GALAXY ENGINEERING DESIGN CONSULTANTS (PVT) LTD
versus
MIDLANDS STATE UNIVERSITY

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 6 and 10 June 2019 & 24 July 2019

Civil Trial

Advocate T Zhuwarara with *B.K. Mataruka*, for the plaintiff
D.C Kufaruwenga, for the defendant

CHIKOWERO J: Rooted in the sole exhibit produced before me, two engineers did battle for the litigants. Yet the latter had filed a statement of agreed facts. That statement contained the larger part of the story.

The following facts were common cause.

Plaintiff is a duly registered company carrying on the business of providing professional services for civil and structural engineering. It is registered with the Engineering Council of Zimbabwe.

Defendant is a duly registered tertiary institution established in terms of s 3 of the Midlands State University Act [*Chapter 25:21*].

In September 2003, the defendant engaged the plaintiff for the provisions of civil engineering services for the design of civil and structural engineering works for certain buildings and Master Site Services which the former intended to construct in and around its main campus in Gweru.

In this vein, in September 2003 the parties entered into the following seven contracts:

- Contract 1 (Faculties of Commerce and Information Systems, Law and Administration Block)

- Contract 2 (Faculty of Architecture, Art and Design)
- Contract 3 (Vice Chancellors House)
- Contract 4 (Master Site Service Design for the Whole Site [Master Plan])
- Contract 5 (Faculty of Natural Resources)
- Contract 6 (Faculty of Science and Technology)
- Contract 7 (Commercial Centre and Sports Facilities).

This matter concerns contracts 1 to 4, as plaintiff did not render any services in respect of contracts 5, 6 and 7.

All four contracts in question comprised of a Standard Zimbabwe Association of Consulting Engineers (ZACE) Form 2 – 1999 Conditions of Engagement for Civil and Structural Engineering Works "conditions of engagement" as may be amended from time to time and a Memorandum of Agreement "MOA." The form applicable in the industry at the material time is the ZACE Form 2012.

The conditions of engagement prescribed the manner in which the engineering works contemplated in the contracts were supposed to be done. It outlined the stages as follows:

i) STAGE ONE – REPORT

The services to be provided under this stage were to include any or all of the following:

- consultation with the client or his authorised representatives
- inspections of the site of the works
- preliminary investigations, route location, planning and design where any of these were required for determination of feasibility
- consultation with authorities having rights or power of sanction
- advice to the client as to the need for surveys, analyses, tests and site or other investigations where such were required for the completion of the report and arranging for these to be carried out at the client's expense
- investigation and collation of available data, drawings and plans relating to the works
- investigation of financial implications in relation to the proposals or feasibility studies

Fees for stage1 were to be calculated on a time basis.

ii) STAGE 2 – PRELIMINARY DESIGN

The services to be provided under this stage were to include any or all of the following:

- Arranging with the client's consent and at his expense, for any surveys, site, geotechnical or special investigations, analyses, model or laboratory or other test required for the completion of the design
- Consultations on matters affecting the works with any other consulting engineer, architect or specialist adviser appointed by the client or with any authorities other than those having rights or power of sanction
- Preparing plans, drawings, estimates and applications for statutory approval but excluding applications to a court or judicial or quasi-judicial tribunal of any kind or Parliament.
- Making modifications to the preliminary design of the works as dictated by consultations or applications already mentioned.

The cumulative fees due at this stage were 30% of the total fees.

iii) STAGE 3 – DETAILED DESIGN, TENDER DRAWINGS AND DOCUMENTATION

- establishment of final design criteria
- the development of the design in collaboration with client's professional advisers, and the preparation of calculations, drawings and specifications of the works to enable a Bill of Quantities to be prepared and tenders obtained.
- provision of outline information necessary for the design of other services
- drafting or adopting invitations to tender, tender conditions, form of tender and conditions of contract and calling for tenders for those parts of the works which are not normally measured by a Quantity Surveyor
- consultations with local or other authorities in connection with the engineering design and the preparation and submission where required of typical details and typical calculations.

The cumulative fees due at this stage were 80% of the total fees.

iv) STAGE 4 – WORKING DRAWINGS

The services to be provided under this stage were to include any or all of the following:

- the preparation of any further designs, specifications and drawings necessary for the execution of the works, including bending schedules for reinforced concrete but excluding shop details for structural steelwork
- the preparation of details and calculations other than typical calculations as may be required for submission to local authorities
- advice to the client on alternative designs and tenders but excluding detailed inspection, reviewing and checking of alternative designs and drawings not prepared by the consulting engineer and submitted by any contractor or potential contractor
- advising the client on the necessity for specialised setting out and arranging for this to be done at the client's expense

The cumulative fees due at this stage were 100% of the total fees due. CONTRACT 1 – FACULTY OF COMMERCE AND INFORMATION SYSTEMS, FACULTY OF LAW AND ADMINISTRATION BLOCK

This contract was for the designing of the Faculty of Commerce and Information Systems, the Faculty of Law and the Administration Block. That was the nature of the contract.

As for the scope of the work, plaintiff was required to carry out the full civil engineering design up to and including working drawings and tender documentation and any other services ordinarily required for the complete execution of the works. This excluded supervision of the construction and contract administration.

Resultantly, the engagement was thus for partial services only since supervision of the construction work and administration of the contract were excluded.

When summons was issued on 18 July 2015 defendant had made some part-payments for services rendered under contract 1.

Despite filing an amended plea on 16 July 2018 disputing both liability and quantum of the claim, defendant admitted indebtedness for the balance of the claim at the Pre-Trial Conference. It then proceeded to pay the same, in the sum of US$84 827.17, being 26% balance due in respect

of the Faculty of Commerce and Information Systems and 30% balance in respect of the Faculty of Law.

The amount due in respect of contract 1 has therefore been paid in full save for the interest component.

CONTRACTS 2 AND 3 – FACULTY OF ARCHITECTURE, ART AND DESIGN; VICE-CHANCELLOR'S HOUSE RESPECTIVELY

The nature of these contracts, scope of works, calculation of fees and payment were similar.

In respect of contract 3, defendant initially made an interim part-payment to the plaintiff of 70% of the total fees due but later reversed it after defendant was stopped from developing on the stand because it was next to a military cantonment.

CONTRACT 4 THE MASTER PLAN

The nature of this contract and the scope of the work were the same as with the three preceding contracts.

Under this particular contract, however, it is necessary that I quote the following agreed fact:

> "SCOPE OF WORK
>
> 4……
>
> (iv) …..
>
> (v) ……
>
> (vi) The project was of the civil engineering services for the master plan and the services were designed as one contract for all the master plan civil engineering works but after completion of detailed designs were broken down into 9 subcontracts to enable stage implementation of the works to suit priority and funding of the defendant." (underling is mine for emphasis).

The 9 sub-contracts are then set out in the Statement of Agreed Facts.

It was common cause that plaintiff began work on the designs as required by the provisions of the contracts.

It also is common cause that on 14 June 2005 and 5 August 2005 the defendant instructed the plaintiff to cease all work on the designs in respect of contract 3 on the one hand and contracts 2 and 4 on the other.

Finally, it also is agreed that defendant paid the sum of US$84 827.17 in respect of services rendered to it by plaintiff under the first contract. The parties agree that this remittance was in full and final payment in respect of that contract save for the interest component which remains unpaid.

THE PLAINTIFF'S POSITION

In essence, it is this.

When the instructions were issued through letters dated 14 June 2005 and 5 August 2005 to stop work, plaintiff had already completed its contractual mandate.

It is therefore entitled to payment for the full services rendered.

What plaintiff claims as owing is as follows:

- Contract 2: US$219 4533.06, constituting the full 100% fees.
- Contract 3: US$155 400.65. Defendant made a payment of 70% which it later unilaterally reversed. Therefore, the full 100% fees are outstanding.
- Contract 4: US$2 8819 872.90.

THE DEFENDANT'S POSITION

Defendant contended that as at 5 August 2005, plaintiff had not fully discharged its contractual obligations in respect of contracts 2 and 4.

As for the third contract, it is in the amended plea that defendant denies that plaintiff had fully discharged its contractual obligations by 14 June 2005.

ISSUES FOR TRIAL

They were essentially three.

Firstly, whether plaintiff had completed its contractual obligations when the instructions to stop further work were issued.

Secondly, in the event of an affirmative answer in respect of the first issue, the quantum of fees due to the plaintiff.

Thirdly, in the event that work had not been completed, the stage that plaintiff had reached when it was instructed to stop work and the quantum of fees plaintiff is entitled to, if any.

ANLYSIS OF THE EVIDENCE

A civil engineer of 42 years' experience, Wilfred Tamayi Vengesai, gave evidence for the plaintiff. He was that party's sole witness.

He is the Managing Director of the plaintiff.

Innocent Masunungure, also an engineer, gave evidence as the single witness for the defendant.

His level of experience and the branch of engineering under which he qualified were not disclosed in evidence.

He was employed by defendant as the Director of Works and Estate at the material time.

It is Engineer Wilfred Tamayi Vengesai's evidence which accords with the documentary evidence. It accords also with the statement of agreed facts.

His testimony was clear and straightforward. It was not dented under cross-examination.

The same cannot be said of defendant's evidence. It went against the grain of the documentary evidence.

The defendant's witness contradicted the statement of Agreed Facts in fundamental respects.

I also was unimpressed with the demeanour of the defendant's witness. He was evasive under cross-examination. It was clear to me that he was simply ducking and diving in a desperate endeavour to avoid the truth.

The net result is that I will accept the plaintiff's testimony wherever it conflicts with that of the defendant.

The plaintiff clearly stated that it was commissioned by defendant to design and produce drawings or plans for use by contractors in erecting the structures or facilities so designed.

By November 2004 the designs had been completed and forwarded to defendant through the latter's architects, Maboreke Architects. By November 2004 the plaintiff, post design and purely for purposes of assisting defendant to obtain funding from the Government of Zimbabwe, was breaking up the Master Site Services contract into 9 sub-contracts. The contract could not be so broken up unless the design for the whole work under it had first been done. That position is corroborated by statement of agreed fact 4 (iv). I have already quoted it in this judgment.

The defendant's witness chose to profess ignorance on what drawings accompanied the letter of 28 November 2004 addressed to him by the defendant's own architects. He is not a lay

witness. He is an engineer. He is an expert. I find that, confronted with the letter of 28th November 2004 from the defendant's own architects, Engineer Masunungure was stuck. The letters on pp 258, 259 and 260 of exh 1 constitute clear evidence that the plaintiff completed the designs for the contracts sued under before work was stopped.

On 13 January 2004, Engineer Masunungure, on behalf of the defendant, wrote a letter to the Acting Secretary of the National Council for Higher and Tertiary Education under the Ministry of Higher and Tertiary Education. The letter is headed "MSU PROPOSED CONSTRUCTION PROGRAMME". In that letter, the defendant confirmed that designs for the following pertinent phase 1 units were at the following completion stages:

- Administration Block - 100%
- Faculty of Commerce and Information Systems - 95%
- Faculty of Law - 95%
- Master site services - 85%

In the same letter the defendant states that:

> "It is envisaged that the consultants will be complete with all designs for Phase 1 by November 2004".

This is coming from the defendant's own correspondence to the Ministry. And this is on 13 January 2004. It ties in very well with the plaintiff's evidence and the defendant's own projection of the working drawings being complete by November 2004.

It must not be forgotten that the Administration Block, Faculty of Law, Faculty of Commerce and Information Systems all fall under contract 1.

The designs relating thereto, despite the averment in the plea to the contrary, were admittedly completed before the date to cease work was communicated, and fully paid for less interest. Interest is admitted to be owing.

Further, on 12 July 2005 the plaintiff submitted tender documents, including construction drawings for subcontracts one and two under main contract four. As already pointed out this shows that by 5 August 2005 the working drawings for contract 4 itself were complete. The letter appears on p 269 of exh 1.

In respect of contract three (Vice-Chancellor's House) the statement of agreed facts reads as follows:

"(ix) Defendant initially made to the plaintiff, an interim part payment of 70% of the total fees due but later reversed this payment after the defendant was stopped from developing on the stand because it was next to a military cantonment" (underlining is mine for emphasis)

Construction could only be commenced after the plaintiff had submitted working drawings to defendant in respect of the Vice-Chancellor's House. For construction or developments to be stopped it means the same were in progress. The letter by defendant's Engineer Masunungure to plaintiff's Engineer Vengesai advising that any further design work be stopped in respect of the Vice-Chancellor's house is dated 14 June 2005. It advises of the reversal of payments previously made for work done by the plaintiff on this particular contract. The letter appears on p 268 of exh 1. I find that a part payment of as high as 70% of the total fees due had been effected before 14 June 2005 because the working drawings had been completed and submitted before 14 June 2005. I find also that construction work had begun on the Vice-Chancellor's house before 14 June 2005 because the working drawings had been submitted to and approved by defendant before that date. The reason for cessation of construction work was not the fault of either the plaintiff or the defendant.

Indeed, true to fashion, Engineer Masunungure chose to feign ignorance on whether the working drawings in respect of contract three had been completed by 14 June 2005. He deliberately decided to be vague. He took refuge in professed uncertainty. This is what transpired when he was being cross-examined, at p 67 of the record of proceedings:

"Q Now let us turn to p 268, did the engineers ever do any work on the Vice Chancellor's house project?
A Yes they did.
Q What did they do?
A I think they did the civil designs.
Q Up to what stage?
A I know maybe they had done up to stage 2, I cannot confirm as such, but I may need to check but they worked on this project to a certain stage.
Q So they did do work?
A Yes, they did do work.
Q And why was the work on the Vice- Chancellor's house stopped?
A I think it was to do with the location.
Q What about it?
A The location for the site of the Vice Chancellor's house was close to a military establishment and it was not supposed to be utilized for construction of that facility."

A whole engineer, employed as Director of Works and Estates by the largest State University in the Midlands Province of Zimbabwe at the material time was unwilling to admit that

construction of the Vice-Chancellor's house was commenced because working drawings had been furnished to defendant, to enable such construction work to be undertaken, pre June 14th 2005. I cannot accept Mr Kufaruwenga's contention, made in defendant's written closing submissions, that defendant's witness was credible. He was the exact opposite.

The following pieces of plaintiff's evidence went unchallenged. The defendant requested a consolidated statement of account reflecting all amounts paid by it and what remained owing. Numerous reminders were send relative to payment. There was deafening silence from the defendant. Defendant used part of plaintiff's designs for the construction of sewer and reticulation works in and around the library and Administration block. In a letter to the Permanent Secretary the defendant's Vice- Chancellor virtually admitted that defendant owed the plaintiff. Plaintiff was advised, through its legal practitioners, that the issue of payments had been escalated to the Ministry responsible for actioning. I have no reason for not accepting this uncontroverted testimony. It all goes to show that defendant is liable to the plaintiff.

I also view the admission made by defendant at the Pre-Trial Conference before ZHOU J, and the not insignificant amount paid consequent thereto as confirmation of defendant's indebtedness not only in respect of contract 1 but also in respect of contracts 2, 3 and 4. That admission, and the payment, were made in the teeth of a plea pulling in the opposite direction.

I do not accept that the plaintiff's suit is premature. In *Business Law in Zimbabwe* 1998 RH Christie at p 55, in dealing with the doctrine of fictional fulfillment, quotes INNES CJ as having said in *MacDuff and Co Ltd* v *Johannesburg Consolidated Investments Co. Ltd* 1924 AD573 591:

> "I am therefore of opinion that in our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfillment, be bound by an obligation, and who has designedly prevented its fulfillment, unless the nature of the contract or the circumstances show an absence of dolus on his part."

It is common cause that defendant neither invited plaintiff to submit estimates of fees owed nor bid for funds from the Government of Zimbabwe for these four contracts for an unreasonably long time. Defendant cannot therefore take cover under its own absence of good faith to defeat the plaintiff's claim. This is an appropriate matter for the application of the doctrine of fictional fulfillment. I hold the condition under which the defendant has decided to take shelter to have been fictionally fulfilled.

QUANTUM

Plaintiff explained how it calculated the amount that it claims. That evidence stands unchallenged. I accept it.

Plaintiff also conceded that the capital sum reflected on the face of the summons should be reduced by a figure of US$84 827.17, paid after issuance of the summons. I will reflect that in the order that I will make.

Plaintiff's evidence on its entitlement to interest on the amount that was paid, and the overall rate of interest, was uncontroverted.

Finally, plaintiff has been successful. Costs should follow that event.

No legal basis was established for claiming collection commission. I disallow that claim.

DISPOSITION

In the result, defendant shall pay to the plaintiff:

1. Interest on the sum of US$84 827.17 at the rate of 19.5% *per* annum from 1 November 2010 to the date that the sum of US$84 827.17 was paid.
2. US$3 207 450.68 together with interest thereon at 19.5% *per* annum from 1 November 2010 to date of full payment
3. Costs of suit.

Gill, Godlonton and Gerrans, Plaintiff's legal practitioners
Dzimba, Jaravaza and Associates, Defendant's legal practitioners