SQUARE DEAL (PRIVATE) LIMITED

versus

HARARE MUNICIPALITY

and

HELLEN MITCHEL

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 7, 9, 20 and 21 March 2012 and

23 May 2012

**Civil Action**

*T Bhatasara*, for the plaintiff

Ms *S Njerere*, for the 2nd defendant

No appearance for the 1st defendant, the claim

having been withdrawn against it on

26 May, 2011

MUTEMA J: In September, 2010 the plaintiff issued summons against the two defendants claiming damages in the sum of US$281 500-00 plus costs of suit. In the declaration, it is averred that: “The first defendant, acting in connivance with the second defendant, wrongfully and intentionally destroyed the plaintiff’s shop on false grounds that it was an illegal structure.” As a result of the defendants’ conduct, the plaintiff suffered the following patrimonial loss:

1. Replacement costs of the shop, equipment, damaged stock and display signs - US$26 000-00.
2. Loss of business - US$160 000-00.
3. Re-origination and replacement of six installed billboards in Harare - US$9 000-00.
4. Re-origination of all media advertising material - US$11 000-00.
5. Sales staff salary due and contractual security expense from 30 August, 2010 up to 31 December, 2010 – US$6 000-00.
6. Press and drop mail advising customers of demolition – US$5 000-00.
7. Goodwill – US$25 000-00.

The claim was defended. The parties filed a joint pre-trial conference minute on 17 February, 2011 encompassing three issues as follows:

1. Whether or not the demolition was lawful.
2. If the demolition was unlawful, whether the second defendant connived with the first defendant to have the structure demolished.
3. What loss did the plaintiff suffer and what damages the plaintiff is entitled to claim from the defendants?

When the trial was held, the plaintiff led evidence from one witness, Elisha Jeche and then closed its case.

The salient aspects of his evidence were the following:

He is the plaintiff’s security and human resources director. In May, 1995 the plaintiff entered into a lease agreement with the second defendant’s (herein after referred to as the defendant) letting agent, Laws Organisation on behalf of the Zaverdinos Family. The agreement was for an indefinite period. The plaintiff was to erect a kiosk on Lot 1 of 54 A Pomona Shopping Centre. The lease agreement was produced as exh 1.

In 2001 the parties haggled over rental increment with the letting agent adamant that rent would increase. In 2002/2003 the plaintiff received a letter from the letting agent to the effect that the defendant had received notification of the plaintiff’s illegal occupation of the premises from Harare City Council. A request to be furnished with a copy of that letter was not favoured with a reply. After a while the letting agent wrote again saying the plaintiff should vacate the premises within three months failing which it would apply for the plaintiff’s eviction. Thereafter the plaintiff successfully applied for an interdict against the council demolition order.

Between 2005 and 2007 the defendant advised the plaintiff to remove the metal kiosk and put up a 3 – sided wall next to the bakery and seek advice on regularisation of the structure from council. He visited the council district office at Highlands. Chief building inspector Magenga visited the site and advised that since the site was not on council land but private land the plaintiff could do the plans for the temporary structure. The plaintiff drew the plans and gave them to Magenga. He produced exh 2 – application for approval of plans of building. Thereafter the plaintiff erected the building, operated from it paying the agreed rent and yearly fees to council which would issue a licence. After sometime the defendant alleged that the plaintiff was dictating the rent and she no longer wanted the plaintiff on her premises and that the plaintiff must vacate immediately or else she would apply for eviction. When the plaintiff queried the defendant’s stance, the latter alleged that the plaintiff had no approved plans for the building and would therefore demolish it.

This scenario prompted him to visit Highlands district office of the council where he discovered that the plans (exh 2) had not been approved, someone in the office having sat on them. He was given exh 3 – a letter dated 7 May, 2002 addressed to the acting director of works querying the confusion surrounding construction of the kiosk in question. The plaintiff continued operating.

In 2005 the plaintiff received first a letter threatening demolition of the kiosk from council, the argument being that it was built on a pavement. He produced exh 4 – the demolition order, dated 9 January, 2007. The plaintiff contested it in the High Court on the basis that the kiosk was on private property. In 2010 the plaintiff learnt that the case had been dismissed in default of the plaintiff’s appearance.

