DISTRIBUTABLE (45)

LYTTON INVESTMENTS (PRIVATE) LIMITED
v
STANDARD CHARTERED BANK ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & BHUNU JA
HARARE: 30 JULY 2020

L. Madhuku, for the appellant

D. Tivadar, for the respondent

GUVAVA JA:

1. This is an appeal against the judgment of the High Court (the court *a quo)* dated 28 November, 2018 dismissing the appellant's claim for damages in the sum of USD320 000 for breach of contract.

2. At the close of arguments by counsel, we dismissed the appeal with costs and indicated that the reasons for this decision would be availed in due course. These are proffered hereunder.

FACTUAL BACKGROUND

3. The appellant is a company duly incorporated in terms of the laws of Zimbabwe. The respondent is also a company incorporated in terms of the laws of Zimbabwe and is registered as a commercial bank. Sometime in March 2013, the parties entered into a loan agreement in terms of which the respondent granted a short-

term loan facility to the appellant for an amount of USD160 000. In terms of the loan agreement, the appellant was to finance its business activities, particularly the procurement of raw materials. The appellant was also obliged to pay the respondent an amount equivalent to 4.5% of the value of the loan to cover the respondent's costs of establishing the loan facility.

4. The respondent did not dispense all the money offered in terms of the agreement. The appellant issued summons against the respondent claiming damages in the sum of US$320 000 for breach of contract and interest at the prescribed rate calculated from the date of the summons to date of full payment. The claim for damages arose from the allegation by the appellant that it failed to access the agreed amount which resulted in its failure to procure raw materials for its business activities thereby causing loss in business opportunities and profits. The appellant alleged that despite having paid the loan facilitation fee the respondent failed to advance the full loan amount and only advanced a paltry amount of US$61 803.50.

5. In its defence, the respondent averred that the appellant had entered into a loan contract in 2012 (the 2012 Facility) for the sum of US$40 000. On 18 March 2013 the parties entered into a new loan contract under a facility letter titled 'Facility Letter (Uncommitted) – Zimbabwe' (the 2013 Facility). The appellant had failed to pay off the 2012 facility and it was rolled over into the 2013 facility. The respondent averred that the 2013 facility had express terms which were agreed to by the appellant which entitled the appellant to access a sum of US$40 000 which

was a short-term loan and which would be used by the respondent to immediately settle the 2012 facility.

6. The respondent further averred that in terms of the agreement, the appellant had been offered access to four facilities and that the appellant had only accessed the short-term loan of US$40 000 and an Importing Invoicing Financing facility in the sum of US$21 802.50. The respondent stated that in processing the loan facilities the appellant was obliged to pay a non-refundable Management Fee of 3% of the total limit of the 2013 Facility. The appellant was also obliged to deposit a minimum of US$45 000 monthly instalment into their main Standard Chartered Bank operating account commencing 31 May 2013 (the deposit covenant).

7. The respondent stated that between September 2013 and March 2014 the appellant failed to meet the deposit covenant in terms of the 2013 facility several times. When the 2013 facility expired on 12 November 2013 the appellant had accessed US$61 802.50 and made payments reducing the balance to US47 302.50. The appellant went on to apply for another loan facility in 2014 with the outstanding amount from 2013 being rolled–over to 2014. The 2014 loan facility was granted by the respondent in the sum of US$50 000. The respondent also averred that it was not liable to pay damages to the appellant as the parties had entered into an uncommitted loan facility. In terms of such a facility the respondent was not obliged to disburse funds at the mere request of the appellant.

8. It also alleged that the appellant failed to submit pro forma invoices in terms of the agreement and only submitted one invoice for US$21 802.00 which was duly met.

