

WALTER NYAUNGWA  
versus  
FORESTRY COMMISSION  
and  
JEFM AUCTIONS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 20 September 2022 and 30 September 2022

### **CIVIL TRIAL**

*C Ndlovu* with Mr *T Musara*, for the plaintiff  
*D Tandiri*, for the 1<sup>st</sup> defendant  
2<sup>nd</sup> defendant in default.

MUZENDA J: Plaintiff is suing both defendants jointly for the following:

- a) *Payment of the sum of US\$74 807 being damages for costs of repairing defective goods sold to and delivered to plaintiff by first defendant which damages arose from the negligence or dereliction of duty by both defendants.*
- b) *Interests at 5 per cent per annum from the date of judgment to date of payment, and*
- c) *Costs of suit.*

*Both defendants opted to defend the action.*

### **Factual Background**

After plaintiff saw an advertisement in the local media in Manicaland about a pending public auction of various equipment by JEFM Auctions (Private) Limited, he proceeded to the site and with the assistance of Forestry Commission's personnel inspected the property for public auction. Plaintiff was satisfied with the condition of the selected lots. On 24 July 2021, he purchased from first defendant a Sandying Machine for US\$1 500, a Hot Press and System for US\$7 500 and a Glue Spreader for US\$1 000. According to the plaintiff he fully paid for the materials on time. However second defendant in its pleadings states that full payment was delayed for a period of a month.

After full payment, plaintiff approached both defendants for delivery of the sold items, defendants refused to release the goods arguing that plaintiff was in arrears. Second defendant published in the media its intention to re-offer the very property items bought by plaintiff for a

second public auction. Plaintiff rushed to court on 25 August 2021 with an urgent chamber application for an interdict and *declaratur*. Both defendants opposed same but after spirited negotiation the order sought by plaintiff was granted by consent.

When plaintiff collected the three (3) lots he discovered that the property had been either neglected, or vandalised or tampered with, their conditions as at the date of pre-sale inspection and date of collection were no longer the same. Plaintiff opted to subject all the items to corrective repairs and quoted a total amount of US\$74 807 to put them back to economic use.

Alternatively plaintiff claims that defendants jointly placed goods at a public auction which was not fit for purposes advertised and he needed US\$74 807 to effect repairs to them to correct the defects.

Both defendants deny any liability. They contend that the goods were sold *voet stoots*, no warranty was given as to quality, and risk passed to the plaintiff upon the conclusion of the sale. Delivery of goods to the plaintiff was delayed due to late payment of the purchase price by the plaintiff and to defendants all the goods sold to the plaintiff was dilapidated.

From the pleadings of both defendants it appears the quantum of repair costs is not contested nor disputed.

At the pre-trial conference meeting the parties agreed that the parties agreed that the following issues constituted those for trial.

- 1. a) Whether or not the plaintiff was prevented from collecting his goods after the conclusion of the sale?**
- b) If indeed the plaintiff was prevented from collecting his goods, whether or not the defendants owed a duty of care to make sure that the goods did not degenerate or deteriorate while in their custody?**
- c) Whether or not the goods degenerated or deteriorated while in the custody of the defendants after the sale?**
- d) If so, what is the quantum of the loss or damage suffered by the plaintiff as a result of the deterioration or damage of the goods?**
- e) Who is liable to pay costs of suit?**

When the trial commenced the issues for trial by consent of both parties second defendant being in default, were further trimmed down. As regards issue 1(a) it was common cause that plaintiff and defendants eventually agreed to resolve an urgent chamber application by having an order by consent to have plaintiff collect his goods from first defendant's

premises. So it is no longer in dispute that plaintiff was prevented by defendants from collecting auctioned goods. As regards item 1(c) plaintiff is claiming spares or components aligned to the advertised lots, it is that they were either vandalised or removed from them. There is no claim based on the degeneration not deterioration of the goods. The crisp enquiry is whether items included on the quotation discovered by plaintiff formed part of the equipment bought by the plaintiff on the day of auction or not. Further it was also agreed by the parties that even though both defendants had not pleaded disputing the replacement value, the plaintiff still bears the onus to prove the quantum of the prospective damages.

***Evidence adduced by the Plaintiff***

Mr Walter Nyaungwa, the plaintiff testified. On 24 July 2021 he bought a Sanding machine, a Hot Press and System and a Glue Spreader. He had inspected these 3 lots before buying them and were all functional to his satisfaction. The sanding machine and Lot 16, Hot Press and System had separate distribution boxes. Lot 18 the Glue Spreader had an electronic motor. He produced a quotation prepared by Mac On The Map Engineering, **exh 1** showing a total of US\$74 807 as the amount of damages constituting replacement costs . all these kits or components represent brand new components. Under cross examination by first defendant's counsel, he conceded that exh 1 contains some errors. The control box for the Hot Press and System is there, it is only the distribution box which is missing. Equally so the control box for the Sanding Machine is not missing but the distribution box. On the Glue Spreader the control box is there, what is missing is the electric motor. When he was further asked whether the quoted replacement value of US\$74 807, included the control boxes he conceded. He was also put to task about the distribution boxes whether it was only one feeding all machines and he insisted that each lot he bought was electrically fed by an independent distribution box. He gave fair market value prices for all the missing components being used as second hand.

The second witness to testify for plaintiff was Mr Owen Mangwarara. Not much comes from this witness serve to state that he was present when plaintiff's Lot 16, Hot Press and System's system was cut by a Mr Hanz who claimed that he had bought it. The cutting and disconnection of the system happened in full view of the first defendant's security guards. Mr Mangwarara later on advised plaintiff about what he had witnessed.

The final witness for the plaintiff was Brendon Tatenda Chafa who prepared exh 1, the quotation. He is a clerk at the engineering company and prepares quotations at the instructions of an engineer. When he prepared exh 1 all spares quoted are pegged using prices for a new

spare part or product. He omitted to add a distribution box for lot 18, the Glue Spreader. When he quotes a client for a second hand product he charges 60 per cent of the price for a new product. However for a system for the Hot Press a second hand Press System set would cost US\$ 29 000, a second hand distribution box would cost \$5 100 a distribution box for sanding machine would cost US\$ 4 800 and the one for the Glue Spreader would be US\$ 1 200. A good electric motor for the Glue spreader would cost US\$ 3 750. He added control boxes on the quotation because he had been instructed to do so since they were going to supply a new set of spares.

Defendant called Mr Joseph Kanduru who is employed by first defendant as a security sergeant. He has been employed by first defendant since 1993. On one occasion he operated some of first defendant's machines but his core business now is safety and security at first defendant's premises. He told the court that there was one distribution box feeding all equipment including lots 15, 16 and 18. He disputed plaintiff's evidence that a separate distribution box was set aside for each lot. He admitted being present at the auction site when plaintiff visited for presale inspection. He told the court that he told plaintiff that the Glue Spreader's electric Motor was stolen long back in 2019 and that a police report was made at Penhalonga police Station. He added that the equivalent bought by plaintiff was old and not functional. On the Hot Press and system he stated that the "system" or double 450mm pipes which supply hot water to the Hot Press was not part of lot 16 but was part of lot 24 on the catalogue relating to Boiler system and iron sheets. The witness could not explain the "system" associated to the Hot Press and System. The first defendant then closed its case.

Analysis of facts and evidence.

Having heard both sides' version I am satisfied that the defendants owed plaintiff the duty of care to look after the goods until plaintiff had fully paid the purchase price to the satisfaction of the second defendant (the auctioneer and first defendant's agent). It is the time that the passing of risk should occur. It is true that the passing of risk should occur on the completion of sale however in this case both defendants thwarted plaintiff from collecting the goods alleging non-payment. The risk passed to the plaintiff when he delivered the High Court order by consent to the authorities of first defendant up until, then both defendants had a duty to protect plaintiff's property against any loss.

Plaintiff claimed and obtained a quotation which included 3 separate control boxes and when he was in court he unreservedly admitted that there is an error. There is obviously an effect on the quoted prices and as such those have to be disregarded by this court.

Plaintiff claims 3 distribution boxes for each set. After the trial the plaintiff decided to abandon prices quoted on exh 1 and urged the court to accept prices given by Mr Chafa for second hand products. Hence the total required for all 3 distribution boxes will add to US\$11 100 (\$5 100 + \$4 800 + \$1 200). Defendants in their pleadings did not challenge the values of the distribution boxes. They contented that all equipment in the workshop used one distribution box. Mr Chafa, third plaintiff's witness told the court that each component was powered by a distinct distribution box specially provided for it because all items use different quantity of energy from heaviest to lightest. I am persuaded by the plaintiff's witness on this aspect and will accept and grant plaintiff's claim for the 3 distribution boxes valued at a fair, market value of US \$11 100. In my view the onus was largely on the first defendant to prove or dispute the market value of all the second hand replacement spares given that first defendant knew the ages of the items being claimed first defendant chose to evade the obligation to do so and the court was left only with evidence of value proved or suggested by the plaintiff I found such values economically reasonable.

On the aspect of the electronic motor for the Glue Spreader, on the eve of the public auction plaintiff inspected the Glue Spreader and saw the electric motor but upon collection it was missing. Plaintiff bought items he was familiar with. There is no way he could have been mistaken about the electric motor. Mr Joseph Kanduru told the court that he informed plaintiff that the electric motor was stolen long back in 2019. I failed to see sense on this evidence, why would plaintiff make a police report about the electric motor if he was informed prior to the auction that it had been stolen and in any case defendant did not produce in court any proof about the police report. I will accept plaintiff's evidence and conclude that the electric motor was removed after plaintiff bought the Glue Spreader at an auction. This issue of theft of the electric motor was not pleaded by either defendants and does not even appear in either defendant's summary of evidence, it only surfaced during cross-examination of plaintiff and spoken of by Mr Joseph Kanduru whose evidence was not summarized and was just called to testify on behalf of first defendant.

A witness' statement must be captured by the party calling it and summarized and served on the other party to alert it in case the other party intends to provide counter evidence or even take instructions from the client. The allegations of theft of the electric motor took

plaintiff by surprise. I will rule that it was an afterthought by the first defendant and dismiss first defendant's defence.

Plaintiff is further claiming a Hot Press and system and submitted that it is the system which was vandalized. The system comprises of 2 parallel 450mm steel pipes which supply hot water from the boiler situated 20 metres from the Hot Press. The first defendant to the contrary contended that the so called system is constituted by an "input and output" devices and do not relate to the parallel steel pipes. It is the evidence of the plaintiff that as described in the auctioneer's catalogue there is a distinct hot press supported by the hot water system for one to talk about a hot press and system. The input and output constitute the hot press. The version of plaintiff is bolstered by the catalogue filed of record, it makes a lot of logic. Otherwise if the auctioneer knew that the input and output is the system alluded to, there was no need to advertise lot 15 as "**Hot Press and System**" the defendant did not call an expert to rebut plaintiff's evidence on the description of the "system" Mr Joseph Kanduru openly admitted during trial that he was not an expert who will shed light on the aspect in dispute. I have no difficulties in accepting plaintiff's evidence. Plaintiff was an honest and credible witness in his testimony and I will accept his evidence. Mr Chafa informed the court that the replacement value of the system is US\$29 000 United States dollars. First defendant did not mark a serious challenge to that figure nor did it lead any evidence to rebut that value. What defendants spiritedly challenge was that the quotation reflected prices for new products. I accept the reasoning of both defendants but they did not meaningfully in my view place before the court any other value and as I said earlier at the outset of this judgment defendants left the issue of replacement value unaddressed and I will safely infer that they placed that onus on the plaintiff. I will accept the value amplified through oral testimony as the replacement value. I will put the value of the system at US\$ 29 000.

Plaintiff has to a large extent managed to prove his claim and the issue of costs goes with the outcome of the matter. On 20 September 2022 second defendant was called three times and was in default. Plaintiff produced a Sheriff's proof of service which shows that second defendant was served on S. Makoni of Messrs. Mutungura And Associates on 31 August 2022 and I was satisfied that service was proper and after service was proper and after plaintiff applied for default judgment I granted it and reserved the issue of quantum to the end of trial after having heard plaintiff's evidence. I am thus further satisfied that both defendants are jointly liable to the plaintiff.

Accordingly the following order is granted:

1. Defendants jointly and severally are ordered to pay plaintiff
  - a) A sum of US\$ 29 000 being the replacement cost for the damaged Hot Press system
  - b) US\$ 5 000 being the cost of a second hand distribution box for a Hot Press
  - c) US\$ 4 800 being the replacement cost of a second hand distributor box for the sanding machine
  - d) US\$ 1 200 being the replacement cost for a second distribution box for the Glue Spreader.
  - e) US\$ 3 750 being the replacement cost for the electric motor of the Glue Spreader
2. Plaintiff's alternative claim is dismissed.
3. Defendants to pay costs.

*Gonese and Ndlovu Legal Practitioners*, plaintiff's legal practitioners  
*Dube, Manikai and Hwacha*, 1<sup>st</sup> defendant's legal practitioners  
*Lanta and partners*, second defendant's legal practitioners