Judgment No. HB 130/2002
Case No. HCA 134/2001

CHOICE GLADYS SHOKO

Versus

FABBIE MAGARA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE AND NDOU JJ
BULAWAYO 4 AND 21 NOVEMBER 2002

Appellant in person
Respondent in person

Civil Appeal

NDOU J: The respondent, hereinafter referred to as Ms Magara sued the appellant hereinafter referred to as Ms Shoko at Gweru Magistrates Court. The facts are that Ms Magara runs a college and provides professional services as a hairdressing tutor. Ms Shoko was one of her students between January and August 2000. Ms Shoko left Ms Magara's college armed with what is termed a certificate of attendance.

For these services Ms Magara claimed at the Magistrates Court, that $3 300 was due and still owing. Ms Shoko's case was that she paid Ms Magara all the sums due for the professional services rendered. The sole issue for determination, by the court *a quo*, was whether Ms Shoko owed Ms Magara $3 300. In other words, did Ms Shoko pay for all the services rendered in terms of their agreement?

Ms Magara testified and gave details of how she arrived at the figure of $3 300. Her computation seems straight forward and nothing turns on it. Under cross examination she was adamant that Shoko did not pay the amount claimed. She accepted that in respect of receipt number 134 Ms Shoko made some payment but it was for $255 only. The receipt was later changed to read $755. This amount was, however, not part of this claim.

Ms Magara called two witnesses in support of her case. These were her employees, Anna Mushunje and Priscillah Ncube. The testimony of these witnesses was only on what was common cause and as such did not take the case any further. Ms Shoko testified. She admitted owing Ms Magara for professional services but averred that she paid up all that was due. The circumstances of the case are such that the issue had to be determined by the court *a quo* making a finding on credibility. The assessment of credibility is the province of the trial court. There are several decisions of the Supreme Court which amplify this point. In *S* v *Mlambo* 1994(2) ZLR 410 (S) at 413 GUBBAY CJ stated:

> "The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense".

In *Alice Shoko* v *S* SC-118-92 at page 8 of the cyclostyled judgment EBRAHIM JA stated as follows:

> "A court of appeal will not interfere with a trial court's assessment on credibility lightly. There has to be something grossly irregular in the proceedings to warrant such interference. This is because the trial court, by having the witness before it, is better able to make an assessment on demeanour and all other factors relevant in assessing credibility. The appeal court, on the other hand, is confined to the record."

In the case of *Joseph Mbanda* v *S* SC-184-90 at page 7 of the cyclostyled judgment GUBBAY CJ stated as follows:

> "An appellate court must not however overlook that the trial court's living through a drama of a case is in a unique position to evaluate the evidence in its proper perspective. To justify the conclusion that the assessment made by a trial court of the credibility of the witnesses is wrong, an appellate court must be persuaded that the finding defies reason and common sense. Questions of credibility are par excellence the province of the trial court."

Lord MacMILLAN in *Watt* v *Thomas* [1947] 1 All ER 582 (HL) at 590 B-D captured this principle appropriately in the following terms:

> "The appellate court had before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements as difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion, but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone completely wrong."

These remarks were quoted with approval by the Supreme Court in *S* v *Isolano* 1985(1) ZLR 62 (SC) at pages 63C-G. See also *Hughes* v *Graniteside Holdings (Pvt) Ltd* SC 13-84 at pages 10-14 of the cyclostyled judgment.

In casu, the crux of the matter is the trial magistrate's finding on the credibility of Ms Magara and Ms Shoko. The trial magistrate believed Ms Magara and made a positive finding in her favour. The trial magistrate was not impressed by Ms Shoko as a witness. The trial magistrate found the latter to be untruthful and attributed the tampering with receipt 134 to her dishonesty. On a careful reading of the record of proceedings this finding does not defy reason or common sense. There is no indication that this finding is affected by material inconsistencies and inaccuracies. If there are inconsistencies in this matter, they are traceable on the part of Ms Shoko's case.

For example she cannot give a satisfactory explanation why she made alterations on receipt 134 and thereafter presented it as evidence to show that she paid more than what she actually did. There is no gross irregularity warranting interference with the finding of the court *a quo*.

In the circumstances, I would accordingly dismiss the appeal with costs.

Chiweshe J …… I agree