On 29 August, 2010 around 11 O’clock in the morning, while at the kiosk, he saw a Fox and Carney vehicle parked next to the kiosk. Fox and Carney were the new letting agents for the defendant. Three men came out of the vehicle and the driver was pointing at the kiosk. They entered the defendant’s office and emerged therefrom after about twenty minutes. The following morning he was called to the kiosk by a salesman. He went there and saw the two men he had seen there the day before. The men said they had a court order empowering them to demolish the kiosk. He called the plaintiff’s legal practitioner Mr *Mavhunga* who came and asked to see the court order. The men only showed him an internal memo by director of urban planning advising that they were going to Pomona to demolish the kiosk. He produced it as exh 5.

Mr *Mavhunga* told them the memo was not a court order but the men proceeded to use picks and hammers to demolish the kiosk while the stock was still inside destroying everything. The three municipal policemen who were there excused themselves saying they would not take part in the demolition. The B 1800 vehicle used to ferry the demolishers was not a council vehicle.

He reported malicious injury to property at Borrowdale Police and that case is still pending before the magistrates’ court.

He produced exh(s) 7 and 8 – quotations for rebuilding the kiosk of which the plaintiff settled for the cheaper which costs US$19 200-00 (exh 7). Exhibit 9 represents the stock reconciliation which yielded a loss of US$3 886-00. Exhibit 10 is a quotation for display signs inside kiosk and on the roof valued at US$2 311-50 that were destroyed during the demolition. Exhibit 11 shows loss of business for the period 1 September – 31 December, 2010 which equals US$156 255-00. For the re-origination of plaintiff’s billboards removing the demolished Pomona kiosk he produced exh 12 for US$4 106-00 and exh 13 for US$1 730-00. The plaintiff paid Advertising Industries (Pvt) Ltd US$4 657-50 for re-origination of media information for flyers and press as shown on exh 14. The other invoice for US$4 715-00 was not discovered hence could not be produced. He produced exh 15 showing payments he said were made to Takawira Mutongwizo, a salesman at the demolished kiosk retained from 1 September – 31 December, 2010 to the tune of US$3 281-00. The plaintiff also paid a guard from Condor Security who remained at the demolished kiosk to issue out flyers to potential customers informing them about the demolition of the kiosk. Proof of the payment of US$1 265-00 is shown on exh 16. This was a monthly salary for September, 2010 and he was paid until December, 2010 but produced no other proof of such payment.

Exhibit 17 is an invoice for US$21 000-00 paid to Bear Call Investments which hired casuals to distribute leaflets to each house in the northern suburbs advising people about the demolition of the kiosk. The plaintiff also paid US$3 068-00 to Newsday and Herald newspapers for advertisements informing customers about the demolition of the kiosk and proof thereof is exh 18.

Lastly he said the plaintiff’s goodwill which was destroyed by the defendant’s conduct of showing council employees the kiosk which they demolished the next day amounted to US$25 000-00.

When the plaintiff closed its case following this evidence the defendant’s counsel applied for absolution from the instance which the plaintiff’s counsel opposed.

The test for granting absolution from the instance is well settled. HERBSTEIN and VAN WINSEN in *The Civil Practice of the Superior Courts in South Africa* 3rd ed. At p 462 laid down the test in these words:

“The lines along which the court should address itself to the question of whether it will at that stage grant a judgment of absolution have been laid down in the leading case of *Gascoyne* v *Paul & Hunter* 1917 TPD 170, which contains the following formulation (per De VILLIERS JP at p 173):

‘At the close of the case for the plaintiff, 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?’

 ... The question therefore is at the close of the case for the plaintiff, was there a *prima facie* case against the defendant, Hunter; in other words, was there such evidence before the court upon which a reasonable man might but not should give judgment against Hunter? It follows from this that the court is enjoined to bring to bear on the question the judgment of a reasonable man, and ‘is bound to speculate on the conclusion at which the reasonable man of (the court’s) conception not should, but might or could arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer.”

Locally, the case of *United Air Charters* v *Jarman* 1994 (2) ZLR 341 (s) is in point. At p 343 B-C GUBBAY CJ stated:

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him.”

The caution by BEADLE CJ in *Supreme Services Station* (*1969*) (*Pvt*) *Ltd* v *Fox & Goodridge* (*Pvt*) *Ltd* 1971 (1) RLR 1 (A) bear useful repetition for clarity regarding the salient features the court should bear in mind when considering what the judgment of a reasonable man might be on the evidence adduced by the close of the plaintiff’s case. The learned CHIEF JUSTICE pointed out that:

1. The court should bear in mind that the defendant has not yet given evidence and cross-examined on it;

 2. If the plaintiff has made some case for the defendant to answer and the defence is something peculiarly within the knowledge of the defendant, justice demands that he should be heard;

 3. The general attitude of judges is that they should be very loath to decide upon questions of fact without having all the evidence on both sides; and

 4. In case of doubt as to what the judgment of a reasonable man might be, the safest course for a judge to take is that which allows the case to proceed.

Now on the basis of the foregoing authorities and bearing in mind the pleadings and three issues referred to trial cited above, I am not persuaded that on the evidence adduced by the plaintiff, a reasonable man could or might find for the plaintiff.

The plaintiff issued summons for US$281 500-00 against the first defendant and second defendant jointly and severally. The basis of the claim as set out in para(s) 4 and 5 of the declaration is respectively that the plaintiff operated a retail shop on a private property owned by Ithaca Properties (Pvt) Ltd at Pomona Shopping Centre with the approval and consent of the first and second defendants and that the first defendant wrongfully and intentionally connived with the second defendant and demolished the kiosk on false grounds that it was an illegal structure.

The first issue in the joint pre-trial conference minute spoke to the actions of the first defendant which the plaintiff’s witness supported as the second defendant was not present at the demolition. In pleadings the first defendant denied that its actions were unlawful since the kiosk was illegal and the demolition was done in terms of the law. After the pre-trial conference the plaintiff withdrew claim against the first defendant. This was not a wise thing to do because by so doing the plaintiff precluded the court from making a determination on the lawfulness or otherwise of the demolition. The first defendant did not withdraw its defence hence the first issue cannot be determined in the absence of the first defendant. It becomes pointless to put the second defendant on her defence regarding this issue.

The second issue would only arise if the first issue was determined in the positive, viz that the demolition was unlawful in order to enquire whether the first defendant connived with the second defendant. By withdrawing the claim against the first defendant the plaintiff put the suit beyond the court’s reach. In the event the evidence adduced entitles the court to draw the conclusion that the demolition was actually lawful. This is supported by the evidence adduced that only an application to the first defendant in terms of s 27 of the Regional, Town and Country Planning Act 1976 (then) for a development permit was made by the plaintiff. That application was never processed, let alone approved by the first defendant. The kiosk was accordingly illegally constructed, its construction never regularised hence the enforcement and demolition orders issued by the first defendant. This, only the first defendant would have been able to explain and not the second defendant. In any event, the witness conceded that the plaintiff’s challenge of the enforcement and demolition orders via its application for an interdict in this court was dismissed in default. This therefore means that at the time the first defendant’s employees demolished the kiosk there was no interdict against its demolition and therefore the action was lawful. Apart from a mere suspicion that the second defendant could have connived with the first defendant because she is said to have pointed out the kiosk to the first defendant’s employees or that the employees entered her office the day before the demolition and emerged therefrom after twenty minutes, there is no evidence that she indeed connived with the first defendant. In the event, issues one and two referred to trial fall away.

Regarding the third and last issue, viz the alleged loss suffered by the plaintiff and what damages the plaintiff is entitled to claim from the second defendant, this pales into oblivion on two premises. Firstly, if the demolition of the kiosk was lawful and the second defendant did not connive with the first defendant to demolish the kiosk (even if she had) there was nothing wrongful about the conduct on grounds of lawfulness.

In the result, a lawful action cannot ground delictual damages.

Secondly, even if the court were to assume that a delict was indeed committed against the plaintiff as alleged, instead of producing proof of actual loss suffered for special damages, the plaintiff was content with producing invoices and quotations. Instead of producing financial statements and extracts from the Pomona ledger books, the plaintiff was content with producing a schedule prepared by the witness baldly alleging that Pomona sales were 25% more than those of Avondale sales. No reason was proffered as to why sales for 2010 should be assessed on the basis of 2011 earnings when the witness admitted that prices in 2011 were different from those for 2010. How should the court work out the 15% to be deducted from the claim? Secondary documents were produced instead of primary ones in determining the alleged loss. In the event, the plaintiff has failed to put before the court evidence that would allow determination of any special damages due. No reasonable man could or might find for the plaintiff regarding this issue.

Regarding the general damages for alleged loss of goodwill, no evidence was adduced to the effect that the plaintiff had goodwill which it lost. The witness said sales remained the same in all other depots as before so no goodwill could therefore have been lost.

On the totality of the plaintiff’s evidence adduced by the close of its case, invoking the process of reasoning laid down in the authorities cited above; there is no evidence upon which a reasonable man might find for the plaintiff. In the result, the application for absolution from the instance be and is hereby granted with costs.

*Mavhunga & Sigauke*, plaintiff’s legal practitioners

*Honey & Blankenberg*, 2nd defendant’s legal practitioners