

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO.

61/09

In the matter between

THE COMMISSIONER OF POLICE

FIRST APPELLANT

**THE ATTORNEY GENERAL
APPELLANT**

SECOND

And

THE PESCO SERVICES (PTY) LTD

RESPONDENT

CORAM: RAMODIBEDI, CJ

DR. TWUM, JA

FARLAM, JA

HEARD: 11 MAY 2010

DELIVERED: 28 MAY 2010

SUMMARY

Contract for services – Measure of damages – Principles involved – Plaintiff failing to prove what expenses it incurred and therefore what profit it made – Appeal upheld and absolution from the instance with costs ordered.

JUDGMENT

RAMODIBEDI, CJ

[1] This appeal concerns a dispute for damages arising from

a breach of contract to treat and fumigate termites and cockroaches at Matsapha Police College. For convenience, the parties will be referred to by their nomenclatures in the court below.

[2] The plaintiff, a company duly incorporated according to the laws of Swaziland, issued summons against the defendants for payment of E1,921 000.00 plus 9% interest for alleged contractual damages.

[3] In its particulars of claim the plaintiff alleged that on or about 1 May 2005 it entered into a written agreement with the first defendant. The express, material, alternatively, implied terms of the contract included the following:-

(1) that the plaintiff agreed to treat and fumigate termites and cockroaches at Matsapha Police College;

(2) that the first defendant agreed to pay E113,000.00

per month for the services rendered and

1. that the contract was for a fixed term from May

2005 to 31 December 2007.

[4] The plaintiff further alleged in its particulars of claim that it fulfilled its obligations by treating and fumigating the termites and cockroaches from 1 May 2005.

[5] The plaintiff alleged that in July 2006 the first defendant repudiated and/or breached the agreement by instructing it and/or its employees not to carry out their contractual duties. It further alleged that the first defendant did this without furnishing it with any reason. Hence it alleged that as a result of this breach it suffered contractual damages calculated from July 2006 to December 2007 in the sum of E1,921 000.00 which the defendants were refusing to pay, notwithstanding demand.

[6] The High Court (Agyemang J) granted the whole claim with costs as prayed. The court described the sum of E1, 921 000.00 thus granted as representing the contract sum for the unexpired term of the contract. The appellants have appealed to this Court against the correctness of that order.

[7] In order to appreciate the real issues which arise for determination in this appeal it is necessary to have regard to the pleadings, even if briefly. In paragraph 6 of their plea the defendants denied the contents of paragraph 7 of the plaintiff 's particulars of claim in which it alleged that it had suffered damages in the amount of E1,921 000.00. Crucially, they further pleaded that the plaintiff was "placed to strict proof" of its damages. They also averred in paragraph 7 of their plea that payment in an amount of E950,000.00 had been made to the plaintiff in full and final settlement of the matter. The court *a quo*, however, came to the conclusion that such payment was for services rendered. That finding is indeed supported by the deed of settlement between the parties. The deed refers to "services rendered". Obviously this can only mean the services rendered before the repudiation of the agreement between the parties. In any event there is no challenge to the court *a quo*'s finding that the payment in question was for services rendered. There is, therefore, no need to debate the point any further.

[8] What is of more importance insofar as this appeal is concerned is the fact that in the minutes of the pre-trial conference the defendants specifically challenged the plaintiff to prove the damages sought. The issue for determination in this regard was recorded as follows:-

“ 7. Therefore, if the plaintiff still insists that the matter was settled

in full and final settlement, it will have to prove the damages during

the trial.”

[9] At the trial the plaintiff led two witnesses in support of its claim. These were Nontokozo Ashers Vilakati (PW1) and her husband Joseph Simon Ashers (PW2) respectively. They were both shareholders and directors in the plaintiff company. They testified that the first defendant breached the agreement between the parties in July 2006 by instructing the plaintiff not to proceed with its contractual obligations due to lack of funds. At that stage the agreement still had 17 months to run until 31 December 2007. Hence the plaintiff claimed the sum of E1,921 000.00 for this unexpired period of the contract.

[10] The plaintiff 's witnesses testified that the plaintiff could not secure comparable jobs at the material time between July 2006 and December 2007. As a result it had to lay off its workers thus leading up to the demise of the company.

[11] Now, the general rule is that when a contract is repudiated the injured party should, so far as that can be done by the payment of money, be placed in the same position he would have occupied if the contract had been performed. An important qualification to this

rule is that the defaulting party is only liable for damages which may fairly be considered to have been within the contemplation of the parties. See for example **Victoria Falls & Transvaal Power Co., Ltd V Consolidated Langlaagte Mines 1915 AD 1.** Similarly, it is trite that the injured party has the right of election whether to hold the defaulting party to his contract or to claim damages for the breach.

[12] In a well presented argument Mr. Magagula for the first defendant correctly submitted, in my view, that the plaintiff is entitled to claim for loss of profits. The highwater mark of his submission, however, was that the plaintiff failed to prove its profits. It simply proceeded on the basis that the agreed monthly figure payable was E113,000.00 for services rendered. But there was no evidence to show how much of this figure went to expenses and how much constituted profits.

[13] In an equally able argument Mr. Motsa for the plaintiff on the other hand submitted that the plaintiff is entitled to the full measure of damages, being the balance of the contract in question. Counsel sought to rely on such cases as **Myers V Abramson 1952 (3) S.A. 121 (C); Masetlha V President of the Republic of South Africa And Another 2008 (1) S.A. 566 (CC)** and **Western Credit Bank Ltd V Kajee 1967 (4) 386 (N).** These cases do not assist the plaintiff. There were no expenses involved in each case. Indeed the first two cases dealt with contracts of employment for personal service. As can be seen, here we have a contract to render services involving, as it does, expenses. Similarly, **The Western Credit Bank Ltd** case concerned leasing of immovables. It, too, did not involve expenses.

[14] Mr. Motsa further sought to rely on **Deloitte Haskins & Sells Consultants (Pty) Ltd V Bowthorpe Hellerman Deutsch (Pty)**

Ltd 1991 (1) S.A. 525 (A) for the proposition that in an exceptional case it is permissible to depart from the normal principle that the injured party must prove loss of profit. I am not persuaded that this is such a case. Crucially, the Appellate Division in **Deloitte's** case specifically held at page 532 F - G of its judgment that the plaintiff's claim was founded solely on clause 15 of the agreement between the parties and not on liability arising by operation of law. It follows that the case in question is distinguishable from the instant matter.

[15] Finally, Mr. Motsa stressed the following submission which appeared in his heads of argument:-

“(c) the plaintiff was, for the entire period of the unexpired portion of the contract, willing to perform its obligations and continued to incur the costs associated with such obligation as if the contract were always in force. The plaintiff was therefore entitled to payment of the contractual sum of each month as a result of its willingness to treat the contract as still in force and because of its readiness to take up its obligations to the first defendant at a moment's notice (see pages 144 and 145 of the record); and

(d) the plaintiff's normal business expenses in respect of employees, creditors and rental for the premises continued until December 2007 and therefore the plaintiff continued to incur all the expenses associated with the contract, leaving nothing to be deducted from the monthly amount payable by the first defendant.”

The fact of the matter, however, is that these two statements are not supported by evidence. There is thus no basis to rely on them.

[16] To sum up then, it is not disputed that fumigation is an exercise that involves expenses. The onus of proof was on the plaintiff to prove its profit. That in turn entailed proof of what expenses it suffered as these had to be deducted before any profit could be realised. The plaintiff failed to discharge such onus. It failed to inform the court what staff it had, the size of the wage bill, when it retrenched them, what fumigation material and insecticides it used et cetera. All this information was readily available to the plaintiff.

[17] At the end of his argument Mr. Motsa submitted that if the Court were of the view that the plaintiff's damages were not proved the case should be remitted to the court *a quo* for evidence to be led on the point. In support of this submission he relied on **Mossel Bay Divisional Council V Oosthuizen 1933 CPD 509** and **Modern Engineering Works V Jacobs 1949 (3) S.A. 191 (T)**. He was given leave to file supplementary heads on the point and in these heads he referred to two further cases **Coetzee V Jansen 1954 (3) S.A. 173 (T)** and **Maswanganyi V First National Bank Ltd 2002 (3) S.A. 365 (W)** at 371 - 2. He contended that special circumstances were present in this case, namely (1) the lack of appreciation on the part of the plaintiff of the measure of damages to be proved in that it used the measure of *locatio conditio operis* instead of the measure of loss of profit; and (2) the fact that the defendant, as he put it, "*only raised spurious defences to challenge the breach and did not controvert the measure of damages approach adopted*" by the plaintiff in the court *a quo*. He also submitted that the prejudice which the defendant has suffered can be cured by a costs order in respect of the appeal but that there would be considerable costs if absolution were granted at this stage.

[18] An application for remittal to the court *a quo* to enable damages to be proved was considered in **Odendaalsrust Gold General Investments And Extensions Ltd V Naude N.O. 1958**

(1) S.A. 381 (T) at 384 G - 385 D where Bekker J, with whom Dowling J concurred, said:-

“Mr. McEwan finally contended that if it should be found that the

evidence was insufficient to justify the award, the case should be

remitted to the magistrate in order to enable the plaintiff to present

additional evidence on which an award could properly be made. In

support of his contention he relied on the decision and reasoning of

*this Court in **Modern Engineering Works V Jacobs, 1949 (3)***

S.A. 191 (T)** at p. 193, and **Coetzee V Jansen, 1954 (3) S.A. 173

(T)**, when such a course was indeed followed. But in **Scrooby V

***Engelbrecht, 1940 T.P.D. 100** at p. 106, RAMSBOTTOM, J., said,*

in refusing such a request:-

‘In my opinion this is not a case in which we should exercise the power of remittal conferred by sec. 84 of the Act; there are no special circumstances to take it outside the ordinary

rule stated in **Kottler V Jordaan, 1930 T.P.D. 466** and in which it was held that:-

'Ordinarily a Court will not give leave to a litigant to have a case re-opened for the purposes of calling further evidence if, after having closed his case, he finds that his case has been insufficiently presented.'

Quite apart from the fact that the Court's attention, in the cases referred to by Mr. McEwan, was presumably not directed to the observation of RAMSBOTTOM, J., in **Scrooby's** case, **supra**, it has been the practice in this division to adhere to the rule laid down in **Kottler V Jordaan** and to refuse such leave in the absence of "special circumstances" (see *inter alia*, **Adams V Halling, 1932 T.P.D. 115**; and **Epstein V Arenstein and Another, 1942 W.L.D. 52** at p. 61). Furthermore in **Deintje V Gratus and Gratus, 1929 A.D. 1** at p. 6, it was said that:-

*'Now as the Appellant asks for indulgence to allow him to lead fresh evidence, the **onus** is upon him to show that he has used proper diligence - reasonable diligence in not presenting evidence at the trial that with due diligence might have been available. Whether he has done so must be gathered from the facts...'*

In the instant case it is of course the respondent who seeks this indulgence but I think these remarks apply with equal force to him. In my view he is responsible to show the "special circumstances" warranting such a course; nor has he shown that he acted with due diligence. The necessary evidence was readily available to him. He could easily have proved the rental value of erf 1522, but he failed to do so. In my view the

request to remit the case for the purpose mentioned must be refused.”

[19] In my opinion the reasoning in that case applies here. The evidence as to the loss of profits allegedly suffered by the plaintiff was readily available.

[20] In the light of these factors I cannot agree that special circumstances are present in the case. In view of the approach adopted by the defendants in this Court, where only the question of proof of damages was argued, it should not be necessary for the plaintiff, if it sues again for the damages it allegedly suffered, to prove all the facts establishing the breach and refuting the defence unsuccessfully raised in the court below on the merits, which was not persisted in on appeal. It may happen once the documents evidencing the loss of profits are made available to the defendants that the matter will be settled. The **Maswanganyi** case relied on by Mr. Motsa does not in my view lead to a contrary conclusion. As I have already pointed out, it will not be necessary in a fresh action for most of the evidence already given to be repeated – as would have been the case in the **Maswanganyi** case, in which in any event the defendant’s counsel did not object to the remittal.

[21] It follows from these considerations that the correct order should in the circumstances have been one of absolution from the instance. Accordingly the following order is made:-

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and is replaced with the following order:-

“Absolution from the instance is granted with costs.”

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree _____

DR. S. TWUM

JUSTICE OF APPEAL

I agree _____

I.G. FARLAM

JUSTICE OF APPEAL

For Appellants: Mr. J.S. Magagula

For Respondent: Mr. K. Motsa