Judgment No. HB 135/04
Case No. HCA 45/03

ROSEMARY NDLOVU

Versus

TADISON E. HOGWE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 18 OCTOBER AND 9 DECEMBER 2004

Civil Trial

NDOU J: This is an appeal against the judgment of a Zvishavane Magistrate handed down on 18 August 2003. Briefly the facts giving rise to the suit are the following. The appellant gave the respondent $6 000 to buy a bovine on her behalf. This transaction took place in 2001 when $6 000,00 was sufficient to buy a beast. The respondent did not deliver on his part of the bargain resulting in the appellant instituting the aforesaid proceedings for "Return (sic) of one head of cattle or the value of $200 000,00 plus costs of suit $1 050,00 only". I believe the question of "return" does not arise here, what seem to be intended is "deliver". The court *a quo* ordered as follows:

"(1) For the plaintiff – defendant is ordered to pay back plaintiff's $6 000,00 which was meant to buy one head of cattle.

(2) And $1 050,00

(3) Total amount to be paid $7 050,00."

The appellant was not satisfied with her partial success and appealed to this court. In her notice of appeal the appellant stated *inter alia*, "I know that he bought the beast and I have evidence to that effect, so I want my beast. He wrote a letter on 17 December 2002 calling me to come and collect the beast." In her submission before us she stated that this letter was produced during the trial in the court *a quo*.

The respondent does not challenge this assertion. The record of proceedings does not support this. There is no reference to the production of the letter at all in the entire proceedings. The trial magistrate did not address his/her mind to this aspect in the reply to the appellant's notice of appeal. In fact the entire reply reads-

> "After reading the appellant's notice of appeal, it appears this is part of the evidence and I have nothing to comment (sic)".

This issue is material because, if on the one hand the respondent bought the bovine, then the trial court was entitled to order delivery thereof. If, on the other hand, the respondent failed to buy the beast on account of the escalating prices of bovines, then the order of refund may not be faulted. Now, we as appellate court do not know whether or not this letter was tendered in during the trial. We do not know whether its contents were taken into account in determining the issues before the court. Besides restating what the witnesses said the court *a quo* did not directly make findings on the credibility of the testimony of the witnesses. Little reliance can be placed on the reasoning of the trial magistrate in such circumstances. Further there is no analysis of probabilities. This court suffers from the disadvantage of not having steeped in the atmosphere of the trial. In some instances this court is entirely free to come to its own conclusions. In others this route is not available. It is of utmost importance for triers of fact to make such direct findings on credibility and analysis of probabilities. Unfortunately, most judgments in civil cases are scant to the extreme and this makes the determination of the appeal very difficult – *Msorwa* v *Munyuki* 1994(2) ZLR 261(S) at 264G-265B; *R* v *Dhlumayo & Anor* 1948(2) SA 677(A) at 706; *Hayes* v *Bar Council* 1981(3) SA 1070 (ZA) at 1085 and *Matsveto* v *Matsveto* HB-51-04. In *casu*, we are unable to determine the issues raised on account of the

above shortcomings. It would not be in the interests of justice to hear further evidence on appeal. The circumstances of this case are exceptional warranting remittal for further evidence. This is a case where a fresh hearing is called for before a different magistrate. This is simply a matter of convenience and not a question of principle.

Accordingly, it is ordered as follows:

1. The appeal hereby succeeds and the order of the court delivered on 18 August 2003 be and is hereby set aside.
2. The matter be and is hereby referred back to Zvishavane Magistrates' Court for a trial *de novo* before a different magistrate.
3. No order as to costs.

Cheda J …… I agree