LOGIVATE INCORPORATED (PRIVATE) LIMITED
versus
COMMISSIONER GENERAL OF THE ZIMBABWE REPUBLIC POLICE (N.O.)
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE (N.O.)

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 22 February 2022 & 8 May 2023

Civil Trial – Damages for Breach of Contract

Mr RG Zhuwarara, for the plaintiff
Mr D Jaricha, for the 1st and 2nd defendants

MUSITHU J: The plaintiff is a legal entity duly incorporated in terms of the laws of Zimbabwe. It specialises in the supply of high-tech traffic safety devices, research and continuous professional development. The first defendant is cited in his official capacity as the authority under whose command the entire police service is reposed. The second defendant is cited in his official capacity as the Minister responsible for overseeing the police service in terms of the Constitution of Zimbabwe. The plaintiff instituted proceedings against the defendants seeking relief of specific performance or alternatively damages for breach of contract. The claim is pursuant to a contract for the supply and delivery of Traffic Law Enforcement Equipment signed between the parties in July 2012. The relief sought reads as follows:

> "WHEREFORE, plaintiff claims:-
> e) An Order for specific performance against the Defendants for the payment of the deposit and sums due in terms of the contract between the Plaintiff and the defendants concluded at Harare on 6th August 2021.
> ***In the Alternative***
> f) Payment for damages in the sum of USD$1, 956, 035.00 for breach of contract against the Defendants jointly and severally the one paying the other to be absolved.
> g) Interest at the prescribed rate on these sums from the date of summons to the date of payment in full.
> h) Cost of suit on attorney-client scale."

Background to the Plaintiff's Claim

The claim is set out in the summons and declaration as follows. On 22 June 2012, the plaintiff was awarded a tender, for the supply and delivery of Traffic Law Enforcement Equipment (the equipment) by the State Procurement Board (SPB) under tender number ZRP/FT 05/11. Following the award of the tender, the parties proceeded to sign a contract on 6 August 2012. The plaintiff was represented by one Zvarevashe Masvingise, while the defendant was represented by its Senior Staff Officer Quartermaster. The effective date of the agreement was stated as the date of the signing of the agreement by the parties. The agreement was signed on 30 July 2012.

The equipment which was sold to the defendant is recorded in the said agreement as follows:

- 50 x High-End Speed Hunter Laser Camera Speedtrap Machines and Printers and Accessories;
- 60 x Standard Speed Hunter Laser Camera Speedtrap Machines and Printers and Accessories.

The purchase price for the first 50 speedtraps machines and printers was US$1 170 125, while the purchase price for the 60 speedtrap machines and printers was US$785 910. The purchase price was inclusive of both Cost Insurance and Freight (CIF) to Harare, and Value Added Tax (VAT). The manner in which the purchase price was to be paid was illustrated in tabular format as follows:

Item	**Lot A**	**Lot B**	
%	**Amount payable**	**Amount payable**	**Remarks**
60%	702, 075.00	471,546.00	Initial deposit
20%	234, 025.00	157, 182.00	Within 30 days after delivery.
20%	234, 025.00	157, 182.00	Within 60 days after delivery
Total	**1, 170, 125.00**	**785, 910.00**	

In terms of clause 6.0 of the contract, risk was to pass to the purchaser once the purchaser was satisfied with the quality of the machines delivered. In terms of the breach clause, vide clause 7.0 of the contract, the purchaser was not to be held liable for any change in the price of the equipment, owing to the late delivery of the equipment by the seller or the seller's agents. The same clause further stated that:

> "Without derogating from the provisions of the above paragraph or even in the event of either party breaching any other condition or terms of this agreement and failing to remedy such breach within fourteen days of the written notice by either party, the seller or the purchaser, as the case may be, shall be entitled to cancel this agreement by reason of any breach of the terms and conditions of this agreement."

According to the plaintiff, the first defendant expressed a desire to purchase the said equipment on confirmation of an order to be obtained by the plaintiff from the supplier. Plaintiff obtained the said order which then culminated in the first defendant making a formal request for the said equipment. That request was made through a letter of 30 July 2012 from a Chief Superintendent Thethe S, the Staff Officer Quartermaster to the first defendant. The letter was addressed to the plaintiff and it partly reads as follows:

> **"REQUEST FOR THE SUPPLY OF TRAFFIC LAW ENFORCEMENT EQUIPMENT: ZRP FORMAL TENDER NUMBER ZRP/FT 05/2011**
>
> The above subject is pertinent.
> This office is requesting for supply of **Traffic Law Enforcement Equipment.**
> The total costs of the items is USD 1, 956, 035.00, broken down into lots as follows:

LOT	DESCRIPTION	COMPANY	PRICE US$
1A	50 Speedtrap Machines and Printers	Lovigate Incorporated	1, 170, 125.00
1B	60 Speedtrap Machines and Printers	Lovigate Incorporated	785, 910.00
	Grand Total		**1, 956, 035.00**

> Site visits have since been done with the manufacturers to ensure capacity and this office is satisfied with the quality of products offered.
>
> Respectfully referred."

In partial fulfilment of his obligations, the first defendant allegedly undertook to make an advance payment of 60% on placement of an order in terms of clause 3.0 of the contract, with the remaining 40% being paid after delivery of the said equipment. Delivery was to be made within 4-8 weeks from the date of receipt of the initial deposit. In breach of the said terms, the defendants allegedly failed, neglected and/or refused to comply with their contractual obligations or settle the plaintiff's claim as set out herein.

