ZIMBABWE REINSURANCE COMPANY LIMITED
and
MOHAMMED A. K. RAMJAN
and
BELTCHLEY TRADING [PVT] LIMITED

HIGH COURT OF ZIMBABWE, HARARE
Mr. P. Nyeperai for plaintiff
Mr. T. Nyakunika for defendants.

Civil Trial.

KARWI J; Plaintiff's claim as amended is for the delivery by the defendants of two Mercedes Benz C200 Kompressor motor vehicles to plaintiff in terms of an agreement entered into by and between the parties. In the event of failure to deliver the motor vehicles, plaintiff claimed a refund of one hundred and seventy million dollars, to be paid by defendants in performance of their part of the contract, together with interest thereon at the prescribed rate from 16 September 2004 being date of demand to date of full payment. Plaintiff also claimed the sum of US$94 654.00, being the difference in cost of the two Mercedes Benz at the time of breach and the time of the contract, and interest thereon together with the cost of suit. After the trial of this matter, parties continued to engage in discussions with a view to settling the matter, and according to Plaintiff s legal representative, parties agreed and defendants made full refund of the purchase price plus interest. The only issue to be decided in this matter is whether the defendants are liable to pay any damages which plaintiff have suffered and if so, the quantum of such damages.

Plaintiff had on 19 March 2003 contracted defendants to supply it with two Mercedes Benz vehicles in terms of a written agreement entered into by and between the parties. In terms of an invoice supplied by defendants, the purchase price was $170 000 for both vehicles. The vehicles, whose full description in terms of colour, make, model and identification were to be second hand and were to be acquired and delivered in three weeks time. In pursuance of the agreement, plaintiff made full payment for the vehicles

in terms of the contract. It is common cause that upon visiting South Africa to confirm the condition of the vehicles, First respondent was not satisfied with the state of the vehicles. He communicated with Plaintiff who indicated that he would opt for new vehicles instead and both parties agreed that the prices of the new vehicles would be finalized upon delivery. Defendants then proceeded to purchase the new vehicles which were driven to Beitbridge Border Post for clearance. Problems arose after the clearing agents acted outside their mandate by trying to clear the vehicles through another clerk unknown to defendants resulting in the vehicles being seized and eventually forfeited to the State. Meantime defendants had surrendered their Ferrari Motor vehicle to plaintiff as security for the $170 000 advanced to defendants. A cession was agreed on and signed giving plaintiff authority to sell the vehicle should defendants fail to deliver in terms of the contract. It is also common cause that parties held several meetings trying to resolve the issue of the seizure. On one hand defendants were always assuring plaintiff that the problem would be sorted out while on the other hand plaintiff was hopeful that a solution would be found. However, defendants failed to sort out the problem until plaintiff issued out summons two years later.

It was conceded by the Defendant‘s legal representative that the defendants were no longer in a position to fulfill their contractual obligation by supplying the motor vehicles in question. It is clear that they had failed to do so for whatever reason. The legal issue which arises is whether plaintiff had suffered any damages as a result of the breach and if so whether defendants are liable for the breach.

The law relating to contractual damages is settled. A wronged party has a right to claim contractual damages for breach of the contract or to claim specific performance. A wronged party is entitled to damages where it is clear the breaching party is liable for causing the non performance of the contract whether negligently or willfully. To that extent the defaulting party is liable for actual damages suffered by the plaintiff. See Pamire &Ors vs Dumbutshena & Anor 2001 [1] ZLR 123. Makarau J had this to say in this case, “Under the law of contract, damages for breach are meant to put the injured party in the position they have been had the contract been properly performed. It is trite

that the proper performance of the contract necessarily involves the satisfactory discharge of all obligations by all parties and not by the one"

In this case plaintiff said that it suffered damages as a result of the default by defendants and has claimed specific performance and damages in the alternative. It has already been noted that defendants can no longer fulfill their obligations in terms of the contract. It has as a result persisted with a claim for damages. In our law the essence of the payment of damages is to restore the wronged party to the position it would have been had the contract been fully performed. It is also settled law that damages are assessed as at the time of the breach. See Parish vs King 1992 [1] ZLR 216 [S] and Victoria Falls and Transvaal Power Co Ltd vs Consolidated Langlaage Mines Ltd 1915 Ad 122.

Plaintiff is therefore claiming the following in terms of its amended claim,
1] Damages in the sum of $94 654.00 or its equivalent in Zimbabwean dollars less the price of the Mercedes Benz C200 Kompressor at the time of the breach of the contract.

2]. Interest at the prescribed rate on the sum of US 94 654.00 or its equivalent in Zimbabwe dollars at the prescribed rate from the date of summons to date of payment.

3]. Cost of suit.

Defendants's position was that plaintiffs contracted defendants to purchase and supply two C200K Kompressor Mercedes Benz vehicles in terms of an invoice dated 19 March 2003. Pursuant to the agreement, plaintiff paid the sum of $101 00.00 to the defendants as part payment in respect of the two vehicles. The vehicles to be supplied were used vehicles with a mileage of around 10 000 km combined. First defendant supplied a vehicle detail form for the vehicles he had obtained from South Africa but upon going to see the vehicles, he was not satisfied with the state of the vehicles. He communicated with plaintiff 's company secretary who indicated that he would opt for brand new vehicles which plaintiff accepted. However the purchase price of the new vehicles would be finalized upon delivery. First defendant proceeded to purchase two brand new vehicles which were taken to Beitbridge boarder post for clearance through

Speedlink Clearance Agents as the vehicles had to be transferred into plaintiff s name. Complications arose after the clearing agents acted outside their mandate by trying to clear through another clerk unknown to the defendants resulting in the vehicles being seized. Efforts to recover the vehicles proved fruitless thus rendering specific performance impossible. Defendants instituted a claim against Zimra and Speedlink in this court who did not enter appearance to defend and defendants have since applied for default judgment. Defendants further submitted that they were not in a financial position to use their own funds to fulfill their obligations.

It was submitted on behalf of defendants that this court should grant an order for damages actually caused by defendants. Such damages ought to be reduced because plaintiff did nothing to mitigate its loss. This is so in view of the fact that plaintiff was in physical possession of defendants Ferrari motor vehicle as security. It is defendants view that plaintiff should have sold the Ferrari in order to reduce its losses which had been occasioned by the breach by defendants. The duty to mitigate one's loss was emphasized in Ambali vs Bata Shoe Company 1999[1] ZLR 417. If a party does not mitigate its loss, its damages will be reduced.

It was further submitted on behalf of defendants that plaintiff had claimed damages in the sum of 494 654.00, after obtaining a quotation from Zimoco for brand new vehicles If the court was inclined in granting damages for new vehicles, the figure had to be reduced by US$15 000, 00 which defendants incurred for the purchase of new vehicles. This would leave the sum of $79 654.00 being damages for second hand vehicles the plaintiff had initially paid for. It was further argued that the amount had to be further reduced in light of the fact that the breach of the contract by defendants was not self inflicted but actuated by an agent acting outside its mandate. Further the plaintiff was in possession of security, which he failed to dispose of in terms of the cession of rights form which parties agreed to.

It seems to me clear that parties to this dispute entered into a contract for the supply and purchase of two Mercedes Benz motor vehicles, which vehicles defendants have failed to supply. They blame their failure on some clearing agent who did not measure up to their expectations. It is clear that defendants have therefore breached their

agreement with plaintiff and should pay damages for their failure to supply plaintiff with the vehicles. The only issue for determination is one of the quantum of such damages. Plaintiff produced in evidence an invoice from Zimoco for two new similar vehicles. The quotation was for an amount of US$94 654.00. Plaintiff claims that amount as damages. It must however be noted that the quotation is not for second hand vehicles for which he had paid. The second hand vehicles which plaintiff paid for had 3500km and 6500km on their clocks respectively. It would be appreciated that although the vehicles had been used, the said vehicles were substantially new, in my opinion. Further, it would not be argued that the usage of 3500km and 6500km respectively for both vehicles would be equated to US15000.00. The combined usage is far less than US$15 000 which defendant want to equate. In my considered view, the combined usage is negligible even for the class of vehicle in question in our country. The figure given in the Zimoco quotation would still not be reduced because there was no proof firstly, that the said amount was ever paid to the suppliers in South Africa and secondly, that plaintiff ever benefited from the said payment. In other words, plaintiff did not benefit from the alleged payment as it did not get the new vehicles in question in the final analysis. If indeed the payment of US$15000.00 was ever made, it would have been easy to produce the receipts in court, which was not done, therefore casting doubts as to the truth of the assertion. Besides, the issue of the payment of US$15 000.00 was only raised in court during the trial. The issue was not raised in the defendants's pleas. It is more probable that the payment was never made and was only raised at the trial for the first time in an effort to reduce the plaintiff s claim. I therefore do not accept that it was ever made. This also means that the figure claimed by plaintiff will be reduced by US$15 OOO.00.

Defendants also submitted that plaintiff should have mitigated its loss by selling the Ferrari that was surrendered as security. The duty to mitigate does require plaintiff not to sit back and allow damages to accumulate. Plaintiff is required to take reasonable steps to mitigate its loss. See Reid vs Hepker Ltd and Sons [Pvt] Ltd, [1] RLR 284 where it was held that the onus is on the defendant to prove that plaintiff failed to take reasonable steps to mitigate his damages.

It seems to me that plaintiff did not fail to take reasonable steps to mitigate its loss. It was clear from the evidence that from the time of seizure of the vehicles several meetings were held between the parties to try to have the vehicles released from Zimra. In view of the efforts both parties were making, there appears to have been no reason for plaintiff to sell the Ferrari for it genuinely believed that something was to come out of the efforts. Besides, defendants kept assuring plaintiff that things were under control. Plaintiff s witness gave evidence, which evidence was not disproved, that plaintiff had been advised by a reputable car dealer that there was no market in Zimbabwe at the time for a Ferrari. The same witness also told the court that even if plaintiff had wanted to sell the Ferrari, the retention of the keys to the car by the defendants would have made it impossible to sell it. In the circumstances, I find that plaintiff did not fail to mitigate its loss.

In the result, it is ordered as follows:

1. Defendants shall pay the Plaintiff damages in the sum of US$94654.00 less the price of the two Mercedes Benz at the time of breach of the contract.
2. Interest at the rate of interest applicable in the United States of America.
3. Cost of suit.