WATERWRIGHT IRRIGATION (PVT) LTD
versus
KUDZAI CHIDAVAENZI

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 16 March 2017 & 31 January 2018

Civil appeal

A Masango, for the appellant
T Chagudumba, for the respondent

CHITAKUNYE J: The appellant sued the respondent for the return of a ROTRIX Rainmaker Irrigator machine alternatively payment in the sum of $8 900.00 being the purchase price for the particular machine. The respondent defended the action.

After hearing the contested matter the magistrate in the court a quo ruled in favour of the respondent.

Dissatisfied with the court *a quo*'s judgment, the appellant launched this appeal.

The grounds of appeal were couched as follows:

1. The court *a quo* grossly erred in dismissing the Appellant's claim with costs yet the court a quo had made a finding that Respondent on the 20th June 2013 left the Plaintiff with US$8 900.00 and thus ought to have granted the Appellant's claim and not dismiss it.
2. The Court *a quo* grossly erred in making a factual finding which is outrageous in its defiance of logic that no sensible person applying his mind to the same facts would arrive at that conclusion in holding that exhibits 1, 2, 3,5,6,7 were not in dispute but proceeded to dismiss Appellant's claim yet these exhibits clearly showed that a refund of US$ 8 900.00 was given to Respondent hence she could not dismiss Appellant's claim.
3. The Court *a quo*'s decision was irrational when it concluded that there were inconsistencies between the Appellant's witnesses' testimonies yet no such

inconsistencies were proved as it was not disputed that defendant had visited Appellant's premises demanding a refund.

4. The Court *a quo* grossly erred in making a factual finding which finding was irrational, in concluding that Appellant proffered no reasonable explanation for not following company procedures for refunds, yet it was clearly stated that Respondent had complained and freaked out and caused Appellant to fail to follow the company's proper procedures.
5. The Court *a quo* grossly erred in making a finding of fact which finding was clearly wrong that Defendant was a credible witness yet it was agreed that Defendant's name appeared in exhibits 1, 2,3,4,5, and 6 as having received a refund and as such could not be a credible witness as he had not proffered a reasonable explanation why his name appeared on those exhibits.

In the circumstances of the above grounds of appeal appellant sought the setting aside of the judgement of the court *a quo* and its substitution with an order allowing the appellants' claim with costs on a legal practitioner and client scale.

This court is thus called upon to determine whether the trial magistrate erred in the manner stated above or in any other manner from the evidence led which would warrant this court's interference with the judgement of the court *a quo*.

It is trite that an appellant court will not lightly interfere with the decision of a lower court. It must be appreciated that in most cases the judicial officer will have exercised his or her judicial discretion in assessing the evidence adduced and coming to a particular decision. Such exercise of discretion will only be interfered with in limited circumstances.

The test for interference with the lower court's decision was laid down in *Barros and Another* v *Chimponda* 1999 (1) ZLR 58(S) where at 62G- 63A GUBBAY CJ stated 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. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

It is thus important that the appellant shows that the court *a quo* erred in the exercise of its discretion such that no reasonable person could have arrived at the decision it did given the same factors. (*Nyahondo* v *Hokonya & Ors* 1997(2) ZLR 457).

In instances where the grounds of appeal are based on findings of fact, in *ZINWA* v *Mwoyounotsva* 2015 (1) ZLR 935(S) at 940E-F ZIYAMBI JA aptly stated 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 rationale for this was clearly stated in *Chimbwanda* v *Chimbwanda* SC 28-02 wherein ZIYAMBI JA remarked that:

> "it is trite in our law that an appellate court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them. See *Hughes* v *Graniteside Holdings (Pvt) Ltd* SC-13-84. The exception to this rule is where there has been a misdirection or a mistake of fact or where the basis the court a quo reached its decision was wrong."

See *Metallon Gold Zimbabwe* v *Golden Million (Pvt) Ltd* in SC12/15 and *Hama* v *NRZ* 1996(1) ZLR 664 (S) at 670.

In *casu* most of the grounds of appeal pertain to findings of fact. The issue is thus are the findings made by the magistrate so grossly unreasonable or outrageous as to defy logic and warrant this court's interference? In determining this issue it is pertinent to bear in mind that the issues before the trial magistrate were basically whether the respondent visited the appellant's premises on 20 June 2013 and whether appellant refunded respondent the sum of US$ 8 900.00 in respect of the Rotrix Rainmaker irrigator.

The grounds will be analysed in seriatim.

