J & P SECURITY (PRIVATE) LIMITED
versus
RIOZIM LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, May 27, 2015 and November 9, 2016

CIVIL APPEAL

F. Mahere, for the appellant
H. Mutasa, for the respondent

CHITAKUNYE J: This is an appeal against a judgement by a Magistrate at Harare dismissing the appellant's claim for-

> "2. The payment of contractual damages for loss of potential income in the sum of US$91 000.00 plus 10% collection commission.
> 3. Interest from 1 March 2013 to the date of full and final payment calculated at 5% per annum.
> 4. Costs of suit on an attorney client scale"

The background to this appeal is that the appellant and the respondent entered into an agreement for the provision of security services by appellant at respondent's Empress Nickel Refinery in Kadoma. The agreement was entered into on the 10th April 2013 and was to run for one year with effect from 1st March 2013 to 28th February 2014. The respondent reciprocally agreed to pay for the said services. The monthly payments were to be in terms of invoices to be raised by appellant on monthly basis. The respondent was to pay 30 days from the receipt of each monthly invoice.

The appellant duly performed its side of the agreement

Invoices were duly sent to the respondent at the end of each month for about 5 months. On its part respondent failed to pay according to the contractual terms.

The appellant then informed the respondent of its displeasure at the respondent's failure to pay in terms of the agreement and advised it would stop providing services at the end of July 2013 if payments for invoices already furnished were not made. True to its word at the end of July 2013 the appellant terminated its services to respondent.

On the 26th August 2013 the appellant issued summons in the magistrates court seeking to recover the full amount for guard security services rendered to the respondent in

the sum of US$ 58, 511.00 plus10% collection commission and contractual damages in the sum of US$ 91 000-00 plus 10% collection commission. It also sought interest at 5% per annum from 1st March 2013 to date of payment in full and costs of suit on attorney client scale.

The issue of the claim for US$ 58 511.00 was resolved before the commencement of trial. The trial was thus on items 2, 3 and 4.

The matter was dealt with in the magistrates court despite the sums involved because in their agreement the parties had consented to the jurisdiction of the Magistrates Court.

After a contested trial the trial magistrate found in favour of the respondent with no order as to costs.

It is against this judgement that the appellant appealed to this court seeking an order setting aside the judgement by the court a quo and substituting it with an order that:

> "1.The plaintiff is hereby awarded damages for loss of profits in the sum of US$ 91 000.00 plus 10% collection commission.
> 2. The plaintiff is further awarded interest at the prescribed rate from 1 March 2013 to the date of full and final payment.
> 3. The defendant shall pay the plaintiff costs on an attorney- client scale."

The grounds of appeal were stated as follows:-

> "1. The court *a quo*, having found that the respondent breached the contract of service, erred in failing to find that the said breach caused the appellant a loss of profits in respect of the unexpired period of the contract.
> 2. The court *a quo* accordingly erred in failing to award the appellant damages for loss of profits."

The respondent cross appealed against part of the judgement of the court *a quo*. Six grounds of appeal were stated. However on the date of hearing the respondent abandoned five of the grounds of appeal and in the same vein amended its prayer. The amendment was granted by consent. The single ground maintained was that:

> "The learned magistrate misdirected himself when he refused to award the Respondent's costs in circumstances where costs should have followed the cause especially taking into account the entire history of the matter."

The amended prayer now read as follows:

> "WHEREFORE Respondent prays that its cross appeal succeeds with costs and that:
> (a) Appellant's appeal is dismissed with costs;
> (b) The order of the Court a quo be and is hereby amended to read-
> "Plaintiff's claim is dismissed with costs;
> Alternatively-
> "Defendant is granted absolution from the instance with costs."

The appellant's counsel *F. Mahere* argued that the appeal should succeed as respondent was found to be in breach of the contract and so the natural consequences should follow; that is damages should be awarded to appellant.

The respondent's counsel *H. Mutasa* on the other hand contended for the dismissal of the appeal on the basis of the submissions filed of record.

Upon perusal of the record of proceedings and hearing counsel I am inclined to say that the trial magistrate appeared to confuse or conflate two distinct issues: repudiation and breach of contract.

