

REPORTABLE (27)

Judgment No. S.C. 47/85

Civ. Appeal No. 28/84

MUNICIPALITY OF KWEKWE v SPACE AGE INVESTMENTS (PVT) LTD

SUPREME COURT OF ZIMBABWE,
BECK, JA, GUBBAY, JA & McNALLY, JA,
HARARE, MAY 24 & 31, 1985-

A.P. de Bourbon, .S.C., for the appellant

I.A. Donovan, for the respondent

BECK, JA: The appellant was the plaintiff and the respondent the defendant in the court a quo. I shall continue to refer to them as such.

The plaintiff sued the defendant for \$13 595, and interest thereon, being unpaid assessment rates in respect of the defendants property for the period 1 July 1978 to 31 December **1980**.

In its plea the defendant admitted this claim but averred that it was:-

"... entitled to set off against that amount excess rates paid by it in previous years, particulars of which are set out more fully in its claim in reconvention."

In the counter-claim the defendant averred that the plaintiff had fraudulently represented to the defendant that the plaintiff was entitled to assess rates on the defendants property on a certain basis whereas in truth it was not entitled to assess rates on that basis; and that the defendants:-

"... relying on the said misrepresentation and unaware of the falsity thereof, in the **bona fide** and reasonable but mistaken belief that they were due, paid rates in an amount of **\$13** 887,25 in excess of the maximum amount payable for the period between the 1st July 1973 and 30th June 1978."

In these premises the defendant counter-claimed for the repayment to it of **\$13** 887,25.

To this counter-claim the plaintiff pleaded a confession and avoidance. The plaintiff admitted the misrepresentation but denied knowledge of its falsity, averring that's-

it **bona fide** believed that it was in law entitled to act as it did, but which belief it now accepts was incorrect."

The plaintiff went on to admit that the defendant paid \$13 887,25 in excess of the maximum amount payable for the period between 1 July 1973 and 30 June 1978, but averred:-

"... that any mistaken belief on the part of defendant was in relation to a mistake of law and not to a mistake of fact then existing."

In those premises the plaintiff denied the defendants right to repayment of the **\$13** 887,25.

In the court a **quo** the **bona fides** of the plaintiff was accepted and the trial was conducted on the basis that both parties genuinely believed at the time that the plaintiff was entitled to assess rates in respect of the defendant's property on the basis that it did. It was accepted that this belief constituted a mistake of law, not fact, but it was nevertheless contended for the defendant that it was entitled to recover the excess rates mistakenly paid to the plaintiff.

But for this claim to repayment under a **condictio indebiti** it was not suggested at the trial that the defendant had any other basis for relying upon a right of set-off against the plaintiff's admitted claim in convention for **\$13** 595.

The learned trial judge held that because the plaintiff acted **ultra vires** in levying from the defendant the excessive rates it did from July 1973 to June 1978, and because the plaintiff by its misrepresentation to the defendant induced in the latter the same mistake of law under which it laboured, the relief of a **condictio indebiti** should not unjustly be denied to the defendant even though the mistake that led to the payment was a mistake of law. Accordingly he gave judgment to the plaintiff on the claim in

convention and judgment to the defendant on the claim in reconvention. He awarded the costs of suit to the defendant.

The plaintiff thereupon noted this appeal contending that there is no right of recovery where a payment is made as a result of a mistake of law and that the learned trial judge should therefore have dismissed the counter-claim and should have given judgment with costs to the plaintiff on the claim in convention.

At the outset this Court raised the point that there was, at least, a natural obligation on the plaintiff to repay the excess rates mistakenly paid to it, and which it was never entitled to exact from the defendant; that a natural obligation suffices to support a right of set-off; and that set-off operates **ipso jure**. (**Smith v Bezuidenhout en Kie** 1967 (3) SA 41 (o); **Fensham v Jacobson** 1951 (2) SA 136 (T)). Accordingly the debt of **\$13 595** was discharged and the plaintiff was not entitled to judgment on the claim in convention.

Mr **de Bourbon**, for the plaintiff (appellant), accepted that this is so. He said that if the point had been raised at an earlier stage it would have been conclusive and the plaintiff would almost certainly not have proceeded any further. While accepting that the general rule that costs follows the result is not

usually departed from merely because an appeal has turned on a new point raised by the court, Mr de **Bourbon** has submitted that the circumstances of the present matter are such that the successful defendant (respondent) should either get no order for the costs of this appeal; or, at best, should be granted only a portion of the costs of appeal.

Donovan freely accepts that this Court has a wide discretion with regard to the costs of appeal and he accepts further that it is a relevant consideration that had the point been raised earlier the appeal would almost certainly not have been noted, or persisted in. As against that however, he has suggested that there should be no great sympathy for the plaintiff which has pursued in the court a **quo**, and which sought to pursue further on appeal, a claim for money to which, in equity, it was not entitled. He also tentatively submitted that, quite apart from the point that was raised, the defendant's prospects of successfully resisting the appeal were at least reasonable. As to that, however, there has been no attempt to support the defendant's claim to a **condictio indebiti** for the refund of such small portion of the sum of **\$13 887,25** as exceeds the amount of the plaintiff's claim in convention, and counsel have refrained from addressing any argument to us on the correctness or otherwise of the basis upon which the judgment proceeded in the court below. It is not, therefore, a factor to which regard can now be had.

As observed by BEADLE CJ in **Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd** 1971 (1) RLR 1, at P 7E:-

"... it is an accepted rule that, where an appeal succeeds on arguments advanced for the first time on appeal, this may be reflected in the appeal court's order as to costs".

In my view the circumstances of the present matter are such that this Court's order as to costs should reflect the consideration that had the point been timeously raised the matter would not have proceeded as far as it has done. I think it would be unfair to award to the successful defendant all its costs of appeal when it has at no time taken the point that it could have taken and which would - so it is agreed - at once have proved conclusive. On the other hand I think it would also be unfair to deprive the defendant of all its costs of successfully resisting an appeal

that the plaintiff accepts it would not have brought had the point occurred to It. The situation is very similar to that which arose in **Dharumpal Transport (Pty) Ltd v Dharumpal** 1956 (1) SA 700 (A) and I propose to make the same order that appeared to be fair in that case.

Although the appeal fails for the reason stated, it is necessary that the order of the court a **quo** be altered to read:-

"Judgment is entered for the defendant on the claim in convention. No order is made on the claim in reconvention. The plaintiff is to pay the costs of suit."

The plaintiff (appellant) is to pay half the defendant's costs of appeal.

GUBBAY, JA; I agree.

McNALLY, JA: I agree.

Winterton, Holmes & Hill, appellant's legal representatives
Scanlen & Holderness, respondent's legal representatives