FINDINGS BY THE COURT *A QUO*

9. The issue that the court *a quo* grappled with was to determine what the terms and conditions of the 2013 Facility between the appellant and the respondent were, and whether or not they had been breached. The court *a quo* found that the facility letter of 2013 provided for a facility which was uncommitted. By signing the facility letter, the appellant agreed to be bound by its terms including the master credit terms which were part of the agreement. It further found that the definition of uncommitted facility had no bearing on the signing of the contract but rather the nature of the contract itself. It found that the agreement is of a temporary nature and that the entity that gives the money has a discretion over whether or not to disburse the money. As such the court took the view that the understanding by the appellant that the agreement was uncommitted until it was signed was ill-conceived as an agreement does not become binding until signed by the parties.

10. The court *a quo* further found that the appellant was required to present pro forma invoices from suppliers for payment thus the understanding by the appellant that it would receive the entire facility in one lump sum payment had no basis. The terms of the facility did not provide for a facility of US$160 000 but for a facility limit of that amount and the respondent was not under any obligation to lend the entire facility of US$160 000 all at once.

11. It also found that the submission of pro forma invoices for the utilisation of the loan was key, as the importation of raw materials was critical to the advancement of the loan. A single pro forma invoice for US$ 21 802,50 was made on time and was duly processed. The court *a quo* further found that there was no proof that the appellant submitted other invoices for the balance of the raw materials in March 2013. The court found that the other invoices were only submitted in June 2013. This was way after the requirement to pay the deposit had come into effect.

12. In addition, the court *a quo* found that the terms were clear that the facility was uncommitted. Thus, the court *a quo* came to the conclusion that, the *contra proferentem* rule was inapplicable. The facility being uncommitted, the appellant could only receive the full loan amount if it met all the conditions of the facility. In the final analysis, the court *a quo* found that the appellant failed to deposit the required sum of US$45 000 by 31 May 2013. Once it failed to fulfil the deposit covenant, the respondent was entitled at its discretion, to refuse to disburse any further amounts under the loan agreement. In the result, the court *a quo* found that the appellant had failed to show that the respondent had breached the agreement and therefore had failed to prove its case for damages.

13. Aggrieved by the decision of the court *a quo*, the appellant lodged this appeal on the following grounds:

1. "The court *a quo* erred in failing to find that the appellant submitted to the respondent, in March/April 2013, all pro-forma invoices that were needed for payment, by the respondent, to the appellant's suppliers of raw materials.
2. As an alternative to 1 above, the court *a quo's* factual finding that the Appellant did not, in March/April 2013, submit any additional pro-forma

invoices beyond the invoice of US$21 802.50 is, on the evidence, irrational in the sense that it is a conclusion that no reasonable judge could have reached.

3. The court *a quo* erred in failing to find that the Respondent breached the contract between the parties when it failed and/or neglected to honour the Appellant's pro-forma invoices submitted in March/April, 2013 in respect of semi-gloss paper.

4. The court *a quo* erred in not finding that the Appellant's obligation to deposit an amount of US$45 000 on 31st May 2013 did not arise as the Respondent had already breached the contract before that date.

5. The court *a quo* erred in failing to find that the 'uncommitted facility' to the extent that it may have given Respondent a discretion not to advance the agreed loan, was contrary to public policy and, therefore, void.

6. The court *a quo's* finding that the Appellant's case for damages in the sum of US$320 000 was not proved is, on the evidence, irrational in the sense that it is a conclusion that no reasonable judge could have reached."

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

14. In motivating the appeal, Mr *Madhuku*, counsel for the appellant submitted that the court *a quo* made irrational findings of fact which warranted interference by this Court. He argued that it was common cause fact that the appellant had submitted pro forma invoices for the purchase of raw materials to the respondent in terms of the agreement.

Counsel further argued that the respondent had failed to honour the loan agreement between the parties by refusing to pay the amount due in terms of the pro forma invoices that had been submitted. He however admitted that the appellant did not have any documentary evidence to prove that the pro forma invoices had been submitted to the respondent. He nevertheless maintained the position that the respondent was in possession of the pro forma invoices as per the agreement between the parties. He thus averred that the respondent had breached

the loan agreement. In closing he submitted that the court *a quo* erred in disbelieving the appellant's evidence that it had submitted the pro forma invoice when there was no basis for disbelieving the appellant's witness.

I note in passing that the appellant's counsel did not motivate the other grounds of appeal in submissions, limiting himself, in the main, to grounds 1-3. As they were not motivated, they may properly be deemed abandoned.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

15. *Per contra*, counsel for the respondent stated that in terms of the loan agreement the appellant had to pay a deposit of US$45 000 by 31 May 2013. Counsel argued that the appellant failed to pay the deposit covenant and as such the respondent had the option to decline to pay the pro forma invoices which had been submitted.

Counsel further argued that the appellant had failed to prove that all the pro forma invoices had been submitted in March 2013 when the respondent paid for other invoices. He also argued that the invoices had been submitted in June 2013 after the appellant had failed to pay the deposit covenant which had to be paid on or before 31 May 2013. In the circumstances it had no obligation to pay for the invoice.

Counsel argued that the appellant failed to provide proof to show that it had provided the other invoices in March/April 2013 thus the respondent could not be said to have breached the agreement. He further submitted that, in any event, it was the appellant which had breached the terms of the agreement as it failed to

deposit the amount of US$45 000 every month in accordance with the deposit covenant. He therefore prayed for the dismissal of the appeal with costs.

ISSUE FOR DETERMINATION

It seems to me that, when regard is had to the arguments raised before the court, only one issue falls for determination. This is whether or not the court *a quo* erred in dismissing the appellant's claim for damages on the basis that there was no breach of contract by the respondent.

APPLICATION OF THE LAW TO THE FACTS

16. It is common cause that the appellant and the respondent had a long business arrangement. It is also common cause that the dispute between the parties arose after the operationalization of the March 2013 loan facility which was titled as the 'Facility Letter (Uncommitted). In determining this case it is necessary to define the meaning of an uncommitted facility. The appellant submitted that the court *a quo* erred in its interpretation of the term 'uncommitted facility'. It argued that if the term is given the interpretation that the court *a quo* made, it would fall in the same category as 'conclusive proof certificates' that the courts in Zimbabwe and South Africa have declared to be contrary to public policy. It seems to me that in order to place this term in its proper context it is necessary to examine the actual words and how they were incorporated into the agreement.

17. The 2013 loan facility issued by the respondent on 18 March 2013 to the appellant was made on the following terms:

> "…the terms and conditions set out in this facility letter (the 'Facility Letter'), the Master Credit term (Uncommitted), the Standard Terms, the General Trade Terms and the Terms and Conditions for foreign Exchange Business."

Clause 1.3 (d) of the Master Credit Terms (Uncommitted) also provides that:

> "Uncommitted: Regardless of any other provision of the agreement, each facility is uncommitted and accordingly it is made available to each designated borrower at the bank's sole discretion. The bank will have no obligation to make any utilisation under, or make available any part of, any facility." (emphasis added)

18. The term "uncommitted facility" is clear and unambiguous. It requires no interpretation as it means exactly what it says. In fact the agreement itself interprets the provision. The respondent had no obligation to disburse any of the funds under the facility. There was therefore no commitment to disburse funds by the respondent. It should also be noted that the appellant, in all its arguments, has not made any submissions as to how the interpretation of the term 'uncommitted facility' given by the court *a quo* is contrary to public policy. Counsel merely made a bald averment that it is similar to 'conclusive proof certificates' but without explaining how these terms mean the same thing.

19. It is our view that the appellant has not established a proper cause to set aside the court *a quo's* findings on this point. The fact that the loan facility advanced to the appellant was uncommitted is clear from the terms of the agreement itself. The respondent in terms of the express terms of the agreement had an absolute discretion as to the amount it would advance to the appellant. The appellant entered into the loan agreement with the full knowledge of the fact that the loan

facility was uncommitted. The doctrine of freedom of contract allows parties to contract on any terms that are not contrary to law.

20. The appellant, by signing the contract, is deemed to have a clear knowledge that the facility was 'uncommitted' and the import of such an agreement. The contract was not induced by fraud or any undue influence. Thus, the appellant signed the contract with a free will. It would be wrong for the appellant to claim damages flowing from its own disdain of the terms of the agreement.

The principle of the *caveat subscriptor* rule applies with equal force herein. The appellant appended its signature to the loan facility fully aware that the facility was uncommitted. In the case of *Muchabaiwa v Grab Enterprises* (Pvt) Ltd 1996 (2) ZLR 691 (S) at 696 B, this Court stated that:

> "The general principle which applies to contracts and commonly designated as caveat subscriptor, is, that a party to the contract is bound by his signature, whether or not he has read or understood the contract."

21. The second point that this Court was thus seized with in determining whether or not the respondent had breached the agreement was whether the court *a quo* erred in finding that the appellant did not submit any pro-forma invoices in March 2013. The appellant contends that the court *a quo* erroneously made factual findings to the effect that the appellant did not submit any pro-forma invoices in March 2013. On that basis appellant alleges that the court *a quo* wrongly proceeded to find that it breached its obligation when it failed to deposit US$45 000 by 31 May 2013.

22. The court *a quo* in dismissing the appellant's claim made factual findings. It is now an accepted principle of our law that appellate courts will not readily

interfere with factual findings by a lower court. In *ZINWA v Mwoyounotsva* SC 28/15 the Court expounded the position to be followed by an appellate court where it is requested to interfere with factual findings by a lower court. The Court held at p 7 that:

> "It is settled that an appellate court will not interfere with factual findings made by a lower 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: or that the decision was clearly wrong."

The same principle was emphasised in *Friendship v Cargo Carriers Ltd* SC 1/13**,** at p 6 where the court held that;

> "It is now settled that an appellate court will not interfere with the exercise of discretionary power by a lower court unless it is shown that the lower court committed such irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision."

See also *Reserve Bank of Zimbabwe v Granger and Anor* SC *34/01, at pp 5 to 6*

23. Thus an appellate court will only interfere with factual findings of a lower court if the findings are grossly unreasonable. The appellant had the o*nus* to show that the factual findings of the court *a quo* were so unreasonable as to warrant interference by this Court. The appellant did not place any proof before the court *a quo* that it submitted invoices. The only evidence that the appellant sought to produce before the court *a quo* was the evidence of a witness who testified that the invoices had been submitted. The court *a quo* did not believe the witness.

24. The appellant's witness conceded under cross examination that the appellant had no proof that the pro forma invoices had been submitted to the respondent. In addition, the appellant also did not produce proof that it submitted pro forma invoices as per the evidence of the witness. It is this Court's view that the court *a quo* set out and weighed up the evidence placed before it with clarity such that there is no basis for interference by this Court.

25. The agreement between the parties obliged the appellant to deposit the sum of US$45 000 every month as proof of its ability to repay the loan. The first instalment was due on 31 May 2013. The appellant failed to make the deposit. The appellant thus failed to comply with the deposit covenant in terms of the agreement. The court a quo's findings that an uncommitted facility is an agreement in which a lender only pays the money loaned to the borrower at its discretion cannot be faulted. The further finding that the pro forma invoices were submitted after the appellant had defaulted on the deposited covenant cannot be impugned. It is our view therefore that the claim that the respondent was in breach of the contract has not been substantiated.

DISPOSITION

26. The appellant entered into an uncommitted facility agreement on its own accord. Such a facility provided that the respondent had a discretion on whether or not to disburse further funds to the appellant. The appellant agreed that it had to make a deposit into its account with the respondent in the sum of US$45 000 every month. It is not in dispute that the appellant failed to make such deposits. The appellant failed to prove that it provided pro forma invoices in March 2013.

Clearly the court *a quo* cannot be faulted for coming to the conclusion it did that the appellant had failed to prove on a balance of probabilities that it was entitled to any damages.

27. With respect to costs we saw no reason to depart from the general rule that costs follow the cause.

28. It was for the foregoing reasons that this Court unanimously found that there was absolutely no merit in the appeal and dismissed it with costs.

GWAUNZA DCJ: I agree

BHUNU JA: I agree

Mundia & Mudhara, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners