

**MAGADALENI NDLOVU**

**Versus**

**JUSTIN NCUBE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 22 MARCH 2011 AND 26 JULY 2012

*Mr M. Ncube* for the plaintiff  
*Mr K. Ngwenya* for the respondent

Civil Trial

**NDOU J:** On 12 May 2009, the plaintiff issued summons against the defendant claiming payment of damages in the sum of ZAR68000-00 being the amount she claimed was needed for the reconstruction of the extension to Stand number 7489/17 Pumula North, Bulawayo. The plaintiff alleged that the defendant constructed the extension in a substandard way.

The basis of the plaintiff's claim was that sometime between 2007 and 2008 the parties entered into a verbal agreement in terms of which defendant was to construct an extension to the plaintiff's house at the abovementioned stand. Plaintiff provided a plan which the defendant had to follow. Plaintiff had the obligation to provide the building/construction material. Plaintiff provided the plan for the extensions: The issues for trial can be summarised as follows:

- (a) whether the extension work done by defendant was substandard;
- (b) in the event that it is found that the extension was not properly constructed and defendant was responsible for such, whether the nature of the construction is of such a substandard scale that it has to be rebuilt;
- (c) In the event of a finding that there is no other remedy save to destroy and rebuild the extension, whether defendant is at all liable to the extent claimed by plaintiff;
- (d) whether defendant procured the roofing material used in the construction of the extension to the property, and,

(e) whether defendant brought in the Area Inspector to inspect the extension.

The plaintiff did provide the plan as well as procured building material and defendant commenced the construction of the additional structure. Specialised areas like carpentry and electrical connections were done by other artisans. After completing the construction of the extension plaintiff was dissatisfied with the structure. The extension was condemned by the Director of Housing and Community Service as per his letter to plaintiff dated 20 February 2008. In the letter the Director stated:

**“RE: SUBSTANDARD CONSTRUCTION ON STAND 7489/17.**

Please note that the development was not officially inspected by the Council’s Area, Bulawayo Inspector prior to the pouring of concrete footing as is the norm and as a result no records of its construction progress can be obtained from Council. Take note also that the Inspector who carried out the construction did so on his individual capacity during his own time and was not in any case acting on behalf of Council.

A recent inspection carried out on the property revealed the following:

- (i) floor level below ground level
- (ii) roof construction substandard (pitch and timber sizes)

Relevant remedial action obviously by the contractor in consultation with the Area building inspector should be taken to rectify the anomalies.

Yours faithfully  
(signed)  
Director of Housing and Community Services.”

It is beyond dispute that the defendant is a seasoned builder having thirty six (36) years in the construction industry. He is a bricklayer by trade and he is also a District Building Inspector at the City Council of Bulawayo. He has the technical knowhow in the field. The defendant agreed and confirmed that he started constructing the extension before the plan was approved. He used measurements that were not yet approved.

The plaintiff Magadaleni Ndlovu testified. She said she entered into the agreement with defendant whom she knew as a building Inspector and was confident that he would assist her with everything regarding the extension. She said she had a plan of extension which she took to defendant because she thought he had the requisite knowledge to inspect it. She said the defendant was responsible for submitting the plan to the City Council for approval. When defendant commenced the construction she did not ask him whether the

plan had been approved. When the construction of the extension was completed there were leakages from the roof and walls. She informed defendant and he was not co-operative resulting the institution of these proceedings.

The inspection revealed the abovementioned defects. The District Inspector condemned the timber used in the roofing as substandard. She approached defendant to remedy the defects but he refused. She said the roofing timber was procured from a Brandon Ross through an arrangement with her child who would deposit cash into Mr Ross's account and the latter would provide the building material. She said because the extension was not properly and professionally done there was a leakage from the roof caused by the wrong timber used and the floor level being constructed below the ground level. The plaintiff testified that the defendant constructed a substandard extension. She implied that the defendant did not carry out the construction work professionally because in the first place he started the construction before the plan was approved. Further it is her case that he was negligent in failing to bring in the area building inspector to inspect the trenches before the pouring of the concrete to the foundation. In other words, had he done his job properly and called in the area building inspector, the anomalies noted by the Director of Housing would have been avoided.

The defendant testified that having satisfied himself that the plan had undergone and passed the necessary stages, he used a copy of the plan in both construction and prescribing the materials to be used for the construction of the extension. He said with thirty-six (36) years in the construction industry he discharged his professional duty of care. He took all the necessary steps which a reasonable builder in his position would have taken before commencing the construction. He said that the extension was constructed according to the plan which he had been given by the plaintiff. He said that the area building inspector was brought to inspect before the pouring of concrete to the foundation. He said unfortunately the latter had not transferred his observations into the plan as is the practice because at that stage the plan had not yet been collected from the relevant City Council authorities as alluded to above. Defendant, however, did not call the said area building inspector to testify as a witness. The court went on an inspection on loco. At the scene it was observed that the floor level was indeed below the ground level. It was also observed that the roof construction was

substandard in terms of pitch and timber sizes resulting in roof leakages. As far as the roofing of the extension is concerned it is beyond dispute that it was done by another artisan hired by the plaintiff after he was recommended to plaintiff by the defendant. The plaintiff apparently concluded a separate and distinct agreement with the said artisan.

I am satisfied that the above testimony of the plaintiff credible. She engaged the defendant and relied on his skill to carry out the extension professionally and up to standard. The defendant on the other hand was very defensive and did not fare well as a witness. These findings of fact, however, do not entitle the plaintiff to all the claims that she has set out. I will consider her claims in turn.

**Substandard roof construction.**

As alluded to above, the roofing was done by another artisan. The plaintiff has a separate agreement procure the roofing material through yet another separate arrangement between a Mr Ross and her child who is based out of the country. If I order that the defendant is responsible for the roofing problems, it would be merely on the basis that the defendant “recommended” the artisan to the plaintiff. This claim has no legal standing and accordingly should be dismissed.

**Floor level below ground level**

The defendant confidently declared that he is a brick layer by profession and is also a District Building Inspector at the City Council of Bulawayo and has been in the building industry for thirty six (36) years. The defendant is an expert in the construction industry and he possesses the technical know how in the building industry. The defendant owes plaintiff a duty of care in the carrying out of his duties. It is trite that when a person engaged in some activity which requires special skill, he is required to show such skill as may reasonably be expected of a person engaging in that activity and if he does not, his lack of skill will be regarded as negligence-*imperitia culpa adnumerata*. – *Colman v Dubar* 1933 AD 141; *Cape Town Municipality v Paine* 1923 AD 207 at 216F; *King v Dykes* 1971 (3) SA 540 (RA) at 542; *Sutcliffe v Thackrah* [1974] AC 727 and Amler’s “Precedents of Pleadings”; (3<sup>rd</sup> Ed), Butterworths (1989) at

page 30. In this claim, the defendant knows or observed before he finished the extension that the floor level to the extension was below ground level, but he did nothing to remedy the situation. It is only in his testimony that he said that the retail wall can be constructed. Surely if this action can rectify the substandard nature of the extension, the defendant should have done it. He did not do so and as a result the water will continue seeping into the house. The defendant failed to act in the manner, that a *diligens pater familias* would have acted, because, when a duty of care exists (which it did in casu), negligence then means failure to take reasonable steps to avert the damage. It is an implied term of a building contract that the contractor must execute the work in a workmanlike manner and that all materials used by him and the structure he constructs must be of a reasonable quality, anything less than this is negligence. The defendant had a special duty to advise the plaintiff of any potential risks and bears the onus to prove that adequate warnings were given to the plaintiff which were rejected by her. In his own words the defendant said that he knew the general slop of the Pumula North area as he was part of the people who constructed the original houses. The defendant then should have foreseen that the floor level in the plan that he was relying on was below ground level even before he commenced the construction. Bearing the fact that defendant is an experienced builder and also employed by the City of Bulawayo, his negligence is glaring.

As alluded to above, the defendant is not legally responsible for the roofing. The defendant is responsible for remedying the floor and resultant damage. The defendant is liable for costs of repairing the floor. Fortunately the reduced costs can be determined using the detailed quotation relied upon by the plaintiff that is:

Foundations	- R12 770-00
Superstructure blockwork	- R15 495-00
Windows and Door Frames	- R 3 900-00
Doors and Locks	- R 5 000-00
Glass and Putty	- R 1 170-00
Plastering	- R 4 700-00
Flooring	- R 7 000-00

Labour 20% - R10 007-00

Transport 5% - R 2 501-75

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**Total =R 62 543-75**

Accordingly Defendant is ordered to pay plaintiff the sum of ZAR62 543-75 together with interest thereon at the prescribed rate of 5% from 12 May 2009 to date of payment in full. The defendant is ordered to pay costs of suit on the legal practitioner and client scale.

*Messrs Cheda and partner's* plaintiff's legal practitioners  
*Mabhikwa, Hikwa and Nyathi*, defendant's legal practitioners