In his judgement he seems to base his finding of breach on repudiation. In this regard it is appropriate to ascertain if the finding of repudiation was correct. In his judgement the trial magistrate stated that:

> "Sometime in June 2013, the defendant communicated with the plaintiff that they were having financial problems and thus failing to honour its performance timeously but were doing everything in their power to remedy the situation. This conduct and notification of viability to perform, in my view, are acts and conduct that amount to repudiation. On this score, the defendant was indeed in breach of contract."

Both appellant's and respondent's counsel cited the above in their respective submissions. The appellant emphasising on the finding of breach whilst respondent was emphasising on the finding of repudiation.

It is for this reason that I thought of addressing these terms from the outset.

> "Repudiation is any conduct of a contractant from which a reasonable person in the position of the innocent contractant would infer that the first contractant, without lawful grounds, does not intend to comply with his duties in terms of the contract. …. The conduct may take the form of a positive act or an omission but mere failure to perform does not justify a reasonable conclusion that performance is being refused or that it will be defective. There must be at least be words or other conduct that can reasonably be interpreted as anticipatory malperfomance."

See *Contract General Principles*, 4th ed. by S W J van der Merwe, L F van Huyssteen, M F B Reinecke nd G F Lubbe @ p 311-312.

In Christie, *The Law of Contract in South Africa*, 6th edition, pages 538- 540 the esteemed author states thus-

> "The true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract"

In casu, the evidence even by appellant did not establish such conduct. If anything it showed a respondent who was willing to pay but was in difficulties. This is evident from the words of the trial magistrate cited above. He states that respondent whilst stating its

difficulties indicated that they were doing everything in their power to remedy the situation. It is thus clear that respondent did not repudiate the contract.

Maxwell Guzha who gave evidence for appellant stated as follows in his evidence in chief at p 13 of the record:

> "Q. when was the contract terminated?
> A. It was in June when we met the financial director and he stated that their financial position was not well.
> Q. what action did you take?
> A. we send them an e-mail and told Mr Makoni that we were withdrawing at the end of the month and handover/ take over."

The respondent's evidence confirms the same scenario when at p 20 of the record, in his evidence in chief respondent's witness John Goodwill Makoni answered as follows:

> "Q what was the relationship?
> A. I still recall around April 2013, I entered into an open agreement with plaintiff to supply defendant with security services for our branch in Kadoma. Along the way we faced some challenges emanating from paying fees. At the start of July plaintiff sent me an e-mail advising that if we do not settle our account from end of July they would withdraw services."

The testimony by the two witnesses was not explored further to show that the respondent was simply not willing to pay or was exhibiting a deliberate and unequivocal intention not to be bound by the contract. If anything the evidence from both witnesses shows respondent was desirous of paying.

In the circumstances therefore it cannot be said that the respondent repudiated the contract. However, repudiation is just one form of breach of contract where, as alluded to above, a party expresses intention not to be bound by the contract any more. Breach of contract can also occur where a party, though not desiring to terminate the contract, fails to perform in terms of the contract.

It is common cause that at the end of July appellant cancelled the contract as a consequence of respondent's failure to pay in terms of the contract. The respondent did not contest the cancellation. The respondent's witness testified that in terms of clause 2.4 of the contract where there was some serious breach of the contract a party could cancel the contract on a month's notice to the other. According to respondent appellant terminated the contract by virtue of the notice it gave by e-mail at the beginning of July 2013. That e-mail was a threat to withdraw services if respondent did not pay. In a way appellant was impressing upon respondent to remedy its breach.

In casu, it is common cause that respondent was failing to pay in terms of the contract. The question as to whether respondent had breached the contract should thus not have overly

detained the court *a quo* unless respondent had raised a defence to the breach. This was not the case.

What is clear is that appellant terminated the contract because of respondent's failure to make monthly payments in terms of the contract.

In R H Christie, the *Law of Contract in South Africa*, 5th ed. at p 495 the author aptly states that:

> "The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay is said to be in breach of the contract."

Where one party is in breach of a material term of the contract, the other party may, if he so wishes, cancel the contract and sue for damages.

The other party is entitled to claim the amount of money as damages necessary to put him, as far as money can do so, in the position he would have occupied had the breach not been committed.

It is accepted that damages are claimable for two forms of loss, namely *damnum emergens* or loss actually incurred, termed 'actual damages' and *lucrum cessans*, or loss of profits which would otherwise have been made, generally termed 'prospective damages'. See Wille's *Principles of South African Law*, 8th ed. pages 524-5; *Whitfield* v *Philips* 1957 (3) SA 318(A) at p 328-9.

The law allows the recovery of prospective damages for loss of profit if such loss was foreseen or foreseeable by the parties. *Gloria Caterers t/a Connoisseur Hotel* v *Friedman* 1983 (3) SA 390 (T) at 393E- 394A

Such damages must however be shown to flow naturally from the breach.

In *Guardian Security Services (Pvt) Ltd* v *ZBC* 2002(1) ZLR 1(S) the respondent unlawfully terminated the security services of the appellant. The appellant proceeded to make a claim for damages being its monthly fee. Court held that:

> "As to damages the appellant was entitled to its net loss only. Deductions had to be made in respect of expenses it saved as a result of the premature termination of the agreement and for amounts it earned whilst doing other work in order to mitigate as it was obliged to do."

In casu, the US$91 000-00 the appellant claimed was the gross sum they would have been paid for 7 months. It is a figure the appellant's witnesses said they have to pay expenses from and thus not the net profit. Yet according to the appellant they terminated their services in order to mitigate their loss. If the termination of service was to mitigate damages it follows they would not be entitled to the entire sum of US$91 00-00 but to a net profit after taking

into account what was saved by withdrawing the service. The two witnesses for the appellant gave different figures as salaries for the guards who were manning respondent's premises. That should have been clarified. If as one witness stated the guards who had been employed specifically for the assignment had their employment terminated it means there was no more salary to be paid to them. Other costs associated with the deployment of the guards at respondent's premises which were saved by the withdrawal of the services must be disclosed and taken account of. All the savings are within the knowledge of the appellant and should be provided to court.

At some point the appellant's witness said they expected a profit of $60 000 per annum at $ 5 000-00 per month. He however could not explain if this was after taking into account all the savings made and earnings made whilst doing other work in order to mitigate damages. When asked why appellant was demanding $91 000-00 in the light of savings that should have been made by withdrawal the witness could not explain.

I am of the view that the appellant did not prove damages as enunciated in the *Guardian Security Services (Pvt) Ltd* v *ZBC* case (*supra*). The appellant simply wanted to be paid as if it had provided services. It was incumbent upon appellant to prove the net profit it would have made rather than the gross amount it would have been paid had the contract continued. It was never argued by appellant that none of the guards was redeployed elsewhere where income was earned. I did not see anywhere in the evidence adduced where appellant stated that they continued paying the guards whilst the guards were not attending to any duties elsewhere. If anything the impression given was that some of the guards were redeployed and others had their services terminated. The savings appellant made in the process must be taken into account.

I am thus of the view that appellant did not prove the extent of the damages as is required in such cases. In her submissions counsel for appellant suggested that in the event of finding the appellant had failed to prove damages it may remit the matter to the trial magistrate for evidence to be led on the question of proper damages. That is the course I find most appropriate in the circumstances of this case.

Costs

The essence of the respondent's sole ground of cross appeal is that the court a quo erred in not awarding the respondent costs in circumstances where costs should have followed the cause especially taking into account the entire history of the matter. In deciding on the question of costs the trial magistrate relied upon unpleaded and unsubstantiated

defence of undue hardship. Indeed in his reasons for judgement he alluded to financial difficulties, economic environment obtaining in the country and concluding on costs by stating that:

> "because of the nature of the claim, it is only fair not to award costs to the winning party. Each party to bear their own costs."

I am of the view that the trial magistrate erred in relying upon a defence that had not been pleaded or substantiated in the exercise of his discretion. It is indeed trite that the award of costs is within the court's discretion but such discretion should be exercised judiciously taking cognisance of what has been adduced by the parties.

In as far as court found respondent to have breached the contract costs should have followed the cause.

Accordingly the following order is made:

1. The appeal is hereby allowed with costs.
2. The judgement of the court *a quo* is hereby set aside.
3. The matter is hereby remitted to the trial Magistrate for adducing of further evidence on the proper quantum of damages.

NDEWERE J I concur ……..

Nyakutombwa Legal Counsel, appellant's legal practitioners
Gill Godlonton & Gerrans, respondent's legal practitioners