Judgment No. S.C. 5/02
Civil Appeal No. 371/00

(1) CHAKANYUKA MUTANDI (2) CHIONISO MUTASA

v CLARA MASUMBANYIKA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & SANDURA JA
HARARE, JANUARY 31 & FEBRUARY 18, 2002

C M Jakachira, for the appellants

C T Mantsebo, for the respondent

EBRAHIM JA: The appellants' claim was for the payment of the sum of $15 509. The claim arose out of an allegation that the respondent obtained this sum from them under false pretences and, in the alternative, that this sum was extorted from them.

Their evidence was to the effect that in November 1995 the respondent came to their hair salon with her three children. Two of the young girls had their hair treated at the salon. The following day, the respondent claimed that one of the children had received burns as a result of the hair treatment. They deposed that the respondent then intimated that her husband was a member of the Central Intelligence Organisation, and he would shoot them if he became aware that his child had suffered injury at the hair salon. Thereafter various sums of money were paid to the respondent over a period of about twelve months, amounting to $15 509. They

claimed that this money was paid as a consequence of false representations and/or that it was extorted from them. In this regard they claimed that the respondent had claimed money for medical treatment for the child, that the respondent required money to perform certain traditional ceremonies that related to the burns that the child had received, and that the respondent said that if she was not given the money she was a powerful traditional healer who could cause them harm. It was also claimed that the respondent had requested them to hand over all their household goods and effects in order to perform some traditional cleansing ceremony.

The learned trial judge, having heard the evidence, concluded thus:

> "The defendant (now the appellant) denied the claims and stated that she had received some money from the (respondents) but this was as payment for her services as a traditional healer. The (respondents) did not dispute that (they) had at times sought the defendant's services as a traditional healer, and that they had paid for these. (They) maintained however that the payments in question were unrelated to the present claim. It became apparent during the course of the trial that the (respondents) … had implicit faith in the spiritual and healing powers of the defendant. (They) held her in awe. In this atmosphere, steeped as it was in traditional practice and belief, it becomes difficult to unravel the extent, if any, any payments were made which were unrelated to the defendant's exalted position as a traditional healer.
>
> Accordingly, in the circumstances, I find that the (respondents) have not established (their) case on a balance of probabilities. The (respondents') claim is dismissed with costs."

It was the appellants who made the allegations against the respondent. The *onus* in establishing their case therefore fell squarely on them. This they failed to do. In *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199 WESSEL JA said:

> "Where there are two stories mutually destructive, before the *onus* is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the

> other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the *onus* rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A Gany …".

In *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC) at 59D KORSAH JA said:

> "Where the question on an appeal from the decision of a judge is one of credibility, and the interests of the parties cannot but affect their testimonies, even where the story told by either party may be true, or the probabilities do not appear to favour one party more than the other, an appellate court would be loathe to reverse the conclusions arrived at by the trial judge, who had seen and heard the witnesses, unless it is clearly demonstrated that he had fallen into error …".

See also *Matiza v Pswarayi* 1991 (1) ZLR 140 (S).

The appellants failed to satisfy this *onus* and the reasoning of the learned judge *a quo* in rejecting their evidence accords with commonsense. In my view, their allegation is wildly improbable and even counsel in this Court representing the appellants accepted that it had to be said that his clients' conduct was bizarre.

Accordingly the conclusion reached by the trial court cannot be faulted. In the result, the appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

Jakachira & Co, appellants' legal practitioners

Mantsebo & Partners, respondent's legal practitioners