T N ZUNZANYIKA ASSOCIATES
versus
TSL PROPERTIES (PVT) LIMITED

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 27 May, 1 June and 30 June 2021

Trial

A.Muchandiona, for the plaintiff
S. Bhebhe, for the defendant

CHIRAWU-MUGOMBA J: The matter before me is an application for absolution from the instance at the close of the plaintiff's case. The brief facts of the case are as follows. The plaintiff seeks payment of the Zimbabwean dollar equivalent of US$607, 453, 35 calculated at the interbank rate prevailing as at the date of payment. After initial denial of liability by the defendant, the only issue that remained for trial was couched in the joint pre-trial conference minute as follows, "Whether or not the obligations that gave rise to this action were caused before or after 22nd February 2019". The date is significant in view of the interpretation by the Supreme Court of the meaning and impact of S.I 33/19. See *Zambezi Gas (Pvt) Ltd* v *N.R Barber (Pvt) Ltd and anor*, *SC* 3-20 and *Breastplate (Pvt) Ltd* v *Cambria Africa PLC,* SC -66-20. Essentially if the debt accrued before 22nd of February 2019, the amount to be paid would be on the basis of one to one between the United States and the Zimbabwean currency. If after 22 February 2019, the debt must be paid at the prevailing exchange rate as at the time of payment.

The law on absolution from the instance has been set out in a plethora of cases. There is a difference as stated in the cases on an application at the close of the plaintiff's case and the defendant's case. See *Danha* v *Mudzongachiso and anor,* 2018(1) ZLR 74(H) and the cases cited. See also *Moyo and anor* v *Methodist Church (Greendale)* 2018(1) ZLR 375(H).

The plaintiff located its claim squarely in the law of contract, that after completion of some work for the defendant, it presented an invoice and it was not paid and therefore it was suing for specific performance. In support of its claim, at the trial the witness for the plaintiff, one Norman Zunzanyika told the court that since 2017 it has entered into various agreements with the defendant to work on various estates as in properties. During the

currency of the first job, the defendant contracted the plaintiff for two other projects. For the dispute in *casu*, the defendant's representative contacted the plaintiff via email with a subsequent meeting held at the defendant's offices. The contract was for the construction of a warehouse, a steel structure, cladding, brick work and concrete floor. The job was completed in May 2019. Sometime in June or July 2019, the plaintiff billed the defendant and were paid in part in RTGS$ for the amount in dispute. In support various documents were produced as exhibits and accepted into evidence. Under cross examination Mr Zunzanyika stated that the contract was not in writing. He admitted that a previous non-paid fee of $75 000 was deducted from an invoice send to the defendant that essentially reduced the amount owed to $607 453.3

The task before the court is therefore to consider whether or not the plaintiff has set out a *prima facie* case, one which the court can say, needs to be explained or rebutted by the defendant. It is trite that courts are loath to grant applications for absolution from the instance at the close of a plaintiff's case since this potentially infringes upon a litigant's constitutionally protected right to equality and right to equal protection and benefit of the law and the right to a fair hearing – see sections 56(1) and 69 of the 2013 constitution. It also infringes potentially on the right to be heard under the rules of natural justice. That is why the standard of proof is the less onerous one of a *prima facie* case. To that end, it is worth repeating the test that has stood the test of time as enunciated in *Gascoyne* v *Paul and Hunter* 1972 TPD170 at p 173, and quoted with approval in the *Danha* case (*supra* as follows;

> "At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, 'Is there such evidence upon which the court…. ought to give judgment in favour of the plaintiff'."

In my view, for the plaintiff to successfully establish a *prima facie* case and having located its dispute in contract and in view of the only issue for trial being the date on which the obligation to pay arose, ought to establish the following- that there was a contract, the clear and unambiguous terms of the contract including the issue of payment, i.e. when was it due. To that end, reference is made to *Stratus Consulting (Pvt) Ltd* v *Zimbabwe Assemblies of God Africa,* HH-494-19. Citing *Gordon Lloyd Page and Associates Ltd* v *Rivera & another,* 2001 (1) SA 88 (SCA), DUBE J had this to say on what a plaintiff who relies on breach of contract have to prove at the close of his case;-

a. The contract relied on
b. Breach of the contract or repudiation of the contract
c. The damages suffered
d. A causal link between the breach and repudiation and the alleged damages
e. Loss, which must not be too remote

More importantly she said as follows, *'What the Gordon Lloyd Page case illustrates is that in a case where the cause of action is breach or repudiation of a contract, the plaintiff must lead evidence regarding the existence of a valid contract sought to be relied on and* ***its material terms.*** (my emphasis).

In my view, the plaintiff failed to make out a *prima facie* case that the defendant ought to answer. Given the fact that the plaintiff and the defendant had been engaged in other contracts, there was no evidence as to when exactly the contract giving rise to the obligation to pay was entered into. There was no evidence of what the clear terms were including payment. None of the exhibits tendered support the requirements as stated above. As a matter of fact, exhibit number 9 threw the plaintiffs case into disarray because it included a figure of 'less $75000' from the previous invoice. The question would be why include this figure in a 'new contract'? The witness failed to explain and put it to 'semantics'. Courts operate on the basis of the law as applied to the facts and not on suppositions. Establishing the clear terms would have enabled the plaintiff to also deal with the pertinent issue, that of the dates of payment. It was crucial for plaintiff to have dealt with each alleged contract one by one so that there could be a distinction with the disputed one. Instead, the evidence leads to the conclusion that there were a series of ongoing contracts but with the terms not clarified. The plaintiff submitted that the documents i.e drawings in relation to the work contracted were 'available' but these were never discovered or tendered into evidence.

In answer to the test and standard enunciated above, there is no evidence placed before the court upon which a reasonable person would give judgment in favour of the plaintiff. Even if the defendant would close its case and not call witnesses, the *prima facie* evidence that is expected in a case of alleged breach of contract, one in which dates are crucial was simply not placed before the court. It would be therefore be an exercise in futility to hear the defendant's side of the matter.

Costs usually follow the cause and I see no reason why the defendant should not be awarded its costs.

DISPOSITION

1. Absolution from the instance is hereby granted to the defendant.

2. The plaintiff shall pay costs of suit

Danziger and Partners, plaintiff's legal practitioners
Kantor and Immerman, defendant's legal practitioners