The Defendants' Plea

In their plea, the defendants averred that the plaintiff's summons was defective to the extent that the plaintiff pleaded evidence by attaching such evidence to its declaration. The defendants also denied that the plaintiff had procured the alleged equipment. They challenged the plaintiff to tender proof to that effect. They also alleged that the plaintiff purchased goods that were outside the scope of the contract between the parties. In short, the defendants denied any liability to the plaintiff.

Pre-Trial Conference Issues

The pre-trial issues were whittled down to just one issue which was captured as follows:

- What is the quantum of damages due to Plaintiff by Defendant for breach of contract?

The Plaintiff's Case

Evidence for the plaintiff was led from its director, Zvarevashe Masvingise. He told the court that the plaintiff responded to a request for proposals (RFP) flighted by the Zimbabwe Republic Police (ZRP) through the SPB. The RFP was for the supply of Traffic Law Enforcement Equipment to the ZRP. Amongst a list of requirements specified in the RFP, bidders were expected to specify in their proposals the unit price, VAT and the total price of each item separately and the global total fee for the entire lot. According to the witness, the plaintiff tendered its bid document that complied with the specifications of the RFP. The total amount quoted in respect of Lot 1A was US$ 1 170 125, while for Lot 1B it was US$785 910. The grand total for the two Lots was therefore US$1 956 035.

The plaintiff's bid was successful and this was confirmed by a letter from the SPB dated 22 June 2012. That letter advised the plaintiff to enter into a procurement contract with the ZRP within a period of 30 days from the date of receipt of the letter. Following the signing of the contract on 30 July 2012, the defendant, through a letter of the same date, placed an order for the supply and delivery of the said machines for the same contract amount that had been quoted by the plaintiff. In the same letter, the first defendant alluded to site visits having been carried out as well as expressing satisfaction with the quality of the products offered.

That the site visits were indeed carried out was confirmed by a letter from the witness to the defendants' Quartermaster dated 10 September 2012. The letter confirmed the travel itinerary for the pre-procurement visit to Medical Sensors India Pvt Ltd (Medical Sensors), India during the period 13-18 September 2012. The witness told the court that it was one of the requirements of the RFP that bidders for the Lot 1 machines must attach letters of authorisation from the manufacturer of the equipment required. That authorisation was supplied by Medical Sensors through a letter dated 23 February 2012. The letter confirmed that the plaintiff was duly authorised to import, sell, distribute and offer technical support for the equipment manufactured by Medical Sensors within Zimbabwe and other countries in the Southern African region.

Following the site visit to India, the defendant compiled a report of that visit and their findings. One of the gadgets manufactured by Medical Sensors for speed traps was the Speed Hunter-11 Laser Camera system. That system comprised of speed measurement with inbuilt computer and camera. The combination allowed targeting a single vehicle within a group of

vehicles and recording both the vehicle image and the measured speed as proof violation of the speed limits thereby eliminating the margin of error to a negligible percentage. The system also allowed the capturing of vehicle images from a range of 10-300 metres. The report recommended that:

- Two samples of the Speed Hunter 11 Laser Auto Camera System be given to the Traffic Branch on arrival for user trial.
- if the users were satisfied with the speed-traps then orders should be made for the purchase and supply of the machines;
- calibrations and repair of the machines be done locally in order to reduce expenses;
- When purchased, the speed traps should be distributed to traffic stations including Highway Patrol.
- The supplier should equip the user departments with the requisite skills of repairing and calibrating the machines.

By way of a letter dated 7 November 2012, the second defendant through the Secretary of the Ministry of Home Affairs (the Secretary), issued a duty free certificate No. 171/12 with the Zimbabwe Revenue Authority (ZIMRA) to facilitate the clearance of the pre-production samples, being accessories for 2 Speed Hunter Cameras, duty free. The letter stated that the accessories were purchased for US$3 000. An export invoice from Medical Sensors dated 31 October 2012, described the equipment as "Accessories for Speed Camera Consisting of Tripod, Canon Portable Printer and Power Supply Unit". The unit price was US$1500, which translated to a total cost of US$3 000 for the complete set. The equipment was imported through Harare International Airport under Bill of Entry number C 26809 of 14 November 2012.

The witness stated that the defendants reneged on fulfilling their obligations under clause 3 of the agreement. More importantly, the defendants failed to make the 60% prepayment which was required on placement of an order by the plaintiff. The plaintiff's representatives wrote several letters to the defendants' officials between March 2014 and February 2018 in a bid to nudge the defendants into fulfilling their contractual obligations. The communication culminated in a series of meetings between the plaintiff's representatives and officials from the second defendant's offices. Following one such meetings, on 27 February 2017, the Permanent Secretary in the second defendant's ministry wrote to the plaintiff as follows:

"RE: CONTRACT BETWEEN ZIMBABWE REPUBLIC POLICE AND LOVIGATE INCORPORATED PRIVATE LIMITED

Pursuant to a meeting which was held between yourselves and officials within my Ministry, some consultations were made with the Zimbabwe Republic Police so as to ascertain the *status quo* of the contract that was entered into between Lovigate Incorporated and Z.R.P.

Kindly take note that whilst ZRP still acknowledges the contract which they entered with Lovigate, it is not them but the Government of Zimbabwe which entered into a contract with UNIVERN through a Public Private Partnership initiative for the same supply of goods and services. The current partnership between the Government and UNIVERN is premised on Built Operate and Transfer arrangement meaning that the project is funded by the private partner after which UNIVERN will be recoup from the project as it progress.

Currently ZRP is not in a position to raise the required 60% of funds required upfront by Lovigate given the current economic situation prevailing in the country. More so, it will be difficult for ZRP to raise those funds as it will result in operational problems and duplication of services which are being offered to them by UNIVERN on behalf of the Government of Zimbabwe." (Underlining for emphasis)

The letter from the Secretary prompted a response from the plaintiff's legal practitioners. Their letter of 14 March 2018 reads in part as follows:

"……

Your letter of even reference dated 27th February *ultimo* has been referred to us with instructions to respond to the same and represent our client henceforth. To enable us to substantively advise our client and for the avoidance of doubt, may you please clarify the following:

1. Was the Public Private Partnership between UNIVERN and the Government of Zimbabwe through any resolution of the then State Procurement Board? If so, may you please avail us a copy or full details thereof.
2. May we have copies of the "No Objection" sought by, and granted to, the Zimbabwe Republic Police for the Integration of the Electronic, vehicle and Fire Arms Management System through the then State Procurement Board **PBR 0665B**?
3. We require copies of the Request by the Zimbabwe Republic Police, directly to the then State Procurement Board which was approved through **PBR 0828** of August 30, 2016.

….."

Further consultations that ensued between the parties did not yield the result that the plaintiff had hoped for. On 29 May 2018, the plaintiff's legal practitioners wrote to the Secretary giving notice of the plaintiff's intention to institute proceedings in terms of the State Liabilities Act[1]. The material portion of the letter that is relevant for purposes of these proceedings reads as follows:

"**RE: NOTICE OF INTENTION TO SUE: LOVIGATE INCORPORATED (PVT) LTD**

……..

The basis of the law suit is that;

[1] [*Chapter 8:14*]

1. ……..
2. ……
3. A contract was signed by and between the parties on 30th of July 2012. Thereafter, a pre-production site visit was carried out from the 13th-18th of September 2012 by a delegation from the Zimbabwe Republic Police.
4. Two Speed Hunter Cameras were acquired to facilitate user trial and training.
5. The user trial and training was attended by various police departments and all such departments that participated recommended the purchase and deployment of the Speed Hunter Cameras.
6. The Speed Hunter Cameras were certified by the Standard Association of Zimbabwe (SAZ) as compliant with the technical specifications of the tender.
7. The Zimbabwe Republic Police subsequently placed an order for the speed cameras to which our client issued an invoice.
8. The Zimbabwe Republic Police sought a price reduction. The request was granted and communicated in the letter dated 2nd March 2015.

……..

Our instructions are to demand specific performance in respect of the contract that is still in existence between Zimbabwe Republic Police and our client failing which we shall proceed with litigation without further ado or recourse to you and make a further claim of interest and legal costs."

The letter provoked a response from the Civil Division of the Attorney General. In their letter of 28 June 2018, the Civil Division admitted the existence of the contract between the parties, but averred that financial constraints hindered performance of the contract. The Government of Zimbabwe then intervened through a Public Private Partnership arrangement. The ZRP was merely a beneficiary of that contractual arrangement between the Government of Zimbabwe and UNIVERN, the private partner identified for the project. The project was being funded by the private partner, after which the private partner would recoup its investment from the project upon completion. The legal practitioners reiterated the position that the first defendant was unable to fulfil the conditions under paragraph 3.0 of the contract because of financial constraints.

According to the witness, the plaintiff's claim for damages was anchored on four bases, which he summarised as follows: US$637 837.50, being prejudice incurred by the plaintiff in respect of lost income on the sale of Speed Hunter Cameras; US$1 015 000. being prejudice on calibration income that the plaintiff expected to earn for 10 years; US$254 845.57, being prejudice on consumables income the plaintiff also expected to earn for 10 years; US$48 351.93 being a claim for costs directly incurred by the plaintiff in pursuit of the contract. These amounts all add up to US$1 956 035, which is what the plaintiff claims herein.

The witness justified the plaintiff's claim on the basis that the defendants placed an order for the equipment through their letter of 30 July 2012. That letter also confirmed that the

defendants had the financial capacity to pay for the equipment. The witness averred that had the contract been performed, the plaintiff would have earned the income under the first three heads, save for the claim under the fourth head which represents direct costs incurred by the plaintiff.

Under cross examination the witness admitted that calibration costs only arose when the equipment malfunctioned. The calibration costs were also not part of the contract. The witness explained calibration as the maintenance process that is designed to ensure that the equipment functions as per standard procedure. That explained the engagement of the Standards Association of Zimbabwe in the whole process. The equipment had been certified by that entity. The amounts being claimed for calibration were based on the costs of the expected maintenance services to be carried out by the plaintiff. The witness also explained that it was the responsibility of the plaintiff to supply the required consumables as well as attend to repairs, maintenance and providing back up service parts.[2]

The witness also told the court under cross examination that the first two cameras that were supplied as part of the pilot phase were not paid for. The two cameras were not included in the computation of the prejudice incurred on the sale of the Speed Hunter Cameras (they were not included in the 50 high-end speed hunter laser cameras and the 60 standard speed hunter laser cameras). These were part of the claim for costs incurred directly by the plaintiff.[3]

Defendant's Case

Mr *Jaricha* for the defendants told the court that all the officers that were involved in the procurement of the equipment had left Police service. The defendants' case was thus being opened and closed without calling any witness. The quantification of damages did not necessarily require an official of the defendants to refute, but an expert who had expert knowledge of this type of equipment and how it operated. The defendants did not dispute the alleged breach of the contract. What they disputed was their liability for the alleged breach.

The Submissions

At the conclusion of the trial, counsels filed their written closing submissions.

The Plaintiff's Submissions

It was submitted that the damages sought by the plaintiff were contractual in nature. Following the breach by the defendants, the plaintiff had to be placed in the same position it

[2] Page 14 of the tender document which is found on p 30 of the record.
[3] See the computation of damages schedule on p 179 of the record.

would have been in had the contract been performed. Citing author *R.H. Christie* in his book Business Law in Zimbabwe, the plaintiff averred that contractual damages were intended to compensate the victim for what it would have gained, but for the breach. If a profit would have been made from the performance of the contract, then the innocent party should be able to claim that profit. *In casu*, damages were limited to what the plaintiff termed positive interest.

The plaintiff calculated the total amount that it would have received from the defendants from the sale of the speed hunter cameras (for both Lot 1A and Lot 1B), calibration costs (for both Lot 1A and Lot 1B) plus consumables for a ten year period. The total amount added up to US$6 287 440.53. This was however not the amount that the plaintiff was claiming. Rather, the plaintiff was claiming a mark-up of US$ 637 837.50, representing a profit that it would have made from the sale of the speed hunter cameras. This figure was arrived at after deducting the cost, insurance and freight from the above global figure. It was submitted that in line with the law contractual damages, what the plaintiff described as mark-up was in fact its actual profit or positive interest, being the income it would have earned had the contract been performed.

Then there was the mark-up on calibration income. The mark-up on the calibration income in respect of both Lots 1A and Lot 1B was claimed as US$1 015 000. This amount was also arrived at after deducting cost, insurance and freight as well as VAT. In quantifying that amount, the plaintiff took into account the following factors: that calibration was to be undertaken every 6 months; the two sets of cameras (Lot 1A and Lot 1B) had a minimum lifespan of 10 years; the calibration cost for every 6 months per camera was US$1 661.27 in respect of Lot 1A and US$1 573.83 in respect of Lot 1B.

The mark-up on consumables was set at US$ 254, 845.57. As with the mark up on calibration, the amount was arrived at after deducting cost, insurance and freight as well as VAT. An assumption was made that the cost of consumables per camera was US$710. 48 per annum.

The last component of the plaintiff's claim was in respect of costs incurred for the India trip, the two cameras that were imported and not paid for, as well as training costs. The amounts were summarised as follows: US$6 065.60 being travelling expenses to India (visas, airfares and within India travel); US$4 000 in respect of accommodation (200 x 4 x 5 days); US$1 785.33 in respect of training costs; US$36 351.93 (US$23 402.50 + US$13 098.50) for 2 cameras handed to the ZRP.

The plaintiff addressed the issue of mitigation of damages in its closing submissions. It argued that the onus to prove that there was need to mitigate losses lay on the defendant. The plaintiff did not need to plead or prove that it had done what was reasonably possible to mitigate its losses. It was also argued that the defendants chose not to lead any witnesses and offered no substantive response to the issue of the quantum of damages. The plaintiff was therefore entitled to the full damages as quantified.

The plaintiff also addressed the issue of prescription. Its witness was put to task under cross examination as regards the time when the cause of action arose. The plaintiff argued that the question of prescription could not be raised at this stage since that defence was never pleaded by the defendants. That was a requirement of the law per s 20(2) of the Prescription Act[4]. Such a defence constituted a plea in bar which ought to have been taken by way of a special plea. At any rate, under the law, a debt became revived once it was acknowledged by the defendant.[5] Reference was also made to the letters from the second defendant to the plaintiff dated 27 February 2018[6], and another from the Civil Division to the plaintiff dated 28 June 2018[7]. The plaintiff argued that in those letters, the defendants acknowledged the existence of the contract and their obligation to pay. They however pleaded an inability to pay. That effectively constituted a waiver of the defence of prescription.

The last submission was with respect to the currency in which the damages ought to be paid. The plaintiff justified its claim in the United States dollar currency for the following reasons. The equipment was manufactured outside the country. The parties carried out a site visit to the supplier in India. Funds for the purchase of the equipment would have to be remitted to India in foreign currency. The equipment would have been imported from India thus requiring import duty exemptions and other important documentation. The agreement between the parties therefore qualified as a foreign obligation. The transaction could not have been performed in local currency. Section 22 (1)(d) of the Finance Act No. 2/2019 was therefore not applicable. An order for damages in United States dollars would adequately place the plaintiff in a position that it would have been in had the contract been performed.

