

DISTRIBUTABLE (54)

Judgment No. S.C. 86/99
Civil Appeal No. 799/95

M M MAVUNDUKIRE t/a MUNGANI CONSTRUCTION
v DOVURWI INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
McNALLY JA, MUCHECHETERE JA & SANDURA JA
HARARE, MAY 3 & AUGUST 18, 1999

F M Katsande, for the appellant

A J Dyke, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant was ordered to pay to the respondent the sum of \$87 317.00 together with costs of suit.

The background facts are as follows. On 20 September 1987 the appellant (“Mungani”), a building contractor, and the respondent (“Dovurwi”) entered into an agreement in terms of which Mungani undertook to do the following work for the respondent:-

“Restoration, renovation, repairs, electrical wiring and fitting, plumbing and all work incidental to the complete restoration of the improvements on stands 397, 398 and 399 and the erection of a wall on the northern boundary of stand 399 and the cleaning up of the property.”

In addition, Mungani undertook to furnish all the required labour, tools and equipment, and acknowledged that he had physically inspected the property and was acquainted with the work to be done.

In terms of clause 7 of the agreement, he guaranteed that the work would be completed, inspected and passed by the relevant authorities by 31 October 1987. It was, however, conceded at the trial that the date agreed upon was 31 December 1987, and not 31 October 1987.

On its part, Dovurwi was obliged to furnish all the building materials and other facilities required for the work to be done. The contract price, which was payable in three stages, was \$54 000.00.

By 31 December 1987 the work had not been completed. It was subsequently completed much later, on 14 August 1988. Nevertheless, Mungani was not paid the contract price of \$54 000.00. Instead, he was paid \$34 000.00, leaving a balance of \$20 000.00.

In the circumstances, Mungani issued a summons against the respondent claiming payment of the sum of \$26 351.00 together with interest and costs of suit. That sum was arrived at by adding the balance of the contract price (i.e. \$20 000.00) and the sum of \$7 168.00 charged for the additional work allegedly done by Mungani, and then deducting \$817.00, which was the charge for part of the work which Mungani was supposed to do in terms of the agreement but which he did not do.

In its plea the respondent denied that Mungani had done any additional or extra work. It alleged that Mungani had failed to perform the work in an efficient, proper and workmanlike manner and had failed to complete it by the due date. It also alleged that, apart from the sum of \$34 000.00 paid to Mungani, it had paid the sum of \$3 450.00 to Step-in Electrical Services, one of Mungani's subcontractors. In addition, it alleged that the value of the work done by Mungani was \$39 450.00 and that as he had already been paid \$37 450.00 the balance due to him was only \$2 000.00.

In its counter-claim the respondent claimed damages totalling \$62 471.63 under four separate heads, the main one being loss of rent. The total sum claimed was subsequently increased, and when the trial commenced the claim in respect of the loss of rent stood at \$107 250.00. That sum represented seven-and-a-half months' rent from 1 January to 14 August 1988 at \$14 300.00 per month. The period of seven-and-a-half months represented the delay in the completion of the work by Mungani as alleged by the respondent.

At the end of the trial the learned judge found that the respondent owed Mungani the sum of \$15 633 in terms of the agreement. The correct amount is \$15 733. He also found that the respondent was entitled to damages in the sum of \$92 950.00 in respect of the delay by Mungani in completing the work in terms of the agreement. After set-off, he ordered Mungani to pay to the respondent the sum of \$87 317.00 together with interest and costs. The question which now arises is whether the learned judge's decision was correct.

In my view, the only error committed by the learned trial judge is a mathematical one. After set-off, he should have ordered Mungani to pay to the respondent the sum of \$77 217.00 (i.e. the difference between \$92 950.00 and \$15 733.00) and not \$87 317.00.

At the trial Mungani gave evidence and called two witnesses to support his claim. His evidence was as follows. He was an experienced contractor. He did the work which he was required to do in accordance with the agreement entered into with the respondent. He could not complete the work within the three months agreed upon because of the respondent's failure to supply the required materials timeously. The extra work for which he submitted an additional charge was requested after the conclusion of the agreement and was not part of that agreement. Although Guni, the principal shareholder of the respondent, had initially said that he wanted to use the building as a hotel he later said that he intended using it for office accommodation.

Mungani's two witnesses, Wilson (a carpenter) and Jacob (a painter) gave evidence concerning the work which they did on the premises and the delays which they experienced in getting the required materials.

Guni gave evidence for the respondent which was as follows. He was the principal shareholder of the respondent and represented the respondent when the agreement was concluded. Mungani undertook to complete the work in three months and knew that the building was to be used for office accommodation. The respondent agreed to supply all the materials needed and an arrangement was made with two firms in Masvingo to supply the materials on account. The accounts submitted by the

suppliers were paid promptly, either by the Mining Industry Pension Fund or by the respondent. All the materials required by Mungani were obtained promptly. On 15 January 1988 he (Guni) wrote a letter to Mungani expressing his concern at the time taken to complete the work and giving him notice that if the work was not completed by 31 January 1988 he would take legal action against him. As a result, Mungani assured him that the work would be completed by that date. The work described by Mungani as extra work and for which he claimed payment was not additional to that which was contemplated by the parties in the agreement. In any event, the work performed on the premises by Mungani and which was completed in August 1988 was deficient in many respects. The premises were leased to the Government for the period extending from 15 August 1988 to 14 August 1993. They could have been leased to the Government on 1 January 1988 if the work had been completed by then. The rent for the first year was \$14 300.00 per month and the loss sustained by the respondent over the period of seven-and-a-half months was \$107 250.00.

The second witness who gave evidence for the respondent was Victor, who had been employed by the respondent to supervise the work being done by Mungani. His evidence was that there was never any substantial delay in the procurement of the materials needed on the premises and that the longest delay could have been a day.

Mudadada, the third witness for the respondent, said that at the relevant time there was a shortage of office accommodation in Masvingo and that the

Government would have leased the respondent's premises in January 1988 if they had been ready for occupation by then.

Commenting on Mungani and his witnesses, the learned trial judge said:-

“Mungani was a very poor witness. He contradicted himself on a number of occasions and was not very forthright in answering questions under cross-examination. He said that he did not keep any notes or records concerning the work which he did on the premises. His memory of events that took place is rather hazy and very selective. I do not think that any weight could be placed on his evidence. The witnesses he called were equally unreliable and did little to bolster his case.”

In the circumstances, the learned judge rejected Mungani's claim for payment for the extra work allegedly performed by him. I agree with the comments made by the learned judge about Mungani and his witnesses. The rejection of Mungani's claim cannot, therefore, be faulted.

However, it was common cause that the respondent paid the sum of \$34 000.00 to Mungani and that in addition it paid the sum of \$3 450.00 to Mungani's sub-contractor. The total amount paid by the respondent was, therefore, \$37 450.00. As the contract price was \$54 000.00, the balance due to Mungani was \$16 550.00 (i.e. \$54 000.00 - \$37 450.00). However, that is not the end of the matter because from that sum must be deducted \$817.00, the value of the work which Mungani admitted not doing. The balance owing to Mungani was, therefore, \$15 733.00 and not \$15 633.00 as the learned trial judge found.

As far as the respondent's counterclaim was concerned, the learned trial judge correctly found that the respondent was entitled to damages for the period extending from 1 February to 14 August 1988, i.e. six-and-a-half months. Guni's letter dated 15 January 1988 warned Mungani that if he did not complete the work by 31 January 1988 legal action would be taken against him. That letter effectively extended the deadline to 31 January 1988 and must have put him on his guard and warned him that time was of the essence of the contract.

Furthermore, it was Guni's evidence that he personally told Mungani that the respondent intended leasing the premises for use as offices. That evidence was accepted by the learned trial judge. No cogent reason has been advanced as to why the evidence should not have been accepted. In the circumstances, Mungani knew that the respondent intended leasing the premises for use as offices and that if it could not do so it would lose the rent that would otherwise have been paid.

The total rent lost by the respondent over the period in question is \$92 950.00 (i.e. \$14 300.00 x 6.5 months).

In the circumstances, Mungani owes the respondent \$92 950.00, whilst the respondent owes Mungani \$15 733.00. The result, after set-off, is that Mungani owes the respondent \$77 217.00. That is the sum which the learned trial judge should have ordered Mungani to pay to the respondent, and not \$87 317.00.

The order of the court *a quo* is, therefore, amended in para 1 thereof by the substitution of \$77 217.00 for \$87 317.00. Subject to that alteration, the appeal is dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

F M Katsande & Partners, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners