

RAINBOW TOURISM GROUP LIMITED
versus
MEDALLION ENGINEERING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 24, 25, 29 January, 2 and 28 February 2018

Civil Trial

R Mabwe, for the plaintiff
LT Musekiwa, for the defendant

TAGU J: Sometime in or around November 2015 and at Harare the plaintiff and the defendant entered into an agreement in terms of which the defendant agreed to repair and fit 3 500 seat holding brackets at the plaintiff's Rainbow Towers Hotel and Conference Centre. The total cost of repairing and fitting the 3 500 seat brackets was quoted by the defendant at US\$50 015.00. Pursuant to the agreement between the parties the plaintiff duly made an upfront payment of the total sum of US\$50 015.00 to the defendant. The plaintiff alleges that in breach of the agreement between the parties the defendant failed to repair and fit the agreed 3 500 seat brackets and only effected repair works on 1 816 seat brackets. As a result the plaintiff issued summons against the defendant claiming for an order compelling the defendant to repair and fit 1 684 seat brackets at Rainbow Towers Hotel and Conference Centre within thirty (30) days of the court order, or alternatively repayment of the sum of US\$24 064.36 being the total cost of repairing the 1 684 seat brackets in the event of the defendant failing to perform the job above. The plaintiff further claimed interest on the sum of US\$24 064.36 at the prescribed rate of 5% per annum calculated from the date of expiry of the thirty (30) day period stipulated in the claim and costs of suit.

In its plea the defendant denied the claim and averred that it repaired and fitted all the damaged seats holding brackets of the Rainbow Towers Hotel and Conference Centre together

with other ancillary repairs under the supervision of the plaintiff's team of people. It further denied that the amount paid was US\$50 015.00 since there was a 5% discount and averred that the payment was made from another entity which was responsible for the project.

Three issues came up for determination in this matter. These were whether or not defendant breached its contractual obligation to repair and fit 1 684 seat brackets at plaintiff's Rainbow Towers Hotel and Conference Centre, if so, whether or not the defendant is liable to render specific performance to the plaintiff for the outstanding works or alternatively refund the plaintiff the value of the outstanding works and the appropriate order for costs.

At the commencement of the trial the court was invited for an inspection in loco by the warring parties. A demonstration of what was supposed to be done was made. The court was shown the seats whose brackets were to be repaired. The court was indeed shown that all the seat brackets for the lower deck bore marks of having been repaired or fitted by way of some welding marks (tack) and fresh painting. On the upper deck none of the seats showed any sign of having been repaired or fitted since the majority of the seats still bore their original manufacturer's marks. The defendant's representative even failed to show the court a single seat bracket that was repaired or fitted by its company on the upper deck of the Harare International Conference Centre (HICC). His explanation being that he had forgotten the seats he repaired despite the fact that he was in charge of the repairs.

To prove its case the plaintiff led evidence from two witnesses. These were Mr. Samuel Chitsato who is the Audit Manager, and an expert witness Mr. Innocent Tandi of Blumsbury Trading (Private) Limited. The defendant led evidence from one witness a Mr. Norman Khumalo a Fitter and Turner as well as a co-director of the defendant.

Mr. Samuel Chitsato's undisputed evidence was that at the lower deck (ground terraces) are a total of 908 seats translating to 1 816 seat brackets since each seat has two sets of brackets. According to his evidence all the seat brackets were repaired. On the upper terraces are 2664 seats. A random survey of over 200 seats revealed that none of the upper terraces seat brackets were repaired. Hence out of the total of 3 500 seat brackets which were to be repaired a total of 1684 seat brackets were not repaired.

To corroborate his evidence Mr Innocent Tandi an expert witness confirmed that none of the seat brackets at the upper terraces were repaired. He disputed the suggestion that the springs

and circlips in the brackets could have been repaired without opening the brackets. Once the brackets had been opened they were to be secured by re-welding since there is no machine in Zimbabwe that can secure the springs once it has been reopened. He did a random survey of 200 seats (400 brackets) from the upper terraces and there was no evidence of them having been repaired or fitted.

For the defendant Mr Norman Khumalo insisted that he repaired all the seat brackets on the lower and upper terraces. He confirmed that all the seat brackets on the lower terraces bore marks or signs that they had been repaired. He confirmed there was no evidence to show that seat brackets on the upper terraces were repaired though he repaired them. His argument was that he devised a special tool that could repair the seat brackets without opening the brackets. He made a demonstration as to how he was repairing the brackets without opening the bracket to restore a spring that would have come out of its groove. In the event of a circlip having problems or the shaft not functioning this court was not shown how this could have been repaired without opening the brackets. I need to mention that in order to open the brackets it entailed breaking the seal made by the manufacturer.

Accepting that he may have devised a tool to replace springs, it is not clear whether he was saying all the upper seat brackets had the same problem of the spring having come out of its groove. What also makes his assertion unbelievable was the fact that he said he replaced the damaged or malfunctioning seat brackets on the upper terraces by those that he removed from the bottom terraces. What makes his story unbelievable was the fact that the bottom terrace had fewer seat brackets than the upper terrace. At least out of the 200 seats (400) brackets that were sampled one should have shown signs that it had been attended to. To make matters worse he failed to show even one out of the 1684 seat brackets that he claimed to have repaired on the upper deck.

The plaintiff managed to prove on a balance of probabilities that out of the 3 500 seat brackets that were supposed to have been repaired at least 1 684 seat brackets were not attended to since they still bore their original (manufacturer's) marks.

The parties from their closing submissions agreed on what the court has to decide in a claim for specific performance. A party claiming specific performance must allege and prove-

- i) Terms of the contract;
- ii) Compliance with any antecedent or reciprocal obligations;

- iii) Allege non-performance by the defendant and
- iv) Claim specific performance.

See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776, *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* [1955] 3 ALL SA 257 (D); *Farmers Cooperative Society v Ben* 1912 AD 343 at 350, *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) and *Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S).

In casu the terms of the contract are not in dispute. The defendant was supposed to repair 3 500 seat holding brackets for which the defendant quoted a figure of US\$ 50 015.00. The plaintiff performed its obligations by paying to the defendant upfront the whole amount. In breach of the contract the defendant only repaired 1 816 seat holding brackets and did not repair a total of 1 684 seat brackets. The defendant must therefore perform its part of the contract failure of which it must refund the plaintiff an amount of US\$24 064.36. Going by the papers and figures filed of record each bracket cost US\$14.29 to repair.

In the result I will grant the following orders-

IT IS ORDERED THAT

- a) The Defendant be and is hereby ordered to repair and fit 1684 seat brackets at Plaintiff's Rainbow Towers Hotel and Conference Centre within thirty (30) days of this court order.

Or, in the alternative:

- b) Pay to the Plaintiff the sum of US\$24 064.36 being the total cost of repairing the 1 684 seat brackets in the event of the Defendant failing to perform in terms of paragraph (a) above.
- c) Defendant to pay interest on the sum of US\$24 064.36 at the prescribed rate of 5% per annum calculated from the date of expiry of the thirty (30) day period stipulated in paragraph (a) to date of payment in full.
- d) Defendant to pay costs of suit.

Mawere Sibanda, plaintiff's legal practitioners
Musekiwa & Associates, defendant's legal practitioners