DOVES FUNERAL ASSURANCE (PRIVATE) LIMITED
versus
ZIMBABWE PLATINUM MINE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 11, 12, 13, 14 October 2016 & 15 February 2017

Trial: Application for absolution from the instance

S Hashiti, for the plaintiff
ABC Chinake, for the defendant

TSANGA J: The defendant, Zimbabwe Platinum Mine (Private) Limited (hereinafter referred to as Zimplats), seeks absolution from the instance in a claim in which the plaintiff, Doves Funeral Assurance (Private) Limited, (hereinafter referred to as Doves), sued for the following:

i) A declaratory order that the purported unilateral rescission of the agreement between the parties by the defendant on the 7th of October 2013 be declared to be unlawful.
ii) That consequent to (i) above, the defendant be ordered to finalise the implementation of the Zimplats Employee Funeral Scheme with the plaintiff.
iii) In the alternative to (ii) above, an order that the defendant be ordered to pay plaintiff damages in the amount of four million one hundred and ninety five thousand five hundred and forty three dollars (US $4 195 543.00).
iv) Costs of suit

THE BACKGROUND

Zimplats issued a written invitation for tenders on the 27th of December 2012 for bids for the provision of an employee funeral scheme. What is common cause between the parties is that the *Tender Procedure* specifically stated that the conditions mentioned in a set of specified documents collectively referred to as the *Tender Document* were to form the basis of the contract entered into between Zimplats and the successful Tenderer. Clause 2.2 of the *Tender Procedure* set out the following as constituting the overall *Tender Document:*

- Letter of invitation to Tender
- Tender Procedure
- Conditions of Tendering
- Scope of works
- Special Conditions of Contract
- Appendix A -Tender Form
- Appendix B – Zimplats General Conditions of Contract

On 20 March 2013, Zimplats communicated in writing to Doves that it had been adjudged to be the successful tenderer. It simultaneously communicated therein that a contract was being worked on and would follow for signing. It is not in dispute that a draft contract was written and exchanged hands but was never signed. Instead, on the 7th of October 2013, Zimplats communicated that it was cancelling the tender process leading to this present action. What informs the dispute is whether at the time of cancellation, there was a valid contract in place which entitles Doves to damages from Zimplats for wrongful cancellation.

According to Doves, the communication on the 20th of March 2013, regarding the successful tender, constituted an agreement in terms of which it was bound to establish the *Zimplats Employee Funeral Scheme* for Zimplats on the basis of terms and conditions set out in its *General Conditions of Contract*. Zimplats position, on the other hand, is that the communication of the success of the tender did not constitute the full terms and conditions of the contract between it and the successful tenderer, since in terms of clause 1.3 of the *Tender Procedure* document, submission of the form would constitute an agreement to be bound to a written contract with the defendant whose terms and conditions were set out in the *Zimplats General Conditions of Contract.* In other words, according to Zimplats, the final terms and conditions of contract would be determined by a written agreement.

Against this background, the issues referred to trial upon which evidence has been led by the plaintiff were as follows:

1. Whether or not there is a contract between the plaintiff and the defendant for the provision an Employee Funeral Scheme by the plaintiff to the defendant.
2. Was the agreement governed by the tender documents or unsigned contracts?
3. Whether or not the defendant unlawfully terminated the contract between the parties.
4. Whether the defendant is liable to the plaintiff.
5. Did the plaintiff suffer damages and if so in what amount.

THE PLAINTIFF'S EVIDENCE

Mr Talent Maziwisa the principal officer of Doves Funeral Assurance and the Chief Executive of Doves Holdings gave evidence in chief, on account of his involvement in the process of the tender from start to finish. He stated that following the purchase of the necessary tender documents, Doves had done a power point presentation to Zimplats, who in addition, had visited their premises. It was thereafter that Doves had been phoned advising it of the success of its tender.

The summary of his evidence upon which he based the argument on whether there was a valid contract in existence at the time of cancellation, was that the parties had met after the award of the tender, whereupon it had been agreed to move the effective date of implementation to May 1 2013. He said that the parties had also agreed at that point that Doves would summarise its benefits and structure, which information would be attached to the forms that individual employees would complete as well as provide information on their dependants. He told the court that it was also agreed at that point that Doves would receive a schedule of employees from Zimplats who were already on an internal fund.

In addition, upon winning the tender, he said it had been agreed that Zimplats would provide Doves with a template of a contract. His evidence was that effective service would be provided to all Zimplats employees whilst registration was in progress. He said Doves had gone ahead to implement the scheme full throttle on the basis of this understanding. He told the court that the written contract was not part of the conditions of the tender. He also stated that when Doves prepared its tender, it was at no point advised that the bid would be conditional to a written contract and neither had this been mentioned when an inspection of their premises had been done or when the list of beneficiaries had been obtained. He also highlighted though that a draft contract had been availed after the tender, which the parties had gone through although it had not been finally signed. He said when the letter of termination was received, Doves had already provided services to about 33 beneficiaries. He also stressed that nowhere in the tender documents was there any provision for the termination of the contract on notice.

His evidence drew on clause 17.5 on termination in the *General Conditions of Contract* to highlight that the provision did not talk of termination of the contract at the instance of one party for no reason or where there had not been any failure or breach. To provide context, clause 17.5 was couched as follows:

> "17.5 In the alternative to the above, the Principal may, in its sole discretion, terminate the CONTRACT without committing breach of the contract if the PRINCIPAL is of the opinion that the CONTRACTOR has not performed in accordance with the provisions of CONTRACT, or where in the PRINCIPAL'S opinion the business relationship between the parties has deteriorated or has been irreparably damaged or where the CONTRACTOR has, in the PRINCIPAL'S opinion, not performed with the necessary skill, care and diligence, consistent with the generally accepted standards within the reliant industry, or other relevant standards of practice where applicable."

He also spoke in his evidence to the contents of Clause 3.2 of the *General Conditions of Contract* which in essence stated that there was to be no variation to the contract or consensual termination unless recorded in writing and signed by both parties and duly authorised representatives. Mr Maziwisa said the parties had not recorded any such variations. Whilst he said that the tender conditions provided for ways of termination, the termination of the contract was not in accordance with what had been provided.

As regards the draft contract which was eventually never signed, his evidence was that it was simply meant to reduce all conditions in writing and was meant to be ceremonial. He also made reference to Clause 3.3 of the *General Conditions of Contract* which outlined the documents which were to be taken into consideration in the event of a dispute. He highlighted that in the hierarchy of documents, the memorandum of agreement only ranked as number three, after the Special Conditions of Contract and the General Conditions of Contract. It was couched as follows:

> "3.3 If conflict between the documents comprising the CONTRACT should occur the order of precedence in interpreting the CONTRACT shall be:
>
> a) the Special Conditions of Contract
> b) the General Conditions of Contract
> c) the Memorandum of Agreement
> d) the Purchase Order
> e) any other documents"

As regards an audit that Zimplats had requested to be done by the company *Ernst and Young* subsequent to the award of the tender, Mr Maziwisa's evidence was that they had written to Zimplats on the 23rd of April 2013 seeking to gain an understanding of why the audit was being done since it had never been part of the conditions of the tender. He told the court that the response they had received was that since Zimplats was part of a publicly listed company, it had to adhere to good business practices but that it was still committed to doing business once the process was complete.

His evidence also addressed the offer of US $30 000.00 in final settlement of the matter which he deemed a mockery as Doves had not breached the contract which was long term in

nature. In terms of how he had arrived at the figure of US $4 195 543.00 claimed in the summons, his evidence was that the figure was actuarial, and based on the period that the contract would have run. He said the contract would have matured at 20 years.

In cross examination, he agreed that in a tender of this nature it would have been expected to sign a contract although he emphasised that he was placing reliance on the contract that arose by virtue of winning the tender. He accepted that the *Tender Document* included the *"General Conditions of Contract"* which governed the relationship and that clause 1.3 of that document contemplated a written contract.

It defined contract as follows:

> 1.3 "CONTRACT" means the contract between the PRINCIPAL and the CONTRACTOR in respect of the contract works to be delivered by the CONTRACTOR, which consist of this document, the purchase order placed by the PRINCIPAL on the contractor and **such other documents as are agreed and signed by the Parties recording the terms of which the CONTRACT works are to be executed**, and any other subsequent amendments thereto"

In cross examination, clause 17.5 of the *General Conditions of Contract* which dealt with breach and termination as already outlined above, was also read into the record on the basis that its contents pointed to the fact that Zimplats had sole discretion to terminate in terms of that clause. It was put to Mr Maziwisa that on the basis of this clause, breach could include non-disclosure or the emergence of information about Doves which did not satisfy the tenderer and which affected the credibility of Doves. It was further put to him that against this reality, if Zimplats got out of the contract on the basis of this clause, it would not be committing any breach. His response was that there had to be a basis for the breach which he denied existed, as the subsequent audit which was carried out by Zimplats had never been part of the tender process.

Additionally, it was put to him that the share ratio and liquidity requirements that are set by the insurance and Pensions Fund Commission (IPEC) had been violated by Doves, and that the audit had become necessary due to issues of solvency, governance and structure of shareholding of the company. Mr Maziwisa's position was that whilst they had consented to the audit being done, this was in the spirit of moving things forward as opposed to this having been a part of the tender process. He stated that in response to the queries raised by *Ernest and Young,* that the observations were contained in a report which was not final to which Doves had provided its comments. However, he said he did not have in court that correspondence sent to *Ernst and Young* correcting their report.

It was equally put to him in cross examination that the report had found no audited accounts going back more than three years and neither had audited accounts been produced for this trial despite the fact that the claim was for damages for loss of profit - a position which was said to be largely determined by audited accounts. His response was that the company was audited and that the reason the accounts had not been produced was that they had not been requested. He was also emphatic that the loss was on the basis of the contract and not where Doves was coming from. He said its financial viability had been proven by virtue of acceptance of its tender. Whilst he confirmed that the termination of the contract followed the *Ernst and Young* report, he maintained that there was everything wrong with that very termination as this was on the basis of an audit which had never been a part of the tender.

In cross examination, clause 16 of the draft contract which dealt with termination by notice was also read into the record. It provided as follows:

> "Either party shall, without penalty, have the right to terminate this agreement at any time upon giving to the other party at least three (3) months written notice of its intention to do so. Save for any rights, obligations and or/ liabilities that may have accrued up to the date of such termination and subject to the provisions of clause 18 below, neither Party shall have any rights, obligations or liabilities against the other Party after such termination of the Agreement."

Mr Maziwisa's response to this paragraph was that this was one of the paragraphs to which Doves had highlighted amendments in an email dated 10 April 2013. The nature of the amendments was again not placed before the court.

Furthermore, it was put to him that clause 19 of the *General Conditions of Contract* which dealt with dispute resolution was clear that the first avenue to be followed would be arbitration. His response to this was that the letter of 7th October 2013 terminating the contract had taken the steam away from pursuance of the various avenues that had been initiated in trying to solve the dispute.

The second witness who gave evidence on behalf of the plaintiff was Mr Albert Mawungwe. He gave this evidence in his capacity as the then general manager for sales and marketing at Doves at the material time of the tender. He confirmed the process as highlighted by Mr Maziwisa regarding the activities that had taken place after the winning of the tender. He also confirmed that they had received a list of employees from the Human Resources department of Zimplats to facilitate their field work on beneficiaries once the tender had been won. His evidence was that the annual premium lost for that year was US

$972 000. 00, which he said was arrived at on the basis of a calculation of the average premium per household multiplied by the number of persons per household.

He conceded in cross examination that the list that had been obtained from Zimplats did not reveal any material information such as the age of the employees, whether married or not and whether they had children which would have enabled it to have a more accurate picture of the households for the purposes of calculating what it deemed to be the premium due. He also conceded that the number of dependents to be covered would have been specific to an employee. With regard to the form's lack of detail, he agreed that the schedule was an empty schedule and that it was the reason they had had to go into the field to ascertain the reality on the ground. He also stated that he was unable to recall how many people had actually completed the exercise of filling out Dove's forms and also how many of those who filled actually had four dependants. He also conceded that it was material how many dependents a person had as it would have a bearing on the premium.

Whilst he accepted that a draft contract had exchanged hands, like Mr Maziwisa, he stated that he had assumed this to be mere procedure rather than that a written contract was necessary even when referred to clause 1.3.5 of the *Tender Procedure* document which read as follows:

> "1.3.5 The Tenderer's standards terms and conditions will not apply. Terms, conditions and exceptions in the Tender Form which depart from the terms referred to in this Tender Document are to be deemed as rejected by Zimplats except to the extent that they may be expressly included in a formal written contract between Zimplats and the Tenderer".

The third witness who gave evidence was Ms Melody Nare, an employee of Beacon. Though not yet an actuary herself she stated that had worked on the actuarial report in terms of number crunching. Whilst she had done the calculations, she had submitted her report for approval to Ms Kafesu her boss who is the actual actuary who had signed off in respect of her findings. She confirmed that Beacon generally provides actuarial services to Doves. She described actuarial services as final calculations to mitigate risk of uncertain events in the future. She said assumptions used are based on past data, market data and any specifics relating to the entity in question.

Her evidence was that they had been asked by Doves to calculate profit to be made from a contract to provide funeral services. Doves had provided a list of 2087 people with identity numbers and also the cost of providing funeral services and how it would be charging for these services. She described the actuarial technique that had been used to calculate the

net value of the arrangement Doves had with Zimplats as the "net present value appraisal method." Given the data availed, she further explained that she had had to make assumptions regarding ages since she was not given any of this data. She clarified that the figure she had arrived at of US$3 223 543.00 was for a 20 year period which she said indicated the profit that would have been made over the entire period if the policy was left in place. She elucidated that she had made the assumption that 70% of the employees were married and had children and would need family cover since the data provided did not include this information. She had further assumed that 10% of the cost of provision of services would cover children.

In cross examination, she conceded that if the assumptions are incorrect the result will be wrong. She conceded that the data she had was incomplete and that ideally the information that should have been there for an accurate picture included the dates of birth, whether married or not, and the number of children employees had. She said that Doves had indicated that this data was not available. She also stated however in cross examination, that when looking at profitability, the balance sheet does not have an impact on profit itself. Furthermore, she stated that to operate an insurance policy there would need to be capital otherwise a company would not be allowed to operate. As such, she had not asked for the profit data as it was not relevant to her calculations of profit for the contract. She stated in re-examination that though this data should ideally be availed it did not make her work impossible as she was able to work by making assumptions.

Ms Pelagio Kafesu the actual actuary also gave her evidence. She confirmed that the number crunching had been done by Ms Nare and that she had thereafter checked the reasonability of the numbers and the assumptions that had been used. She explained that the assumptions used in the report were demographic, looking at the mortality, and, economic with a focus on the financial situation. Assumptions had also been made on cash flows that would come through as well as a discount to today's values. In cross examination, her inflation and interest rates that had informed the report were queried. It was put to her that her financial projections were unrealistic in light of the shrinking economy and that some insurance companies had in fact closed.

She stated in cross examination that her calculations were not based on a 20 year contract but on a 20 year premium paying period. Like Ms Nare, she also stressed that the issue of Dove's solvency was not an issue and this data was never requested because what they were looking at was the profitability of a contract. She also explained that the data,

relating to individuals was not detrimental as it did not affect how the premium was calculated. Furthermore, she explained that that even without the empirical data markets behave similarly. She explained that the 70% assumption for married people was also based on experience garnered for benefits involving family members. In re-examination, she clarified that in a group scheme people are not taken for undertaking. She further explained the meaning of assumption in the context of actuarial science as "the best estimate of a variable that is being examined".

THE APPLICATION FOR ABSOLUTION

The test for absolution from the instance is well settled namely whether sufficient evidence has been adduced upon which a court applying its mind reasonably could or might find for the plaintiff. See *Gascoyne* v *Paul Hunter* 1917 TPD 170 as applied in our jurisdiction in cases such as *Supreme Service Station 1969 (Pvt) Ltd* v *Fox Goodridge (Pvt) Ltd* 1971 (1) ZLR 1; *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 314 (S); and *Lourenco* v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) among others.

Against the backdrop of the evidence given, Mr *Chinake,* counsel for the defendant, tailored his application for absolution on the core thematic issues that were referred to trial, namely, whether there was a contract and whether it was governed by the tender documents or unsigned contracts. He also zeroed in on whether the defendant was liable to the plaintiff and whether the latter suffered any damages and the quantum thereof.

He emphasised the core elements of a valid contract as whether the parties are *ad idem* in respect of the following:

a) The subject matter of the contract
b) The terms of the contract
c) He financial terms and conditions of the contract
d) Performance of the contract

The gist of his argument was that there were certain conditions and clauses in the tender documents which both parties were bound by and from which a clear running theme was that there would be a written contract governing the relations between the parties. The tender documents were also said to constitute an intention to contract on certain terms which were to be captured in the special conditions of contract. Whilst the special conditions were drafted, they were subsequently never signed. As such, a binding contract is said not to have come

into existence. Various cases on the binding nature of a tender once accepted were relied on in argument. (*PTC* v *Support Construction (Pvt) Ltd* 1998 (2) ZLR 221 (S); *National Overseas Distributors Corporation (Pvt) Ltd v Potato Board* 1958 (2) SA 473 A *at 479 (D) Fraser* v *Chalmers (SA) (Pty) Ltd* v *Cape Town Municipality & Anor* 1964 (3) SA 303 at 306 G. As regards the onus to prove that a verbal contract was not intended to be binding until reduced to writing, Mr *Chinake* argued that it is common cause that the tender documents contemplated the signing of a contract and as such the lack of existence of a written contract meant there was no binding contract. He equally argued that if the court concludes that the tender documents constituted the terms and conditions upon which the parties agreed to contract then the parties were bound by the contents therein.

His arguments for absolution therefore zeroed in on clauses relevant to the running theme of a written agreement that had been raised in the plaintiff's evidence and had been the subject matter of defendant's cross-examination. These included clause 1.3.5 of the *Tender Procedure* document which outlined that the tenderer's terms and conditions would not apply "save as they may be expressly included in a written document". He also highlighted clause 2.1 of the *Tender Procedure* which emphasised that the conditions in the tender document will *"form the basis of the contract to be entered into between Zimplats and the successful tenderer."* Equally of relevance was clause 2.2 of the *Tender Procedure* document which spelt out the constituents of the *Tender Document*, among which were Special Conditions of Contract. Mr Chinake argued that these special conditions of contract where material to the contract and that they constituted the draft agreement. Clause 2.24 of the *Tender Procedure* document among other things excluded Zimplats "*for liability for any claim for damages arising from the "rejection of the Tenderer's tender or Zimplats withdrawal or cancellation of the Tender process*. Clause 3.3 of the *General Conditions of Contract* outlined the documents to which were to be taken into consideration in the event of a dispute. He emphasised that it was not disputed that besides the draft contract not being finalised, equally no Purchase Order had ever been issued. He further highlighted that he contract could be terminated on notice in terms of clause 16 of the Draft agreement.

Absolution was also sought on account that the *Tender Document* specifically spoke to arbitration as the initial avenue for dispute resolution. Mr Chinake argued that as such this dispute was improperly before the court. Furthermore, he stressed the point that the written communication to Doves regarding acceptance of their Tender had unequivocally highlighted that a "*contract with all details is being drawn up and you will be invited to sign as soon as it*

gets ready". To the extent that the contract was never finalised he argued that there was no binding contract between the parties. The case of *Metallon Corporation v Stanmarker Mining Private Limited* 2007 (1) ZLR 301 was citied in support of this contention.

On damages claimed Mr *Chinake* submitted that since no binding contract existed, there was no basis for claiming damages. Moreover, he maintained that the tender documents specifically excluded a claim for damages. Furthermore, he argued that the claim itself was speculative in that methodology used was defective and based on discredited assumptions. In particular information on the names, ages, and number of dependants and beneficiaries which had been used to make the calculation on projected profits had been based on assumptions and not on grounded realities. The report was also argued to be partisan given the existing business relationship between Doves and Beacon. In addition, he highlighted that no audited accounts for Doves had been produced. There were also discrepancies in the sum claimed by Doves and that which had been calculated by the actuary. He equally objected to what he termed efforts to smuggle into the record a different copy to the Actuary's report to that which had been filed in the initial instance. His submissions for seeking absolution boiled down to the argument that termination was permissible in terms of the tender documents and also that the parties had chosen arbitration as the avenue for dispute resolution.

THE CHALLENGE TO ABSOLUTION

Mr *Hashiti* argued that the defendant's submissions on absolution from the instance should be dismissed on the grounds that they sought to rely on evidence had not been discovered, led, or cross examined. He relied on a number of cases such as *Rigid Group Transport* v *Remington Gold (Pvt) Ltd* HH 110-11; *Jane Mutasa* v *Telecel International and Telecel Zimbabwe (Pvt) Limited* HH 331-14; *Cargill Zimbabwe* v *Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H); *Vivon Investments (Pvt) Ltd* v *Win King Investments (Pvt) Ltd* HH 272 -16 *and Supiya* v *Mutare Rural District Council* 1985 (2) ZLR 53 (H) to articulate the view that in applications proceedings it is improper for evidence which should have been in the affidavits to be snuck into the heads of argument. In reality his arguments against absolution consisted of citations of unending chunks of paragraphs from cases he deemed relevant, contrary to the expectation that arguments should be crystalline in their approach to the issue which they seek to address and should contain the most important part of the argument. See *Vukutu (Pvt) Ltd* v *Pride Kwinje & Anor* HH 364-16. Also as highlighted HARMS JA in the case of *Caterham Car Sales & Coachworks Ltd* v *Birkin Cars (Pty) Ltd* &

*another*1998 (3) SA 938 (SCA), a recital of the facts and quotations from authorities do not amount to argument.

Mr *Hashiti* relied on the case of *PTC* v *Support Construction (Pvt) Ltd* 1998 (2) ZLR 221 (S) for the position that acceptance of the tender sealed the contract. He also highlighted that the damages sought were contractual as opposed to delictual and that the test and considerations are different. Whilst contractual damages seek to place a party in the position he would have been had the contract been performed, delictual damages seek to place a party in a position he would have been had the delict not occurred. He relied on the cases of *Chinyere* v *Fraser NO* 1994 (2) ZLR 234 (H) and *Pockets Holdings (Pvt) Ltd* v *Lobels Holdings (Pvt) Ltd* 1966 (4) SA 238 at 250 for these distinctions.

FACTUAL AND LEGAL ANALYSIS

I do not think that the objections by Mr *Hashiti* are well founded. This was an application for absolution at the end of the plaintiff's case in trial proceedings. These were not application proceedings in which the evidence is adduced in affidavits. They were trial proceedings in which Doves as plaintiff adduced its evidence which was put to cross examination. I cannot see how cross examination which placed reliance on provisions from discovered documents, which Doves in its pleadings and evidence had accepted and utilised, can then be said to introduce new evidence by Zimplats in its application for absolution.

To recapitulate, Doves in its pleadings referred to clause 2.2 as regards the conditions in the *Tender Procedure* document as constituting the terms and conditions between the parties. Mr Maziwisa in his evidence drew on clause 17.5 of the *Tender Procedure* document to argue that this clause did not permit termination for no reason. Clause 3.2 of the *General Conditions of Contract* was also said to be of significance to Doves case in so far as any variations were to be recorded in writing.

Clause 3 of the *Tender Procedure* document was used to interrogate Mr Maziwisa on the meaning of a contract being inclusive of *"such other documents as agreed to and signed by the parties."* Clause 17.5 on termination which he had already drawn on was used as an entry point by the defence counsel to introduce the reasons why the tender had been cancelled and to put forward the view that that this had been done for good cause relating to Dove's viability. Clause 19 of the *General Conditions of Contract* on arbitration was also interrogated in cross examination while Clause 16 of the draft contract was also put into focus in so far as it permitted termination of the contract on notice.

The submissions by Mr *Chinake* in the application for absolution therefore in no way seek to introduce any new evidence. They directly relate to the issues which he had put forward in cross examination. Clause 2.24 for instance, which excluded liability for damages for withdrawal of the tender or cancellation of the tender process, cannot be isolated from his cross examination which put forward the reasons that were behind Zimplats withdrawal of the tender process. Mr *Chinake* referred to the tender documents to ask questions on those aspects of the evidence given which he was of the view did not ring true in terms of the contents of the applicable documents.

It is trite that a cross examining party is allowed to ask leading questions and effectively put their own case forward. They are allowed to elicit facts which weaken or qualify the case of the party examining in chief, or which support the case of the cross-examining party. This is so since the function of cross examination is to test the credibility of the deposing witness. Cross examination is itself a matter of right and not a privilege.

My observation therefore is that the so called legal issues which Mr *Hashiti* complains of as characterising the defendant's argument for absolution, are essentially issues that Mr *Chinake* purposively unearthed in his cross examination. He had already drawn on the contractual provisions which put forward the theory of his case which was that a written contract was a material term of the tender provisions and that the tender documents allowed for the cancellation of the tender process. In any event, I cannot see how reference to provisions of the contract which inform his application for absolution can be excluded as they go to the heart of the one of the key questions that were referred for trial. The provisions which Doves was in fact interrogated on, tended to challenge the veracity of its evidence on the claim that a written contract was peripheral to the agreement. An application for absolution hinges on sufficiency of evidence. It is this sufficiency of evidence or rather the lack of it that was at the heart of the cross examination. The plaintiff's evidence in my view cannot be looked at in isolation from what emerges in cross examination on its veracity.

Materially, before the commencement of the trial Mr *Hashiti* had sought that the matter proceed by way of a stated case primarily because he considered the questions to be purely legal questions that could be gleaned from the documents. It is therefore somewhat surprising that he now finds objection in the clear fronting of those issues that he had sought to zero in on, which in this case are factual in as much as they are legal.

On whether absolution should be granted on account of a clear arbitration clause, it is not in dispute that there was an arbitration clause. The existence of an arbitration clause is

generally a valid defence to a law suit as it generally has to be complied with as a condition precedent. The Arbitration Act [*Chapter 7:15*] is clear that any dispute which the parties have agreed to submit to arbitration may be determined by arbitration. Being that as it may, courts of course have to be wary of denying litigants access to justice where there is some dispute regarding its non-use. *In casu* Mr Maziwisa submitted in his evidence that the applicability of the arbitration had been waived by the conduct of Zimplats when it cancelled the contract as this was inconsistent with the arbitration clause. He maintained that the cancellation scuttled whatever process was in the pipe line towards the use of arbitration. Without the full details of the processes that had been in motion from either side, I do not think that the issue of applicability of the arbitration can be effectively decided at this point. In any event I agree with Mr *Hashiti* that the issue of arbitration was never pleaded and is not the focus of this case. What is more significant in my view and most likely to be dispositive of the argument for absolution either way is the issue of the contract. I say this because whether or not there was a contract between the plaintiff and the defendant which was governed by the tender documents or unsigned contracts is effectively a question of substantive law that can be gleaned from the tender documents provided.

The tender documents reveals a clear intention that the provisions therein would inform the agreement between the parties. The provisions in the tender documents also addressed termination as an eventuality and also the fact that no damages could be claimed. Whilst the evidence of the actuary was that Dove's profitability was of no moment in the calculation of damages, and that assumptions had been used in the calculation of damages deemed due, there was a concession that the data would have been different against the backdrop of more accurate data as opposed to assumptions. Both witnesses from Beacon were forthright that Beacon had simply been asked to look at the profitability of the contract and had not done their report with a view to an actual claim for damages. This was ultimately a business endeavour where viability of a business is most certainly core rather than peripheral to business dealings. For a contract of this nature, said by Doves to have been long term, it would be most unusual that evidence on the plaintiff's viability would be deemed irrelevant to the cancellation. Furthermore, no audited accounts have been produced by Doves which would enable the court to make an informed decision on the merits or otherwise of the reasons advanced for cancellation. No evidence has been placed before the court of comments to the *Ernst and Young* report which Doves says was merely a draft. No evidence has been placed before the court confirming that Doves objected to the cancellation clause in

the draft contract. There was also a concession that actual data on the client base would yield a far more accurate result on any purported claim for damages. No evidence has been placed before the court of the results of Dove's own survey which it says it commenced soon after the award of the tender.

To avoid absolution, a plaintiff has to make out a *prima facie* case relating to all elements of the claim. A plaintiff bears the onus of proving the damages it suffered and the quantum thereof. The method applied to calculate those damages must also be appropriate to the claim. The evidence by Doves has not shown that there was a final contract or that there was a repudiation of that contract that was outside the tender documents. I cannot see how the tender provisions would cease to apply by virtue of the tender being accepted given that acceptance was to be within the framework of those documents.

The case of *Standard Chartered Finance Zimbabwe* v *Georgias & Anor* 1998 (2) ZLR 547 (H) makes it clear that courts should lean in favour of a case continuing if there is evidence upon which the court might find for the plaintiff. The grounds for absolution that have been raised by Zimplats are certainly not issues that are peculiarly within their knowledge. The grounds centre on provisions contained in the tender documents whose contents both parties are acutely aware of and which the Doves agrees were at the centre of the tender process. It certainly cannot be said that Zimplats is in fear of taking to the witness stand. I do not think that any purpose will be served in putting the defendant to their defence in the face of unequivocal evidence that the tender documents contained clear provisions regarding the agreement. No more evidence is likely to emerge regarding these documents than has already emerged. There will be no utility served in putting the defendant to their defence to reiterate the very same clauses that have already been referred to which speak to the lack of merit in the claim.

In view of the evidence and its interrogation in the light of the applicable provisions in the tender documents, this is not a case where a court might make a reasonable mistake and give judgment for the plaintiff.

In the result, absolution from the instance is granted with costs.

Mutamangira & Associates, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners