ADVANCE AFRICA (PVT) LTD
versus
BIRMET INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 20th JULY 2020, 14TH & 15TH SEPTEMBER & 18TH NOVEMBER, 2020

Civil Trial

C. Makwara, for the plaintiff
B. Muzenda, for the defendant

ZISENGWE J: This is a claim based on an alleged breach of contract. The plaintiff claims that the defendant company is liable for the loss it suffered owing to the malfunctioning of an integral unit of its gold processing mill after the latter supplied and installed defective components. That section of the mill is known as the "agitation plant".

The plaintiff seeks to recover three separate sums of money emanating from the loss it allegedly suffered consequent to the breach complained of. Each sum of money corresponds to a separate but related cause of action.

In a nutshell the plaintiff's claim is founded on the following.

Firstly, alleged poor workmanship in the fabrication and installation by defendant of three constituent parts of the agitation plant namely the shaft, impellers and couplings. Secondly, the alleged procurement and supply by the defendant of faulty gearboxes and motors meant to run the agitation plant from a South African based company and thirdly consequential damages attendant to loss of earnings suffered by plaintiff during the period that the agitation plant failed to run.

The parties

The plaintiff is company a duly incorporated in terms of the laws of and operating in Zimbabwe. It is apparent from the very nature of this dispute that its main interest lies in gold mining and extraction. It was represented both in the conclusion of the contract which forms the subject matter of this dispute and throughout these proceedings by its Managing Director Mr Brennan James Michael De Bruyn.

As with plaintiff, the defendant is also a duly registered company. The evidence reveals that it is a manufacturing concern whose interest and experience lies in the fabrication of mining equipment and related components. Mr Patrick Frank is Mr Dr Bruyn's opposite number within the defendant company.

The background

An appreciation of the nature of the dispute requires of one to get a basic grounding of the mechanical structure, assemblage and function of the agitation plant, itself a vital section in the gold ore processing plant. An agitation plant, as I understand it from the evidence led, consists of a tank into which a sludge or slurry of crushed gold ore (pulp ore) and water are directed. Inside that tank are horizontal blades (impellers) mounted on a vertical spindle or shaft (rather akin to the rotor blades of a helicopter).

The impellers agitate (or basically stir up and mix) the slurry as they rotate around the vertical shaft. The speed, power and other variables of the impellers are controlled by gearboxes which are in turn connected to motors which provide the rotational force of the impellers.

Couplings on the other hand are devices that connect one shaft to another. This assemblage consisting of the impellers, shaft and couplings was frequently referred to by the witnesses by its other name namely "the mixers".

It is common cause that the plaintiff is the owner of a gold claim in the Silobela area situated in the Midlands province. On that claim are several heaps (or dumps) which according to the plaintiff (ostensibly from an expert metallurgical report) bear a considerable quantity of gold. It was therefore the plaintiff's intention to assemble an agitation unit as part and parcel of the entire gold processing plant for the purpose of recovering gold from the dumps.

To that end, Mr De Bruyn on behalf of the plaintiff approached Mr Frank who runs the defendant company with a view to procuring from the latter components needed for the agitation

plant. At the conclusion of their negotiations the two on behalf of their respective companies entered into a verbal contract. The exact terms of that contract are fiercely disputed as between them.

It is common cause, however, that at the inception of its mining operations in Silobela, Mr De Bruyn on behalf of plaintiff had approached the defendant company with a view to securing a long term arrangement wherein the latter would supply mechanical components for the gold ore processing plant. To that end plaintiff made a down payment (or deposit) of US$14 000 (fourteen thousand United States dollars) the understanding being that part payment of work done and equipment supplied by the defendant would be disbursed from that account.

It is against the backdrop of the above that the verbal agreement was concluded. Pursuant to the aforementioned verbal agreement a series of events took place. Firstly, the plaintiff enlisted the services of a Harare based engineering firm to erect platforms designed to enable access to the top of the tanks (the platforms). It is clear from the evidence that the gearboxes and motors were to be mounted atop these platforms and the shaft and impellers immersed into the tank from above.

In due course and pursuant to the oral agreement the defendant machined and supplied the shaft, impellers and couplings. Meanwhile, there were separate but related negotiations between the parties regarding the procurement of matching gearboxes and motors to run the unit from a South African based company called Mixtec.

There is intense disagreement as between the parties as to the true nature of that tripartite arrangement comprising the defendant, the plaintiff and Mixtec. Whereas the plaintiff insists that it contracted the defendant to source, purchase, supply and install the gearboxes and motors, the defendant adopts a contrary position. The defendant maintains that its role was merely facilitative. It claims that it only referred the plaintiff to Mixtec following the former's enquiry regarding where it could purchase these two vital components.