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[4] [*Chapter 8:11*]
[5] *Mashonaland Tobacco Company v Mahem Farms & Ano* HH 597/18. See also W.A. Joubert, *The Law of South Africa*, Vol 21; *Tanner v Smart* 30 R.R. 461
[6] p 135 of the record
[7] p 141 of the record

The Defendants' Closing Submissions

The defendants did not deny that they breached the contract. It is the liability to pay damages that they contested. They argued that damages were not intended to punish the transgressor. Rather, damages were intended to place the innocent party in the same position as if the contract had been performed.[8] The defendants also highlighted the importance of the principle of mitigation in claims for damages. In cases where there was an available market for the goods that were the subject of the contract, then the seller was expected to mitigate its loss by selling the goods to an alternative buyer within the market.

It was submitted that the plaintiff, and by extension the defendants did not receive the equipment from the manufacturer. No goods were dispatched from India to Zimbabwe. The contract died a still birth with no prejudice to the plaintiff apart from a few costs that the plaintiff incurred in pursuit of the contract. The defendants averred that the starting point for the computation of the damages was the contractual value. The plaintiff was required to supply equipment worth US$1 956 035, which coincidentally was the same amount the plaintiff was claiming herein. The defendants proceeded to comment on the individual claims as follows.

The requirement for the calibration of the machines was provided for in the contract in para 3.0 thereof. The plaintiff undertook *"to provide calibration and repair services for the machines' entire lifespan."* The defendants argued that it was not clear from the contract whether the calibration service was for a fee or for free. It was at most a mere pledge to render those services, and the plaintiff could not rely on a mere pledge to claim damages. For that reason no damages could be claimed on the basis of loss of income from calibration because there was no contract that bound the parties for the provision of such a service. The claim for damages in the sum of US$1 015 000 was therefore incompetent.

On the claim for damages on consumables, the defendants argued that the entire contract did not speak of the supply of consumables by the plaintiff. It was not a requirement that consumables were to be supplied by the plaintiff alone. It was averred that under cross examination, the plaintiff's witness referred to the bidding documents, which the defendants argued did not bind them. The defendants pointed out that in terms of their request for proposals, they reserved the right to alter the scope of work specified during the contract negotiations. There being no other contract apart from the one signed by the parties, the parties rights and obligations had to be confined to those set out in the signed memorandum.

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[8] *Robinson v Harman* 1848 1 Ex Rep 850, 154 ER 363

The defendants further averred that at common law an invitation to tender was akin to an invitation to negotiate and not an offer. It did not create a legally binding agreement until an offer was subsequently made, accepted and a contract signed. One could not predicate their claim on the terms of an offer which was subsequently altered in the contract signed by the parties. A mere undertaking could not found a cause of action unless such undertakings were made terms of the contract. For that reason, the defendants argued that the claim for US$254 845.57, in respect of lost income from consumables was insupportable and ought to fall.

As regards the claim for the two sample speed hunter cameras, the defendants commented as follows. The plaintiff's witness had conceded under cross examination that the two cameras were from the two separate Lots, and were supposed to be removed from the undelivered Lot had the contract been fully performed. For that reason, the two cameras had to be excluded in the computation of damages for the undelivered equipment since they were already catered for under the claim for costs directly incurred by the plaintiff in the course of pursuing the venture.

The defendants argued that they had made important assertions which fundamentally vitiated the basis of the plaintiff's claims. For that reason, the court was invited to exclude, in its computation of damages, the claims based on calibration, consumables and the double billing on the two sample cameras.

Lastly, the defendants commented on the currency in which the claims were denominated as follows. The parties' obligations arose in July 2012 following the consummation of the contract. The parties' obligations and liabilities were thus ascertained before the effective date of Statutory Instrument 33/ 2019. Those obligations were denominated in the United States dollar currency. The plaintiff's claims therefore fell within the ambit of s 4(1)(d) of that law. The various amounts denominated in the United States dollar currency were transformed into local currency obligations by operation of law. They did not fit within the exceptions permissible by the law.

The Analysis

I must state at the outset that the parties' pleadings were materially deficient in substance. It was only in evidence and in closing submissions that the court was able to decipher the scope of the plaintiff's claim and the defendants' defence. The plaintiff's summons and declaration did not set out with the expected clarity and exactitude, the nature,

extent and grounds of the cause of action as would be expected especially in a highly technical claim of this nature. Similarly, the defendants' plea was afflicted by the same deficiencies. In fact they were two of them.

There was a special plea in bar which raised two objections: absence of jurisdiction by this court and the failure to comply with s 6 of the State Liabilities Act with respect to the absence of notice to institute proceedings.[9] That plea was issued and filed on 27 September 2018. It appears to have been abandoned along the way for the legal issues raised therein were never pursued. The other plea was issued and filed on 16 April 2019. In that one, the defendants pleaded to the merits of the plaintiff's claim. That plea contains bare denials. It hardly meets the threshold expected of a plea as required by r 37(1) of the High Court Rules, 2021 (the Rules).[10] This kind of inattention to detail does not reflect the seriousness with which pleadings must be approached at this level of litigation.

The defendants' nightmare does not just end with the poorly prepared pleadings. It also shows in the half-hearted manner in which they approached the trial itself. It is common cause that the defendants did not deny that they were in breach of the contract. What they contested was their liability to pay damages. Can a party to a contract who does not deny a breach completely escape liability, more so without placing any evidence before the court in rebuttal of same? This is the issue that the court must deal with in these proceedings. The defendants' case was opened and closed without calling any witnesses to give evidence in rebuttal of the plaintiff's evidence on the question of liability and the extent of such liability. The defendants' submissions are therefore only relevant to the extent that they address issues of law in claims of this nature, and where they seek to poke holes in the plaintiff's claim.

The position of the law is trite in this regard. What is not denied is taken to have been admitted.[11] It is with the above in mind that the plaintiff's claims will be considered under the four broad heads in which they were set out in evidence.

The Law in damages claims of this nature

With the exception of the claim for costs directly incurred by the plaintiff, the other three heads of claims relate to the alleged loss of income occasioned by the defendants' breach.

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[9] [*Chapter 8:14*]

[10] Rule 37 (1) states as follows:

> "(1) The defendant's answer to the plaintiff's declaration shall be called his or her plea, and it shall set forth concisely the nature of his or her defence, and deal with the allegations in the declaration as provided for in rule 36(11)-(18)".

[11] *Fawcett v Director of Customs and Others* 1993 (2) ZLR 121 (SC)

Put differently, the plaintiff expected to make a profit from this transaction. In determining the competency of such a claim, the court can do no better that an advert to the words of CORBETT JA *in Holmdene Brickworks (Pty) Ltd* v *Roberts Construction Co Ltd*[12], where he said:

> "To ensure that undue hardship is not imposed on the defaulting party…..the defaulting party's liability is limited in terms of broad principles of causation and remoteness to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded by the law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (*Shatz Investments (Pty) Ltd* v *Kalovyrnas* 1976 (2) SA 545 (A) at p 550). The two limbs, (a) and (b) of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of Hadley v Baxendale (1854) 150 ER 145, which read as follows:
>
> > 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"
>
> …..The damages described in limb (a) and the first rule in *Hadley* v *Baxendale* are often labelled 'general' or 'intrinsic damages, while those described in limb (b) and the second rule in *Hadley* v *Baxendale* are called 'special' or 'extrinsic' damages."

What is clear from the above dictum is that it is critical for a party that seeks to claim damages on the basis of an alleged breach of contract to particularise the nature of the breach and the respective head under which damages are sought. In the context of damages for loss of profit, the position of the law is that not all breaches of contract will entitle a claimant to recover damages for loss of profits. In *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel* v *Friedman*[13], the court held:

> "…. A claim for damages in the form of loss of profits is not necessarily special damages. Such loss of profits may be general damages. It depends on the circumstances of each case and in particular the type of loss of profits being claimed. In the *locus classicus* on the subject, namely *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD1 INNES CJ at 22 said:
>
> > 'Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom ….. Moreover, it is the duty of the complainant to take all legal steps to mitigate the loss consequent on the breach …. It follows that damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance.'." (Underlining for emphasis)

[12] 1977 3 SA 670 (A) at 687
[13] 1983 (3) SA 309 (T) at p 393E-394A

In the case of *Rowland Electro Engineering (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation Ltd*[14], GOWORA J (as she then was) explained the difference between general and special damages as follows:

> "……General damages are the loss which a plaintiff suffers as a direct result of the breach of the contract, or is the intrinsic loss suffered by the plaintiff and is due to the diminution of the value of the subject matter of the contract or the impairment of its use. On the other hand special or extrinsic damages constitute loss flowing indirectly from the breach of the contract and extend to all the property. …." (Underlining for emphasis)

The theme that runs through the above cited authorities is that damages for loss of profits ordinarily fall under the genre of special damages. The critical question for the court to consider in the present matter is whether the loss of profits, in the form of the mark-up that the plaintiff expected to earn was too remote as not to have been within the contemplation of the parties at the time the contract was consummated. The respective heads under which the claims were made will be considered hereunder in determining that issue.

Prejudice on the sale of the Speed Hunter Cameras

The plaintiff claimed that it expected to earn a profit of US$637 837.50 by way of a mark-up from the sale of the speed hunter cameras from both Lot 1A and Lot 1B. It is common cause that on 30 July 2012, the very day that the contract was signed, the first defendant, through his Staff Officer Quartermaster, made a written request to the plaintiff for the supply of the equipment. The communication triggered a wave of activities from both sides. Teams from both sides visited the manufacturer of the equipment in India. A report was thereafter generated by the first defendant's officials recommending the purchase of the equipment.

Two samples were imported for user trials. The relevant user demonstrations were done by the plaintiff's officials to the satisfaction of the defendants' officials. All that was left was for the defendants to release funds for the supply of the requested equipment. In their closing submissions, the defendants did not refute the plaintiff's claims under this head. The court has no reason to doubt, in the absence of evidence in rebuttal by the defendants, that it was within the contemplation of the parties that had the defendants performed their obligations consistent with their request for the supply of the equipment, then the plaintiff would have earned its income in the form of a mark-up. That mark-up represents the profit the plaintiff expected to earn from the transaction.

[14] HH 3-2007 at page 10 of the cyclostyled judgment

The plaintiff was not the manufacturer of the equipment. It was at most a distributor of equipment manufactured by the manufacturer in India. Nevertheless, it had the expertise in not only dispensing, but operating equipment of this nature. The defendants had no such expertise. For if they had such expertise, they would not have gone to tender to acquire equipment that was exclusively for use by the Police. They had to outsource the procurement of that service which was essential to their operations. The procurement of that service had to come at a cost especially where a middlemen was involved. The defendants had no such internal middleman of their own. They needed that service from elsewhere. From the nature of the contract, the plaintiff occupied the position of a middleman. A middleman is entitled to earn a fee in return for services rendered in matching the procurer of the equipment and the supplier. The defendants cannot surely contend that the plaintiff was acting in that capacity gratuitously. It was doing so in order to earn a profit in the form of mark up. That the plaintiff was entitled to a mark-up was not disputed by the defendants as already noted herein.

Prejudice on Calibration Income

The claim was based on the calibration services to be conducted every 6 months per camera for a lifespan of 10 years. I am persuaded by the defendants' argument that it was not clear from the contract whether the plaintiff would provide calibration at a cost to the defendants. In terms of clause 3.0 of the contract, the plaintiff undertook to "*provide calibration and repair services for the machines' entire lifespan."* The plaintiff's own response to the tender was silent on the issue of the payment for calibration.[15] In the absence of independent evidence corroborating the plaintiff's claim, the court is not satisfied that the plaintiff was entitled to receive any calibration income and that it was proved that it was within the contemplation of the parties that such income would accrue to the plaintiff. As correctly submitted by the defendants, the plaintiff made an undertaking to provide calibration but forgot to mention whether or not it would be at a cost to anyone. A mere undertaking cannot be a basis for making a claim for loss of income especially when the parties did not relate such undertaking to financial obligations by either party. The claim is devoid of merit.

Prejudice on Consumable Income for 10 years

The same fate that befell the claim for loss of income on calibration services must befall this claim. As correctly argued by the defendants, the entire contract did not speak of the

[15] Page 14 of the plaintiff's tender document, being p 30 of the record.

supply of consumables by the plaintiff alone. Clause 9.0 of the plaintiff's tender document spoke of repair services, maintenance and back-up parts. The same clause further stated that *"the work must be carried out on the device by authorised service personnel in Zimbabwe, whenever required. Only original back up service parts from the manufacturer will be used."* The tender document does not define the "authorised service personnel in Zimbabwe". What was clear was that back up service parts had to be sourced from the manufacturer of the equipment. The plaintiff was under no obligation to supply the back-up service parts. It is not clear how the plaintiff would have suffered any loss under this head when it was not required to supply the back-up equipment. The claim is therefore devoid of merit and must be dismissed.

Claim on costs incurred by the Plaintiff

As already stated, the defendants did not contest the amounts stated under this head save for the cost of the two cameras imported for user trials. Their submission was that these should not be considered in the computation of damages in the three heads above since they were catered for under this head. It was not disputed that these two cameras and their accessories were indeed imported at the plaintiff's cost. The exact costs incurred in the importation of the two cameras as computed by the plaintiff were not disputed by the defendants. Just as is the case with travelling expenses to India, accommodation expenses, and training costs, the computed amounts were not contested by the defendants.

The two cameras were for user trials. The defendants did not suggest to the court that the amounts claimed as direct costs for their acquisition included the mark-up that was claimed for the equipment that was to be imported under the first head of damages. As already stated, the defendants did not challenge the damages for loss of profit as calculated and presented under the first head. It was not suggested that the said amount of US$637 837.50 unjustifiably included mark up for the two cameras that had already been imported. For that reason, I find the plaintiff's claim incontestable.

The currency in which damages must be paid

It was argued on behalf of the plaintiff that the procurement contract involved the purchase of equipment from a foreign entity and the remittal of funds offshore. The transaction therefore constituted a foreign obligation within the contemplation of s 44C (2)(b) of the Reserve Bank of Zimbabwe Act[16]. The defendants on the other hand argued that the alleged foreign obligations between the parties arose in 2012, and were therefore affected by Statutory

[16] [*Chapter 22:15*]

Instrument 33 of 2019. All the United States dollar obligations were transformed into Zimbabwean dollar obligations by operation of that law.

On 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS), through the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33/19" or the instrument). The instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142/2019). The 24th June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act are sections 22 and 23, which state in part as follows:

> **"22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation**
> 1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—
> (a) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and
> (b) ……..; and
> (c) that such currency shall be legal tender within Zimbabwe from the first effective date; and
> (d)…….
> (3)…..
> (4) For the purposes of this section—
> (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar;
> (b) ……..; (Underlining for emphasis)
>
> **23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date**
> (1) For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe."

Section 22(1)(d) of the Finance Act states that *".....for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar…".* The words *"financial or contractual obligations"* are defined in s 20 of the Finance Act to include (for the avoidance of doubt), judgment debts. Judgment debt is defined in the same section to mean:

> "…….a decision of a court of law upon relief claimed in an action or application which, in the case of money, refers to the amount in respect of which execution can be levied by the judgment creditor; and, in the case of any other debt, refers to any other steps that can be taken by the judgment creditor to obtain satisfaction of the debt (but does not include a judgment that has prescribed, been abandoned or compromised)" (underlining for emphasis).

The words *"assets and liabilities"* are not defined in the Finance Act or in S.I. 33/19. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited* v *N.R. Barber (Private) Limited & Ano*[17]. The court said:

> "The liabilities referred to in s 4(1)(d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.
>
> Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters." (Underlining for emphasis)

Further down in the same judgment the court went on to state that S.I. 33/19 was specific to the type of assets and liabilities excluded from s 4(1)(d), reasoning that the origin of the liabilities was not a criterion for the exclusion. The court highlighted that:

> "What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C(2) of the Reserve Bank of Zimbabwe Act…." (Underlining for emphasis).

[17] SC 3/20 at p 9

In their closing submissions, the defendants submitted that as at July 2021, they had a liability to the plaintiff, while the plaintiff had an asset in the form of a debt owed by the defendants. They are probably correct. Their only problem is that even though the contract was valued in the United States dollars before the first effective date, this court is not dealing with a straight forward contract in which the value of the contract is the sole issue. The court is dealing with a claim for damages arising out of a breach of that contract. The words "assets" and "liabilities" as used in s 22(1)(d) must be interpreted not by reference to the value of the transaction in which the plaintiff was expected to supply equipment to the defendants. The dispute before the court is not about the currency in which the plaintiff was required to import the equipment. Those amounts were known and agreed under the contract.

The dispute now is about the extent of the defendants' liability to the plaintiff arising from a breach of the contract. Going by the defendants' own version of "asset" and "liability", can one accept that the two were "valued" in the United States dollar currency immediately before the first effective date? I do not think so. What was already valued and expressed in the United States dollar was the value of the contract. It is known by merely reading the contract. The defendants' liability to the plaintiff for damages was not valued or expressed in the United States dollar because it was unknown. As noted in the Zambezi Gas Zimbabwe case, if the value of "the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula"**,** then s 22(1)(d) of the Finance Act would not apply.

The extent of the defendants' liability to the plaintiff was only ascertained by this court after the first effective date. The parties are before the court specifically for that. They could not agree on the extent of the defendants' liability, which liability is an asset in the hands of the plaintiff. Having been so ascertained, that liability must in my view, be dealt with in terms of s 22(1)(e) of the Finance Act, which states:

> "(e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis.

The amounts claimed by the plaintiff herein can only escape treatment under s 22(1)(e) above if they fall within the ambit of s 44C (2)(b) of the Reserve Bank Act. That section states as follows:

> "**44C Issuance and legal tender of electronic currency**
> (1) ……..
> (2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of—

> (*a*) funds held in nostro foreign currency accounts, which shall continue to be designated in such foreign currencies; and
> (*b*) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency." (Underlining for emphasis).

Does the plaintiff's claim constitute a foreign loan or a foreign obligation? I do not think so. I have already observed that the underlying contractual obligation was the supply of the equipment by the Indian manufacturer. That was clearly a foreign obligation as it required the plaintiff to make payments in a foreign currency acceptable to the manufacturer. But the defendants committed a breach which means that the contract cannot be performed any more. The plaintiff can only escape treatment under s 22(1)(e) of the Finance Act if it can prove that its case still fits within the ambit of s 44C(2)(b) of the RBZ Act. The reasons given by the plaintiff in its closing submissions for seeking refuge under s 44C (2)(b) are without merit. The mere fact that the cameras were manufactured in India and that the parties visited India does not bring the obligation within the ambit of s 44C(2)(b) of the RBZ Act once the parties accept that the defendants committed a breach by failing to perform their obligations.

The plaintiff submitted that funds would have to be remitted to India for the purchase of the two advance cameras that were imported for user trials. In the computation of the damages schedule, the two cameras are listed amongst the costs directly incurred by the plaintiff. In other words, the plaintiff has already paid for the two cameras. It does not owe the supplier anything. It has no foreign obligation so to speak. The other justification was that the speed cameras and accessories would have to be imported from India. I have already determined that the contract is no longer capable of performance. The plaintiff is not obliged to import and supply any equipment to the defendants any more. Consequently, the defendants are not obliged to discharge their obligations in a foreign currency since the transaction collapsed. The plaintiff's claim must therefore be treated in terms of s 22(1)(e) of the Finance Act.

COSTS

Earlier on in the judgment, I expressed the court's dissatisfaction with the manner in which both parties pleaded their cases herein. It is unacceptable for legal practitioners to abuse the litigation process through a surreptitious amendment of pleadings via the backdoor. The plaintiff sought costs on the legal practitioner and client scale. I found no justification for the award of costs on that scale.

On their part, the defendants took an irresponsible risk by proceeding to trial, opening and closing their case without leading any evidence in rebuttal of the damages claim. They filed their closing submissions after the cross examination of the plaintiff's key witness. Their somewhat laid back approach to a claim of this magnitude betrays a serious lack of care and concern about the ramifications of an adverse award in general. An adverse order of costs should therefore not be a cause for alarm to them under the circumstances.

DISPOSITION

It is ordered that:

1. Judgment is hereby entered for the plaintiff.
2. The first and second defendants shall pay to the plaintiff, jointly and severally, one paying the other to be absolved, the following damages in the Zimbabwean dollar currency or RTGS at the prevailing interbank rate on the date of payment:
   a) US$637 837.50 being profit lost on the sale of High-End Speed Laser Cameras and Standard Speed Hunter Laser Cameras.
   b) US$48 351.93, being costs incurred by the plaintiff in respect of:
      i. travelling expenses to India;
      ii. accommodation;
      iii. Training;
      iv. The purchase of the 2 cameras imported on behalf of the defendants for user training.
3. Interest at the prescribed rate on the above amounts from the date of summons to the date of payment in full.
4. The first and second defendants shall pay the plaintiff's costs of suit on the ordinary scale, jointly and severally, one paying the other to be absolved.

Stansilous & Associates, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners