

HC 10682/2000

MAGMU ENTERPRISES (PRIVATE) LIMITED
versus
CLAUDIOUS CHIGUVI
and
MUTSA CHIGUVI

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 19 May and 23 July, 2003

Mr *P G Muchemwa* for plaintiff
Mr *T Muskwe* for defendants

SMITH J: The plaintiff (hereinafter referred to as "Magmu") issued summons claiming \$196 597,04 as being due to it by the defendants in respect of construction work it had carried out at the defendants' residence. Details of the claim are set out in a certificate attached to the summons. That shows that the contract price was \$602 397 and the defendants had paid \$419 998, leaving a balance of \$172 399 (in fact the correct figure is \$182 399). Then the certificate specifies various amounts, being \$108 389,97 for "add 45 & 24% wage increase", \$67 308,46 for "interest on unpaid OD", \$100 000 for "100 bags of cement", \$11 000 for "variation on verandah and cubbing" and \$18 000 for "March, April salaries and admin fee". The certificate then shows that the total of the additional charges is \$396 597,04 (in fact, according to the figures, it should be \$304 698,43). After deducting a payment of \$200 000, the certificate shows a balance outstanding of \$196 597,04. Because of the mathematical errors, the actual amount should be \$287 097,43. The defendants deny that there is any balance owing in terms of the contract they entered into with Magmu. They also deny that they are liable to pay any wage increments or interest charges. They admit that Magmu had paid for 100 bags of cement but claim that the cost thereof was \$10 000 which they had repaid. They admit that there was a variation on the verandah and "cubbing" but claim that they paid \$11 000 for the variation. They further deny that they are liable to pay salaries for any period after October 1999 as Magmu was required to have completed construction of the house by the end of October.

The defendants filed a counterclaim alleging as follows. The material terms of the contract they entered into were that the construction of the house would be completed within 7 months from the date work started, they were to supply the building materials, they were to pay \$105 599,23, being 25% of the labour costs, once Magmu moved onto the site and the construction was to be done by good workmanship and in an efficient manner. Construction started about the beginning of March 1999, and should have been completed by the end of September. However it was not completed until the end of April 2000. The workmanship was poor, which meant that the house had numerous defects. Internal plastering, painting, door frames and window frames were not done properly. The cost of rectifying the defects was \$172 714,85. The painting of the external walls, gutters and fascia boards was not done properly. The cost of rectifying the defects was \$86 450. The plumbing was not done properly, resulting in the necessity to replace a geyser. The cost thereof was \$35 824,65. There was a leaking pipe, the repair of which would cost \$23 852,13. There were cracks in the walls; the cost of repairs was still to be computed by an engineer. When the contract was entered into, the defendants were occupying rented accommodation. The monthly rental was \$6 000. Because the house was completed 7 months later than the due date, they had paid rent for an extra 7 months. That would not have been necessary if the house had been finished in time. Accordingly the defendants claimed \$320 840,63 for repairs to the house and \$42 000 which they had had to pay as rent because the house was not completed within the specified period of 7 months. Before the trial commenced Mr *Muskwe* applied to amend the counter-claim by adding claims of \$2 689 754 for structural underpinning of the walls, \$905 420 for repainting the ceilings and the interior of the house and \$235 780 for rectifying plastering defects.

Magmu opposed the counter-claim on the following grounds. The period of 7 months for the completion of the house was

dependent on the defendants supplying the required materials timeously. As that was not done it was not possible to complete the work on schedule. In terms of the contract, the defendants were liable to pay any escalation in labour costs. The wages of the workers were increased by 45% in July 1999. The house was completed in April 2000. Magmu denied that the work had not been performed in a workmanlike manner. It denied that the work did not meet the required standards and claimed that it had not done any painting of the external walls, gutters and fascia boards. Inspections by officials of the City of Harare had been done at various stages and the work had been passed. The defendants moved into the house before it was fully completed, and so a certificate of occupation could not be granted.

Mr Magama, the Managing Director of Magmu, testified as follows. The contract he entered into with the defendants was that Magmu would build a house for them. They would provide the materials and Magmu would provide the labour. The agreement was that the house would be built within 7 months but, because of delays in the supply of materials, it took 9 months. The building inspectors carried out three inspections during the course of the work, first when the foundations were laid out, then when the slab was cast and finally at roof level. A structural certificate was issued by the City Council which required that the roof had to be done by a roofing specialist or else an engineer would have to be employed. Initially, a roofing specialist was going to be hired but, because the defendants wanted to buy the timbers, an engineer was engaged. The defendants took occupation of the house in September or October 1999. They just moved in without any handover/takeover procedure. They took the keys from the security guard without getting his prior approval. At that stage the house had not been fully completed as there was still some touching up and finishing to be done. The interior doors had not been fitted. The defendants undertook to do the doors. As they did not pay the amount Magmu claimed in respect of escalation in costs, a letter of demand was sent to them. The defendants gave Magmu two cheques, one for \$120 000 and the other for \$196 899. The second cheque should have been for \$200 000. He was not aware of any defects in the house until the counter-claim was served on him. He had been asked to relay the tiles in the bedroom, which he had done. The defendants took occupation in October 1999 and he had been told of the defects in May 2001. He had not visited the house after the defendants moved in. They had not asked him to go and see the defects. The paint was to have been provided by the defendants and Magmu was to do the painting. However, they had

not provided the paint. Had they done so, Magmu would have done the painting. Magmu had done the plumbing but he had not been called in to look at the geyser. Because there had not been a proper handover/takeover, he had not obtained a certificate of occupation. However, one had been obtained after the counter-claim was filed. He had received a letter from the City Council confirming that building inspectors had inspected the house whilst it was being built.

Magama was subjected to a lengthy cross-examination in the course of which he gave the following responses. He is related to the 2nd defendant by marriage. The defendants purchased materials for the house but occasionally they bought items such as bricks through Magmu, because the company could get a discount. He would tell the defendants what materials were needed and when. He agreed that the 100 bags of cement cost \$10 000 and not \$100 000 as he had claimed. That was a mistake he made. The interest on the overdraft had not been specified in the contract but it had been part of the costs Magmu incurred in building the house. Similarly, the \$18 000 claimed in respect of administration fees and salaries were costs incurred by Magmu. The salaries for March and April were claimed because it was not due to Magmu's fault that the construction of the house took more than 7 months. The plan of the house had not included a verandah. He had agreed to incorporate one, but on the basis that Magmu would have to charge extra. He had been a councillor on the City Council at the time the house was being built. He accepted that Mr Badza, a district officer in the employ of the Council, had written the letter dated 1 December 2000 in which it was said that there was no record of any inspection of the house by a building inspector, that the building had not been done properly and that there were visible cracks in the walls that had to be rectified before a certificate of occupation could be issued. However the defendants must have manipulated Mr Badza to write the letter because district officers were not the proper officials to issue certificates of occupation. He could not say why the certificate of occupation did not bear the official Council stamp. There should be such a stamp on the certificate but it was for the officials to apply it,

not him.

Mr Jumbe, a building inspector, testified as follows. He had done the inspections of the house in question, which was in Bluff Hill. He had carried out two inspections, one at foundation level and the other at floor level. Both stages were done correctly and he gave his seal of approval. He did that by making an entry in his diary and signing it. He knew Mr Badza. He was a district administrator whose job included the approval of building plans. He did not visit sites. That was the job of a building inspector. Mr Chirombe was a building inspector who also covered the Bluff Hill area. He did not agree with the contents of the letter dated 1 December 2000 that was written by Mr Badza. It was not part of the functions of a building inspector to comment on plastering or the moisture on window seals and so Mr Chirombe would not have commented on those aspects. The defects pointed out in the letter did not disqualify the house for a certificate of occupancy. A person could not lawfully occupy a newly-built house before a certificate of occupancy was issued. Such a certificate was necessary in order for the Council to assess the rates that would be payable. It was he who had issued the certificate of occupancy for the house. Such documents did not have the Council stamp placed on them.

In the course of cross-examination, Jumbe gave the following responses. It was normal to issue a certificate of occupancy after two inspections, one at foundation level and the other at slab level. It was not necessary for the superstructure to be examined. Such certificates were often issued only after people had moved in and were occupying the house. In some cases they were issued on application by the owner. He could not produce his diary because he had mislaid it. However, he had looked at his diary before he issued the certificate of occupation for the house. The building plan would show the dates of his inspections but he did not have that plan. It was kept by the owner. He had been shocked when he noticed in 2002 that people were already living in the house before a certificate of occupation had been issued. Jumbe said that he was the one who had issued the certificate of occupation. He did that after he noticed that people were living in the house. It was illegal for them to have done that so he decided to issue the necessary certificate. He agreed that the certificate had been issued at the request of Magmu's legal practitioners but he was not aware that they had made such a

request.

The first defendant then testified as follows. He and his wife bought the stand in Bluff Hill in order to build their own house. His wife suggested that they approach Magama to do the building as he was related to her by marriage. Magmu submitted two quotations, one for labour only and the other for labour and materials. They decided to accept the former. However, in the case of some materials, such as bricks, sand, cement and window and door frames, Magmu could get a discount so the materials were purchased through Magmu. They paid Magama \$193 000 for the materials purchased through Magmu. Magmu started the building and they checked regularly on the progress. Magama was a qualified contractor and they relied on him. The house was to be completed within 7 months. Initially progress was good, but in July or August they heard that Magmu had obtained another contract to build a house in Borrowdale. The manpower working on their house was scaled down. When he raised the issue with Magama, the latter said not to worry because the house would be finished within the 7 months. It was not true that the supply of materials was erratic. His wife sacrificed a lot of her time so that she could visit the site and procure the necessary materials expeditiously. Everything was on track until Magama removed some of his workers to the site at Borrowdale. Materials were always procured when they were needed. The house was eventually completed in April 2000 and they moved in in May. All the materials for the plumbing were purchased in November and then Magama said he would do the plumbing after the December shut down. There had been an official handover/takeover. Just before they moved in they pointed out to Magama the defects in the plastering and painting and that the handles of the windows were not brass. He promised to rectify the defects. Two days later two gangs came to the house to redo the plastering. They just made it worse. It was Magama who had the keys to the house, not the security guard, and he was well aware of the defects. They could not delay in moving in. Some fittings were missing. Door handles and taps were missing. The interior doors were at the house but they had not been fitted. They had called in a contractor to fit the carpets. There were cracks in the walls at every corner and some plaster had fallen. No qualified person would have issued a certificate of occupation. They had asked Magama to obtain the certificate and he had promised to do so.

After they moved in they noticed a number of defects. The plastering and painting had been done poorly. The plumbing was not right because a pipe in the wall leaked, as did the geyser. They tried to get Magama to rectify the faults but he never came to the house. Eventually they had to approach a firm of plumbers to repair the geyser. They also approached an engineering firm to look at the house. That firm confirmed that the foundations had not been done properly. There were two options to remedy the position. Either the walls could be rebuilt or the foundations could be underpinned. The first option did not seem to be feasible. It would cost \$2 689 764 to

reinforce the foundations. That was the quotation given last year. Today it would cost three times as much. He had paid the plumbing company \$25 852,13 to repair the pipe in the wall that was leaking and \$35 820,65 to repair the geyser. If Magmu had done the work properly those repairs would not have been necessary. The quotation to repair the plastering and repaint the walls was \$786 520 for painting the exterior, \$905 420 for painting the interior and \$235 780 for making good all the plastering defects. Those were necessary to rectify the bad workmanship on the part of Magmu. Again, the quotations were obtained last year; at current prices the cost would be between \$2,5 million and \$2,8 million. The 1st defendant said that he had not agreed to pay interest on Magmu's overdraft. The additional cost for the verandah and curbing had been paid by cheque. The March and April salaries were not for the defendants' account. Magmu had agreed to build the house for \$602 397 and that was what they had paid.

The 1st defendant said that he and his wife had stayed in a self-contained cottage at the house of his mother-in-law. They paid \$6 000 a month for rent. They stayed there for 15 months, from January 1999 to April 2000. Had their house been finished within the 7 months that had been agreed, they would have moved out of the cottage in 1 November.

The 1st defendant gave the following responses in cross-examination. The house had not been completed to their satisfaction. When they asked Magama to hand over the keys they pointed out the defects. He had promised to rectify them and said he could do that whilst they were in occupation. They had given notice that they would vacate the cottage because they thought their house would be ready. So they had to move out of the cottage at the end of April. The defects in the house started to surface just before they took occupation and then got bigger. They were not due to wear and tear.

The 2nd defendant testified as follows. Magmu did not complete the house in 7 months because three-quarters of the way through the project it got another contract and moved some of its workers to the other site. Although Magama had promised to get the certificate of occupation he never did so. The house had too many defects. In the main bedroom the wall got wet because one of the pipes leaked. Magmu promised to repair the pipes but failed to do so. There were cracks in the walls because of the poor foundations. The certificate of occupation that was produced was not valid because no-one came to inspect the house. She never saw a building inspector on the premises. They had paid Magmu what they owed. She had personally asked Magama to come to the house and told him about the defects. He promised to come but never did. He was always making promises but nothing materialized.

Under cross-examination the 2nd defendant said that she used to visit the site three times a week. At first everything seemed alright. The cracks did not appear until later. It was only after they moved in that they noticed the cracks and the moisture on some

walls.

Magama was not a credible witness. For example, when in cross-examination he was asked when the house was completed, initially he said he was not sure, then he said that it was in September. However in the pleadings he admitted that the house was finished in April 2000 and he even included a claim for salaries paid in March and April. Even in the summons itself, a false claim was made. One of the claims was for \$100 000 for 100 bags of cement. Yet when he was testifying Magama said that the amount should have been \$10 000, and explained that there had been a mistake. As pointed out earlier, there was also a mistake in subtracting one figure from another, resulting in the claim being for \$172 299, instead of \$182 399. Dealing with that claim, Magama did not mention the claim for under-payment when he was testifying. Furthermore, as regards his claim for \$67 308,46 for interest on his overdraft, he admitted that there was nothing in the contract which would render the defendants liable for such payment. He merely said that it was a cost Magmu had incurred. Although he did say that there had been a statutory increase in wages of 45%, he did not indicate how this resulted in an increase of \$108 389,97 in the cost of building the house. He did not mention the additional claim for a 24% increase. As regards the claim for "salaries and admin fee" for March and April, he did not even mention the "admin fee" and say what it was. He did say that it was the erratic supply of materials which had caused the delay in completing the house but he gave no details of the materials that were supplied late. In fact, the impression he gave was that he seldom visited the house whilst it was being built and he admitted that he never went to see it after it was completed.

The roles played by some officials of the Council do give rise to some concern. In a letter dated 1 December 2000 from the Mabelreign District Office which was addressed to the 1st defendant, the writer, Mr Badza, said that inspections carried out by the area building inspector, Mr Chirombe, revealed the following defects -

- “(1) There are no records of stage building inspections to show that construction stages were inspected and approved by the building inspectorate. This means that the contractor did not bother to consult the council’s building inspectorate as required in terms of building by-laws.
- (2) Plastering on the building was not done properly and is already peeling off.
- (3) There are visible wall cracks which are indicative of failure to fix brick force on required courses or poor footing.
- (4) There are signs/traces of moisture on window seals which might have been caused by lack of DPC on window seals.
- (5) Leaks were detected from sealing which is indicative of geyser overflow, leaks are also inherent within the whole water piping system (both cold and hot).
- (6) Door frames are not filled with mortar as indicated by very loud abnormal sound when you knock on them.

Because of the above mentioned defects the owner is strongly advised to seek engineer's advice and report especially on the cracks and foundations. Because if these are not rectified council will not issue certificate of occupation."

A certificate of occupation in respect of the house was issued on 30 August 2002. Mr Jumbe said that he had issued it because, when he passed the house, he noticed that it was occupied. However, he did not inspect the house before he did so. Then in a letter dated 18 November 2002 addressed to the former legal practitioners of the defendants the Acting Director of Works advised as follows -

- “(i) The Certificate of Occupation issued as a valid document number 0057 in Council records.
- (ii) The necessary inspections were carried out by Inspector (Mr.) Jumbe as reflected in his diary as follows:
 - (a) Siting and foundations - approved 17/02/99
 - (b) Hardcore - approved 3/03/99
 - (c) Wall plate and roof - approved 2/09/99
- (iii) Comments on attached documents are as follows:
 - (1) The letter from the District Office dated 1st December, 2000, was written way after inspections had been conducted by the then area Inspector and as such at the time of inspections there were no such defects.
 - (2) The attached Structural Certificate was issued by Registered Engineer Jacob Jensen after the roof assembly had been done on site. Item (4) on the form guarantees the structural fitness of the assembly and liability in the event of any failure.
 - (3) A letter from C.M. Marketing dated 29th November 2000 refers. It is not Council policy to comment on routine maintenance as Mr. Chiguvi had by then spent over a year occupying the house. Chiguvi had by then been staying in his house.
 - (4) A letter from MCD Plumbing Maintenance (Pty) Ltd also dated 13th November 2000 refers. It is not Council policy to comment on routine maintenance, painting has also no bearing on inspections."

In the first letter it is said that it was Mr Chirombe who carried out the inspections, whilst in the second letter it is said that it was Mr Jumbe. Also, in the second letter it is said that Mr Jumbe had carried out an inspection of the wall plate and roof whereas Mr Jumbe said

that he had only carried out inspections at the foundation and slab levels. Mr Jumbe was not a very credible witness. The reason he gave for issuing the certificate of occupation is not very convincing. It was his evidence that he carried out inspections when the foundations were laid and the slab cast, which would have been around February, 1999. The next thing was that he was shocked to see that people were already living in the house before a certificate of occupation had been issued. That was in August 2002, which was nearly two and a half years after the defendants had taken occupation. When he saw that there were people living in the house, he did not go and speak to them and carry out an inspection, as one would expect. Instead, he merely decided to issue a certificate of occupation. It is incredible that he did that without carrying out an inspection. When giving evidence Mr Jumbe said that it was not necessary to carry out any inspections after the initial inspection at foundation level and the next at slab level. That is not credible. Furthermore it contradicts what the Acting Director of Works said in his letter which I have set out earlier. He said that it was reflected in Mr Jumbe's diary that Jumbe had inspected and approved the wall-plate and roof on 2 September 1999. One of the effects of the late issue of the certificate of inspection is that the Council has been financially prejudiced. It could not claim payment of rates for the period from May 2000 to August 2003.

Accordingly, I find that Magmu's claims have not been established and must therefore be dismissed.

As regards the counter-claim, I found the defendants to be credible witnesses. They gave their evidence well and were convincing. Furthermore, their evidence as to the defects in the house was corroborated by the quotations received from respected firms that described fully the defects that were found and by the photographs that were produced which showed the results of the leaking pipe. I consider that the defendants have established that there was poor workmanship in the building of the house. That has necessitated the underpinning of the foundations and the repairing of

the plastering and repainting of the walls. In addition, they have established that the delay in the completion of the house was not due to the failure on their part to provide materials timeously. The delay was because Magmu withdrew half of the workforce and moved it to build the house in Borrowdale before the house in Bluff Hill was finished. Therefore, Magmu is liable for the additional rent that the defendants had to pay because their house was not ready within the 7 months. However, the defendants have not established that the 7-month period started on 11 March, 1999. I consider that the most they can claim in this regard is the rent for the period from 1 November 1999 to 30 April 2000.

Accordingly I find that the defendants have established that Magmu is liable to pay the amounts claimed, save that the amount claimed for rent must be reduced to \$36 000.

As mentioned earlier, the defendants were given leave to amend their counter-claim. Unfortunately the amendment has introduced an element of confusion. Initially, the counter-claim sought damages in respect of the cost of repairs to the house in the sum of \$320 841,63. That amount was made up of \$172 714,85 for painting the interior of the house, \$86 450 for painting the exterior, and \$69 676,78 for repairs to the plumbing. The amendment added further claims for \$2 689 754 for structural underpinning, \$908 420 for painting the interior and \$235 780 for rectifying general plastering defects. Clearly the claim for \$172 714,85 is a partial duplication of the later claim for \$905 420 for painting the interior, and therefore cannot be allowed. The evidence led by the defendants included a quotation for \$786 520 for painting the exterior of the house. However, that amount was not claimed in the amendment to the counter-claim. Since that amount far exceeds the amount of \$86 450 claimed for painting the exterior, the lesser amount can be granted.

The plaintiff's claim is dismissed with costs.

It is ordered that the plaintiff pay the defendants -

1. \$1 227 680 damages in respect of the defective plastering and painting;
2. \$69 676,78 damages in respect of the defective plumbing;

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3. \$2 689 754 damages in respect of the defective foundations;
 4. \$36 000 damages in respect of the leasing of alternative accommodation;
 5. Interest on the various amounts specified in paragraphs, 1, 2, 3 and 4 at the rate of 30% per annum from 1 February 2001 to date of payment;
 6. Costs of suit.

T H Chitapi & Associates, legal practitioners for plaintiff
Muskwe & Associates, legal practitioners for defendants