HH 106/2004
HC 2237/98

BROMAR AND BYTE (PVT) LTD
and
WILSON HOLDINGS (PVT) LTD
and
TERRIER SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 12th May, 2004

Civil Trial

R.M. Fitches, for plaintiff
H. Simpson, for respondent
N.B. Nagar, for third party

KARWI J: Plaintiff company was formed in 1996 for the specific purpose of providing clinical waste disposal service in Harare. This focussed on safe and hygienic disposal of incineration at high temperature waste emanating from hospitals. The plaintiff company was represented by its directives, Engineer Godfrey Mkushi.

On 11th October 1996 Plaintiff contracted the defendant to provide crane hire services to plaintiff using a 45 tonne crane. In terms of the contract, defendant was required to offload an incinerator plant weighing about 14 tonnes from the delivery truck at Plaintiff's premises, and place or position the incinerator on a concrete slab where the incinerator was going to be operated from. In terms for the summons, it was the defendant's duty and responsibility to ensure that the offloading and positioning of the incinerator was carried out with proper skill and efficiency without causing damage to the incinerator or any of plaintiff's property. Plaintiff further stated in his declaration, as amended, that on 17th October 1996, after offloading, but during the process of positioning the incineration in its intended place, by the third party, the incinerator plant was dropped on the concrete slab several times resulting in damage to the concrete slab and the incinerator plant.

Plaintiff further stated that defendant breached the aforesaid contract in that:

a) It failed to supply a 45 tonne crane and only supplied a 25 tonne crane downgraded due to usage and old age to offload and position the incinerator.

b) It failed to ensure that the offloading and positioning of the incinerator was done properly and skilfully. As a result of the defendant's breach of the aforesaid term, plaintiff's property was damaged as aforesaid and as a result thereof the incinerator could not be commissioned - upon its arrival since plaintiff had to engage the services of the manufacturer to assess the extent of the damage to the incinerator and those of an engineer to check if the incinerator could be commissioned. It was further, the plaintiff's averement that as a result of the damages to the incinerator the life span of the machinery was reduced to 20% and plaintiff suffered damages to the extent of 80% of the replacement value of the incinerator. The plaintiff placed the value of the incinerator at the time at R130 000.00. Plaintiff's loss of 80% was placed at $808 404.52 (using the exchange rate of Rand to Z$5.00) which was calculated as follows:

(a)	80% of replacement value	$520 000.00
(b)	15% of import duty	78 000.00
(c)	20% customs duty	104 000.00
(d)	20% tax	104 000.00
(e)	transport/insurance	39 960.00
(f)	5% administrative charges and bank charges on landed costs	26 000.00
(g)	Engineer's fees for overseeing replacement unit 4% of landed cost	20 800.00
(h)	Crane hiring cost for offloading and positioning new incinerator	19 200.00
(i)	Local input for commissioning	7 920.00
	Total	915 880.00

It was plaintiff's further averement that as a result of the breach, plaintiff incurred the assessor's expenses in the total sum of R7 250.00 then the equivalent in Zimbabwean dollars being $28 275.00 for travel and inspection of the machinery. Plaintiff also had to engage the services of an engineer at a cost of $3 000.00 to assess whether the incinerator could be commissioned. As a result of the breach, the incinerator was only commissioned on 1s February 1997 as a consequence of which plaintiff suffered loss of profit in the total sum of $139 164.01 calculated from 18th October 1996 to 1st February 1997 broken down as follows:

Gross sales 1997	$ 776 715.62
Gross sales 1998	$2 468 084.18
	$3 244 799.80

Less: Expenses 1997	$ 603 147.78	
Expenses 1998	$1 674 130.72	
		$2 277 278.50
Net profit for 2 years		$ 967 521.30
Average profit per year –half of $967 521.30		$ 483 760.63

Actual loss of profit

$\frac{105 \times \$483\ 760.63}{365} = \$139\ 164.01$

Plaintiff also averred that as a result of damages to the slab, plaintiff incurred damages in the sum of $115 500.00 being the cost of replacing the slab.

Plaintiff's claim is therefore as follows:

a) Payment of the sum of $1 201 319.01

b) Interest at the prescribed rate on the sum of $1 0030 880.00 from 20th February 2002 to date of full payment.

c) Interest at the prescribed rate on the sum of:

  i) $28 275.00 from 5th November 1997 to date of full payment.

  ii) $139 164.01 from 1st February 1997 to date of full payment.

d) Cost of suit.

It must be noted, however that the claim for $1 201 319.01 was further amended during the trial as will be shown later.

Issues which I must decide on are as follows:

a) Whether or not defendant breached the contract between itself and the plaintiff.

b) Whether or not the plaintiff suffered damages as a result of the breach and the quantum of damages suffered by plaintiff.

c) What were the terms of the contract between the defendant and third party.

d) Whether or not third party breached the contract.

e) Whether or not defendant suffered damages as a result of third party's breach of the contract and the quantum of damages suffered by the defendant.

The above issues will be dealt with one after the other, as follows:

a) Whether or not defendant breached the contract between itself and the plaintiff.

Defendant denied liability. Mr Leslie Carlos De Souza, the director of defendant

company said in his evidence that initially Mr Mkushi of the plaintiff had initially requested the hire of a 25 tonne crane. As that was not available defendant supplied a 45 tonne crane which broke down on the way to the site. Thereafter, the defendant sought to replace it with a 25 tonne crane which it sub-contracted from third party. It was Mr De Souza's evidence that a 25 tonne crane could have performed the off-loading and resighting of the plaintiff's incinerator.

Defendant submitted that plaintiff had paid the defendant in advance for the hire of a 25 tonne crane. As the plaintiff initially requested a 25 tonne crane it cannot be said that defendant was in breach of the contract by its failure to supply a 45 tonne crane. It was further submitted by defendant that there lay with defendant a residual discretion as to which replacement crane to sent plaintiff when the 45 tonne crane broke down. The plaintiff would not have objected to the supply of a 25 tonne crane as that was his initial request.

Defendant further submitted that defendant was not in breach of its contract of hire with plaintiff and that it was the third party which was in breach when it sent an 18 tonne crane to the site. Defendant also submitted that the joinder that was filed was for the reasons that contractual liability was denied by the defendant and the plaintiff was referred to third party for any liability arising out of the incident as averred by plaintiff.

Defendant further submitted that Mr Mkushi who was present when the offloading and resighting was done, was the author of his own mishap. It was stated that Mr Mkushi was in serious error when he decided to ignore the crane driver's warning that a heavier crane should be sent from the third party.

It is my opinion that it is not correct for the defendant to submit since Plaintiff initially requested for a 25 tonne crane, it cannot be said that defendant was in breach of the contract by its failure to supply a 45 tonne crane. In his defence in court, Mr De Souza clearly admitted liability on behalf of his company when he said the contract between itself and the plaintiff was not fulfilled. It was common cause that plaintiff hired the services of a 45 tonne crane, not a 25 tonne crane. This is clearly supported by the receipt which plaintiff received from defendant after paying for the services in advance. It is not correct therefore to say that plaintiff had initially requested for the services of a 25 tonne crane. It was also common cause that the 45 tonne crane would have easily performed that task required by plaintiff. It is common cause that the 45 tonne crane was not supplied and that

the contract was not fulfilled. The contract was not fulfilled because an 18 tonne crane, which was substantially downgraded, was supplied and could not perform the task. Efforts by the defendant to misrepresent fact and put blame on the third party and on Mr Mkushi, are in my view, fruitless efforts to shut the door to the stables after the horses had bolted. I find nothing wrong in Mr Mkushi's presence at the site at the time when the incinerator was being offloaded and resighted. This was his project. He said he had invested a lot of money and time in it. He clearly was excited and interested in seeing to it that things go well. His excitement was reflected in his recording of the event by photographs. There is no evidence, in my view which suggests that Mr Mkushi took over the process as was suggested by defendant. It is clear to me that he relied on the expertise of the operators. In fact, it was only after the damage had been incurred, that the information as to down grading was proffered. It would be inconceivable that plaintiff would have exposed his incinerator to damage if he had known that the crane in use was not capable of doing the job. For these reasons, I find that the defendant breached its contract with the plaintiff.

b) Whether or not plaintiff suffered damages as a result of the breach and the quantum of damages suffered by plaintiff.

Plaintiff avers that as a result of the breach, he suffered damages as listed in his declaration, as amended. Plaintiff itemised his damages as totalling $577 423.32 based on 80% of the market value at the time of the damage. This followed an amendment from claiming the current replacement value, plus transport cost, Mr Fick fees for assessment, loss of profit and interest on the amounts claimed above. The plaintiff proved the damage to the incinerator. This was based on a report by an engineer, Mr F. Fick, the manufacturer's agent. The report was made in 1977. Mr Fick had established that as a result of the drops, the incinerator had developed cracks in the refactory lining which in turn affected heat propagation. He had concluded that cracks could only have developed from these drops. Mr Fick opined that the deep nature of the cracks ruled out any meaningful attempts at satisfactory repair. Mr Fick concluded that the life span of the incinerator had been reduced to 5 years to 7 years from the normal expected life expectancy of between 15 and 20 years. Mr Mkushi said in his evidence following Mr Fick's report that he had no option but to use the incinerator in its state of shortened life. He had spent

all his resources on the project and the best option was to use the unit. He could not do so immediately as trials had to be run.

The defendant in its submissions has challenged Mr Fick's report on the basis that Mr Fick was not called as a witness and therefore his report was not subject to cross-examination. Defendant also submitted that Mr Mkush had failed to establish his loss of profits for the period October 1996 to February 1997 when the incinerator was out of commission.

I find that Mr Fick's report is admissible in evidence. The issue which should be decided on is the weight that the court should put to it. Section 27(4) of the Civil Evidence Act provides that:

> "In estimating the weight, if any, to be given to evidence of a statement that has been admitted in terms of subsection (1) the court shall have regard to all the circumstances affecting its accuracy or otherwise and, in particular, to –
> a) whether or not the statement was made at a time the facts contained in it were or may reasonably be supposed to have been fresh in the mind of the person who made the statement; and
> b) whether or not the person who made the statement had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact."

In this case, I find that Mr Fick visited and inspected the incinerator on 26th August 1997. Mr Mkushi was present at the inspection and he gave a graphic explanation of the inspection. I consider that this is reasonable time enough for one to conclude that the facts contained in the report were or may reasonably be supposed to have been fresh in his mind. Taking all the circumstances of this matter into account, I cannot say, neither was it alleged or proved that Mr Fick had any incentive or might have been affected by circumstances, to conceal or misrepresent any fact in his report. As a result, I attach considerable weight to Mr Fick's report in assessing damages which plaintiff suffered.

I also find that plaintiff has clearly proved the claimed quantum of his damages and his loss of profit. For example, a mathematical calculation based on envisaged profits expected having taken into account all the expenses for the period when the machinery was lying idle show how the plaintiff suffered loss of profits. This method of calculating loss was not in my view challenged by the defendant. In the result I find that plaintiff suffered damages in the quantum he has claimed.

<u>Whether or not third party breached its contract with defendant and whether defendant suffered any damages as a result of the breach.</u>

It is common cause that summons were issued out of this court against defendant on the 12th March 1998. On 6th January 1999 defendant obtained an order of this court to join Terrier Services (Pvt) Ltd as third party to the proceedings. Plaintiff has framed its claim in contract as against the defendant. Defendant in turn hedges its claim in contract in that it alleges a breach of contract at the instance of the third party, which it claims entitles it to an idemnity from the third party in respect of any liability which the court may find against the defendant. The third party's pleadings in respect of the defendant's claims is to the effect that, in the event that this court finds that the third party breached its contract, resulting in liability in the defendant to the plaintiff, it undertakes to indemnify the defendant.

In its amended plea filed of record on the 19th March 2002 defendant avers that the third party breached the contract in that it provided an 18 tonne crane instead of a 25 tonne crane. It is the third party's case that the defendant has no claim against the third party because all the third party contracted to do was to lift the incinerator off the swift vehicle and not to position. The contract was performed and no damages resulted from the same. It is the third party's case that the damage occurred after the contract had been executed. It is on that basis that third party is of the view that no recompense is payable to the defendant by third party on any contractual basis.

I find that it is common cause between defendant and third party that their contract was for the provision of a 25 tonne crane to only off-load the incinerator from the back of Swift truck. Both parties agree that the contract did not involve more. It is common cause that third party supplied an 18 tonne crane which off-loaded the incinerator without a problem. Problems only started to occur as the crane was used to resight the incinerator plant onto a concrete slab. That is when the incinerator was dropped several times. It could appear to me that since both parties, the defendant and third party agree that their contract was to off-load only – third party executed its contact well up to that stage, and defendant cannot claim to be compensated for no breach of contract on third party's part.

It is on the basis that defendant's efforts to be compensated for any damages due to plaintiff should fail. Furthermore, I accept third party's submission that in terms of Rule 95(1) of the High Court Rules, third party jounder precludes a plaintiff from obtaining judgment against a third party as Order 14 Rule 95 only applies to the relationship between the defendant joining third party, *inter se*. This is also the position of the plaintiff who submitted that its claim was basically against the defendant. GILLESPIE J had this to say

in *Watson v Gibson Enterprises & Others* 1997(2) ZLR 382H at page 321 and 322 in support of this view:

> "Third party procedure is by definition the means of bringing before the court in a dispute between two parties a third party from whom a party in the existing action claims an indemnity from or contribution to any award that may be given against him in favour of his opponent. It is not a means by which a party might intervene in existing proceedings in order to advance a claim of his own against one or other of the parties in those proceedings."

As a result I find that third party did not breach its contract with defendant and that therefore defendant did not suffer any damages arising out of third party's breach of contract.

It is therefore ordered as follows:

a) Judgment be and is hereby entered in favour of plaintiff against defendant in the sum of $577 423.32 together with interest at the prescribed rate from

 1) October 1996 in respect of the damage to the incinerator.
 2) Interest at the prescribed rate from 5th November 1997 in respect of the engineer's fees.
 3) Interest at the prescribed rate from 26 October 1996 in respect of the local engineer's fees.
 4) Interest at the prescribed rate from 1st February 1997 in respect of loss of profits. Defendant to pay cost of suit to plaintiff and third party.

Messrs Sawyer & Mkushi, plaintiff's legal practitioners
Messrs Loft & Fraser, defendant's legal practitioners
Messrs Atherstone & Cook, 2nd defendant's legal practitioners