Be that as it may, it is common cause that the gearboxes were soon delivered via the defendant's workshop in Kwe kwe and subsequently installed by the plaintiff at its mine.

Shortly thereafter, the impellers shaft and couplings were supplied and installed as well. There are diametrically opposite versions regarding who between the parties installed the impellers, shaft and couplings; whereas the plaintiff insists that it was the defendant who did so as per the terms of the contract. The defendant vehemently denies this. It argues (through Mr Frank)

that the installation of those components was done by the employees of the plaintiff as there was never an agreement for the installation of any component. The defendant's position is that its contractual obligation was confined to the fabrication and supply of the shaft, impellers and couplings.

The reasons for these warring positions are not too far to find. The plant simply failed to operate. Try as they might to identify and rectify the problem the system just could not work and soon enough the motors gearboxes supplied by Mixtec broke down to the extent that they were rendered worthless. Not even their replacement by a different set by the defendant would breathe life into the plant.

The plaintiff puts the blame squarely on the defendant whom it accuses of poor workmanship in the design and quality of the impellers, shaft and couplings. According to the plaintiff in the evidence led on its behalf, the failure of the machine to operate is a direct consequence of the manufacture and supply by the defendant of oversized impellers and the use of solid core shaft for the unit. This in turn, so the argument goes, caused the unit to draw excessive power thereby putting a severe strain on the gearboxes and motors causing them to give in and collapse.

What the plaintiff demands from the defendant in this regard therefore is the reimbursement of the money that it paid to defendant (drawn from the initial deposit referred to earlier) for the manufacture, supply and installation of the impellers, shaft and couplings.

Further it demands from the defendant the sums of money it paid to for the procurement of the motors and gearboxes from Mixtec which were ruined on account of their being faulty or unsuitable for the intended purposes.

The third claim as alluded to earlier, is based on alleged loss of revenue occasioned by the failure of the machine to run and process the gold ore within the projected time frame. The loss is calculated on the basis of the alleged concentration of gold ore per tonne (as per the metallurgical report) as extrapolated over the size of the dumps at the mine. Also factored in was the projected daily output of the machine.

The plaintiff's prayer in the summons therefore reads as follows:-

***WHEREFORE**, Plaintiff prays for:-*

(a) US$7 600.00 (seven thousand six hundred United States dollars) being money paid to the defendant by the plaintiff for a shelf, impeller and coupling which implements the defendant failed to properly supply in breach of the parties agreement.

(b) R142 000.00 (one hundred and forty two thousand Rands) being the value of motors and gearbox paid to defendant by plaintiff but which implements the defendant failed to properly supply and or supplied wrong sizes in breach of the parties agreement.

(c) *US$200 000 (two hundred thousand United States dollars) being damages for lost expected earnings resulting from defendants breach of the parties agreement*.

Solely for convenience and ease of reference these claims will be referred to as the "mixers claim" the "gearboxes/motors" claim and the "damages" claim respectively.

The defendant completely denies any liability whatsoever in respect of each of the three claims. As stated earlier, with regard to the mixers claim the defendant denies that the verbal contract included the installation of the agitation plant. It maintains that all that was required of it was supply the mixers and it duly performed what it was contractually obligated to do. As a matter of fact both in its plea and during the ensuing trial put the blame on the plaintiff (through its employees) for the wrong installation of the mixers.

Regarding the gearboxes and motors claim the defendant maintains that its role was merely facilitative. It merely provided plaintiff with information on companies in South Africa which deal with gearbox. Reliance was placed on the fact that plaintiff made direct payment for those components to Mixtec as being reflective of its role as mere facilitator.

Regarding the damages claim, the defendant denies being responsible for the loss, if any, suffered by the plaintiff consequent to the failure of the plant to run. It was contended on behalf of the defendant that plaintiff had dismally failed to lead cogent evidence to establish that it (i.e. plaintiff) had indeed suffered the loss claimed.

Each of these three claims will be dealt with in turn, suffice it however to state that the claim based on consequential damages arising from the alleged breach (claim 3) will only arise should it be found that liability attaches defendant for the malfunctioning of the agitation plant.

Claim 1 – The mixers claim

As I see it, there are two basic issues that fall for determination under this claim namely;

(1) Whether or not the terms of the contract included the installation of the mixers by the defendant and whether in fact the defendant did install the mixers

(2) Whether the defendant exhibited poor craftsmanship in the fabrication of the mixers in circumstances amounting to breach of contract

These tie in with items 1(a) and 1(b) of the parties' Joint Pre Trial Conference Memorandum of Issues.

