

CHIDO MATEWA  
versus  
ZIMBABWE ELECTRICITY TRANSMISSION &  
DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE  
CHIKOWERO J  
HARARE, 24 May, 28 June, 7, 8 and 18<sup>th</sup> July 2018, 25 July.2018

### **Civil Trial**

*Advocate F Chinwawadzimba*, for the plaintiff  
*V Muza*, for the defendant

CHIKOWERO J: Plaintiff claimed that in or about October 2009 defendant, through its employees, unlawfully and wrongfully removed electrical gadgets from her farm in Nyazura.

On the employees being apprehended, defendant went on to make a total of four undertakings to restore electricity supply at the farm.

The undertakings were accompanied by assurances to plaintiff to proceed with her farming activities as the restoration of electricity would enable her to irrigate her crop.

On the basis of the undertakings the plaintiff, who had planted ten hectares of tobacco, went on to plant an additional twenty hectares of tobacco and twenty five hectares of sugar beans. The undertakings or promises were not honoured by the defendant. Plaintiff could not therefore irrigate her tobacco and sugar bean crop.

It suffered moisture stress and wilted. The soya bean crop for the 2009-2010 season was a total write off. The tobacco harvest for the same season was bad. It could not even cover her labour costs. It was therefore a total loss.

She therefore claimed US\$500 000 as damages for the actual loss of earnings in respect of the total of thirty hectares tobacco crop and twenty hectares sugar bean crop. In addition she claimed US\$200 000 being damages for consequential loss.

By way of further particulars, plaintiff claimed that US\$400 000 were damages in respect of the thirty hectares of tobacco for the 2009 -2010 as well as the 2010-2011 farming seasons. The US\$100 000 were damages in relation to the twenty hectares of sugar beans over the same period.

In its plea, the defendant averred that no electrical fittings were removed by it from plaintiff's fields. A further averment was made to the effect that the plaintiff's field had no crops and was not being irrigated because it was not connected to the national grid. Plaintiff's farm had no electricity since 2006 as the power lines transmitting electricity to the dam and the dam transformer were vandalised.

Defendant averred that the operation of 5 October 2009 at plaintiff's homestead which plaintiff foiled, was lawful as it was intended to recover some electrical equipment for use elsewhere. The same was lying idle and thus at risk of being stolen or vandalised.

Although inelegantly drafted and containing evidence, the cause of action is the aquilian action.

The requirements of the acquilian action are:

- wrongful or unlawful conduct (act or omission) on the part of the defendant.
- the conduct must have led to financial loss
- the defendant must have inflicted the financial loss intentionally or negligently.
- There must be a causal link between the defendant's conduct and the loss.

These requirements are set out in *A Guide to the Zimbabwe Law of Delict* by G Feltoe 3 ed at p 9 and in *Nyaguse v Skinners Auto Body Specialists and Another* HH 32/07.

They also appear in Lee and Honore: *The South African Law of Obligations* 2 ed at pp 196-202 and in Boberg: *The Law of Delict* Vol 2 at pp 24-25.

My first task is to examine whether plaintiff proved that defendant removed some electrical gadgets from the former's farm.

It is common cause that nobody testified to seeing defendant's employees removing such gadgets from the farm.

Both parties were agreed that such removal constituted the crime of theft.

None of the defendant's employees were arrested, prosecuted and convicted of such theft.

Plaintiff claimed, without proof, that defendant's workers stole the electrical gadgets from the farm at night a few days before 5 October 2009.

Plaintiff did not adduce evidence from either her employees at that time or her neighbours to show that there was electricity transmission at her farm in October 2009.

I have not accepted plaintiff's evidence that four undertakings were made by the defendant to restore electricity supply to her farm by end of January 2006.

Plaintiff testified that Assistant Inspector Dube was present when the first undertaking was made by Edward Makove at Rusape Police Station.

Edward Makove was defendant's first witness. He was the defendant's Rusape depot foreman at the time.

There is no evidence of this undertaking having been made. It was never reduced to writing. Edward Makove denied making it.

Under cross-examination, plaintiff accepted that her evidence on this aspect would be her word against Edward Makove's word. She gave two conflicting reasons for not calling Assistant Inspector Dube to testify on the first undertaking. At first she said he was corrupt. She later stated she had lost track of him.

Whatever her true reason for not calling him to testify, the fact remains this police officer who it is claimed witnessed the making of the first undertaking to restore electricity within two weeks, never testified.

I preferred the evidence of Edward Makove in this regard. He was calm and gave detailed evidence. His evidence accords with the probabilities and the report that he wrote to Head Office. It was produced as exh 3.

The next verbal undertaking was said to have been made by Mr Rafemoyo in Harare. He was the Zesa Holdings (Pvt) Ltd Group Chief Executive Officer at the time.

He too did not give evidence for the plaintiff to substantiate the making of the undertaking. Plaintiff claimed that he undertook to cause electricity to be restored within the next two weeks from the date of his verbal undertaking.

Next in line was Mr Mhike, the then Zesa Holdings (Pvt) Ltd Chief Loss Control Officer. He too was not called by the plaintiff to testify on the third verbal undertaking to restore electricity supply at the plaintiff's farm. No reasons were given for not calling him, just as no reasons were not given for not calling Mr Rafemoyo.

Cathrine Kutsenza was employed as a Loss Control Officer by Zesa Holdings (Pvt) Ltd at the relevant time. She testified as defendant's second and last witness.

She denied making a verbal undertaking to plaintiff that electricity supply would be restored at the plaintiff's farm. She confirmed that she had no authority to make such an undertaking.

She had gone to the farm in January 2010 to investigate the plaintiff's complaint about lack of electricity at the farm and the allegations that defendant's employees had stolen

transformers and conductors from the plaintiff's farm. She adhered to her report, which exonerated defendant's employees. I had no reason not to believe her testimony.

Messrs Chinembiri and Munodawafa, two other employees of the defendant at the material time, are claimed to have admitted that the defendant's employees stole the electrical equipment at the plaintiff's farm and therefore defendant was liable for the plaintiff having no electricity transmission to irrigate her crop. Neither testified for the plaintiff. They did not testify at all.

Munodawafa is claimed to have been in favour of a gentleman's agreement to compensate the plaintiff.

The plaintiff testified that Chinembiri promised that the defendant's insurers would compensate the plaintiff. The insurers rejected the claim for compensation.

The only acceptable evidence of what Munodawafa and Chinembiri may or may not have said or done should have come from their mouths. Neither testified. The onus was on the plaintiff to adduce evidence through them to prove her case.

No evidence was placed before the court that whatever position was taken by Munodawafa and Chinembiri represented the official position of the defendant.

In fact, the plaintiff confirmed that the official position of the defendant was a denial of liability hence the institution of the instant legal proceedings.

The above are obvious gaps in the plaintiff's case. In the absence of records substantiating her evidence she was always going to have problems in building her case around the defendant's employees' alleged undertakings in a situation where such employees did not give evidence for the plaintiff.

She simply did not have the evidence to prove the alleged undertakings.

Assistant Inspector Dube's absence compounded her woes.

Isaac Ramire's evidence advanced her case not at all. He admitted that he made records on the quantum and nature of her 2009-2010 farming season crop but did not bring such records to court.

Crop assessment reports are recorded. In the absence of such records the court has nothing to go by.

The plaintiff admitted that she did not take any photographs of her 2009-2010 tobacco and sugar bean crop.

Further, as it is the 2009-2010 farming season crop which, according to her testimony, suffered moisture stress and wilted, no reason was given as to why her claim for damages extended to the 2010-2011 and 2011-2012 farming seasons.

It was admitted by the plaintiff and her witness that neither produced documentary evidence of the selling price of tobacco and sugar beans for the 2009-2010 season nor at all.

Damages must not be too remote: *Business Law in Zimbabwe* by R H Christie Juta and Co, Ltd 1998 at p 125. I found no connection between the consequential damages claim of US\$200 000-00 and the absence of electricity and irrigation at the farm.

The unproved losses of cattle, fruit trees, irrigation equipment and roofing sheets had no discernible link with the absence of electricity and irrigation.

I have also found that the plaintiff prevaricated both in her pleadings and evidence between the alleged theft of electrical equipment and the undertakings as to which constituted her cause of action. In any event, she failed to prove either.

In the result the plaintiff having failed to prove her case in respect of both liability and quantum it be and is hereby ordered that her claim is dismissed with costs.

*Venturas and Samukange*, plaintiff's legal practitioners  
*Muza and Nyapandi*, defendant's legal practitioners