CBZ BANK LIMITED
versus
DR ALPHA ABIOT MOYO

HIGH COURT OF ZIMBABWE
CHITAKUNYE & CHIRAWU-MUGOMBA JJ
HARARE, 14 and 21 November 2019

Civil Appeal

M Ndlovu with R *Gwatsvaira* for the appellant
C. Damiso with *Ms L Rubaya,* for Respondent

CHITAKUNYE J**:** This is our decision in this appeal relating to CBZ Bank Limited and Dr Alpha Abiot Moyo. The basic facts are that the appellant issued summons against the respondent claiming, *inter alia*, a sum of $ 411 340- 72 with interest at the rate of 28% per annum from the date of summons to the date of payment in full. The appellant also sought that the defendant's immovable property, that is, Lot 2 of Lot 1 of Waterfalls Induna of Waterfalls in extent 4311 metres held under deed of transfer no. 6126/93 and all movable property in his name be declared specially executable.

The respondent, the defendant in the court -a- quo, defended that action. It is clear from his defence that there are certain issues he was raising pertaining to the level of the indebtedness. He contended that the appellant had made some errors in its calculation of his indebtedness.

The sole issue before the court -a- quo was 'whether or not, the defendant is indebted to the plaintiff in the sum of $411 340. 72.'

In an endeavour to prove its case the appellant called two witnesses. The witnesses' evidence was buttressed by documentary evidence some of which was not challenged. The documents included four facility letters which the respondent signed in acceptance of the credit facilities and the security he offered in return for the credit facilities, the *in duplum* schedule and the Bank statement pertaining to respondent's bank account.

The respondent thereafter gave evidence. In his evidence he did not deny signing the facility letters and offering the security for the facilities. He, however, denied being indebted to the level claimed.

After considering the evidence adduced the trial magistrate dismissed the appellant`s claim. The trial magistrate's decision was premised on his finding that no money was deposited into the respondent's account and therefore the appellant had not proved that it had loaned the respondent the sum it was claiming.

That dismissal did not go down well with the appellant who then appealed to this court on about 10 grounds of appeal. The grounds of appeal may be summed up as that the trial magistrate erred and misdirected himself in coming to the decision as he did considering the nature and extent of the evidence that was given and that the decision goes contrary to that evidence, some of which was not contradicted or disputed.

It is trite that there are limited grounds upon which an appellate court can interfere with the lower court's decision. An appellate court will not interfere with the decision of a trial court based purely on findings of fact unless it is satisfied that having regard to the evidence placed before the trial court, the findings complained of were contrary to the evidence adduced and that had the trial magistrate applied his mind to the issue to be decided he would not have arrived at that decision. Others include where it is shown that a trial court erred and based its findings on something that may not have been placed before it or on wrong principles or that the misunderstood the law and misapplied that particular law that was involved.

In other words the findings must be shown to have been contrary to the evidence adduced and the principle of law applicable.

In *Baross & another* v *Chimponda* 1999(1) ZLR 58(S) at 62G-63A GUBBAY CJ aptly noted that:-

> "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 considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the material for so doing."

It was with the above factors in mind that we examined the record of proceedings. After hearing arguments from counsel for both parties and analysing the evidence that was adduced as portrayed in the record of appeal, we were of the view that the trial magistrate erred in dismissing the appellants claim as he did.

We noted that it was common cause that the appellant and the respondent were in a banker and client contractual relationship as a result of which the respondent signed four agriculture credit facilities termed 'facility letters'. Those letters were indeed tendered into

evidence and were duly signed by the parties on particular dates. The facilities were intended to enable the respondent to access agricultural inputs and services.

We also noted that there was a bank statement covering the period in question which was tendered into evidence and the *in duplum* schedule relating to the respondent`s account showing how the debt was incurred and how it rose to the figure that it was at the time of issuance of the summons. The statement showed that the respondent's account had negative balances during the period in question. As the debt increased the respondent would approach the bank and sign a facility letter with a greater sum than the previous letter to cater for the coming farming season. The bank statement also showed that the respondent's account was active, as drawdowns were being effected despite it being in the negative. Evidence in this regard was not disputed and, in our view, showed that the respondent was accessing the credit facility offered by appellant.

