

JANUARY PEDZISAI  
versus  
MICHAEL HAMUTYINEYI  
and  
TAWANDA MUDZAMIRI  
and  
BISPRO INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE  
BERE J  
HARARE, 6 and 8 February 2013

### **Civil Trial**

Plaintiff, in person  
*E. Matiza*, for the defendants

BERE J: It is common cause that there was an agreement entered into between the defendants and the plaintiff for the drilling of a borehole at the latter's farm in Mvuma.

It is abundantly clear and requires no detailed analysis of the evidence led that although the first and second defendants took part in the actual negotiations which led to the subsequent agreement with the plaintiff, these defendants were only acting in a representative capacity for the third defendant which is the company that actually entered into an agreement with the plaintiff.

It is a time honoured and firm legal position that a company stands as a separate legal entity from its directors and in this regard it was improper for the first two defendants to be cited in their personal capacity. In fact, it was incompetent to do that in the absence of any allegation of fraud on the part of the first and the second defendants.

If this is accepted, as it should be, then there can be no argument that the first and the second defendants cannot be found liable in their individual capacities. If there was any breach of contract, that breach must be visited upon the third defendant as the contracting party.

From the evidence placed before this court by the plaintiff and the third defendant's representatives it is clear to the court that the parties agreed that the third defendant was to drill a complete borehole at a cumulative cost of \$2 600 which was split as follows:- a deposit

of \$1 500 which was paid in advance by the plaintiff to enable the third defendant to do the work with the balance to be paid upon completion of the work at hand.

I am aware that the parties who testified in this regard were not in agreement on this point. I prefer the narration of events as given by the plaintiff as to me it accords with normal business or contractual practice.

The story told by the first and the second defendant is highly unlikely and consequently unconvincing for the following reasons: if accepted it would mean that the plaintiff entered into an agreement with the third defendant without being appraised of the contract price. That approach is not feasible as it is not normal for people to enter into an open ended contractual arrangement. Such an arrangement would bring about uncertainty into the whole arrangement.

The parties who testified are agreed that the third defendant did not manage to complete the task that it had undertaken to do.

I do not accept the position adopted by the third defendant's representatives that their inability to complete the drilling was due to the alleged non-payment of \$1 100 by the plaintiff. This money was supposed to be paid upon completion of the job. The view I take is that the initial payment of \$1 500 was supposed to be used to take care of all the requirements in the drilling of the borehole from start to completion and that the remaining amount was only due to the third defendant upon completion of the work.

The generous hand extended by the plaintiff in assisting the third defendant's representatives in looking for a generator must be viewed as a desperate measure by the plaintiff to see the borehole drilling completed to enable him to embark on his farming activities as testified by him.

I have not the slightest doubt in my mind that in failing to complete the borehole drilling the third defendant was in breach of the contract.

The plaintiff has sought in the alternative to claim an amount of \$16 800 being for breach of contract. In other words this amount represents damages as computed by the plaintiff.

It is trite that when damages are being claimed there must be a clear indication as regards the computation of such damages. A litigant desiring an award for damages must be able to prove such damages to the satisfaction of the court. Computation of damages must not be based on speculative evidence.

In this regard and in a recent Supreme Court judgment, viz *Mathew Mbundire v Tyrone Sim Buttress*<sup>1</sup> the court laid down numerous guidelines to be relied upon in the computation of damages.

The import of this judgment is among other things aimed at discouraging casual presentation or casual assessment of evidence to do with damages in general.

In these proceedings there was no attempt by the plaintiff to lay before the court the basis upon which he sought to recover \$16 800 from the defendant. He dwelt on speculative evidence of a relative who is into vegetable production and attributed the source of the amount of claim to her without calling her to testify. That is not the correct approach. Consequently this claim cannot be upheld by the court.

In the final analysis, I grant the following order that:-

1. The third defendant be and is hereby ordered to complete the drilling of a 40 metre deep borehole at the plaintiff's plot within 30 days of the plaintiff giving it through its representatives who appeared in court \$1 000-00 in accordance with the agreement as found by the court.
2. In the event of the third defendant failing to comply with part (1) of this order, the third defendant be and is hereby ordered to refund the current total cost of drilling a similar borehole within 60 days from the date of this order.
3. The third defendant is to pay costs of suit.

*Muzondo & Chinhema*, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants' legal practitioners

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<sup>1</sup> Judgment No. 13/11