IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. CACLB-085-09
(High Court Civl Case No. CVHLB-001804-08)

In the matter between:

EZRA AND EZRA CONSTRUCTIONS (PTY) LTD APPELLANT

and

KHUTSO INVESTMENTS (PTY) LTD RESPONDENT

Advocate H Lever SC (with Mr S P Mwiya) for the Appellant
Mr L Morapedi for the Respondent

JUDGMENT

CORAM: MOORE J.A.
FOXCROFT J.A.
HOWIE J.A.

HOWIE J.A.

1. The parties are construction companies. The appellant's tender to construct certain houses for the Government was accepted in the sum of P5 930 101.10. The tender was drawn up by the respondent, the parties intending that the respondent would do the work. Accordingly the appellant and the Government entered

into a main contract and the parties entered into a subcontract. It was a term of the latter that whatever sums the Government paid the appellant under the main contract, the appellant would pay the respondent subject to a deduction by the appellant of 3 per cent.

2. In the course of the respondent's performance of its obligations the appellant brought another contractor on to the site. The respondent then vacated the site, alleging that the appellant had repudiated the subcontract, which repudiation the respondent said it accepted.

3. In due course the respondent sued the appellant in the High Court for damages for breach of the subcontract. The trial was presided over by Kirby J. (as he then was) who found that the appellant had breached the subcontract by wrongfully repudiating it as alleged by the respondent. The learned Judge went on to hold that the respondent had proved damages in the form of lost profits in the sum of P1 144 600.00, to payment of which it was entitled. It was ordered accordingly.

4. The appellant's appeal is confined to the damages issue.

5. In support of the appeal counsel for the appellant raised four points which, so it was argued, warranted the conclusion that the respondent had failed properly to prove its alleged damages. They were these:

   (a) The respondent had failed to adduce the best evidence, such evidence having been available to it.

   (b) Part of the work had been done but the respondent had failed to establish the extent of it, the costs involved in performing it and the proportion of the lost profit attributable to this part of the work.

   (c) The respondent had failed to mitigate its damages.

   (d) Computation of the alleged damages was bedevilled by uncertainties of calculation.

6. Point (c) may be summarily disposed of. The appellant bore the legal onus of showing that the respondent could have mitigated its damages and, because it bore that onus, it was incumbent on the appellant, on established principle, to plead accordingly. This it did not do. The omission to do so was not an empty

technicality. It resulted in mitigation not being an issue before the trial court and the matter of mitigation not being canvassed. It cannot be raised on appeal for the first time.

7. The other three points raised on the appellant's behalf can conveniently be dealt with together. It is trite law that the victim of a contractual breach is entitled to be placed, by an award of damages, in the position it would have been in had there been no breach and had the contract been properly performed. The present case is not one in which it was necessary to prove details of the work done or the costs incurred in doing it. The respondent's case, gleaned from the pleadings and pre-trial statements, was simply this: had it been allowed to perform its contractual obligations it would have been paid P5 903 101.10 less 3 per cent. Its profit would have been 20 per cent of the balance after deduction of the 3 per cent. In a pre-trial summary of the proposed evidence of the respondent's key witness it was explained that the profit margin of 20 per cent was determined by the fact that the respondent's costs of doing the work would amount to P4 578 400.00. It remains to see what was said in

evidence in the trial in addition to the facts that were common cause or indisputable.

8. The main contract price of P5 930 101.00 and the required deduction of 3 per cent are figures that are common cause. It is therefore clear what the respondent would have received, had the subcontract run its course, namely P5 752 198.00 (to the nearest Pula).

9. The respondent's key witness, its director, Mr Selwana, said that as regards the part of the work that was done, he had made no claim for payment for it and the respondent had, indeed, not been paid for it. It follows that the respondent received no payment from the appellant at all. It was therefore unnecessary for the respondent to itemise the work done or its costs involved in performing it.

10. There remains the matter of the profit that would have been made, in other words the amount left over after receipt of the total due and payment of all expenses and costs. One way of

calculating the profit would have been to have regard to the quantum of the costs and expenses. The other would be simply to state the profit as a percentage of the amount that the respondent would have received. The latter, perhaps shorthand method one could call it, was the course taken in evidence.

11. I should mention that in evidence-in-chief Selwana was asked what his profit would have been and he gave the figure of P1 470 000.00 (That is noticeably more than the sum of P1 140 600.00 which was claimed). Shortly afterwards he said under cross-examination that his profit was to be 20 per cent "of the contract price". It is necessarily to be understood that he meant the subcontract price. The figure of 20 per cent was left unexamined and unchallenged by the appellant.

12. However, the matter does not end there. The evidence revealed that the tender accepted by the Government was compiled by Selwana. It is a matter of compelling inference that the tender would not, indeed could not responsibly, have been accepted had it failed to explain how the tender amount was arrived at.

This would have involved revealing the respondent's expected costs and expenses and its expected profit. In the evidence of the appellant's principal witness, its managing director, Mr Mu, he was asked in cross-examination about the tender. He said it was priced by the respondent but that he checked it, stamped it and signed it. It is inherently improbable that he would have done so had he thought that the expected costs and expenses, and consequently the respondent's profit margin, were likely to impact adversely on the sum which would represent the appellant's 3 per cent.

13. In argument in the court below and in its notice of appeal the appellant focused principally on mitigation of damages but in any event proffered no reasons for querying, as such, the 20 per cent profit figure.

14. Given the restricted compass of the damages enquiry, the evidence goes sufficiently far to establish that 20 per cent would have been the extent of the respondent's profit. There being no possible dispute as to the amount to which that percentage had

to be applied, the respondent accordingly proved its entitlement to 20 per cent of P5 752 198.00, i.e. P1 150 440.00. In the event he claimed and was awarded P1 144 600.00 a result about which the appellant can hardly complain.

15. It follows that the appeal must fail.

16. The Order of the Court is:

    The appeal is dismissed, with costs.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27TH DAY OF JANUARY 2011.

C.T. HOWIE
JUSTICE OF APPEAL

I agree **------------------------------**
S.A. MOORE
JUSTICE OF APPEAL

I agree **------------------------------**
J.G. FOXCROFT
JUSTICE OF APPEAL