TAPVICE ENTERPRISES [PRIVATE] LIMITED
versus
SINO ZIMBABWE COTTON HOLDINGS [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 18, 22 & 27 March 2013, 16 May 2013

*B Mufadza* for the Plaintiff
*C Maunga* for the Defendant

MAFUSIRE J: The parties in this matter were dealers in cotton. On 17 August 2011 they entered into a written agreement in terms of which the defendant, as plaintiff's agent, would buy from the cotton farmers around the country seed cotton for delivery to the plaintiff's ginnery or other ginneries chosen by the defendant and approved by the plaintiff. The seed cotton would be processed into lint and cotton seed. The plaintiff would provide an initial amount of US$120 000-00 in two phases which the defendant would utilise for the purchase of 205 tonnes of the seed cotton. The agreement would operate on a revolving basis until terminated by either party. The preamble recorded that the plaintiff went into the deal with the defendant because of the defendant's extensive infrastructure throughout the country. The agreement also acknowledged that the parties' common goal was the creation of wealth through the coordination and combining of technical skills, expertise and funds. Among other things, the price at which the plaintiff would be buying the seed cotton from the defendant was agreed upon.

In this action the plaintiff claimed that the defendant had breached the contract in that the defendant had failed or neglected to deliver all the seed cotton for which the plaintiff had paid it. The plaintiff therefore claimed an order for specific performance or damages in the alternative. For specific performance the plaintiff sought an order directing the defendant to deliver to it 85,57 tonnes of processed lint. In the alternative, the plaintiff claimed as damages an amount of US$2 160 per tonne of lint plus interest on that amount at the prescribed rate from the date of the summons to the date of payment in full. The plaintiff's rate of damages

at US$ 260-00 per tonne was arrived at on the basis that it had confirmed orders for the lint from a South African customer, that the defendant was aware, or ought to have been aware, of this fact at the time of the conclusion of the contract and that the plaintiff had lost that market as a result of the defendant's breach.

The defendant's position was that the contract did not oblige it to deliver processed lint but seed cotton, that it had no facilities to process seed cotton into lint, that its obligation was to deliver seed cotton to selected ginneries and that it had delivered all the lint that had been processed from the plaintiff's "*cotton seed*" after taking into account all the ginnery losses and packaging costs and that therefore it owed nothing to the plaintiff.

The defendant gave no figures. At the trial it called no witness and therefore gave no evidence. It was not explained who it had allegedly delivered all the lint to. On the other hand, not only did plaintiff give evidence of the defendant's breach of contract through its managing director, one Wilson Tendai Donzwa, but also comprehensive documentation was produced showing, among other things, that of the amounts paid by the plaintiff to the defendant for the procurement of the cotton seed in terms of the agreement, there was a shortfall of the seed cotton delivered by the defendant amounting to the equivalent of 85,57 tonnes of lint.

Amongst the plaintiff's bundle of documents was a letter from Mr Donzwa to the defendant on 6 December 2011 which was a concise summary-cum-reconciliation of the transactions between the parties since the inception of the contract. It appeared from that letter that the total amount paid to the defendant in terms of the agreement was US$1 490 652-00 which included an amount of US$30 652-00 paid for transport. The summary gave the breakdown of the costs of procuring the seed cotton, the ginning costs, including the percentage margin of loss, the amount of lint output expected and the amount of lint actually collected. The balance of the lint was 85,57 tonnes.

From the bundle there were receipts and other documents such as vouchers from the bank to show the payment by the plaintiff to the defendant of the sum of US$1 490 652-00 aforesaid. There were also vouchers and statements for the transport costs, goods received and samples of directives in the form of memoranda from the defendant to the various ginneries for the release of various quantities of lint to the plaintiff. Furthermore, there were copies of orders from plaintiff's South African based customer, Branson Marketing, for the purchase of cotton at prices ranging from 91.50 to 94.50 US cents per pound. In evidence Mr Donzwa explained that those prices converted to US$2 104-00 per tonne of lint. He also

explained that the price of cotton lint was controlled internationally and that those were the prevailing rates at the time of the defendant's breach. Cross-examination of Mr Donzwa did not dwell on such specifics. Furthermore, the defendant called no witness. Thus the plaintiff's version went uncontroverted.

I was satisfied that the plaintiff proved its case for specific performance in respect of the 85,57 tonnes of lint. The defendant's obligation was not only to deliver seed cotton to the ginneries. From the various release notes issued by the defendant it is evident that it was also obliged to ensure that the plaintiff received or collected the lint equivalent of the seed cotton that it would have paid for.

The plaintiff's alternative claim for damages requires investigation. If the defendant is unable to deliver, or to cause to be delivered, to the plaintiff the 85,57 tonnes of lint then the plaintiff should be entitled to damages. It is the measure of such damages that requires to be ascertained. The plaintiff claimed the sum of US$2 160-00 per tonne of lint on the basis that the cotton that it was procuring through the defendant's agency was being processed into lint for export at a profit and that the rate of US$2 160-00 per tonne was already a confirmed rate as the plaintiff had confirmed orders from a Durban based customer. The question is whether or not, at the making of the contract, it was actually or presumptively within the contemplation of the parties that in the event of a breach the defendant would be liable for such loss of profit.

In the case of *Victoria Falls & Transvaal Power Co Ltd* v *Consolidated Langlaagte Mines, Ltd* 1915 AD 1 INNES CJ acknowledged that the assessment of compensation for a breach of contract was a most difficult question of fact[1]. He formulated the general principles governing the investigation as follows[2]:

> "The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract."

R H CHRISTIE in his book, *Business Law in Zimbabwe*, 2nd ed, points out[3] that damages for breach of contract are not calculated in the same way as damages for delict. Delictual damages are intended to compensate the innocent party for what he has lost

[1] At p 22
[2] At p 22
[3] At p 124

whereas damages for breach of contract are intended to compensate the innocent party for what he should have gained had the breach not occurred.

However, even though the damages for a breach of contract are intended to compensate the injured part for the loss that he should have gained had the breach not occurred, the measure of such damages is limited to the general or intrinsic damages that flow naturally and generally from the breach of the contract in question. Special or extrinsic damages are recoverable only if in the special circumstances attending the conclusion of the contract the parties actually or presumptively contemplated that they would probably result from the breach of the contract[4]. In general it is those damages which the innocent party might suffer from the non-performance of the contract in respect to the particular thing which is the object of it which he is entitled to recover, and not such damages in respect to his other affairs as may have been incidentally occasioned by the breach [see FARLAM & HATHAWAY: *CONTRACT, Cases, Materials and Commentary*, 3rd ed, at p 625].

To help illuminate the distinction between the general or intrinsic damages and the special or extrinsic damages I quote two examples from two different texts. The one is by FARLAM & HATHAWAY [*supra*][5] reproduced from POTHIER'S *Obligations* para 161:

> "… suppose I sell a person a horse which I am obliged to deliver in a certain time, and I cannot deliver it accordingly: if in the meantime horses have increased in price, whatever the purchaser is obliged to pay more than he would have given for mine, in order to procure another of the like quality, is a damage for which I am obliged to indemnify him, because it is a damage *propter rem ipsam* non *habitam,* and which only relates to the thing that was the object of the contract, and which I might have foreseen; the price of horses like that of all other things being subject to variation. But if this purchaser was a canon, who for want of having the horse that I had engaged to deliver to him, and not having been enabled to get another, was prevented from arriving at the place of his benefice in time to be entitled to his revenue; I should not be liable for the loss which he sustained thereby, although it was occasioned by the non-performance of my obligation; for this is a damage which is foreign to the obligation, which was not contemplated at the time of the contract, and to which it cannot be supposed that I had any intention to submit"

The other example is from the authors of the book *General Principles of Commercial Law*[6]:

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[4] R H CHRISTIE, *Business Law in Zimbabwe*, 2nd ed at p 125
[5] 3rd ed at p 625
[6] 6th ed by P HAVENGA, M HAVENGA, R KELBRICK, M MCGREGOR, H SCHULZE & K VAN DER LINDE at p 135 [para 11.4.3]

> "Danies sells a watch to Gugu. For some time the watch runs perfectly, but one day it suddenly stops owing to a defect. As a consequence of this, Gugu misses her train and cannot keep a very important business appointment. As a result she loses a considerable amount of money, and is declared insolvent. Among other things she is unable to pay for the education of her children as a result of this. It would not be fair to hold Danie liable for all these consequences, despite the fact that it may be argued that they were all caused by Danie's breach of contract."

In *United Air Charters [Pvt] Ltd* v *Jarman 1994 [2] ZLR 341* [S] the Supreme Court rejected the "*convention*" principle as a test for deciding whether special or extrinsic damages are recoverable form a breach of contract and adopted the "*contemplation*" principle. Under the convention principle it is not enough that the type of loss was within the contemplation of the parties; the defaulting party would only be liable if he had entered into a contractual undertaking with the plaintiff that he would be liable for such damage if he breached the contract. However, under the contemplation principle the innocent party should recover if the contracting parties actually or presumptively foresaw that the breach of contract in question would result in the type of loss being sued for.

In the *United Air Charters*' case above, the plaintiff was the defendant's former employee. The defendant had prematurely terminated his two year contract of employment as a pilot. In terms of that contract the defendant would undergo training during that two year period. Following his breach the defendant undertook to pay a *pro rata* portion of the costs of his training. The plaintiff wanted more in special damages. These were said to comprise the revenue that the plaintiff would lose during the period it would take to replace the defendant with someone suitably qualified. GUBBAY CJ rejected the claim for such special damages on the basis that the parties had not foreseen or contemplated that type of loss as being a result of the breach in question.

In the case of *Hersman* v *Shapiro & CO* 1926 [1] TPD 367 the parties were both dealers in corn. The defendant had contracted to sell and deliver to the plaintiff at a specified date a certain quantity and quality of the corn at a specified price. On the strength of his contracts with the defendant the plaintiff had re-sold the corn to markets in London. Unfortunately, there was a massive failure of the crop. The defendant failed to deliver. The

plaintiff sued. The defendant pleaded a supervening impossibility. That defence failed. In assessing the plaintiff's damages the court had this to say[7]:

> "The first thing one has to observe is that neither the plaintiff nor the defendant are consumers or producers of kaffir corn. Both are merchants or dealers in corn. They are both apparently people who make their living by buying and selling produce; and people who buy and sell any commodity with a view to making their living intend to buy in a cheap market and sell in a dear: in making these contracts a degree of speculation is necessarily involved, and they take the risk of variations in prices when buying or selling for forward delivery."

The remarks of the court[8] in *Hersman's* case above apply with equal force. In this case neither the plaintiff nor the defendant was a consumer of the cotton. They both were merchants or dealers for profit. During cross-examination of the plaintiff's witness the defendant's counsel alluded to the fact that at some stage during the subsistence of the contract the cotton seed had become unavailable from the farms. However, it was never suggested that the defendant was pleading a supervening impossibility of performance. Therefore I have not concerned myself with this aspect which was the central defence in the *Hersman's* case. I am satisfied that it must have been obvious to the defendant, if it actually did not know, that the plaintiff required the lint for its markets and that it would enter into forward contracts with those markets on the basis of its contract with the defendant.

Therefore, whether a particular loss constitutes special or extrinsic damages or was within the contemplation of the parties at the time of making the contract is a question of fact. In the present case clearly the plaintiff lost its South African deal as a result of the defendant's breach. The question that I have to decide is whether at the time of the making of the contract the defendant actually or presumptively foresaw the plaintiff losing its forward contracts or end market if it breached the contract. I am of the view that the defendant did. It was the essence of the parties' contract as captured in the preamble that they were coming together to combine their skills, expertise and funds for the mutual purpose of creating wealth for themselves. Clause 3 of that preamble read as follows:

> "3. AND WHEREAS, the parties have agreed to enter into this agreement as a framework through which they would co-ordinate, combine their technical skills, expertise and funds in order to pursue their common goals of creating wealth through co-operation in their investments and activities."

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[7] At p 373 - 374
[8] STRATFORD J

Thus there can be no question that the defendant appreciated, or should be presumed to have appreciated, that the reason why the plaintiff was buying the seed cotton for ginning was so that it could sell the processed cotton or lint to the end market. Furthermore, in its summons and declaration the plaintiff expressly stated the basis and the rate at which it was claiming its damages. It was explained in those pleadings that the plaintiff was selling a tonne of lint to the end market for $2 160-00 and it then claimed that amount per tonne as damages. In response to that the defendant just made a bare denial. It stated in paragraph 8 [iii] of its plea: "*The defendant denies that a tonne of processed lint is sold by the plaintiff to the end market for* ***two thousand one hundred and sixty United States of America dollars [US$2, 160]***". Furthermore, in evidence, Mr Donzwa, the plaintiff's witness, testified that in order to mitigate the situation, they would, at times, go directly to the farmers to buy the cotton seed and hand it over to the defendant to help it meet its obligations, and that on those occasions it was impressed upon the defendant that the plaintiff was anxious to maintain its good relations with its end market. As previously stated, the defendant gave no evidence. Thus the plaintiff's case was not refuted.

The plaintiff is plainly entitled to its special or extrinsic damages. I am satisfied that these flow naturally from the defendant's breach.

The actual quantum of the defendant's damages needs further investigation. Attendant on the right of the innocent party to claim damages for breach of contract from the defaulting party is the duty to mitigate such damages. In this case I am satisfied that the plaintiff did all that it could to mitigate its loss. Firstly, there was evidence that even as the defendant was malperforming it unilaterally and arbitrarily raised its procurement charges. Although the plaintiff protested it nonetheless paid the increased charges in order to maintain the flow of the cotton to the ginneries. Secondly, the plaintiff would also pay the defendant's transporters despite the fact that all such costs would have been paid up-front. Thirdly, as already been mentioned, the plaintiff would at times go to the farmers directly to procure the cotton seed, all in an effort to keep the ginneries running in order that it would not lose its end market. Therefore there can be no question that the plaintiff made effort to mitigate its damages. At any rate, given the nature of defendant's defence this was not an aspect that possibly could have been put in issue.

On the actual assessment of damages the court in *Hersman's* case, quoting a passage from *Halsbury*, (Vol. X, p. 333, par. 610) had this to say[9]

> "When the seller fails to deliver and there is no market, the buyer is entitled to be awarded an amount which represents the value of the goods to him at the date when delivery should have been made, and the profit which he would have made on a contract of subsale which he had entered into is evidence of such value, though the seller had no notice of such contract." [my own emphasis].

In this case it was not made clear whether the quoted prices of 91.50 and 94.50 US cents per pound which the plaintiff said translated to US$2 160-00 per kilogramme of lint were gross or net. Plaintiff would not be entitled to gross amounts which would include such aspects as, for example, costs of freight, which in this case it did not incur. This aspect was not canvassed. The nature of the defendant's contracts with its end market was not explored. However, in evidence the actual amount per tonne was said to be US$2 104-00 and not US$2 160-00, admittedly a small difference.

In a claim for damages the loss claimed does not need to be established with mathematical exactitude or precision. In *Esso Standard SA* (*Pty*) *Ltd* v *Katz* 1981 (1) SA 964 [AD] it was noted that in some types of cases damages are difficult to estimate, but however that the fact that they cannot be assessed with certainty or precision will not relieve the wrong doer of the obligation to pay damages for his breach of duty. The plaintiff is entitled and required to adduce the best evidence reasonably available to him. Relying on the cases of *Hersman* and *Katz'* above FARLAM & HATHAWAY (*supra*) at p 602 stated the principle as follows:

> "Failure to establish loss will therefore result in no award being made. Loss does not, however, have to be established with mathematical precision. A plaintiff who has suffered a loss and has produced all the evidence reasonably available, is entitled to an award, even one based on an estimate on the available evidence (**Esso Standard SA (Pty) *Ltd* v *Katz*** 1981 (1) SA 964 (A), ***Hersman* v *Shapiro & Co*** 1926 TPD 367]" [my emphasis].

I am satisfied that the forward contract which the plaintiff in this case produced to show its loss was sufficient to enable an estimate of its damages to be made. In the circumstances the plaintiff is entitled to an award of damages in the alternative in the sum of US$2 104-00 per tonne of the 85,57 tonnes of lint due by the defendant.

[9] At p 379

In the final result I make the following orders:

[1] the defendant shall deliver, or cause to be delivered, to the plaintiff at a place to be advised by the plaintiff to the defendant in writing, eighty five point five seven (85,57) tonnes of cotton lint within seven (7) days of the date of handing down of this judgment,

[2] in the event that it is unable to deliver as aforesaid, the defendant shall pay the plaintiff damages on the said 85,57 tonnes of cotton lint at the rate of two thousand one hundred and four United States dollars (US$2 104-00) per tonne, thus amounting to one hundred and eighty thousand and thirty nine United States dollars and twenty eighty cents (US$180 039-28),

[3] the defendant shall pay the plaintiff's costs of suit.

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