1. The court *a quo* grossly erred in dismissing the Appellant's claim with costs yet the court a quo had made a finding that Respondent on the 2oth June 2013 left the Plaintiff with US$8 900.00 and thus ought to have granted the Appellant's claim and not dismiss it.

The appellant's argument was to the effect that the trial magistrate had in his judgement acknowledged that respondent had visited the appellant's premises on the date in question and had been refunded the sum when he said in his judgment that:

> "From the evidence led by the plaintiff's 1st witness Rungire Mututsa, I make a finding that the defendant on the 20th of June 2013 left the plaintiff's premises with an $ 8 900-00 refund for the Rotrix Rainmaker Irrigator, without signing any document acknowledging receipt of the refund."

The appellant argued that having made such a finding the trial magistrate ought to have granted judgement for the plaintiff as that was the issue for determination.

The respondent on the other hand contended that what the trial magistrate referred to as a finding was in fact not his finding as can be discerned from the rest of the above quoted sentence and subsequent statements. The respondent's counsel contended that a holistic reading of the judgement clearly shows that the magistrate was simply summarising the 1st witness' evidence.

A reading of the judgement shows that the appellant simply chose to take a part of the sentence in the magistrate's judgment whereas a reading of that entire sentence gives a contrary impression.

That sentence and the rest of that paragraph relevant to the issue read as follows:-

> "From the evidence led by the plaintiff's 1st witness Rungire Mututsa, I make a finding that the defendant on the 20th of June 2013 left the plaintiff's premises with an $ 8 900-00 refund for the Rotrix Rainmaker Irrigator, without signing any document acknowledging receipt of the case refund and yet the same witness produced exhibit number 4 in evidence, which is a petty cash voucher allegedly drawn up on the 20th of June 2013. I make a finding that this petty cash voucher is inconsequential to the claim before the court given that the fact that it shows that the 1st witness authorised $8 900.00 in cash allegedly going to the defendant, does not in any way prove that the defendant received the $8900-00 from the plaintiff."

I am inclined to agree with the respondent's contention in that had the magistrate made a finding, which is basically a conclusion after considering the evidence, he would not have gone on to say:

> ".. and yet the same witness produced exhibit number 4 in evidence, which is a petty cash voucher allegedly drawn up on the 20th of June 2013. I make a finding that this petty cash voucher is inconsequential to the claim before the court given that the fact that it shows that the 1st witness authorised $8 900.00 in cash allegedly going to the defendant, does not in any way prove that the defendant received the $8900-00 from the plaintiff."

This latter part confirms the magistrate was in fact juxtaposing the two aspects of the 1st witness' evidence after which he did not believe in the veracity of those statements as proof that a refund was effected.

This is a situation of a poorly written judgement where by the magistrate may not have realised the import of the word 'finding' in the first place when he merely meant to restate what the witness had said. A reading of the whole judgement shows that the magistrate did not believe the evidence by the plaintiff's witness. The magistrate did not make matters any better when he did not comment on the grounds of appeal. He could easily have clarified that point

as it was self contradictory and was not in sync with his conclusion that exhibit 4 "does not in any way prove that the defendant received the $8900-00 from the plaintiff."

2. The Court *a quo* grossly erred in making a factual finding which is outrageous in its defiance of logic that no sensible person applying his mind to the same facts would arrive at that conclusion in holding that exhibits 1, 2, 3, 5, 6 and 7 were not in dispute but proceeded to dismiss Appellant's claim yet these exhibits clearly showed that a refund of US$ 8 900.00 was given to Respondent hence she could not dismiss Appellant's claim.

   The trial magistrates finding in this regard was captured as follows:

   "I make a further finding exhibit numbers 1,2,3,5,6 and 7 were not in dispute as they form the basis of the agreed facts so I will not make any determination in their regard."

The appellant's argument in this regard was to the effect that with such findings it was a gross misdirection on the court which amounts to error of law to dismiss the appellant's claim when the exhibits above proved appellant's case and were not disputed.

An examination of the exhibits in question shows that indeed some of the aspects were not disputed. However the undisputed nature of the exhibits did not prove that respondent received the refund. The fact that respondent's name was inscribed on some of the documents was not sufficient to prove receipt of the money. What was required was proof of receipt of the money on the part of the respondent. This is so because the respondent's defence was to the effect that on the date in question he did not go to appellant's premises and further he did not get any refund. It was never his defence that appellant or any of its employees never inscribed his name on any of its documents. In fact most of the exhibits cited were not relevant to the issues at hand.

For instance exhibit 1 is a letter from appellant's managing director to its legal practitioners indicating that a Mr R Mututsa had been authorised to sign legal documents on behalf of the appellant in the case between appellant and the respondent. Such a document was of no effect on the issues at hand.

Exhibit 2 comprises receipts of sums of money paid by respondent when paying for the original 2 Clubman Rotrix machines. Again there was no dispute that respondent paid the money and was issued with receipts. The receipts had nothing to do with the issues at hand.

Exhibit 3 is a 'Goods returned from customer document'. It was common cause that respondent returned the 2 clubman Rotrix machines in exchange for the bigger Rotrix Rainmaker irrigator in question and his account was credited with an adjustment sum.

Exhibit 5 is a print out of ledger entries as at 31st December 2012 showing appellant's clients including the respondent. There is virtually nothing that affects events of 20 June 2013 or an indication that respondent was refunded any money. As noted from its date this was before the event in question had occurred. The entry pertaining to the respondent is in fact dated 21/12/12.

Exhibit 6 pertains to a sum of $2451.00 received from respondent settling his account with appellant. It is dated 12/6/13.This had nothing to do with the alleged refund of $8 900-00. It was common cause respondent had such an account and no issue arose from it.

As can be noted the above cited exhibits were not in issue as they were irrelevant to the issues at hand. They pertained to events before 20 June 2013 and those occurrences were common cause. The appellant's argument that such exhibits proved the appellant's case was clearly without merit. In any case even before this court appellant's counsel could not show how exhibits 1, 2, 3, 5 and 6 proved that respondent was refunded $8 900-00 on 20 June 2013 or that he visited appellant's premises on that date..

The fact of respondent's name being on these documents was neither here nor there as it was common cause that respondent had been appellant's customer for some time. Prior to getting the Rotrix rainmaker irrigator he had in fact bought two smaller clubman Rotrix machines which he returned upon getting the bigger one. So the presence of respondent's names in appellant's records or files should not be of concern. The issue was whether or not respondent had visited appellant's premises on 20 June 2013 and had been refunded $ 8 900-00 to which none of the above exhibits could speak to.

The existence of exhibits 4 and 7 was not disputed. What was disputed was whether they proved that the respondent visited appellant's premises on the day in question and received the refund.

In this regard exhibit 4 is a petty cash voucher prepared and signed by appellant's first witness Mr Mututsa on 20 June 2013. On it is written respondent's name and words to the effect 'Rotrix refund cash 8 900-00.' In his evidence and under cross examination Mr Mututsa confirmed that he is the one who signed that document after he had prepared it. On the portion to be signed by the one authorising the refund it is him who signed. That exhibit has a portion

were the receiver of the money so authorised was supposed to sign and such space is not signed. Even the name of the receiver is not stated at the bottom.

It was in these circumstances that the trial magistrates stated thus of exhibit 4:

> "I make a finding that this petty cash voucher is inconsequential to the claim before the court given that it shows that the 1st witness authorised $8 900-00 in cash allegedly going to the defendant, does not in any way prove that the defendant received the $8 900-00 from the plaintiff."

In the circumstances can it be said the magistrate erred in that regard? I am inclined to say no. The preparation of a petty cash voucher for a refund to a named payee is surely not evidence that the named payee has received the refund. This is a document prepared in anticipation of effecting a refund. The voucher in fact has a space for the payee to sign acknowledging receipt of the refund and this was not signed. Given this scenario it cannot be said that the magistrate's finding on this aspect is irrational or that it is in defiance of logic and that no reasonable person placed in the same position would have come to such a finding.

Clearly this exhibit did not prove receipt of the refund or even that respondent visited appellant's premises on that day.

The last exhibit to consider is exhibit 7. This is a document pertaining to ledger entries in appellant's books of accounts. Amongst the entries is one were respondent's name is indicated against a refund of $8 900-00. I did not hear it contested that these are entries made by appellant's employees in the course of their work. The question appellant was supposed to answer is how do such entries show that the purported refund was received by the respondent.

In the circumstances the findings by the court *a quo* that the exhibits did not prove that the respondent received a refund cannot be faulted.

3. The Court *a quo*'s decision was irrational when it concluded that there were inconsistencies between the Appellant's witnesses' testimonies yet no such inconsistencies were proved as it was not disputed that defendant had visited Appellant's premises demanding a refund.

The appellant argued that there were no inconsistencies in the appellant's evidence as given by its two witnesses and that it was not disputed that respondent visited appellant's premises on the date in question.

The appellant's argument in this regard had no merit. It is incorrect to say that it was not disputed that respondent visited appellant's premises demanding a refund on the day in question. In paragraph 7 of his plea respondent stated, inter alia, that:

> "This is denied. Defendant never went to the plaintiff's premises on the said date and he never received a refund from the plaintiff."

In his evidence in chief the respondent reiterated the point that he did not visit the plaintiff's premises on the date in question. Under cross examination the respondent maintained the same denial.

It is thus difficult to comprehend how the appellant got the impression that it was not disputed that respondent visited the appellant's premises on the day in question.

On inconsistencies, the magistrate noted that the appellant's witnesses contradicted each other on the events that transpired when the respondent is alleged to have visited appellant's premises. In this regard he stated that:

> "The 2nd witness …… testified to the effect that the managing director one Mr. Graham Wright was never within vicinity when the defendant approached her complaining that they had sold him a second hand item and she informed the accountant and the designer, before the defendant proceeded to the designer where he complained and continued to 'freak' out until the accountant went to collect the money which he then handed over to the defendant."

In contrast he stated as follows of the 1st witness:

> "The first witness testified to the effect that on the day in question he was called by the managing director who was in the company of the defendant and the managing director advised him that he was supposed to refund the defendant for the machine."

The question is did the trial magistrate err in concluding as he did? The question is best answered by reference to the record of proceedings. In his evidence in chief the 1st witness stated as follows on the events of the day in question at p 11 of the record:

> "I was called on 25 June 2014 (*sic*) by Graham who was in the company of the defendant who wanted the import documents relating to the machines. From their discussion I was then advised by the Managing Director that I was supposed to refund for the machine. I took the money to defendant in the sales office receive one of the designers was helping him who is based in Zambia and Tanaka Govhele. I counted the money with Tanaka in the presence of defendant and defendant just collected the money and without signing left." (Note the date of occurrence is 20 June 2013 and not 25 June 2014).

Later on when it was put to him that defendant denied going to the appellant's premises and receiving a refund from this witness, the witness stated that:-

> "He came and made threats to go to Standard Association to show that it was a substandard machine and because the Managing director is white he felt that it was going to be a racial issue that is why he said we should refund him the money and we did."

Under cross examination the witness stated that when the defendant came to the premises he spoke to the MD who then instructed him to refund the defendant. He also indicated that he was present when the MD was discussing with the respondent.

The 2nd witness on the other hand gave a narration not in sync with the above. This is clear at pp23-24 of the record wherein the following exchange took place:

"Q. Tell court what transpired when defendant came.

A. He came in the afternoon around lunch time and we had sold him one of our machines and he complained that we had sold him a second hand and he wanted his money back. I told the accountant about the complaint and I also told the designer he was dealing with about the complaint as well."

She proceeded to state that:

"A. defendant got into the designer's office which is next to the reception. It's an open plan office and the designer sits opposite the back in another office and defendant complained and designer addressed him regarding the issue. Defendant continued threatening and the accountant went to get money equivalent to the value of the machine and then he came back to the designer's office, they counted the money and gave to the defendant."

Under cross examination the following took place at pp 25 -26

"Q. Who was present when defendant came?

A. Myself, the accountant and the designer and another one who is based in Zambia were present and when he comes (sic) I could see from the angle at which I was sitting.

Q. Was the MD Mr. Wright present?

A. I don't recall.

Q. In your testimony you said there were three people?

A. He might have been there since his office is not close to mine and I could not see it from where I sit. He also uses the back entrance so he might have been there. I was basically concentrating on the drama that was unfolding so I might not have seen him leave his office."

Under further cross examination the 2nd witness indicated that she was the one who called the 1st witness in this manner:

"Q. So the accountant was the 1st person you told of the drama?

A. I told the designer first and I only called the accountant because defendant wanted his money back and the accountant is the one who handles money….."

Q. The 1st witness testified that the MD was the one to attend to the defendant and the accountant was later called so he was lying?

A. I would not say he was lying because like I said the MD uses the back entrance and if he used that entrance I would not have seen him and if he was standing at an angle I could not see I would not have seen him."

It is apparent from the above that the appellant's witnesses were not in unison regarding who the respondent saw first and who called 1st witness to attend to the respondent. The 1st witness said he was called by the MD to attend to respondent and that the MD was in the company of the respondent. In that company the respondent was speaking to the MD and causing a scene hence the MD agreed to refund him. The MD then verbally authorised the refund. He went and effected the refund in the sales room where there were other people. The 2nd witness on the other hand indicated that as she was at the reception respondent came in and started complaining. She described his conduct as freaking out. She first informed the designer and thereafter called 1st witness by phone to come and attend to the respondent as respondent was demanding a refund. It is 1st witness that the respondent thereafter dealt with leading to the refund

Though the two were agreed that respondent was complaining and making a scene, it is interesting to note that they were not agreed as regards the presence of the MD in all this. They were also not agreed as to who dealt with the respondent leading to the refund. The 2nd witness who gave the impression respondent was always in her sight as he was freaking out somehow did not see the MD in the same room or in the company of the respondent, as what the 1st witness testified.

It may also be noted that the second respondent's version differs materially from the pleadings on this aspect. Paragraph 8 of the appellant's particulars of claim states that:

> "Defendant came on the 20th of June 2013 and had an argument with the Managing Director after which the Managing Director was unduly influenced to refund the money on the basis that Defendant will return the machine. He collected the refund in the amount of US$ 8 900-00 and left."

It is such conflicting aspects of witnesses' evidence that the trial magistrate was referring to. In that regard the magistrate did not err.

The question is whether such inconsistencies are material to the issues at hand. As already alluded to, the issues were on the respondent's visit and being refunded on the day in question. If the witnesses gave two different versions of what transpired when the respondent

came, who he saw and dealt with for the refund to be made, this raises doubts on their evidence and such inconsistencies are material.

It is trite that inconsistencies and contradictions in the evidence of witnesses and pleadings create doubts on the veracity of a litigant's case. The situation is aggravated by the fact that the MD who, according to 1st witness and the pleadings, was the one who was confronted by respondent and unduly influenced in the process to authorise a refund was not called to testify. His evidence could have served to confirm whether he dealt with respondent on the day in question and that he authorised the refund. He would also have shed light on why no proper procedure was done to confirm the refund.

4. The Court *a quo* grossly erred in making a factual finding which finding was irrational, in concluding that Appellant proffered no reasonable explanation for not following company procedures for refunds, yet it was clearly stated that Respondent had complained and freaked out and caused Appellant to fail to follow the company's proper procedures.

The magistrate's finding in this regard was premised on the inconsistencies and contradictions in the testimony by the appellant's witnesses, which inconsistencies and contradictions have been discussed above. The appellant's explanation for failure to cause respondent to acknowledge receipt of the refund was deemed in adequate. For instance the 1st witness' evidence was to the effect that they did not follow the procedures for refunding respondent because the agricultural sector has long term relationships so they believed respondent would be honest like other clients would do. This is a client who had come complaining and had caused a scene. He had been shouting and complaining to them and in the process had unduly influenced the MD to accede to a refund even before the machine was returned. Surely the conduct of the respondent as described by both appellant's witnesses took him out of their ordinary honest clients. The alleged conduct was such that any prudent person would have wanted the respondent acknowledged receipt of the refund. However in this case, the witness did not see the need to cause respondent to acknowledge receipt of the refund by signing on any document.

When asked why they did not call the police if respondent was behaving in the manner alleged the witness said it was because the MD decided to solve the issue amicably. If the situation was such that they could resolve the matter amicably then surely the respondent

should have been made to endorse his signature on the refund document exh 4. That petty cash voucher has a space meant for the recipient to endorse their signature.

The appellant's witnesses other than alleging that the respondent took the money and left without signing for it did not show that the respondent had actually refused to sign for the money upon their request. Surely if they had refunded him the money the logical thing was to demand that he signs for it more so as this was a substantial amount. To take a lackadaisical approach towards the acknowledgment of receipt of such a sum is difficult to comprehend.

It is in these circumstances that the trial magistrate concluded that the explanation proffered was not adequate. I am of the view that the finding by the magistrate in this case cannot be said to be in defiance of logic at all.

5. The Court *a quo* grossly erred in making a finding of fact which finding was clearly wrong that Defendant was a credible witness yet it was agreed that Defendant's name appeared in exhibits 1, 2,3,4,5, and 6 as having received a refund and as such could not be a credible witness as he had not proffered a reasonable explanation why his name appeared on those exhibits.

I am of the view that this ground had no merit at all. The exhibits that appellant's counsel referred to have been dealt with at lengthy and in my view the appearance of respondent's names on those exhibits was of no consequence to the issues at hand. The magistrate's finding on the credibility of the respondent was premised on the inconsistencies in the appellant's failure to adequately explain why the respondent was not made to append his signature on any document acknowledging receipt of the refund whilst the respondent steadfastly maintained his defence.

In conclusion I am of the view that the appellant's arguments have not been enough to persuade this court to interfere with the court *a quo*'s decision. The appeal will thus be dismissed.

Accordingly the appeal is hereby dismissed with costs.

NDEWERE J. I agree ……

Musunga & Associates, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners