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Judgment No. SC 94/04
Civil Appeal No. 107/01

GAMANJE (PRIVATE) LIMITED v CITY OF BULAWAYO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
BULAWAYO, MARCH 16, & NOVEMBER 23, 2004

J C Andersen SC, for the appellant

E Matinenga, for the respondent

ZIYAMBI JA: This is an appeal against a decision of the High Court.

The record has, contrary to sub rule (2) of Rule 15 of the Rules of this Court, not been paginated. The record consists of two volumes comprising of about 600 pages. To say it has been almost impossible to find the references made by counsel is an understatement. This court has before stressed the need for compliance with Rule 15. An appellant who has not complied with the rules in this regard risks having his appeal struck off the roll.

The facts forming the background to this appeal are set out hereunder:-

The appellant is a registered company carrying on business of farming under the style of "Denver Gamanje Farm" (Denver Farm). On 4 December 1978, the appellant issued summons against the respondent claiming payment of the sum of ZW $3207330.00 together with interest at the rate of 25% calculated from 13 February 1988 to the date of payment as well as costs of suit. The claim was for the balance outstanding for clay and gravel sold and delivered to the respondent.

The appellant alleged that the amount claimed was due in terms of an agreement concluded with the respondent in terms of which the appellant sold to the respondent gravel and clay at a cost of $30.00 per cubic metre. Alternatively, it was alleged that the reasonable price for the gravel extracted by the respondent was $30.00 per cubic metre.

Pursuant to the agreement referred to above, the respondent extracted gravel from Denver Farm totaling 105545 cubic metres and clay amounting to 31366 cubic metres giving a total of 136911 cubic metres at a total value of $4 107 330.00 of which the respondent paid $900 000.00 leaving the balance, now claimed, of $3 207 330.

In the further alternative, it was claimed by the appellant that the respondent had been unjustly enriched at the appellant's expense in the sum claimed.

The respondent in its plea denied entering into any agreement for the sale

of the gravel and clay. It alleged that if any such agreement was concluded with the appellant by the respondent's employees, the alleged agreement was null and void for want of compliance with the tender requirements of the Urban Councils Act [Chapter 29:15] ('the Urban Councils Act'). In any event, there being no agreement on the price of the gravel, the alleged agreement was not an agreement of sale. In the further alternative, the respondent denied that $30,00 per cubic metre was a fair and reasonable charge for the gravel and clay extracted from Denver Farm.

The issues settled at the pre trial conference were as follows :-

1. Whether the defendant (respondent) entered into a contract of sale with plaintiff (appellant) for purchase of gravel and clay and if so what were the terms.

2. Alternatively to issue 1. whether there was an implied term in the agreement (if any) that the plaintiff (appellant) would be paid $30.00 per cubic metre or a fair and reasonable amount.

3. If a contract is proved whether such is valid in law.

4. Whether the defendant (respondent) is liable to pay the sum of $3 207 330 or any amount.

The learned judge found in favour of the respondent on all issues. It is against this

judgment that the appellant now appeals.

Counsel were agreed that the two main issues for determination by this court are, whether there was a contract express or implied between the parties for the sale of gravel and clay; or in the alternative, whether the respondent was unjustly enriched at the expense of the appellant who was therefore entitled to judgment in an amount equivalent to the extent of the unjust enrichment.

It was common cause, that in terms of a written lease agreement entered into in or about 1995, the appellant had let to the respondent a section of Denver farm for the purpose of establishing sewage ponds and that at the end of the lease, the ponds would belong to the appellant. It was also common cause that A P Glendenning (Private) Limited (Glendenning) won a tender to construct the ponds on the leased portion of Denver Farm. Initially it had been envisaged that there would be adequate gravel and clay on the leased portion of the farm for the construction of the ponds. However, during construction it became clear that this was not the case and that it would be necessary to extract gravel and clay from another portion of the farm.

The respondent alleged in the court below that its engineers, without seeking prior authority from the respondent, negotiated with the appellant who had no objection to the gravel and clay being "borrowed" from another portion of the farm close to the leased portion. It was agreed that the respondent would eventually rehabilitate that portion of land once it ceased to extract gravel and clay therefrom. Thus it was in terms of that agreement that Glendenning extracted gravel and clay from a portion of Denver Farm not leased to the respondent. Accordingly, the respondent was surprised to receive

from the appellant a claim for the gravel and clay so extracted at $30.00 per cubic metre.

On behalf of the appellant it was submitted that there was a clear agreement between the appellant and the respondent through its engineers for the purchase and sale of gravel at $30,00 per cubic metre. Indeed the record shows that the respondent authorized Glendenning to extract gravel and clay from the appellant's land and represented that an agreement had been concluded with the appellant. The following is an excerpt from the evidence of N. Dube ('Dube') of Hydro-Utilities (Private) Limited ('H.U'.) the respondent's consulting engineers which appears at p 69 of volume 11 of the record:-

> "Q. Alright, so that is the background, you were asking for an indication from the City Council as to where you should get the land and for them to look at your tests and negotiate with the farmer. What then eventually happened?

A. I think immediately after this letter it should have been towards the end of April I remember getting a letter from the City Council saying that we can go ahead and extract the gravel from the farmer's land because they had concluded negotiations with him.

Q. They indicated to you that they had some agreement with the farmer so you could move on to his land. That is what you are saying.
A. Yes. I remember receiving a letter to that effect but I do not remember the date and I discussed it on the phone with Mukoma."

On 20 October, 1997, a letter was addressed by H.U. to the respondent's director of engineering services containing the following passage:

> "(ii) GRAVEL CHARGES

> The agreement on gravel source and charges have nothing to do with Hydro-Utilities. A meeting between Engineering Services Department and the farmer resolved that the farmer be paid through the contract. It must be made clear that the Engineer has done so in good faith."

The respondent's engineer, Mukoma, was the one who instructed its consulting engineers, H U, to extract the gravel and clay.

Claim no 14 which was submitted by Glendenning to the respondent for payment included a claim of $900 000 for the gravel and sand extracted from Denver Farm. It was submitted for payment by Dube and authorized by the respondent's director of engineering services Mukoma.

When the appellant requested payment from the respondent on 31 July 1997, the respondent, by letter, directed that the appellant make its claim through, not to, Glendenning as the respondent was "not in a position to make direct payment" to the appellant. No query was raised then, by the respondent, as to why a charge was being levied for the gravel and clay when the agreement was (allegedly) to borrow it.

When payment for the gravel and clay was not forthcoming, the appellant denied Glendenning access to its gravel and clay and only restored access when the payment of $900 000.00 was made, through Glendenning, by the respondent.

It is clear then, that at the very least, the facts proven show an implied or

tacit agreement of sale.

(See *R H Christie Law of Contract in South Africa* (2nd Edition pp 92 - 103).

Counsel for the appellant did not deny the allegation by the respondent that the agreement, concluded as it was between the appellant and the respondent's employees, was invalid for non compliance with the procedures set out in s 211 of the Urban Councils Act which provides as follows:-

"211 Tenders

(2) Subject to s 8 and 9, before entering into a contract for the excavation of any work for the council or the supply of any goods or materials to the council which involves payment by council of an amount exceeding such sums or sums as may be prescribed, the council, or, in the case of a municipal council, the municipal procurement board shall call for tenders, by notice posted at the office of the council and advertised in two issues of newspaper, specifying;

(a) the nature of the proposed contract, giving such particulars thereof, as the council or the municipal procurement board, as the case may be, considers to be desirable; and

(b) the closing time and date for receipt of tenders thereof, which shall be not less than twenty-eight days after the date of the first publication of the notice in the newspaper."

The contention advanced by counsel, in the alternative, was that the appellant had acted in terms of an agreement between the parties for the purchase of the gravel and that the respondent was unjustly enriched by the value of the gravel and clay at the expense of the appellant who had been impoverished to the same extent. The

respondent, on the other hand, denied that there had been unjust enrichment alleging that the element of impoverishment of the Plaintiff (the appellant), necessary to sustain a claim for unjust enrichment, was lacking in this case.

The requirements for an action for unjust enrichment are, firstly, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the expense of the plaintiff; thirdly, that the enrichment is unjustified (in the sense that it would be unjust to allow the defendant to retain the benefit); fourthly, that the enrichment must not come within the scope of one of the classical enrichment actions; and fifthly, there must be no positive rule of law which refused an action to the impoverished person.

See *Industrial Equity v Walker* 1996 1 ZLR 269 AT P 300;

See also *Wille's Principles of South African Law* 8th edition at pp 633-5.

The evidence was that the respondent would have had to pay a price for the gravel and clay which was higher than the $30 per cubic metre which was charged by the appellant. Indeed the court a quo found that the respondent benefited from the gravel and clay extracted from the appellant's farm. There has been no cross appeal against this finding by the respondent and I did not understand Mr *Matinenga* to contend otherwise.

With regard to the second requirement, it was submitted by the respondent that it had not been shown that the enrichment was at the expense of the appellant as the appellant had not established that it was impoverished by the extraction of the gravel and sand. In this regard, the learned judge found that because the appellant was not in the

business of buying and selling gravel and clay it cannot be said that it was impoverished by the extraction thereof.

I agree with the submission on behalf of the appellant that:-

> "it matters not that the appellant was not in the business of selling gravel and clay. It is sufficient that its (the appellant's) gravel and clay was collected and used by (the) respondent to its benefit at the expense of the appellant to the extent that (the) appellant's gravel and clay was mined by the respondent thereby turning that portion of his farm into large craters."

And further that:

> "the mere fact that the portion of the appellant's farm from which the clay and gravel were mined, was left as large craters, unusable for any purpose, clearly establishes that the benefit accruing to (the) respondent was at (the) appellant's expense."

It was not disputed that large craters were left on the appellant's farm after the extraction of the gravel. In this regard the appellant's farm was adversely affected. The very presence of the craters on the land in question meant that the appellant could not use that part of the farm whether for grazing or for any other purpose. I am therefore in agreement with the submission made on behalf of the appellant that the benefit gained by the respondent was at the expense of the appellant who could no longer enjoy the use of the land on that portion of his farm.

The value of the enrichment is the amount by which the appellant is

enriched. The evidence of Dube, the respondent's consulting engineer, was that the respondent would have paid a price greater than the $30 per cubic metre charged by the appellant had the gravel and clay been sourced from elsewhere.

The respondent commissioned an investigation which found that the charge raised by the appellant compared favourably with what it would have cost the respondent to have sourced gravel from its own pits at Richmond. Accordingly it would be fair to say that the value of the enrichment is, at the very least, the total cost of the gravel extracted at $30 per cubic metre less the amount already paid by the respondent. This is the sum claimed in the summons and it amounts to $3 207 330.00

Is the enrichment unjust? The appellant allowed the respondent to extract the gravel and clay from its farm pursuant to an agreement between the parties. The price was either agreed upon or accepted as being fair and reasonable by the respondent's agents. The agreement being unenforceable by the appellant by virtue of the Urban Councils Act, it would, in my judgment, be unjust, in these circumstances, to allow the respondent to retain the benefit of the agreement at the appellant's expense.

With regard to the fourth and fifth requirements, I did not understand the respondent to suggest that they have not been met.

Accordingly the appeal is allowed with costs. The order of the High

Court is set aside and substituted with the following:-

"Judgment is entered for the plaintiff in terms of the summons."

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Webb Low & Barry, appellant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners