GALAXY ENGINEERING DESIGN CONSULTANTS PRIVATE LIMITED
versus
BELVEDERE NURSING HOME PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 17 September 2018, 3 October 2018 & 30 January 2019

Civil Trial

S..Bhebhe, for the plaintiff
Advocate Magwaliba and K Tundu, for the defendant

MATANDA – MOYO J: On 27 June 2018 I dismissed an application by the defendant for absolution from the instance HH 346/18 refers. I had the matter enrolled for continuation of trial. However on the day of trial the defendant opened its case by closing its case in other words defendant opted not to testify. I am thus once again faced with an application for absolution only this time at the close of the defendant's case. This is akin to having to determine the merits of the case based on plaintiff's evidence alone.

The plaintiff instituted a claim against the defendant for the following relief:

"(a) an order declaring the agreement between the defendant to be valid and enforceable, the said agreement having been entered into between the plaintiff and defendant being represented by its Managing Director;

(b) payment of the sum of $685 733.93 arising from civil and structural engineering services rendered to the defendant by the plaintiff and at defendant's instance and request;

(c) interest on the above amount at the prescribed rate of 5% from the date of summons to the date of full and final payment and

(d) costs of suit"

The plaintiff alleged that around the 24th of November 2006, it entered into a written agreement with the defendant for the provision of civil and structural services to defendant's stands namely number 6803 and 6804, also known as number 17 Princess Road Belvedere Harare. In terms of the agreement the plaintiff was to do the following:

"(i) prepare and submit a report embodying preliminary proposals or feasibility studies;

(ii) develop preliminary or basic planning of the works;

(iii) prepare all documents necessary to enable tenders for works to be called for;

(iv) prepare documents necessary to enable work to proceed; and

(v) to do general administration and execution of the works in accordance with the agreement"

In turn the defendant was to pay fees levied within 14 days of presentation of statement of account.

The plaintiff pleaded that it carried out its obligations in terms of the agreement and duly presented a fee note to the defendant. In breach of the agreement the plaintiff has failed to settle such fee note within 14 days in terms of the agreement between the parties.

The defendant denied liability on the basis that it never entered into any agreement with the plaintiff as alleged. Any agreement alleged to have been entered on behalf of the defendant was never authorized by the Board of Directors or the shareholders. The defendant also denied ever receiving a fee note from the plaintiff and did not admit same. The agreement was thus invalid as the then Managing Director who entered into the agreement lacked the requisite authority to bind the defendant. The defendant prayed for the dismissal of the plaintiff's claim with costs.

The plaintiff insisted in its replication that the agreement was valid, and that the job having been performed, that the plaintiff is entitled to payment. The plaintiff maintained the Managing Director of the defendant had the authority to enter into the contract which bound the defendant.

At the pre-trial conference the following issues were referred to trial:

(1) whether or not the agreement between plaintiff and defendant is binding?

(2) whether or not the defendant owes the plaintiff professional fees in the sum of $685 733.93?

Three witnesses testified in support of plaintiff's claim that is Mr Winfield Vengesayi, Professor Patson Zvandasara and Mr Mutumwapari C R Vengesayi. Mr W Vengesayi is the managing Director of the plaintiff. Sometime around September 2006 this witness was approached by the defendant to carry out civil and structural designs for defendant's Belvedere Maternity Hospital expansion. Subsequent to that an agreement was signed between the parties. Such agreement appears on pages 1 to 34 of plaintiff's bundle of documents. This witness represented the plaintiff in that agreement whilst the defendant was represented by Professor Zvandasara, who then was the Managing Director of the defendant.

Thereafter the plaintiff carried out the works in terms of the contract. Such works included civil service in respect of water reticulation and supply, sewage disposal and structural designs for the building. The plaintiff also did the consolidation of two adjacent properties owned by the defendant. Such consolidation was approved by the City of Harare. Plaintiff produced a Bill of quantities for the project which appears on pages 90-104 of plaintiff's bundle. It took plaintiff about four years working on defendant's site. Plaintiff produced all the required drawings.

After accomplishing the works the plaintiff raised a fee note which appears on pages 36 and 37 of plaintiff's bundle. This witness testified that the fee note was calculated in terms of the 2009 ZACE form. The initial ZACE 2005 forms had been revised to reflect the new currency in use then. In terms of the ZACE 2009 plaintiff was allowed to charge up to 4% of the total value of the works for structural engineering services. Such fee note was done and submitted to the defendant through the Architect and Project Supervisor, Vengesayi Architects. To date the fee note remains unpaid.

Under cross-examination this witness conceded that the fee note was not directed to the defendant but to the Architects. There was no reference that such fee note was received on behalf of the defendant. The Architects were not acting on behalf of the defendant.

This witness conceded that in the contract the client's name was not inserted-see p 7 of plaintiff's bundle. He also conceded that under clause 3 of the contract, the parties failed to delete the inapplicable between whether fees were to be charged on percentage basis or on a time basis. Similarly clause 5 left the method of payment of fees undetermined.

On re-examination this witness insisted that when charging it is common for Engineers to use current rates, that is to say rates applicable as per year of completion.

Professor Zvandasara testified that he was the M.D. for the defendant at the time. In that capacity he engaged the defendant to design the structure for the extension of the Belvedere Maternity ward. It was after a Board Resolution had been passed for such works to be done. He testified that he signed the agreement on behalf of the defendant. The works were done in terms of the agreement. This witness testified that sometime in August 2010 he received an invoice from the defendant for works done.

He submitted such invoice to the Board. The Board advised him to negotiate a payment plan pending funding. Such funding was availed through a loan of $7,5 million from a local bank

and $12 million from a South African Group. The fund came to a total of $21 million. During that period squabbles erupted amongst Board members resulting in the stoppage of works. Construction failed to commence as a result. On 22 September 2011 this witness testified that he was locked out of his office and from then to date he had never been to that hospital.

Under cross examination this witness admitted that when he left, his relationship with other Board members was bad. He explained that he could not produce the Board Resolution as such resolution was kept in his former office which he had no access to. He explained that since the invoice was raised in 2010 the rates had to be as per ZACE 2009. He admitted that certain works were done during the Zimbabwe dollar era. He also admitted that the agreement had no formula for calculating fees. The witness admitted that he was also fighting defendants in court. He admitted he is still a shareholder of the defendant. He said despite the fact that he had issues with the defendant, he was telling the truth. He said the work to be paid for pertained to drawings of diagrams and plans. No construction was done.

Mutumwapari Charles Vengesayi testified that he was in the architecture profession and operates under Vengesayi Architects Company. His company did consulting works for the defendant since 2005. He was the overall supervisor for defendant's project at Belvedere Maternity Hospital. He testified that indeed plaintiff carried out works at defendant's place. The proof was the approval by the City of Harare.

He explained that the plaintiff had a contract with the defendant which spelt out how charges were to be calculated. The plaintiff would raise a fee note which it would submit to the Architect for onward transmission to client. Alternatively the fee note could be sent directly to the defendant. He testified that they received a fee note from the plaintiff and passed it on to the defendant.

According to this witness the figure charged was reasonable.

Under cross-examination he admitted that W. Vengesayi was his elder blood brother. W. Vengesayi was the brains behind plaintiff and this witness is the brains behind Vengesayi Architects. He conceded that the construction as per designs and plans has not commenced. He was taken to task on what was presented to him, whether invoice, fee note or quotation. He admitted he received papers on p 36 of the plaintiff's bundle titled "Fees Estimate For Project

Budget" He however said such papers were presented after the drawings and plans were done and approved in 2010. He admitted p 35 of plaintiff's bundle refers to a quotation.

Under re-examination he said although the fee note was headlined "Fees Estimate for Project" on p 37 it is written "Total fees now due including V.A.T." It was clear to anyone reading the invoice that it pertained to fees due and payable.

The plaintiff closed its case. The defendant opened and closed its case. The end result is that I am called upon to determine the matter based on plaintiff's evidence alone.

The facts as proved are that the plaintiff and defendant entered into a contract whereby the plaintiff agreed to carry out civil and structural engineering works for Belvedere Nursing Home Pvt Ltd (See p 1 of plaintiff's bundle). The date of agreement is September 2006. The plaintiff was represented by W.T Vengesayi and the defendant was represented by Professor Zvandasara. At that time both parties agreed that Professor Zvandasara was the Managing Director of the defendant. Page 6 of the bundle provides how the fees will be calculated. The contract provided for two options that is, either charging on a percentage basis or on a time basis. The parties were obligated to delete the inapplicable. Nothing was deleted. Article 17 of the agreement also provided another formula of calculating fees.

The plaintiff's witnesses testified that consolidation of the two properties was successfully done and approved by the City of Harare. Designs and plans were also done and approved. However construction was not done as serious squabbling ensued amongst defendant's directors.

Professor Zvandasara was and is still a shareholder of the defendant. At the time he was the Managing Director and was actively involved. He admitted that currently he is in court fighting with the other shareholders of the defendant. It is true that his evidence need to be scrutinised in view of the fact that he is not in good books with the other directors. It is not in dispute that Professor Zvandasara was in charge of the project on defendant's side. The contracts produced show that indeed he signed on behalf of the defendant. In view of the fact that he is still fighting to get what he believes is owed him by the defendant, I do not believe he would want to sabotage the company. It is in his interest that the company remain liquid so that he can recover what is owed to him. In that respect I have no reason to doubt his sincerity. The defendant admitted that he was locked out of the office and that explains his failure to produce certain documents like the approval and the board resolution.

From the evidence submitted I have no doubt that the plaintiff did carry out the works as per the contract.

The only issue in dispute relates to the fees charged. From the evidence the fees were charged on a percentage basis.

According to Professor Zvandasara when he received the fees note he took same to the Board of Directors. He was advised to negotiate a payment plan pending availability of funding. He never got to negotiating such a plan. The payment plan was therefore never agreed to.

The defendant applied for absolution from the instance at the close of its case. The test is different from the test applicable when such an application is made at the close of plaintiff's case. In an application for absolution at the close of plaintiff's case the test is whether a *prima facie* case has been made against the defendant. In other words whether there has been placed before the court such evidence upon which a court might find for the plaintiff. See *Gascoyne* v *Paul & Hunter* 1917 TPD 170 @ 173, *Lourenco* v *Raja Dry Cleaners and Steam Launding (Pvt) Ltd* 1984 (2) RLR 151, *Dube* v *Dube* 2008 (1) ZLR 326, *Movine and Trade Insurance Co. Ltd* v *Vandaschuff* 1972 (4) SA 26(A) @ 379-38A.

The test for absolution at the close of the defendant's case becomes whether there has been placed before the court such evidence upon which a court 'ought' to find for the plaintiff. See *Supreme Service Station* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) ZRR 1 (A) @ 5F-G where the court said:

> "The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne* v *Paul and Hunter* 1917TPD 17 – Gascoyne's case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical."

The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes its case is "what might a reasonable court do?", whereas the test to be applied when the application is made after the defendant has closed its case is 'what a reasonable court ought to do?'

I would want to add my own understanding that the application before me is another way of defendant saying to the court, proceed to determine the matter on the merits without my input.

The onus remains on the plaintiff to have proven its case on a balance of probabilities for plaintiff to succeed in its claim. The test becomes whether the court applying its mind ought to find for the plaintiff.

The defendant argued that because the parties failed to delete the inapplicable rates there is no valid contract between the parties. The defendant submitted that the contract failed to specify whether the charges would be percentage based or time spent based. There having been no agreement in respect of this essential element of the contract, the defendant ought to be resolved.

On the other hand the plaintiff argued that there was a valid binding contract between the parties. The plaintiff submitted that the fees were indeed charged in terms of clause 3 of the Agreement. Clause 3 provided that:

> "3.1 Fees will be charged:
>
> On a percentage fee basis (or) on a time basis (where appropriate)
>
> (delete the inapplicable)

Plaintiff argued that the interpretation that should be given to that clause is that fees are to be charged on a percentage basis by default and on a time basis only "where appropriate". In the absence of an express agreement that fees would be charged on a time basis then the fees would be charged on a time basis then the fees would be charged on a percentage basis. Plaintiff also referred me to clause 17 of the Agreement which provides a detailed formula to be used in calculating the fees due to the consultant.

I agree with plaintiff's submissions that the court ought to look at the whole contract document as opposed to only looking at clause 3. When clause 3 is read together with clause 17 it becomes clear that the parties agreed on how the fees were charged. Taking into account the conduct of Professor Zvandasara on receiving the fee note, one can only conclude that he was in agreement with the charges. He seems to understand the formula used. His evidence that the Board directed him to negotiate a payment plan has not been challenged by the defendant. The figures were accepted by the Board of defendant. The only issue referred for discussion according to evidence was to do with payment plan.

In my judgment relating to application for absolution at the close of plaintiff's case, it was obvious certain evidence required answers from the defendant. The defendant exercised its right

not to provide the answers. I am persuaded by the sentiments expressed by the court in the case of *Ex Parte Minister of Justice*. In *Le R* v *Jacobson and Levy* 1931 AD 466 at 478-9 where it said;

> "*Prima facie* evidence in its more usual sense, is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive and the party giving it discharges his onus. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof."

In the case of *Hoffman and Carvahlo* v *Minister of Agriculture* 1947 (2) SA 855 (T) at 860 the court had this to say;

> "Where parties intend to conclude a contract, think they have concluded a contract and proceed to act as if the contract were binding and complete, I think the court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequence of all that he has done and all that he has intended."

See also *Belville Inry (Edms) Bpk* v *Continental China (Pty) Ltd* 976 (3) SA 583 (C) at 592A …….

> "Business often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly, the duty of the court to construe such documents fairly and broadly, without being astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English Law, *verba ita sunt intelligenda ut res magis valeat quam pareat*."

I am convinced that the parties did enter into a valid and binding contract. It is clear what the parties intended to achieve. The parties intended that plaintiff proceeded to consolidate two adjacent properties and prepare designs and plans for the extension of the Belvedere Maternity ward. The plaintiff carried out such works and the defendant provided monies for payment to City of Harare. The parties actions showed that they had concluded a contract. The contract agreed on methods of calculating fees. The plaintiff used one of the methods as provided in the agreement.

In the result the defendant has failed to discharge the onus on it. Instead the plaintiff on a balance of probabilities discharged onus of showing a valid and binding contract. Plaintiff showed works were carried out in terms of the contract and that the fees charged are still owing.

In the result I order as follows;

1. The defendant's application for absolution at the close of defendant's case fails and is dismissed.

2. The agreement signed between the parties is valid and binding.
3. The defendant is ordered to pay to the plaintiff the sum of $685 733.93 together with interest at the rate of 5% per annum from date of summons to date of full payment.
4. Defendant to pay costs of suit.

Kantor and Immerman, plaintiff's legal practitioners
Chihambakwe Mutizwa & Partners, defendant's legal practitioners