

DR. J L MAVURUDZA  
and  
MRS MAVURUDZA  
versus  
MEIDLER POOLS AND CONSTRUCTION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
BHUNU J.  
HARARE, 4 November 2009.

**Civil Trial**

*P Chiutsi*, for the plaintiffs  
*D Drury*, for the defendant

BHUNU J: The plaintiffs are husband and wife residing at number 4 Softstone Close, Chisipite, Harare whereas the defendant is a registered company in the business of constructing and refurbishing swimming pools.

Sometime in October 2006 the plaintiffs contracted the defendant to refurbish their swimming pool with a marblelite finish. The defendant provided a written quotation of \$7 904 235-00 It is admitted that the plaintiff paid the amount in full in terms of the contract.

The written quotation provided for a guarantee in the following terms:

**“GUARANTEES**

The swimming pool tiles are guaranteed for 2 (two) years from the completion date against latent defect in its construction. Should a defect in the work become evident during the period it will be repaired free of charge. In order to keep the structural guarantee you will need our permission to empty the pool. The pool surrounds are guaranteed for 6 (six) months, due to the different ratio of structural movement.

The manufacturer’s guarantees regarding the filtration equipment will be honoured by ourselves. These warranties run for 6 (six) months from the construction hand-over date depending on the component.

This quotation does not include the cost of filling the swimming pool with water, or the pool chemicals.”

The defendant refurbished the swimming pool in terms of the agreement but not to the plaintiffs’ satisfaction as the swimming pool soon developed a leaching problem which the defendant has failed to rectify.

The plaintiffs then issued summons claiming specific performance for the supply and fitting of non leaching chip pool tiles or alternatively payment of damages in the sum of \$787 600 000-00. The amount has since been amended to read US\$9 500-00 being the current cost of supplying and fitting the marble pool finish.

That the pool developed a leaching problem soon after refurbishment is not in dispute. What is in dispute is the cause of the leaching problem. The plaintiffs allege that the leaching problem was due to poor workmanship by the defendant's employees whereas the defendant alleges that it was due to incorrect maintenance of the pool PH levels by the plaintiffs.

The plaintiffs maintained that they kept the correct pool PH levels as they have extensive experience in maintaining swimming pools. On the other hand the defendant was adamant that it refurbished the swimming pool in accordance with the manufacturer's specifications. The product is manufactured by Cemcrete South Africa. It comes with a "POOL START- UP GUIDE" which contains detailed complex application instructions. The instructions read in part:

**"CEMCRETE POOL START-UP GUIDE**

An important step by step guide to chemical treatment of New Marble Plaster Swimming Pools

Day minus 1

1. Before the pool is plastered check tap water for:
  - a. pH (not to be below 7.2);
  - b. presence of iron or copper in solution. If present add metal remover at stage (4). It is advisable to add a metal remover even if no metals are found to be present; and
  - c. calcium hardness (ideal 300 – 400 ppm) if below will need to add calcium chloride at step (5)

**Day 1**

2. Plaster pool.

**Day 2**

3. The day following plastering the plaster should be treated with CEMCRETE'S Pool Plaster Hardener, especially advantageous on coloured and dark marble Pool Plaster to inhibit free lime growth forming white patches on plaster surface.
4. Can immediately start to fill pool from deep end with old towel loosely tied over end of hose to avoid direct flow of water over new plaster. In hot dry conditions it is advisable to damp down un-submerged plaster with a fine spray every two hours until pool is full.
5. Add metal remover while filling.
6. When full add required calcium chloride in flake form dissolved in water and check again for metals and calcium hardness.
7. Start filter and run, do not use automatic pool cleaner for three weeks, use hand vacuum on long handle to remove dust and debris. Brush surface with soft pool brush and back wash often
8. Leave pH high, this will aid the curing and hardening process of the marble pool plaster. Do not use any acid for first three weeks.
9. Dose only with small quantities of stabilized granular dry chlorine – (HtH), or unstabilized liquid chlorine during this period.

## **Day 22**

10. After three weeks check pH and add only a ¼ cup of Hydrochloric Acid (per 70 000 litre pool) dissolved in a plastic bucket of the pool water in any single six hour period with the filter running. Periodically dose until pH reads between 7.4 and 7.6. It could take over a week before the pH is corrected. (Never use Sulphuric Acid in the pool)
11. Follow chlorine manufacturer's instruction for dosing from now on.
12. Stabilize water if desired. First dissolve granules in boiling water
13. If salt water chlorinator is installed add salt to water and switch on chlorinator.
14. Automatic pool cleaner can now be connected.

**NB. Never overdose with any chemical hoping that the effect will last two weeks rather than one. Chemical reactions do not work that way.**

**Overdosing with acid causes etching and destroys total alkalinity. Always dilute acid before dosing and add while the pump is running to ensure an even distribution.**

**Overdosing with calcium hypochlorite (dry granular chlorine) causes scaling and high pH.**

**Overdosing with Trichloroisocyanuric acid (stabilized chlorine) causes a drop in pH and etching of the plaster as it neutralizes itself on the Marble plaster. Keep pill or granules well away from the immediate edge of the pool or surface of the marble pool Plaster. Also keep out of direct airflow and away from and near the weir.**

**The use of a gas chlorinator is not recommended due to the chemical reactions that take place when the gas is introduced to the water, HCl and causes etching of the marble plaster surface and serious staining will occur.”**

Both plaintiffs gave evidence to the effect that when the defendant completed the refurbishment there was no proper hand over takeover of the swimming pool and they were not provided with a copy of the pool Start-Up Guide. As a result they continued to maintain their pool in the normal way as they had previously done before refurbishment.

When they discovered the leaching problem they contacted the defendant who acknowledged liability saying that the problem was due to its failure to apply pool plaster hardener when refurbishing the pool as recommended by the manufacturer. The defendant thus wrote to them on 30 April 2007 apologizing and promising to rectify the problem. The letter reads:

“Dear Mr & Mrs Mavurudza

We apologise (sic) for the delay and not updating you about the way forward to sort out the leaching of your pool. We managed to purchase 25 litres of the pool hardener from South Africa as recommended by the Cemcrete Company to apply to your pool. Unfortunately we found out that the pool hardener can only be used when applying the pool plaster not on the existing pool. We contacted Cemcrete Company again to find out if they is (sic) any way we can solve the problem and they advised (sic) to get orbital grinder with a 60 grit sand paper.

We layed a sqm of marble sample which we used the orbital grinder as a trial area for sanding (sic). On sanding the trial area it ended up being rough, scored and inconsistent. We phoned Cemcrete for the third time to advice (sic) us what the best solution to this problem and we are still waiting for their advice. We are hoping to have an answer end at the of this week (sic).”

Yours Faithfully

Mielder and Construction”

It is common cause that the defendant initially attributed the leaching problem to its failure to apply pool plaster hardener where upon it attempted to rectify the problem in consultation with the manufacturers. It is also an established fact that when all attempts to rectify the problem had dismally failed the defendant made an about turn and began to shift the blame onto the plaintiffs.

Thus when sued the defendant denied liability blaming the leaching problem on plaintiffs' failure to maintain the correct ph balance in the pool and or poor maintenance of the pool. Apart from wild speculation the defendant had no concrete basis for blaming the leaching problem on the plaintiffs. It was unable to rebut the plaintiffs' assertion that they kept the correct ph level and properly maintained the pool.

Despite being appraised of the leaching problem at an early stage it made no attempt to test the ph level of the water used to fill the pool. It carried no investigation on how the plaintiff had maintained the pool up to the time the leaching problem occurred.

The defendant's managing director gave evidence to the effect that his company relined the pool in accordance with the standard application for such product as recommended by the manufacturer of the product Cemcrete South Africa.

It is needless to say that he is not qualified to give that kind of evidence because he was not present when the job was done. He therefore has no personal knowledge as to how his employees performed their duties. None of those employees who actually did the job was called to substantiate whether or not all the intricate procedures laid down in the Pool Start-Up Guide were followed. Although the defendant had a site foreman responsible for the day to day supervision of the work, he was not called to shed light on the quality and nature of the work done in refurbishing the pool. No cogent reason was given as to why he was not called to give evidence on this crucial aspect of the defendant's case. Under cross-examination he admitted that his employees did not use the Start-Up Guide. He was asked:

- Q. When you started and finished you did not have any instructions or guide from the manufacturers?
- A. As far as the Start-up Guide is concerned we did not have such instructions.
- Q. This installation was done from the heads of the construction personnel?
- A. From the experience we have gained from the 1970's
- Q. What were you relying on?
- A. There are instructions on the 49 kg bags which tally with our experience since the 1970's.

Q. What level of pH did you advise Dr. Mavurudza to maintain?

A. 7.1

Q. What are you relying on to say he did not?

A. Leaching cannot occur when the pH is maintained at 7.1.

Q. What did your company do to try and rectify the problem?

A. We waited until the curing period had expired so there would be no free calcium particles in the finish and that the plaster would be hard enough to use an abrasive or chemical to remove the scaling.

Q. Did you check the pH level?

A. No.

Q. Have you ever checked the pH level in this swimming pool?

A. No

No weight can therefore be placed on the managing director's evidence based on unsubstantiated hearsay evidence. Equally, the defendant's attempt to blame the leaching problem on poor pH maintenance does not wash for the simple reason that he did not measure the pH level when he had ample opportunity to do so. Had the problem been solely attributable to high pH levels surely the first thing the defendant would have done was to measure the pH level and advise the plaintiffs of the root cause of their problem. This the defendant did not do.

We already know that the defendant's employees omitted to add the pool plaster hardener yet the Start-Up Guide stipulates under day 2 that, "The day following plastering the plaster should be treated with CEMCRETE's pool plaster hardener, especially advantageous on coloured and dark marble. Pool Plaster to inhibit free lime growth forming white parches on plaster surface."

Despite the above clear written guidelines from the manufacturer stipulating that it is necessary to use pool plaster hardener to inhibit free lime growth the defendant's managing director Mr Meilder gave sworn testimony to the contrary. He gave evidence to the effect that when this problem started he spoke to the manufacturer's technical manager in Johannesburg who told him that it was not necessary to apply pool plaster hardener.

That evidence directly contradicts an e-mail sent on 20 March 2007 by Jeniffer Cheu one of the defendant's employees addressed to Russel Gullies the manufacturer's export manager. The e-mail reads:

"H Russel

Russel, we are still battling to solve the pool of our customer. At first you told us to purchase 25 litres of pool hardener and we did that and then we discovered that we can

only use pool hardener before filling the pool. We called you back and you told us that we can use a (n) orbital grinder with the 60 grit sand paper..."

Having regard to the above e-mail that has not been challenged, Mr Meilder's evidence to the effect that the same Russel Gillis told him that it was not necessary to use pool plaster hardener was obviously false and misleading.

Vincent Muyeza a director in Jackson Muyeza Pools a reputable company in the construction of pools gave sworn evidence to the effect that it is necessary to add pool plaster hardener. He had this to say:

"I am aware of the mabelite supplied by Cemcrete South Africa. I have used it before. This product comes with a hardener. Its mandatory that it be applied to the finish. Then you also put a little bit when you are filling the pool with water.

Failure to put the hardener weakens the mabelite. I am familiar with their starter up guide if it's the same as that we use".

Again no weight can be given to this aspect of Mr Meilder's evidence which is based on unsubstantiated hearsay evidence contrary to the manufacturer's written guidelines. Mr Meilder is a man of limited education who started work at the age of 12 years. He gave his evidence badly. He was hesitant and unsure of himself in the witness stand. He was clearly shaken and sweating profusely. His evidence had no ring of truth as it went against the grain of evidence.

The defendant's conduct in initially accepting liability and attempting to rectify the leaching problem but then turning around and denying responsibility upon failure to rectify the defect betrays a guilty frame of mind.

On the other hand the plaintiffs told a simple and believable story consistent with proven facts. They corroborated each other in every material respect. They were honest and credible witnesses. I believe them

Looked at from a different angle, even if I were to accept for one moment that the leaching problem was due to poor maintenance by the plaintiffs as alleged by the defendant, I would still find it liable. Mr Muyeza gave uncontroverted evidence to the effect that it is standard practice after construction of the pool for the owner to maintain the pool under the guidance of the service provider.

I have already demonstrated that both plaintiffs testified that the defendant did not give the necessary guidance and the defendant was unable to rebut that assertion. The defendant was therefore negligent and to that extent liable to the plaintiffs for the defect which was due to poor PH maintenance.

I accordingly have no hesitation whatsoever, in holding that the plaintiffs have proved their case against the defendant on a balance of probabilities. For that reason they are entitled to damages in lieu of specific performance. I now turn to consider the quantum of damages, in lieu of specific performance..

The plaintiffs' claim was initially for \$787 600 000-00. That amount was subsequently amended to read US\$9 500-00. It is common cause that there is a limited number of service providers offering the same service. Leisure living is a reputable service provider which supplied a quotation of US\$9 500-00

Jackson Muyeza pools supplied a quotation of US\$7 000-00.

Although the initial transaction between the parties was in local currency both parties were alive to the fact that the product was to be imported using foreign currency. Now that the Zimbabwean Dollar is no more the justice of the case demands that compensation be paid in foreign currency. The parties were aware all the time that if there was need to replace the product it will have to be done using foreign currency. They must therefore be deemed to have agreed that if there was need for compensation it would have to be in foreign currency.

As the plaintiffs have already performed their party of the bargain, it is only fair, just and proper that the defendant must be compelled to perform its part of the bargain failure of which it is obliged to compensate the plaintiff so as to place them in the same state they would have been had the defendant properly performed its part of the bargain.

That being the case the plaintiffs' claim can only succeed. It is accordingly ordered:

1. That the defendant be and is hereby ordered to rectify the defects on the plaintiffs' mabelite tiles in terms of specifications from Cemcrete South Africa (Private) Limited within 14 days of service of this judgment upon it.
2. In the alternative, the defendants be and are hereby ordered to pay damages in the sum of US\$7 000-00 being the cost of repairing the defects
3. The defendant shall bear the costs of suit.

*P Chiutsi Legal Practitioners*, plaintiffs' legal practitioners  
*Gollop & Blank*, defendant's legal practitioners.