ELASTO HILARIOUS MUGWADI
versus
WEBCRAFT INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 20 July 2016

CIVIL APPEAL

B Maruva for appellant
S T Mutema for respondent.

CHITAKUNYE J: In July 2012 the appellant issued summons in the Magistrates Court against Israel Kembo and the respondent. Israel Kembo was cited as the first defendant and the respondent as the second defendant. The appellant's claim against the defendants, jointly and severally, one paying the other to be absolved was couched as follows:

(a) First defendant to resurvey Plaintiff's farm for underground water and to drill a fresh borehole at no additional cost to Plaintiff or in the event of absolution.

(b) Second Defendant to survey and drill a fresh borehole on plaintiff's farm at no cost to the Plaintiff.

Alternatively

(c) Payment of the sum of US$ 2 530.00 (two thousand five hundred and thirty United States dollars) being the cost incurred by Plaintiff in payment to Defendants for surveying and drilling and wasted seed plus interest at the prescribed rate of 5% per annum from the date of summons to the date of full payment.

(d) Costs of suit at an Attorney-Client scale.

The defendants duly filed their defences to the action. However on the trial date Israel Kembo was in default and so a default judgement was entered against him.

The trial proceeded as between the appellant and the respondent. The appellant was the only witness for his case and a Mr Charles Tsiga gave evidence for the respondent.
At the end of the trial the trial magistrate dismissed the appellant's case with costs.

The appellant being dissatisfied with the judgement appealed against the entire judgment to this court.

The grounds of appeal were couched as follows:

1. The court *a quo* misdirected itself, such misdirection amounting to an error in law and fact in holding, on the evidence before it, that Appellant had been misled by the inaccurate findings of the second respondent (Israel Kembo) and that 1st respondent was merely contracted to drill a 40 metre borehole and Appellant could not for that reason be entitled to specific performance, when in actual fact the contract was for drilling an irrigation borehole.

2. The court *a quo* further erred and misdirected itself at law and in fact by holding, on the evidence before it, that 1st respondent had complied with the terms of the drilling contract when evidence led was clear that 1st respondent did not carry out capacity testing and that the casings inserted in the borehole were not perforated causing a low water yield not sufficient for irrigation purposes.

3. The court *a quo* further misdirected itself, such misdirection amounting to an error in law and fact in holding on the evidence before it, that appellant was not an expert witness thereby discrediting his evidence, when his evidence was based on a letter that had been drafted by the 2nd respondent who is a borehole drilling expert advising Appellant of the wrong procedures and wrong drill bits that 1st respondent had used in drilling appellant's borehole.

4. The court *a quo* further misdirected itself, such misdirection amounting to an error in law and fact in holding that evidence by the appellant that the casings were not perforated was nothing more than his mere say so, when it was accepted in evidence by the 1st respondent's manager who was its representative, that he was not at the site when the borehole was drilled and that all his evidence was based on hearsay evidence. It is unbelievable, if not shocking, that the court a quo chose to embrace hearsay evidence and apply it to controvert factual evidence of the Appellant who was on site monitoring the borehole drilling from start to finish.

The basic facts giving rise to this case were that the appellant entered into a verbal contract with Israel Kembo for the said Israel to survey and site a suitable site for the drilling of a borehole for irrigation. This was to be sited in the field the appellant had planted wheat

seed. The appellant duly paid US$150-00 to Israel for the survey and siting. Israel duly sited a position he believed would yield enough water for the intended purpose.

The appellant then entered into a verbal contract with the respondent for the respondent to drill the borehole whose survey and siting had been done by Israel. The contract was for drilling and casing a 40 metres deep borehole. The respondent was duly paid its fee of US$1800-00 and proceeded to drill the borehole. Trouble arose when that borehole could not yield the required amount of water for irrigation. It was then that the appellant began to question the manner in which the two contractors he had engaged performed their respective sides of the contracts.

The contractors themselves pointed fingers at each other. Israel Kembo blamed the drilling company (Respondent) for not having done its work well hence the non yielding of adequate water whilst the drilling company pointed to Israel as the one who had not done a good job in siting.

Faced with the scenario of accusation and counter accusation as between the two independent contractors, appellant opted to sue both of them jointly and severally.

As already alluded to, on the trial date Israel Kembo was in default and a default judgment was entered against him.

The trial, however, proceeded as between the appellant and the respondent. It was from the evidence adduced from these two parties that the trial magistrate ruled that the appellant had not proved its case and so entered judgment in favour of the respondent.

It is pertinent to point out at the outset that in civil proceedings the standard of proof required is on a balance of probabilities.

In *the* present case, the onus was on the appellant to establish the terms of the contract and to show that respondent had not fulfilled those terms. It was in the fulfilment of that task that the trial magistrate made a finding that the appellant had not proved his case on a balance of probabilities.

In this appeal appellant seeks this court to overturn the findings and conclusion by the trial court.

It is trite that an appeal court has the power to interfere with the decision of an inferior court or tribunal. This must however be done in terms of the law.

Section 31(1) (a) of the High Court Act, [*Chapter 7:06*] states that:

> " On the hearing of a civil appeal the High Court shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;"

In the exercise of its appellate jurisdiction the court of appeal is enjoined to take cognisance of the discretion enjoyed by the trial court as a trier of fact. It is in limited cases that the court of appeal will interfere with the decision of the inferior court.

In *Nyahondo* v *Hokonya & Ors* 1997 (2) ZLR 457 (S) at 460G- 461A, KORSAH JA alluded to the general rule applicable when he said that:

> "I have not been furnished with any reason to depart from the general rule that an appellate court will not interfere with a 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 are so outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion."

In *Barros & Another* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62F – 63A GUBBAY CJ reiterated the general rule when he alluded to the fact that the determination of the trial court involved an exercise of judicial discretion and the exercise of this discretion may only be interfered with on limited grounds. He went on to say that:

> "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 relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing."

The issue is thus: given the evidence adduced did the trial magistrate misdirect himself to an extent where it could be said a reasonable court or person applying his mind to the facts could not have come to such a decision or did the court *a quo* apply wrong principles such that it failed to appreciate the issues before it.

The first two grounds of appeal pertain to the terms of the contract and whether respondent complied with those terms.

The trial magistrate's findings were to the effect that the contract between appellant and respondent was for respondent to drill a 40 metre borehole with casings. The contract did not include capacity testing as demanded by appellant. The question of whether the borehole yielded adequate water for irrigation was on the shoulders of the one who had done siting and not on the drilling company.

It is my view that the trial magistrate cannot be faltered in coming to that conclusion. The evidence adduced showed clearly that respondent's task was to drill a 40 metre borehole at a site that had been determined by Israel Kembo. It was not the respondent's responsibility to ensure that the site had adequate water for irrigation.

The appellant conceded that he paid $1 800-00 which fee had been advertised by the respondent as being for 'drilling a 40 metre borehole and casing.' In that same advert respondent had indicated the fee for capacity testing as $250-00. The appellant did not pay this fee. In any case capacity testing would not have changed the quantity of water to be realised from the borehole.

In as far as appellant accepts that respondent drilled a 40 metre borehole at a site determined by Israel Kembo it means the respondent fulfilled its part of the contract.
I did not think the appellant was serious in arguing that the respondent should have made it a point that the borehole had adequate water for irrigation. Clearly this was not within the mandate of the respondent. In as far as the respondent was made aware of the purpose of the borehole being for irrigation; all that the respondent was required to do was to drill a borehole of the size/diameter suitable for irrigation.

The appellant argued that respondent used a smaller drill bit to the one suitable for drilling boreholes for irrigation.

The respondent admitted to using the 125 mm drill bit but contended that that size is suitable for irrigation as well. At p 27 of the record of proceedings the following exchange took place between appellant's counsel and respondent's witness under cross examination:-

"Q. Did you read exhibit 2?

A. Yes

Q. It says it was wrong casing used and drill bits of 125mm. Is that wrong?

A. Yes

Q. What is the size of the appropriate casing?

A. For irrigation or domestic the process used is the same and the pipes are the same. The 125mm we used depend on the soil type. The Standard Association of Zimbabwe and the Ministry approved 125mm and the size of the casings for domestic and irrigation purposes."

This exchange confirms that there is no dispute on the size of the drill bits and casings

used. The question is on their appropriateness. The appellant would have done himself good by calling expert evidence if he seriously believed the low water yield was due to the size of the drill bits and casings used. The appellant for some reason thought he could rely on a letter (exh 2) from first defendant (Israel Kembo). Unfortunately the appellant's case against this defendant called into question his expertise. In any case, as already alluded to, the one who did the siting could not be expected to accept responsibility for poor siting. Further the evidential value of the letter is something that the appellant should have considered as the letter was not a statement on oath but written to defend oneself and pointing at the drilling company as the one at fault. It was wrong for the appellant to have expected court to treat that letter as 'expert evidence.' It was a letter for self exoneration and not of expert opinion.

Another aspect worth noting is that in para(s) 5 and 6 of his declaration the appellant stated that:

> "The Defendant's inaccurate siting and unprofessional findings misguided the Plaintiff who went on to hire second Defendant to drill on the pointed site which yielded very low water.
>
> The plaintiff under the mistaken belief and guidance by first defendant engaged second defendant who drilled a (40) forty metres deep borehole which yielded very little water that is not sufficient for the intended irrigation on the farm and hence the Plaintiff has suffered serious prejudice."

The defendant being referred to is Israel Kembo. Having so stated in his declaration plaintiff confirmed the same in his evidence when at p 17 of the record of proceedings he conceded that if a survey is wrong it will have a direct impact on the results of the drilling.

Under cross examination appellant said that para 5 of his declaration reflected his initial reaction to the low water yield but upon getting Israel's reaction to the drilling he now blamed both the one who sited and the one who did the drilling; clearly showing he was not sure of the cause for the low water yield. This uncertainty should have spurred him to engage an independent expert to provide expert opinion on which he could rely on.

In the circumstances it cannot be said that the trial magistrate misdirected himself by holding that the appellant had been misled by the inaccurate findings by Israel on the siting of the borehole when appellant in the above cited para(s) 5 and 6 of his declaration alleges the same.

From the above it should also be clear that the terms of the contract were for the respondent to drill a 40 metres deep borehole and to install casings. This the respondent did. The size of the drill bit used was not shown to have been inappropriate for the purpose for

which the borehole was being sunk. As noted above the plaintiff did not pay for capacity testing and so should not have expected this to be part of the contract.

The appellant's third ground of appeal is hard to comprehend. He alleges that the trial magistrate misdirected himself in holding that the appellant was not an expert witness thereby discrediting his evidence, when his evidence was based on a letter that had been drafted by the second respondent (Israel Kembo) who is a borehole expert advising the appellant of the wrong procedures and wrong drill bits that the first respondent had used in drilling the appellant's borehole. It is common cause that appellant is not an expert in the field of siting and drilling of boreholes. Tendering a letter, exhibit 2, did not make him an expert either.

Further, a reading of the record of proceedings does not show that Israel Kembo was shown to be an expert or that the letter he drafted was of an expert witness. There was no evidence showing the expertise Israel possessed. It would appear that appellant was seriously mistaken in believing that tendering a letter turns that letter into 'expert evidence.' Had he been desirous of tendering the letter as expert evidence he ought to have called the author to testify on it. As it is the letter is just an unsworn statement of self exoneration by a co-defendant in the matter. There was no misdirection by the magistrate on this aspect.

The last ground of appeal was equally without merit. It is clear from the record of proceedings that whilst respondent's witness stated that he was not at the drilling site, he nevertheless stated that casings are taken to the site when they are already perforated. They are not perforated at the site. He indicated that to his knowledge the casings were perforated. It is also not disputed that the witness had in fact asked for the casings to be uprooted so that both parties can have sight of the state of the casings. His only condition was that the appellant should meet the costs of this as he believed the casings were perforated. The appellant declined to meet the cost despite the fact that he was the one who had to discharge the onus of proof.

It is my view that after a careful analysis of the evidence adduced during the trial the trial magistrate did not misdirect himself in the manner alleged by the appellant. The appellant simply failed to prove his case on a balance of probabilities.

If anything it is appellant who seemed not to appreciate his case against the respondent. For instance the relief he sought against the respondent in the court a quo was couched as follows:

"The plaintiff's claim against First and second Defendant, jointly and severally, the one paying the other to be absolved is for:

(a) First Defendant to resurvey Plaintiff's farm for underground water and to drill a fresh borehole at no additional cost to plaintiff **or in the event of absolution.**

(b) Second Defendant to survey and drill a fresh borehole on Plaintiff's farm at no cost to the plaintiff."(emphasis is mine)

In terms of the main claim for specific performance, respondent was only to be ordered to survey and drill the borehole in the event of an absolution from the instance in Israel Kembo's case. In *casu*, there was no absolution from the instance in the claim against Israel Kembo. He had a default judgment entered against him.

I am thus of the view that no case for specific performance was made against respondent even on this aspect.

The alternative claim for $2530-00 was also not proved. It was common cause from the evidence led that the appellant paid $150-00 to Israel for survey and siting and then $1800-00 to the respondent for drilling and casing bringing the paid sum to $1950-00. No evidence was led on the sum of $580-00. The appellant seemed content with just alleging he incurred cost of $2530-00 without addressing the issue of proof of that sum.

In totality I find that the trial magistrate did not err or misdirect himself in any of the aspects alleged by appellant.

Accordingly the appeal is hereby dismissed with costs.

NDEWERE J concurred

Mugwadi & Associates, appellant's legal practitioners
Gunje and Chasakara Law Firm, respondent's legal practitioners