CITY ANGELS TRAVEL AND TOURS (PVT) LTD
versus
TINASHE MURAPATA

HIGH COURT OF ZIMBABWE
TSANGA & DEME JJ
HARARE, 1 February, 2024 & 4 September 2024

Civil Appeal

P Kawonde, for the appellant.
E Ngweru, for the respondent.

DEME J: The Appellant approached this court by way of appeal seeking to challenge the decision of the Magistrates Court sitting at Harare on 4 July 2023. The respondent in the court *a quo* made an application seeking to recover from the Appellant, the sum of US$2 360.00 together with interest at the prescribed rate with effect from 30 July 2022 up to the date of final payment. The application was referred to trial and the respondent was successful in his claim.

The factual context

The Respondent's case was that sometime in April 2022, he engaged the appellant to book for his accommodation in France. The respondent further alleged that he paid US$2 360.00 which was meant to cater for the service to be rendered by the appellant in securing the accommodation on his behalf. According to the respondent, the appellant failed to render the service and made an undertaking to refund the respondent. He also alleged that the Appellant acknowledged its indebtedness of the amount of US$2 360.00 through a signed acknowledgement of debt which was attached to the application. The respondent also maintained that the appellant failed to honour the debt. The respondent further stated that in terms of the acknowledgement of debt, the appellant undertook to pay costs on an attorney and client scale in the event of being sued by the respondent for failure to honour the debt.

More particularly, the respondent prayed for the following relief:

> "1. The Respondent be and is hereby ordered to pay to the Applicant US$2360 (two thousand three hundred and sixty United States Dollars).
>
> 2. The Respondent shall pay interest on US$2360.00 calculated at the rate of 5% per annum from 30 July 2022 until date of payment of the amount in full.
>
> 3. The Respondent shall pay costs of suit on a legal practitioner and client scale."

The appellant opposed the application in the court *a quo.* The appellant denied having failed to book accommodation as agreed. The appellant argued that it actually booked the accommodation and paid for it. In terms of the opposing affidavit, the appellant alleged that it attached proof of payment to the opposing affidavit. However, a perusal of the opposing affidavit reflects that there is no such attachment. According to the appellant, the respondent was booked at the Hotel but he failed to travel for reasons known to himself.

The appellant denied ever signing the acknowledgement of debt and further alleged that the purported acknowledgement of debt was forged. According to the appellant, the acknowledgement of debt does not reflect the name of the person who signed it on its behalf. The appellant also insisted that it was illogical for it to sign the acknowledgement of debt when it fulfilled the terms of the contract.

The court *a quo* referred the court application to trial. Parties proceeded to prepare the Pre-Trial Conference papers, which eventually led to the trial of the matter. Only four issues were referred to trial. These were as follows:

> "1. Whether or not plaintiff paid $2 360.00 to book for accommodation in Paris France.
>
> 2. Whether or not Defendant failed to render the service.
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> 3. Whether or not Defendant undertook to refund the Plaintiff.
>
> 4. Whether or not Defendant should refund the amount."

Before the court *a quo*, the appellant failed to discover documents and hence no documents were discovered in its favour. At the conclusion of the trial of the matter, the court *a quo* made the following order:

> "1. Defendant is hereby ordered to pay US$2 360.00 US$ (sic) / prevailing bank equivalent (sic) plus costs of suit on high scale."

The grounds of appeal

The Appellant's grounds of appeal are as follows—

> "1. The court a *quo* erred in failing to take into account evidence that alternative accommodation had been paid for in consultation with the respondent's agent and that therefore no amount was due as a refund to the respondent.
>
> Alternatively,
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> The court *a quo* erred in failing to deduce that the extent of the respondent's loss was the difference between the price paid for by the respondent in accommodation fees and the cost of the alternative accommodation paid for.
>
> 2. The court *a quo* erred in holding that the amount to be recovered by the respondent from the appellant was a debt whereas in fact the claim was one of damages arising out of breach of contract in which case the damages in question were not proved.
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> 3. The court *a quo* erred in failing to separate between the appellant's company and a witness one Lesley Simbarashe Gurajena. In error, the court imputed liability to the company whilst in fact on the other hand it ruled that the person that was liable was Lesley Simbarashe Gurajena in his personal capacity.
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> 4. The court *a quo* erred in finding that costs ought to be awarded to the respondent on the legal practitioner and client scale when no basis for such an award existed."

The Appellant prays for the following relief:

> "1. That the appeal succeeds with costs.
>
> 2. That the judgment of the court *a quo* be and is hereby set aside and substituted with the following;
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> "1. That the plaintiff's claim be and is hereby dismissed with costs."'

The submissions by parties

The appeal was opposed by the respondent. The respondent raised two technical objections to the present appeal. Firstly, the respondent argued that the appeal, in its first and second grounds, raises factual findings. According to the counsel, Mr *Ngweru*, the appellate court cannot interfere with the findings of inferior court in the absence of exceptional circumstances which must be established by the appellant. The court was referred to the cases of *Hama* v *National Railways of Zimbabwe*[1] and *Sable Chemical Industries* v *David Peter Easterbrook*[2]. The respondent prayed for an order that the first and second grounds of appeal be struck off. Responding to this point *in limine*, Mr *Kawonde* submitted that the cases of

[1] 1996 (1) ZLR 664 S.
[2] SC18/10

Hama v *National Railways of Zimbabwe* (*supra*) and *Sable Chemical Industries* v *David Peter Easterbrook* (*supra*) are not applicable to the present situation as those cases deal with appeals of labour matters where appeal on a factual finding is severely restricted unlike in the present matter.

The respondent's second point *in limine* was to the effect that the second and third grounds of appeal are issues that never arose in the court *a quo*. This court was referred to the cases of *Maposa* v *The State*[3], *Reserve Bank of Zimbabwe* v *Granger and Anor*[4] and *Dube* v *Murehwa and Anor*[5]. Consequently, the respondent prayed for an order that the second and third grounds of appeal be struck off.

Analysis

Turning to the first point *in limine,* I do not agree with the submissions of Mr *Kawonde* of confining the principle stated in the *Hama* case as applicable to labour matters. The same principle in the *Hama* case has been applied with equal force by the Supreme Court in non-labour cases. For this reason, it is difficult for a litigant to challenge a finding of fact without satisfying certain requirements. The appellant does have to meet a requisite threshold for such ground of appeal challenging a factual finding to be accepted by the appellate court. In *Metallon Gold Zimbabwe* v *Golden Million (Private) Limited*[6], the Supreme Court propounded the following remarks:

> "It is settled that an appellate court will not interfere with factual findings made by a trial court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.[7]
> The factual issues raised by the appellant in its notice of appeal were carefully considered by the learned Judge who gave detailed reasons for his decision on the facts. None of the established grounds for interference as set out above has been established. On the contrary, the judgment of the court *a quo* is detailed and well-reasoned and his findings accord with the probabilities of the matter. His preference of the evidence of the respondent's witnesses against that of the appellant's witnesses is amply supported by the record. No basis, therefore, has been established for interference with the judgment of the court *a quo*."

[3] HH323/13
[4] SC34/01
[5] SC68/21
[6] SC12/15.
[7] Herbstein and Van Winsen The civil Practice of The Superior Courts at page 738-9;
Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) at 670

In *Dube* v *Murehwa*[8], the Supreme Court expressed similar sentiments in the following remarks:

> "It is settled that this Court will not easily interfere with factual findings made by a lower court unless there has been such a gross misdirection by that court on the facts so as to amount to a misdirection in law, in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the conclusion reached by the lower court. [9]
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> In assessing whether the court *a quo* misdirected itself in finding that the first respondent had rights to the property, regard may be had to the case *of Reserve Bank of Zimbabwe v Granger & Anor SC 34/01,* wherein this Court stated the following:
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> "An appeal to this Court is based on the record. If it is to be related to the facts there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.
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> In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58(S) at 62G-63A the court stated the following:
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> "These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court."'

I respectfully associate myself with the comments of the Supreme Court in the cases of *Metallon Gold Zimbabwe* (supra) and *Dube* v *Murehwa* (*supra*). A perusal of the first and second grounds of appeal reflects that such grounds do not meet the minimum base outlined in the two cases. Clearly, the first ground and its alternative ground are matters falling within the province of factual findings. The issue of whether or not the accommodation had been paid for, is a factual matter. The issue raised in the alternative ground of appeal of the actual amount payable to the respondent is equally a factual question. Whether or not the amount payable to the respondent arose as a result of a debt or damages arising from the breach of contract is again a factual issue. The appellant raised this issue in its second ground of appeal. In the first two grounds of appeal, there are no allegations made on behalf of the appellant, in compliance with the dictates of *Metallon Gold Zimbabwe* v *Golden Million (Private) Limited* (*supra),* that the court *a quo* acted in a manner that is so grossly unreasonable:

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[8] SC68/21

[9] *Chioza v Siziba* SC 16/11

> *"*in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it."

The court *a quo* properly applied its mind by considering evidence which was placed before it. The Appellant, having breached the rules of discovery, failed to produce any document in support of its defence. In this context, the court *a quo* observed that:

> "Unfortunately, defendant did not comply with the rules in relation to discovery so they were unable to tender any exhibits."

This failure to discover documents made the appellant's defence palpably weak. If the appellant was dissatisfied by the decision of the court *a quo* to deny it from producing exhibits which were not discovered, it ought to have taken practical steps through seeking the setting aside of such a decision by the court *a quo*. Reference is made to p 39 of the electronic record where parties consented to the expunging of appellant's bundle of documents, which were irregularly discovered.

On the other hand, the respondent produced exhibits which include proof of travel through a stamped passport page which is on p 91 of the electronic record; acknowledgement of debt, which is on pp 92-3 of the electronic record; and, proof of hotel booking which is on pp 79-81 of the electronic record. Against this evidence, there was no document to counter this evidence by the appellant. One cannot find fault with the court *a quo* for reaching the conclusion in the manner it did. In analysing the evidence before it, the court *a quo* remarked as follows:

> "In *casu* the Plaintiff explained consistently how he engaged the Defendant whom he trusted by virtue of being a church mate. The figure paid is not even in dispute. The second witness Alex Chaya was consistent too in how payments were made and the problems encountered including failure to get refund.
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> The Defendant on the other hand blew hot and cold. At some point he even highlighted that the Plaintiff had not travelled to Paris and later on changed his stance. The court is inclined to believe the Plaintiff who has proved his claim on a balance of probabilities."

Consequently, we upheld the first point *in limine.* In the circumstances, we unanimously struck off the first and second grounds of appeal as prayed for by the respondent.

In the second point *in limine*, the respondent argued that the second and third grounds of appeal raise issues which never formed part of the record. Having struck off the second

ground of appeal, it is no longer relevant to examine the status of the second ground of appeal, which is no longer before the court.

Proceeding to the third ground, the counsel for the appellant did not make meaningful submissions rebutting the allegations raised in the third ground of appeal. To recap this ground of appeal, this is related to the court's failure to separate the company from Lesley Simbarashe Gurajena. Clearly, the court *a quo* was alert to the fact that Lesley Simbarashe Gurajena acted as the representative of the Defendant, which turns out to be the Appellant in this matter, and was not the defendant himself. To this end, the court *a quo* commented succinctly as follows:

> "Plaintiff case was closed and Defendant opened his case. The witness who testified was Lesley Simbarashe Gurajena who represented the company."

Although the court *a quo* viewed Lesley Simbarashe Gurajena as the Defendant in certain instances, that minor mistake cannot be exploited by the Appellant, which failed to demonstrate any iota of evidence before the court *a* quo. It is apparent that the issue of whether liability may be imputed upon Lesley Simbarashe Gurajena was never before the court *a quo*. Reference is made to the four issues which were referred to trial and which have been captured earlier in this judgment.

Further, the court *a quo* never made an observation that Lesley Simbarashe Gurajena was liable in his personal capacity. The appellant's third ground of appeal, therefore seeks to introduce issues that never formed the findings of the court *a quo.* Accordingly, the third ground of appeal is struck off for advancing extraneous issues.

In the circumstances, the only remaining ground of appeal is the fourth and the last ground of appeal. In its fourth ground of appeal, the appellant argued that there was no basis for the court *a quo* to make an order of punitive costs against it. In determining the question of costs, the court *a quo* elegantly postulated the following comments:

> "Ordinarily costs follow the cause.
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> In the case of *Mahembe* v *Matambo 2003 (1)* ZLR 149 at 150C CHEDA J (as he then was) commenting on the costs of a higher scale held:
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> "Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a judicial decision against a genuine complaint. It is therefore essential that the court only awards such costs in situation where it is clear that the losing litigant was not genuine in pursuance of a stand in litigation….."
>
> The applicant need not be unnecessarily put out of pocket by the conduct of the respondents who were legally represented and should have known that they had no defence at law and should have consented and avoided wasting the court's time too. Costs on a higher scale are therefore warranted."'

It is apparent that the court *a quo* had a basis in awarding the punitive costs against the appellant. In any event, costs are within the discretion of the court. It was submitted on behalf of the appellant that the appellant had a defence in the court *a quo* and as such the court *a quo* erred by ignoring the appellant's defence, according to the submissions made on behalf of the appellant. On the other hand, the respondent's counsel submitted that there was a justification for punitive costs by the court *a quo*. In light of the fact that there was no evidence adduced by the appellant in the court *a quo*, it is patent that appellant had no leg to stand on as its defence. Given that there was no defence, the appellant ought to have taken practical steps consistent with the position where there is no defence like consenting to the judgment. It ought to have dawned upon the appellant that its matter took a new twist where it was no longer able to produce its bundle of documents that constituted its defence. By proceeding to argue the matter under such circumstances, it was an exercise in futility and hence the appellant was now wasting the time of the court *a quo*. In the premises, it is my considered opinion that the court *a quo* never erred by ordering the appellant to pay costs on an attorney and client scale. There is no reason that necessitates this court to interfere with such order of costs made by the court *a quo*. The court *a quo* reasonably and conscientiously applied its mind before making a determination on the question of costs.

In the premises, the appeal is not merited. Costs ordinarily follow the outcome. The court has not been persuaded to have a departure from this usual practice. The respondent prayed for costs on an attorney and client scale against the appellant. An order that the appellant must pay costs of suit on an ordinary scale is appropriate in the circumstances. Such costs are reasonably sufficient. The order of costs by the court *a quo* is enough to act as an alarm bell to litigants who are in a similar position like the appellant. In my view, an order of punitive costs against the appellant would subject the appellant to double jeopardy as it had been ordered to pay such costs by the court *a quo*. Such costs by the court *a quo* together with the order of costs in the present appeal would continue to deter the appellant from mounting empty, vexatious and frivolous defences.

Disposition

In the result, it is ordered as follows:

The appeal be and is hereby dismissed with costs on an ordinary scale.

DEME J:……

TSANGA J: ……AGREES.

Kawonde Legal Services, appellant's legal practitioners.
Chatsanga and Partners, respondent's legal practitioners.