It is also evident that as the respondent signed the next facility letter he would in effect be increasing his indebtedness and hence he would correspondingly increase security for the increased debt. It was from this that when one examined the *in duplum* schedule and the bank statement that respondent was being given, they clearly corresponded to the cropping seasons that he was approaching the bank for facilities to access inputs for his agricultural activities.

We noted for instance that the first facility letter was signed on the 7th of February 2010. After the respondent signed the first facility letter his account had a negative balance of about $ 429-00 as at 1st April 2010. This is confirmed by the *in duplum* schedule (exhibit 2) and the Bank statement (exhibit 13). The facility is described as agricultural loan for which respondent was to access funds not exceeding $20 000-00 as working capital.

The second facility was signed in the next cropping season which was for winter wheat and is dated the 5th of May 2010. The facility offered is described as- for Winter Wheat $60 000-00, and Loan (existing) working capital $ 20 000-00. The $ 20 000-00 is the one subject of the first facility. The total captured for the second facility was thus $ 80 000-00 and the respondent duly signed for it. The security held was a 1st Mortgage bond for $27 000-00 over Lot 2 of Lot 1 of Waterfalls Induna of Waterfalls. This was apparent in respect of the first facility. When respondent signed for the second facility with an increased amount he offered a further security over the same property in a 2nd Mortgage bond for $81 000-00.

The *in duplum* schedule and the bank statement confirm a negative balance of about $9 900. 00 at the time this facility was entered into. That negative balance in his account was a result of accessing the overdraft facility.

When the respondent signed for the third facility letter dated the 8th of November 2010 for summer cropping the debt had ballooned to about $81 284.00 (see exhibit 13). This negative balance was as a result of the respondent having accessed the facilities stated above. The facility offered is stated as – Summer cropping overdraft facility $ 110 000-00; Winter wheat $60 000-00; Rollover $20 000-00 making a total of $190 000-00. It is evident that the rollover pertained to the first facility and the $ 60 000-00 pertained to the second facility. So as the respondent signed for the third facility he was very much aware of the debt that was being carried over to the next facility as rollover or restructure.

In order to cater for the increased debt the respondent offered further security in the form of cession of insurance Policy over the immovable property already offered as security; MGCB for $ 147 000-00 over movable assets in the name of the respondent and 100% tobacco crop stop order.

The fourth facility letter was dated 7th of March 2012. At that time the debt had ballooned to about $ 225 445-00. That facility is described simply as 'loan in the sum of $230 000-00'. The respondent was allowed to drawdown an aggregate limit not exceeding $230 000-00. The facility letter makes it clear in stating, *inter alia*, that:

> ''it is understood that the amount outstanding to the debt of your account shall not, in aggregate exceed US$230 000-00 at any one time."

The security held in respect of the already stated three facilities had added to it security proposed of – Leaseback Agreement for US$18 300.00. It is evident that the security offered for the debt was increased in appreciation of the increased facility.

It is pertinent to note that with each facility letter signed, the respondent would also sign another document confirming agreement with and acceptance of the terms and conditions of the new facility entered into by the parties.

As alluded to above the increase of the debt was indeed matched with a provision of more security. It was clear beyond question that the debt was increasing with each passing cropping season as respondent signed further facility letters.

. The sum claimed by the appellant was clearly evident from the Bank statements that the respondent did not dispute receiving from his bank which meant that at the times he was signing for the next facility letter he was aware of the state of his account. Having been so aware it was untrue to say that he did not access the funds. Our view is that respondent was aware of the nature and extent of the credit facilities offered to him by the appellant. He did access the funds as testified to by appellant's witnesses.