Mr De Bruyn was the sole witness for the plaintiff. This was despite the fact that in its summary of evidence the plaintiff had undertaken to also lead evidence from an additional witness one Sungano Mashingaidze – one of its employees.

Two witnesses on the other hand testified for the defendant. These were Mr Frank and one Alec Nyawo, a former employee of the defendant company. The latter was at the material employed as a fitter and turner and was the workshop foreman/supervisor.

The evidence of Mr De Bruyn was to the effect that in terms of the parties' oral contract, the defendant was required to manufacture the mixers and install them and this is precisely what it proceeded to do. As a matter of fact, he indicated that the defendant was also contractually obliged to erect the platforms, but because it (i.e. defendant) was experiencing difficulties in procuring the required materials, he contracted a Harare based engineering firm to erect them. This is significant as will soon become apparent in this judgment.

Equally significant is Mr De Bruyn's evidence that it was that same Harare based company with the assistance of the plaintiff's employees who under his suspension and guidance mounted and connected 4 sets of gearboxes and motors. This was after he had collected them from the premises of the defendant in Kwekwe upon their arrival from Mixtec in Johannesburg. According to him the gearboxes and motor worked perfectly following their installation and testing.

It was his avowed position that it was the defendant's employees who installed the mixers. However, the plant after the erection of all its constituent components failed to run. Upon inspection he observed and concluded that the cause of the plant's still birth was occasioned by the following:

(a) That the flanges manufactured and installed by the defendant connecting the gearbox to the shaft and tightened by 4 bolts were installed at an angled instead of being truly vertical.

(b) The impellers manufactured by the defendant were longer hence heavier than what was specifically required as per design. (The design was provided by Mixtec and came with the gearboxes and motors). Instead of being 950mm in length they extended 1500 mm (i.e. 1.5m)

(c) That the defendant made the central shaft of solid steel rather than she desired tabular design

The net effect of the last two, so the argument goes, was to make the mixers significantly heavier thereby exerting undue strain on the motors and generators which in turn yielded and broke down as a result.

Mr Dr Bruyn denied that the plant broke down as a result of poor workmanship on the part of plaintiff's employees in erecting the mixers because according to him it was the defendant who installed them in the first place.

He also claimed that the installation of the gearboxes did not in any way contribute to the failure of the plant to operate insisting as he did that the installation of the gearbox was a simple and straightforward procedure. According to him it involved the mere securing of the gearboxes by a set of bolts and in any event according to him the problem only emerged upon the installation of the mixers.

It was also his evidence that numerous attempts through a process of trial and error were undertaken to remedy the situation but to no avail. All these endeavours were with the assistance and co-operation of the defendant.

Of significance, however, is the fact that at some stage the size of the impellers was reduced and tubular shafts were installed to replace the solid steel ones. The result was that the plant coughed into life. But the success was short-lived as it once again broke down after only two weeks.

Also important is the fact that sometime in December 2018 as part of efforts to make the plant work, the defendant through Mr Frank, at its own expense, replaced the broken down motors with brand new higher powered motors (9 kw). It was then that the plant briefly spluttered into life

According to Mr De Bruyn, the conduct of Mr Frank in not only attempting to repair the machinery at no additional cost and most importantly his conduct in offering the 9 kw motors for free amounted not only to a tacit admission of liability but also confirmatory of plaintiff's version that the verbal contract was on a supply and fix basis. He would dismiss assertions put to him in cross examination in this regard that it was merely a gesture of good will and benevolence on the part of the defendant to rectify an error that had occurred.

He would also deny suggestions put to him in cross examination that the specifications provided by Mixtec on the length of the impellers were mere guidelines. He maintained that the defendant was required to follow those specifications to the letter.

The evidence of Mr Patrick Frank with regard to the mixers claim was a complete denial of liability. He indicated that the verbal contract entered into between him and Mr De Bruyn on behalf of their respective companies was confined to the fabrication of the mixers and did not encompass their installation.

Further, he vehemently denied that his company had in fact installed the mixers and insisted that it was employees of the plaintiff who had done so. More specifically would dispute assertions put to him under cross examination that one of his employees Heaven Tobve, had assisted in the installation. He stated that it is inconceivable that his employees with the experience they had and more particularly given that it was then who had fabricated and marked the couplings would mismatch them.

He elaborated by pointing out that had the contract included installation, then the mixers would have been accompanied with a warranty against defect entitling the plaintiff to free rectification of whatever defect would subsequently manifest itself.

Further in this regard he would also deny that his repeated attempts to rectify the gearboxes in general and the fact that he replaced the motors for free in particular was reflective of a warranty being in existence.

It was suggested during cross examination that his relationship with Mr De Bruyn did not extend beyond their business dealings hence it was unconceivable that he could have purchased brand new motors out of sheer benevolence and magnanimity. In response he indicated that he would have eventually invoiced the plaintiff. He stated that he regarded Mr Dr Bruyn as a respected business friend and as such his primary concern was to get the plant running. He denied that he

had raised the issue of the misalignment of the shaft as an afterthought meant to deflect liability on his part.

Regarding the departure from the specifications provided by Mixtec, it was his evidence that those specifications are not an exacting standard but a mere guide. He maintained that according to his knowledge and experience, it was permissible to adjust the dimensions of the impellers depending on the demands of the job at hand and this is precisely what they did. He stated that having decided to forgo a second set of impellers mounted lower down the shaft, he compensated this by making the single set of impellers longer than provided in the specifications.

Most importantly, it was his evidence that if at all the sizes of the impellers coupled with the weight of the solid shafts was such as to create a power strain on the motors, the result would have been a tripping of the electrical power breakers. He repeatedly indicated that this is a safety mechanism designed to protect the equipment in cases of power overload.

To the contrary it was his firm assertion that when he sent his team to inspect the installation they established that the plaintiff's employees had improperly assembled the couplings that connected the gearbox to the shaft. Whereas they were required to match each particular "male" and "female" coupling pair assigned for each unit, they had in fact randomly used the coupling combinations. The result was a misalignment of the shaft owing to the mismatch. This in turn caused the shaft to stand skewed at an angle.

This was despite the fact that the coupling combinations had been clearly marked for ease of matching. The result was that the mechanical operation of gearbox was affected as the gearbox shaft was forced to be at an angle leading to their breakdown.

He elaborated under cross examination that it was the misalignment of the connection between the shaft of the mixers and that of the gearbox through a coupling set that must have led to the wobbling of the gearbox shaft and resultantly caused the damages to the gearbox.

The said defence witness Alec Nyawo supported Mr Frank; evidence in three key areas as far as the mixers claim is concerned. Firstly, he vehemently denied that is was the defendant who installed the mixers and maintained as he did that it was the plaintiff's employees who did so.

Secondly, he indicated that the plaintiff's employees had strangely not followed the pork marked misconceptions on the couplings for the matching of the couplings to the shafts leading to the misalignment of the gearbox shaft which in turn was the proximate cause of the malfunctioning

of the plant. He made this discovery upon being assigned by Mr Frank to proceed to plaintiff's mine to investigate the cause of the plant's failure to run. It was him and his team who discovered that whereas the coupling meant and earmarked for the mixer 1 had erroneously been used for mixer 3. He would admit though during cross examination that he has not present when the mixers were installed.

Thirdly, he as with Mr Frank, dismissed the notion that the oversized impeller blades would cause damage to the gearbox. He (as with Mr Frank) maintained that any strain on the power supply would lead to overload relay switch tripping. The rest of his evidence will be referred to as and when it is necessary for the resolution of any fact in issue.

By agreement, the parties filed written closing addresses wherein their diametrically opposite positions remained entrenched. Reference will equally be made to the portions thereof as when same are relevant for the resolution of any point in issue.

The positions of the parties regarding the mixers claim are undoubtedly mutually destructive. This then brings to me the fore the question of onus. The general position was laid out in the case of *Pillay* v *Krishna & Anor* 1946 AD 946 which position has been interpreted to mean that the person who makes a positive assertion is generally called upon to prove it, with the effect that the burden of proof lies generally on the person who seeks to alter the status quo. That person is usually the plaintiff and the defendant will bear the burden of proof only in relation to a special defence.

Similarly in *Astra Industries Limited* v *Peter Chamburuka* SC 258/11, OMERJEE AJA stated the following in this regard;

> "The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation. This position has been affirmed by this court. In *Book v Davidson* 1998 (1) ZLR at 384 B – F, DUMBUTSHENA CJ quoted with approval the words of POTGIETER AJA in *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 AD at 711 E – G
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> "*The general principle governing the determination of the incidence of the onus is the one stated in the corpus luris simpler necessitasprobandiincumbatilli qui agit. In other words he who seeks a remedy must prove the grounds therefore*."

In the present matter the onus was on the plaintiff to prove not only that the contract in question included the term that the defendant was to install the mixers but also that it in fact did install them. The standard of proof of being, of course, on a balance of probabilities.

An evaluation of the evidence, in my view shows that the plaintiff failed to discharge the evidential burden resting on it. Here is why. First and foremost Mr De Bruyne insisted that the installation of the mixers was done at his mine in the presence of plaintiff's employees and possibly in the presence of members of the engineering firm from Harare yet none of those witnesses who could have been critical in corroborating his evidence were called to testify.

From submissions made in the written closing submissions, the explanation for the decision not to call those crucial witnesses appears to be that certain portions of Mr De Bruyn's evidence had not been challenged thereby obviating the need to call witness to corroborate the same. I believe the plaintiff took a giant and unjustifiable leap of faith in adopting that position. Corroborative evidence was needed to sway the probabilities in its favour.

In regard to the above it is perhaps necessary to revisit the method generally employed by courts in evaluating evidence where the court is confronted with mutually destructive versions. This most commonly used method was stated in *Stellenbosch Farmers' Winery Group Ltd & Another* v *Martell et cie and Others* 2003 (1) SA 11 (SCA) as follows.

> "On the central issue as to what the parties actually decided, there are two irreconcilable *versions. So too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (1) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, part from the factors mentioned under (a)(ii) and (v) above, on (i) opportunities he had to experience or observe the events in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and*

evaluation of the probability or improbability of each party's version on each of the disputed issues. In light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded on discharging it. The hard case which will doubtless be the rare one occurs when a court\s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

Given the general tenor of defendant's plea (particularly in paragraphs 2 and 3 thereof) coupled with the general thrust of the cross examination of Dr De Bruyn it is surprising that the plaintiff decided to forego the calling of corroborative witnesses. Questions such "Defendant will say that there was no agreement for the erection and fixing of the agitation plant but that the $7 600 was for the supply of the mixers surely implied an attendant denial by the defendant of any contractual obligation to install (i.e. fix) the mixers.

Admittedly, the cross examination of Mr De Bruyn was lack lustre in certain respects and as it often lacked particularity and specificity on precisely what was denied, there can be no escaping of the fact that the installation of the mixers was being denied. It was unjustifiably presumptive on the part of the plaintiff in those circumstances to neglect calling corroborative witnesses.

What evidently eluded the plaintiff was that onus rested on it to convince the court of the truthfulness of its assertions particularly in instances such as the present, where it lacked the benefit of a written contract. The sheer magnitude of what was at stake should have driven it, in the scheme of things, to secure the attendance of witnesses to corroborate Mr De Bruyn's account. Its failure was telling and dealt a body blow on its case.

Further, there are discreet pieces of evidence which to my mind appear to negate the narrative that it was the defendant who in fact installed the mixers. Firstly, if the contract in question included the installation of the entire agitation unit as Mr De Bruyn wants the court to believe, why then would he proceed to engage a separate company from Harare to install the platforms? Why would he enlist the services of plaintiff's employees to install the gearboxes and the motors? The latter were an integral part of the entire process. After all, he was supposedly paying for such a service. Further, why would he proceed to Kwekwe to collect the mixers?

All the above observations lend credence to the defendant's assertions that the contract never include the installation of the mixers.

Defendant's reliance on the fact that defendant in the wake of the malfunctioning of the plant proceeded to purchase and install higher powered motors at his own expense as being *ipso facto* indicative of the latter's tacit acceptance of liability when viewed against the backdrop of Mr Frank's explanation cannot be sustained. One cannot fail to observe that there was an element of friendship and mutual respect that permeated the entire arrangement. The very fact that the plaintiff was prepared to make a down payment of some US$14 000 for work yet to be done epitomises the type of business relationship that the two enjoyed.

I do not believe that Mr Frank's explanation that he was consumed by the desire to get the plans running is far-fetched. The parties' common desire to see to the successful operation of the CIP plant at that stage transcended immediate financial considerations. This is further buttressed by the fact that parties are in agreement that several trial an error attempts were made to nudge the plant into life, unfortunately to no avail.

Against the backdrop of the foregoing I do not believe the plaintiff managed to discharge the onus resting on it to show that the agreement included the installation of the agitation plant let alone that defendant did in fact install it.

The next question for consideration is whether the defendant manufactured defective components in breach of an implied term of the contract.

I am of the view that the defendant was contractually obligated to fabricate components which matched the specifications supplied by mixtec. His departure from those specifications in the absence of concurrence from the plaintiff was neither justified nor properly explained.

This being an engineering job it required the defendant to observe those specifications to the letter. The variation from those specification was surprising even to a lay person in the field. They very term "specification" connotes precision and exactitude. It cannot by any stretch of the imagination be construed as a general guideline as the defendant wants the court to believe.

Its liability for the first claim therefore would, but for what later transpired, have been founded primarily on the manufacture and supply of components different from what he was contractually required to supply.

However, evidence was led to the effect that at some point the oversized impellers and the solid steel shafts were removed and replaced with the correct sized impellers and tubular shafts respectively. This was with the concurrence of the plaintiff. There was a prompt rectification of the breach by the defendant. The plaintiff could upon a realisation of the defectiveness of the impellers and shafts have opted to resile from the contract. It is trite that a party to a contract who has acquired a right to resile has an election or choice between upholding and cancelling the contract, see *Bekazaku Properties (Pty) Ltd v Pam Goldings Properties (Pty) Ltd* 1996(2) SA 537 (C). An election to uphold the contract despite knowledge of the defective performance can be exercised expressly or tacitly. By allowing the defendant rectify the initial breach (as well as the events that subsequently followed) the plaintiff impliedly elected to uphold the contract instead of resiling from same. It would be anomalous, in my view, therefore, to order defendant to make recompense for the same.

Claim 2: The gearboxes and motors claim

There was protracted haggling as between the parties as to whether the plaintiff contracted the defendant to procure the gearbox and motors from Mixtec, South Africa or whether the defendant merely assisted plaintiff by referring it to Mixtec, South Africa.

Whereas there are some factors seemingly indicative of the fact that the defendant merely played in facilitative role – not least the fact that the plaintiff paid the purchase price thereof directly into Mixtec Account, there are also some factors pointing in the opposite direction. For example the fact that the communication leading up to the purchase of those motors was principally done through the employees or the defendant and the fact that the motors where delivered to the premises of the defendant.

What perhaps got lost in this argument was whether or not the gearboxes and the motors were in fact defective or that they were not fit for the job for which they were procured.

I do not think sufficient evidence was placed before the court to make such a conclusion. What the plaintiff wants this court to do is to conclude by mere supposition that the gearboxes and motors were defective.

Surely if they were, a legal suit would have been mounted to confront Mixtec. There was no effort made whatsoever to attribute liability on Mixtec.

There is no evidence placed before this court to suggest the use of substandard material in the manufacture the gearboxes or that they fell below the mechanical standards that they were required exhibit. As if that is not enough, the evidence by Mr De Bruyn himself was to the effect that upon their installation the gearboxes and motors worked "like a dream" (to use his own words). Problems only surfaced when the mixers were added to the assemblage. How then can one take a leap in one breath from the gearboxes and motors working perfectly to them being defective or substandard in the next?

Further, according to Exhibit 1 Mixtec guaranteed its products against defect. The following is stated.

> ***Materials of Construction***:
>
> *Mixtec agitators are manufactured from materials which in our opinion, are most suitable for the purpose intended. Since Mixtec has no control over the conditions of use, there is an obligation on the part of the user to check that the material selection is suitable for the installation specified and to use all necessary care and precautions in operation.*
>
> ***Guarantee***:
>
> *The units are fully mechanically guaranteed for a period of one year from date of commissioning or 18 months from date of delivery. This guarantee covers faulty mechanical design, material and workmanship.*
>
> ***Process Guarantee***:
>
> *The units recommended, which are based on the data given in your enquiry, will meet or surpass the requirements detailed. Should the units recommended fail to meet or surpass the requirements, as expected, the company will modify or replace or take the unit back and issue a full credit, subject to the company's expert insight and recommendation into the non-performance.*
>
> *Under the terms of this guarantee, we are not responsible for any indirect or consequential damages whatsoever; our operation of FIVE (5) years from the date of acceptance of our quotation, for any extension to the goods, not for the duplication of any part of the goods except with our consent in writing.*

If the gearboxes and motors were defective or the parties suspected them to be, what precluded either party from taking advantage of the above clauses and seek a rectification of the

same? The probabilities of this matter are such as to point to some other cause for the breakdown of the motors and gearboxes than their alleged manufacturing defects.

The second leg of the plaintiff's claim on the gearboxes and motors claim was that the defendant supplied wrong sizes of gearboxes. The plaintiff however failed to establish in what way those two components were the wrong sizes.

Perhaps it would have assisted the plaintiff to lead cogent expert evidence on the sizes that were ideal for his plant and a comparison thereafter made with what was supplied. In the absence of the same it would be merely speculative to conclude that those gearboxes and motors were no the right sizes.

Sight must not be lost of the fact that information was supplied to Mixtec on the work the gearboxes and motors were supposed to contend with. That information is included in the comprehensive list of specifications on both Annexures 1 and Annexures 2 of the record. Those specifications include among others detailed information on the tank information (diameter, height pressure and temperature) tank design (including mixer mass, torque and load), tank contents (including the type of product and its viscosity) as well as the construction materials to be used. It is against that information (which was supplied by the defendant through Mr Heaven Tobve) that mixer specifications and the motor details were crafted. If ever there was any variance or discrepancy between what the two units were held out to perform (in light of the information appearing *ex facie* Exhibit 1) the parties would surely have taken the matter up with MIXTEC.

In the final analysis I am unable to conclude from the available evidence that the gearboxes and motors were either defective or were not the right size for the mixers. There is simply not sufficient evidence to arrive at either conclusion.

It is immaterial therefore to make any definitive finding that either party was responsible for the procurement of the same.

The consequential damages claim

What remains is to determine whether or not the breakdown of the plant and its failure to run is attributable to the defendant. Put more directly the question is whether in breach of the contract the defendant fabricated unsuitable components for mixers which in turn led to the malfunctioning of the agitation plant. Viewed from a different angle the question is whether the

nature of the mixers manufactured by the defendant were the proximate cause of the malfunctioning of the unit.

This question is equally to be answered against the backdrop of the onus resting on the plaintiff to prove the requirements listed below. It is trite that for plaintiff to succeed in a claim for damages arising from a breach of contract must prove the following:

(a) Breach of contract by the defendant;
(b) Damage;
(c) A factual causal connection between the breach of contract and the damage;
(d) That the damage is a natural consequence of the breach of contract or that an agreement was concluded to compensate the damage concerned;
(e) The quantum of damages.

Breach

That there was an initial breach by the defendant in supplying wrong sized impellers has already been stated above. At the risk of repetition, it is perhaps necessary to stress that by initially supplying impellers of the wrong sizes, the defendant breached an implied term of the contract. It was contractually obligated to adhere to the specifications as provided by MIXTEC, more-so given the admission by Mr Frank that when the impellers were fabricated they (i.e. employees of the defendant company) had in their possession a copy of the said specifications.

Damage

Similarly, it can hardly be disputed that as a result of the failure of the plant to operate the plaintiff suffered loss (the quantum, if any, of which is however disputed). The plaintiff anticipated that upon the plant being properly commissioned would successfully recover certain quantities of gold from the dumps at the mining site but this was never to be on account of the plant's failure to run.

Causal nexus between breach and damage

It is on this third hurdle that this particular claim stumbles. For a claim for damages for breach of contract to succeed the plaintiff must prove *ante omnia* that the damage for which he is claiming compensation has been factually caused by the breach (see *Combined Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS* [2011] All SA 1182B10). This claim cannot be sustained if no nexus is established between the defects in the mixers and the breakdown of the plant. Factual causation is traditionally established by means of the *conditio sine qua non* test

(also known as the "but for" test). The test enquires whether the loss in question would have been suffered had the breach of contract not been committed. If, but for the breach, the loss would not have been suffered, the breach is a factual cause of the loss; conversely, if the loss would in any event have been suffered, the breach is not a factual cause of the loss. The innocent party needs to prove, on a balance of probabilities, that the loss would not have been suffered, but for the breach. If it fails to establish this causal link, that is the end of the enquiry and the damages claim must fail.

This is indeed a specialised technical field for which a court would ordinarily have minimal grounding. It behoved the plaintiff (because the onus rested on him) to enlist the assistance of expert opinion evidence from a person who on account of his or her training and/or experience is conversant with matters attending to this specialised field.

While acknowledging that ultimately the decision to be rendered is a judicial one, there can be no doubt that the evidence of an expert to draw the necessary scientific nexus between the defect(s) complained of by the plaintiff and the breakdown of the agitation unit would have been invaluable. In the absence of such expert evidence any conclusions drawn by this court suggestive of the existence of such nexus is merely speculative and conjectural.

Mr De Bruyne belatedly held himself out to be an expert in the mining and mechanical engineering fields, however he was at pains to support his claim to such expertise. His opinion in any event suffers from the obvious blemish of want of independence or neutrality. It is all very easy for him to simply point an accusatory finger at the defendant's workmanship as the cause of the failure of the machinery to function.

Further, there is no evidence that he used the "scientific method" usually employed by eliminate the possibility of false results and false conclusions. Put differently it was not shown to the degree required to discharge the onus that but for the size of the impeller blades and the use of a solid steel shaft for the mixers, the malfunctioning of the agitation unit would not have arisen. What we have is Mr De Bruyne's mere *ipse dixit.*

Yet he could have taken advantage of Section 20 of the Civil Evidence Act, [*Chapter 8:01*] which permits the adduction of documentary evidence in the form of a report compiled by an expert. The said section reads as follows:-

"20 Proof of certain matters by affidavit

(1) ....
(2) Where oral evidence would be admissible to prove either or both the following—

(a) any fact ascertainable by a scientific examination or process;

(b) any opinion relating to a fact referred to in paragraph (a);

a document which purports to be an affidavit made by a person who states in it that—

(a) he is qualified to carry out the scientific examination or process and indicating the nature of his qualifications; and

(b) he ascertained the fact by means of the scientific examination or process and additionally, or alternatively, that he arrived at an opinion stated in the document; shall be admissible, subject to subsection (12), on its production by any person as prima facie proof of that fact or opinion."

Physics is one of the disciplines that are specifically included. The plaintiff could therefore have obtained and presented a report from an expert in the field wherein is established the scientific nexus between the defects complained of and the failure of the plant to operate. This would notionally in turn establish a nexus with the loss suffered. Alternatively, plaintiff could have secured the attendance as a witness of an expert witness who examined the agitation plant in the aftermath of its breakdown.

That is not, however, to say that the opinion of a lay person is without value, (Section 22(2) of the Civil Evidence Act permits the adduction of lay opinion evidence) all that is being said is that the evidence of an expert in that field would have carried more weight and would perhaps have assisted the plaintiff to discharge the evidential burden resting on it.

Expert opinion evidence would have established whether or not the sizes of the blades and the nature of the central shaft were the proximate cause of the breakdown and malfunctioning of the agitation plant.

Further, I could not help but observe that Mr. De Bruyn was literally all over the place in his attempt to assign the cause of the breakdown. Firstly, he blamed the sizes of the blades and the solid steel shaft. Secondly, he appeared to attribute the same to supposedly faulty gearboxes and

motors procured from Mixtec. Thirdly, in his evidence in court he appeared to blame it on the misalignment of the shafts which he claims were skewed at an angle. All this is reflective of the absence of the use of the scientific method to establish the true cause of the failure. I am also fortified in arriving at this conclusion by the fact that even after the removal of the oversized impellers and the solid shafts the plant still failed to operate. If the problem lay with those offending components, their replacement with the correctly sized ones should have seen an immediate change of fortunes.

The defendant on the other hand through Mr. Frank was consistent that the mismatch of the coupling pairs led to a misalignment of the gearbox shafts which in turn led to the latter's wobbling and eventual damage of the gear boxes themselves.

Further, in my view the defendant's response to the allegation by plaintiff that the weight of the oversized impellers and the solid steel shaft led to power strain on the gearboxes and the motors makes sound logic. Both Mr Frank and *Mr Nyawo* insisted that had there been a strain on the power supply, the result would simply have been a tripping of the safety relay switch. It is improbable that equipment of this nature and size would come without such a safety power switch.

The nexus which plaintiff seeks to draw between the sizes of the impellers and the breakdown of the plant is too tenuous to form the basis of liability. The plaintiff has therefore failed on this hurdle rendering it unnecessary to embark on the quantification of its alleged loss thereby. A finding that the defendant initially supplied wrong sized impellers does not *ipso facto* translate to the conclusion that those impellers were the proximate cause of the malfunctioning of the unit.

In summation, therefore, the plaintiff's claim must fail in its entirety.

COSTS

The general rule is that the substantially successful party is entitled to its costs. There is no justification in denying the defendant its costs.

In the final analysis therefore the following order is hereby given.

IT BE AND IS HEREBY ORDERED:

1. The claim for $7 600 ZWL being money paid to defendant by plaintiff for a shelf impeller and couplings be and is hereby dismissed.
2. The claim for R142 000 (one hundred and forty two thousand Rands) in respect of the value of motors and gearboxes be and is hereby dismissed.
3. The claim of US$200 000 (two hundred thousand United States dollars) being in respect of damages for lost expected earnings be and is hereby dismissed.
4. The plaintiff to pay defendant's costs.

Mavhiringidze & Mashanyare, plaintiff's legal practitioners
Hore & Partners, defendant's legal practitioners