

JETHRO DAURAMANZI  
versus  
SOLOZA CHICKENS (PRIVATE) LIMITED  
and  
SOLOMON ZAWÉ

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 23 September 2015

**Civil Trial**

*R. F. Mushoriwa*, for the plaintiff  
*B. Machengete*, for the defendants

MATANDA-MOYO J: Plaintiff issued summons against both the defendants jointly and severally for the following relief:

- 1) Payment of the sum of \$9 249-60 being damages for loss of porkers, due to the defendants' negligence;
- 2) Damages in the sum of \$50-00 per day from 22 February 2013 to 24 April 2013 being storage costs incurred for the rotten porkers;
- 3) Interest on the sum of \$9 249-60 at the prescribed rate from 1 March 2013 to date of full payment and
- 4) Costs of suit on a legal practitioner – client scale.

The defendants denied liability for the plaintiff's loss on the basis that the plaintiff left the porkers at his own risk. The defendants alleged that the plaintiff was aware that the services offered by the defendants did not include freezing the porkers. The defendants denied acting negligently. They also denied being liable for the \$50-00 per day storage costs incurred by the plaintiff. They urged the court to dismiss plaintiff's claim.

The only issue referred for trial was “whether or not the defendants are liable for plaintiff’s loss. Most of the facts are common cause. On 21 February 2013 the plaintiff approached the defendant for overnight storage of his 28 porkers. The defendants are in the business of selling frozen chickens. The two parties agreed that the porkers be kept in defendants’ cold-room overnight at a price of \$50-00. At around 9 pm the same day the plaintiff called the second defendant advising him to come to the premises and attend to the cold-room which the plaintiff believed was malfunctioning. The second defendant assured the plaintiff that everything was alright. On being advised that the cold room temperature was reading 26°C, the second defendant assured the plaintiff that the gauge was malfunctioning. On the following morning all the porkers had gone bad and could not be sold. The porkers were then transferred to some other facility in Granite side which charged \$50-00 storage fees per day.

The plaintiff gave evidence on his own behalf. His evidence was simple and straight forward. He testified that he entered into an agreement with the defendants for storage of 28 porkers at \$50-00 for the night. He intended to deliver the porkers to his customer the following day, on 22 February 2013. The 28 porkers were duly loaded into the defendant’s cold-room. At the time of loading there was no electricity. Around 9 pm the plaintiff decided to check on the porkers. He found that the electricity was back on. However he was informed by the guard that the temperature in the cold-room was reading 26°C. He immediately contacted the second defendant so that either he fixes the temperatures or that the plaintiff transferred the porkers to some functioning cold-room. The defendant refused to come and check after persistent calls from the plaintiff. The following morning the plaintiff observed that the porkers had turned green, an indication that they had gone bad. He could, not sell the porkers and lost the sale value of \$9 249-60. The plaintiff decided to keep the porkers so that the second defendant would have sight of them. He transferred them to some storage in Graniteside on 22 February 2013. He was charged \$50-00 per day for the storage. The second defendant refused to view the porkers and also refused to compensate the plaintiff for the loss. He decided to dispose of the porkers on 24 April 2013 upon realising that the second defendant was not willing to discuss the issue with a view of finding common ground. The plaintiff testified that he gave away the porkers to some people to feed their crocodiles. He did not benefit anything from the porkers. The plaintiff testified that he had an order to supply the porkers at \$4-10 per kilogram. Each porker weighed

between 55 and 60kgs. He was to realise \$9 249-60 upon selling the porkers. He wanted the defendants to compensate him for that loss. The plaintiff also testified that he wanted the defendants to re-imburse him \$50-00 per day storage costs from 22 February to 24 April 2013. Upon cross-examination the plaintiff admitted that he had not produced any documents to prove the weight of the porkers and the selling price.

The second defendant testified on behalf of the defendants. He testified that on 21 February 2013, he was approached by the plaintiff to provide refrigeration facilities for his porkers. He told the plaintiff that his container could only hold frozen products. It did not have provision for freezing fresh meat products. The plaintiff agreed to that. The second defendant testified that he specifically told the plaintiff that he was leaving the porkers at, his own risk. He charged the plaintiff \$50-00 for overnight storage, which, the plaintiff duly paid. He denied that the plaintiff was refused entry into the premises when he visited the premises around 9pm the same date. The second defendant testified that he and the first defendant were not responsible for the plaintiff's loss. He also queried the logic of keeping the porkers from 22 February 2013 to 24 April 2013 when they had already gone bad. He testified that the plaintiff was not entitled to recover such storage charges from the defendants.

The two parties agreed that they entered into a verbal contract for the storage of the porkers. The two differ on the terms of the verbal agreement. However the plaintiff's version is the more probable one. The plaintiff intended to deliver fresh porkers the following day, 22 February 2013. He would obviously not have accepted leaving the porkers where he was not sure there would be fresh by morning. That explains why he checked on the porkers at 9pm. He had loaded the porkers around 6pm when there was no electricity. The second defendant admitted being paid \$50-00 for overnight storage costs. That was the market value for functional facilities. That alone suggest that the second defendant had indeed guaranteed his facilities as functional.

The second defendant admitted that he was phoned by the plaintiff around 9pm the same day. When he was told that the temperature of the cold-room was reading 26°C, he admitted he refused to go and attend. He instead highlighted that the temperature gauge was malfunctioning but the temperature inside was correct. Because the porkers went bad by morning it is clear that

the temperatures were high. I am of the view that the cold-room was malfunctioning resulting in the porkers going bad.

The plaintiff's claim is based on negligence. Negligence is a failure to exercise care that a reasonable person would exercise in like circumstances. In order to satisfy a claim based on negligence a plaintiff should prove the following four elements:

- 1) That the defendant owed a legal duty to the plaintiff under the circumstances.
- 2) That the defendant breached the legal duty by acting or failing to act in a certain way.
- 3) That it was the defendant's action that actually caused the plaintiff's loss and
- 4) That the plaintiff was harmed or injured as a result of the defendant's actions.

Looking at the totality of the facts, I am of the view that the plaintiff has managed to prove the above four elements. Once the plaintiff and the defendants entered into a contract that obligated the defendant to keep the porkers fresh until the following morning, the defendant assumed a legal duty to the plaintiff. When the defendant was advised of the high temperature, he failed to rectify same. He even refused the plaintiff access to the cold rooms, so that the plaintiff could remove the porkers. In so doing the defendant breached that legal duty to ensure the porkers remained fresh until the following morning.

That refusal to either attend to the fault, or, allow the plaintiff remove the porkers resulted in such porkers going bad. That failure to act by the defendant was the direct cause of the loss of the porkers. The defendant's actions were the cause of the plaintiff's loss.

It is clear that the defendants acted negligently and are liable to the plaintiff's loss.

That brings me to the issue of quantum of damages. The plaintiff claimed \$9 246-60 as the value of the porkers. From the pleadings the defendants never challenged that value. It is a settled principle of law that, that which is not denied must be taken to be admitted. See *Chihwayi Enterprises Ltd v Atish Investments (Pvt) Ltd* 2007 (2) 89 (S). Whilst the defendants had a right to cross-examine the witness on the value of the porkers, the mere fact that no document had been produced by the plaintiff during the hearing was of no consequence. Upon the value not

having been challenged the plaintiff had no duty to prove the value of the porkers. This is the position of law so as to enable a litigant to appreciate the full evidencing ambit he or she faces.

However, the defendants challenged liability for storage charges of the decayed porkers. The defendants challenged such need, considering that such evidence was never bought before the court. I agree with the defendant's submission. I do not believe there was much use in keeping the rotten porkers from 24 February to 24 April 2013. The worst case scenario would have been keeping such evidence for a week. When it was apparent the defendants' would not look at such porkers, the plaintiff was obligated to mitigate his costs by disposing of such porkers. I am not satisfied that the plaintiff has discharged the onus on him to recover such storage costs beyond a week.

The plaintiff also claimed costs of suit on a higher scale. He has not shown any basis for that.

Accordingly I order as follows;

That defendants jointly and severally the one paying the others to be absolved shall

- 1) pay the plaintiff the sum of \$9 242-60 being the value of the porkers.
- 2) pay the plaintiff the sum of \$350-00 for storage costs for seven days and
- 3) pay costs of suit.

*Mawere & Sibanda*, plaintiff's legal practitioners  
*Nyamushaya, Kasuso & Rubaya*, defendant's legal practitioners