It is our view that the finding by the trial magistrate, (at page 21 of the record of appeal) that: -

> "There is no proof that $ 230 000.00 was advanced to the defendant. There is no proof that he had an overdraft facility. There is no proof that he accessed the loan through vouchers as alleged"

- is clearly erroneous and is contrary to the evidence adduced. The third facility dated 6 November 2010 states clearly that this was an overdraft facility. When respondent signed it he knew it was an overdraft facility. The reasoning to the effect that the money ought to have been deposited into the respondent's account was clearly erroneous. This was a credit facility whose terms and conditions were clearly understood by the respondent. Such reasoning fails to appreciate what a bank overdraft is. In an overdraft facility the bank simply allows its customer to drawdown to an agreed limit even if there are not insufficient funds in his account. As aptly stated at p 182 *Paget's Law of Banking* 10 *ed:*

> "An overdraft is money lent. A payment by a bank under an arrangement by which the customer may overdraw is a lending by the bank to the customer of the money. A banker is obliged to let his customer overdraw only if he had agreed to do so or such agreement can be inferred from a course of business; borrowing and lending are a matter of contract, express or implied."

See also Madondo NO v *ZimBank Corp* 2008(1) ZLR102 (H).

In *casu*, therefore by allowing the respondent to access funds for agriculture inputs and services, through the facility letters in question even when his account was in the red, the appellant lent money to the tune that respondent utilised plus the attendant interest.

Indeed it would appear that the trial Magistrate did not carefully interrogate the bank statements tendered by the parties and the fact that the respondent did not deny receipt of such statements on a regular basis as testified to by the appellant's witnesses. Had the trial magistrate examined the bank statement he would have noted that the respondent was allowed to draw down funds to meet his obligations even at a time his account was in the red. This is the typical position with an overdraft. The trial magistrate would also have noted that at each time respondent signed a new facility letter reference was made to the outstanding facilities and his account would be in the red. The respondent would thus be aware of his indebtedness and this indebtedness would be carried into the next facility. If the respondent was aware of the state of his account, as he should have been, he surely cannot be heard to allege that he did not access the overdraft facilities that appellant's witnesses testified to. It is in fact apparent from his defence or plea that his major concern or quarrel seemed to have been on 'errors in calculations' made by the bank. He did not deny approaching the bank for the bank to meet his needs for

agriculture inputs and services. He equally did not deny ever receiving inputs and services from the said credit facilities.

For instance, in paragraph 2 of his plea, which is a response to paragraphs 3-6 of appellant's particulars of claim, the respondent pleaded as follows:

> "Denied. The arrangement was that plaintiff supply defendant with farming inputs and then credit the account with the value of inputs supplied supported by voucher, receipts from suppliers. No such information as vouchers for inputs, receipts or regular statements clearly showing the values were made available. Defendant is surprised with the figures. Defendant denies the total alleged figure as it clearly reflects that plaintiff's responsible department having made a mistake in calculations as it duplicated amounts and treated value already advanced to have been advanced again. Plaintiff need to relook into the quantification of its values."

It is apparent from the above that respondent quarrel was with the 'quantification.' He does not state that he ever protested against the debiting of his account with certain sums during the duration of the facilities or any time prior to the issuance of the summons.

There is no denial that the credit facility was in fact an overdraft facility as stipulated in paras 3 to 6 of the claim. Those paragraphs outline how the facilities were provided to the respondent and that these were in fact overdraft facilities as they enabled the respondent to access funds for his farming activities even though his account had no credit balance. This assertion is clearly stated in paragraph 4 of the particulars of claim to which respondent did not specifically deny.

The respondent, either in his plea or evidence, did not deny that he had agreed to all the terms and conditions of the credit facilities offered. Such terms included an agreement that any certificate signed by the appellant or by the manager or accountant of any of the appellant's branches to which respondent is indebted, showing the amount owing by the respondent, would be prima facie evidence of the nature, character, and amount of sums due or owing to the plaintiff.

The respondent having signed for the facilities without challenging the debt being rolled over, cannot surely deny liability for a debt he was well aware of for over 3 years only because the appellant has sued him. It is unwise for a party to seek to question something they were aware of, and had not challenged over a long time, when they are now being sued. See *African Banking Corporation of Zimbabwe Ltd* v *Sunjet Development Holdings (Pvt) Ltd* HH 190/14.

In any case, even the errors in calculations he alluded to as the basis of his defence had never been raised with the appellant during the duration of the credit arrangement. Assuming he had reason to raise such a point, he still did not specify the alleged errors and their effect on

the total debt. He remained very general in his contestation. It is clear that each of the statements he was getting from the bank had at the bottom of it a statement to the effect that if he did not raise any query with the bank within a period of 14 days, the bank would assume that the Bank statement was correct. We did not see anywhere in his evidence where he indicated that he had raised queries with any of the statements he was getting during the duration of those facilities that he was afforded by the bank prior to being sued. Such conduct was not consistent with someone who was receiving bank statements containing false statements on the operations of his account especially as the debt was ever increasing. It is safe to infer that his silence or failure to protest was clearly because he was aware of the entries in the account leading to the increase in the debt.

It is our view that in as far as it is accepted that the standard of proof in a civil matter is on a balance of probabilities, in the circumstances of this case, the balance favoured the appellant. It was clear from the admitted facts that there was adequate evidence to tilt the scale in favour of the appellant.

The trial magistrate alluded to the failure by the appellant to produce the vouchers that were used. Whilst this may have added weight to the appellant's case, it is our view that appellant had already established its case on a balance of probabilities from the evidence already adduced. The statements that portrayed the state of account were tendered and there was no credible evidence to refute their authenticity. The respondent did not deny receiving similar statements from the appellant. Indeed whilst such vouchers may have been helpful, that, in our view, would have only served to add more weight to appellant's case which had already been established as the more credible version.

As aptly held in *ZESA* v *Dera* 1998(1) ZLR 500(S):-

> "..in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims."

In P J Schwikkard *et al in Principles of Evidence,* 3 ed, Juta and Company at 580 the above was illustrated as follows:

> "In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a 'balance of probabilities' but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed. In *Miller* v *Minister of Pensions* 1947 2

> All ER 372 at 374, Lord Denning expressed the civil standard of proof as follows: 'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if probabilities are equal it is not.' The civil standard of proof on a balance of probabilities is applied consistently irrespective of the cause of action… The suggestion that there might be different degrees, or standards of proof, depending upon the nature of the facts in issue, is not correct, and has been rejected in South African law."

After considering all the grounds of appeal, it is our view that the appeal must succeed with costs on a higher scale. It is our view that the respondent was simply being dishonest in denying a liability he knew he had incurred. As for collection commission, counsel did not insist on it and we did not find any justification for a collection commission where appellant has been awarded costs of suit. In the circumstances no collection commission will be awarded. Appellant is only entitled to costs of suit.

Accordingly, it is here by ordered that;

1. The appeal succeeds with costs.
2. The judgment of the court-a- quo is here by set aside and is substituted by the following:-
   2.1 The defendant shall pay-
   (a) The plaintiff the sum of $ 411 340. 27.
   (b) Shall pay interest on the said amount calculated at the rate of 28% per annum from the date of summons to date of payment in full.
3. That certain piece of land situate in the district of Salisbury called Lot 2 of Lot 1 of Waterfalls Induna of Waterfalls in extent of 4311 square meters held under deed of transfer number 6126/93 dated 23rd of December 1993 is hereby declared specially executable.
4. That all the moveable properties in defendant`s name is also hereby declared specially executable.
5. The defendant shall pay costs of suit on the legal practitioner and client`s scale.

CHIRAWU- MUGOMBA J: I concur.

Mutamangira and Associates, legal practitioners for the appellant.
Rubaya-Chinuwo Law Chambers, legal practitioners for the respondent