

KACEE ELECTRICAL CONTRACTORS (PVT) LTD
versus
ZIMCN INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 27, 28 May, 13 June and 11 December 2019

Civil Trial

V Muza, for the plaintiff
T J Madotsa, for the defendant

TAGU J: The plaintiff issued summons against the defendant for payment of the sum of USD20 472.12 being money due to plaintiff arising from a breach of contract by the defendant, interest at the prescribed rate calculated from date of judgment to date of payment in full as well as costs of suit. The facts are that on the 12th of June 2017 the plaintiff and defendant entered into a contract in terms of which the defendant contracted the plaintiff to install electricity infrastructure at defendant's mine premises. After making various payments to the plaintiff, the defendant remained with a balance of US\$22 000.00 owing to the plaintiff. However, through subsequent payments, the defendant reduced the balance to USD20 472.00 which amount the defendant failed, neglected and or refused to pay despite demand.

Upon being served with the summons the defendant denied the claim. In its plea the defendant submitted that from the entire project of an amount of US\$93 326.00 an amount of US\$92 585.02 was duly paid leaving only a balance of US\$741.00. The defendant then counter claimed an amount of US\$54 000.00 being operational expenses incurred from July 2017 to date. The basis for the counter-claim being that the works were supposed to be undertaken and completed within twenty one days but the plaintiff finalized the installations well beyond 21 days thereby resulting in patrimonial loss to the defendant. Despite the inordinate delay the transformer which was installed by the plaintiff blew up after running for only 17 hours due to the negligence

of the plaintiff which failed to remove the rubber seals resulting in non-circulation of oil leading to overheating and explosion.

The issues to be determined in this case were captured in the joint pretrial conference minutes as follows:

1. Whether or not the defendant is liable to the plaintiff in the sum claimed?
2. Whether or not the defendant in reconvention is liable to compensate the plaintiff in reconvention for the transformer?
3. Whether or not the defendant in reconvention is liable to damages.

The plaintiff led evidence through a single witness Mr. Blivious Musodza while the defendant led evidence through two witnesses one Jefrees Kachidza and Billy Mukasa.

The evidence of Mr Blivious Musodza can be summarized as follows. He said the two parties went into a contract. The first contract was signed in January 2017. After signing of the first contract the plaintiff mobilized hardware and labourers and camped at Makaha in Mutoko. The defendant failed to make payment of the required deposit and the plaintiff demobilized and left the site. Later, on or about June 2017 the defendant and plaintiff renegotiated terms and signed a second agreement. Both agreements were produced as evidence. After the defendant paid the required deposit the plaintiff went on site and commenced the electrical installation. At the conclusion of the works and on the 28th of September 2017 the plaintiff wrote an email to the defendant advising them that the works had been completed successfully. Subsequently, around October one of the electrical poles that had been pitched required re-fixing and as a result a new contractor was asked to do the work. Zimbabwe Electricity & Transmission Distribution Company officials inspected the installations and were satisfied about the quality.

It was his further evidence that it was a requirement by ZETDC that all inspections of transformers be carried out by ZESA Enterprises (Pvt) Ltd (ZENT) a sister company. Defendant took the transformer to ZENT for inspections. This was a Chinese built transformer. He had discouraged the defendant from purchasing a Chinese transformer because these were not suitable for our local climate. However, it was tested and was approved by ZENT. In January 2018 after further inspections of the transformer and the installations ZETDC Officials switched the defendant on. He said because ZETDC energized the works meant that they had done their work properly and were supposed to be paid.

The defendant's first witness was Mr Jeffrees Kachidza. His testimony was to the effect that he was a personal assistant to one of the shareholders and was not an expert in electrical engineering but a driver. He confirmed the two agreements which he labored to interpret as one. He testified that when the transformer was eventually switched on it blew off. He heaped all the blame on the plaintiff in that the plaintiff failed to accompany ZESA ton the site to do the inspection in terms of the agreement. Secondly, when ZESA eventually inspected the line and noted an anomaly with the pole that needed to be fixed the plaintiff refused to return to the site to attend to the anomaly. He further blamed the plaintiff for not accompanying ZESA officials to the site when they energized the line and the substation hence a pre-commissioning test was never conducted between the contractor and ZESA hence in doing so plaintiff was in breach of the contract. He testified as to the loss suffered by the defendant.

The second defendant's expert witness Engineer Mukasa put the last nail in the defendant's case. The court found him tom be a forthright person who was not biased as compared to the first defendant's witness. He was honest by admitting that the fault of the blowing up of the transformer laid squarely with the ZETDC officials who switched on the transformer. It was his evidence that the ZETDC Officials need not have energized the transformer without being satisfied that all was in order.

What this court found proved on a balance of probabilities is that the defendant and the plaintiff entered into a contract whereby the plaintiff was contracted to specifically pitch up a power line as well as install a transformer at the defendant's mine. The transformer was to be provided by the defendant. Before it was installed the transformer was examined by ZENT which went on to approve it for use. It is clear that at first defendant failed to provide the necessary deposit before works could commence resulting in the plaintiff pulling off the site. A second agreement with terms was later entered into by the parties. The defendant partially full filled the terms of the second agreement. When plaintiff finished the works it sent an email to the defendant to pay off what was outstanding. When ZESA officials went to inspect the work done it noted a pole that needed adjustment and did not commission the works. The pole was eventually adjusted by another contractor. After that adjustment the inspection report was however not produced. But ZESA Officials having apparently been satisfied with the work done went on to energize the transformer. The transformer ran for 17 hours and blew off. According to the first defence witness

plaintiff was negligent because they did not remove the seals. The second defence witness said transformer was not protected and ZESA Officials who switched it on were negligent because they should not have switched it on in that state.

In *casu*, it therefore emerged that the plaintiff was not to blame for the blowing off of the transformer. The plaintiff was therefore absolved from any wrong doing. I therefore find that the plaintiff managed to prove its case on a balance of probabilities and that the defendant failed to prove its counter-claim and I dismiss it.

IT IS ORDERED THAT

- a) The defendant be and is hereby ordered to pay to the plaintiff the sum of USD20 472.12 being money due for breach of contract.
- b) Interest at the prescribed rate calculated from date of judgment to date of payment in full.
- c) The counter claim is dismissed.
- d) The defendant to pay costs of suit.

Muza & Nyapadi, plaintiff's legal practitioners
Madotsa & partners, defendant's legal practitioners.