

DISTRIBUTABLE (38)

JG CONSTRUCTION (PRIVATE) LIMITED
v
NJERE TRADING (PRIVATE) LIMITED t/a TELFORD MICA
HARDWARE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
HARARE, JUNE 2, & JULY 9, 2015

R Goba, for the appellant

D Ochieng, for the respondent

ZIYAMBI JA:

[1] This is an appeal against a judgment of the High Court which ordered the appellant to pay to the respondent the sum of \$59 136.00 together with interest and costs of suit.

BACKGROUND

[2] The appellant is a company incorporated according to the laws of Zimbabwe and carrying on business as a building contractor. The respondent, also a duly incorporated company, is a retailer of building materials and hardware, tools, electrical and other supplies.

[3] In or about January 2008, the appellant, represented by Mr Cobi Summerfield, obtained credit facilities from the respondent for the supply of building materials. According to the respondent, it was agreed that the invoices were, for tax purposes, to be made out to

Diverse Private Limited. The corporate identity of this entity was not established at the trial but suffice it to say that in keeping with the facility agreement an account was opened for the appellant and monthly invoices were issued to the appellant by the respondent in the name of Diverse Enterprises trading as Tabor Tanks. Diverse Enterprises and Tabor Tanks are apparently trading arms of the appellant.

[4] Various clients of the appellant drew supplies on that account and, upon payment to the appellant, the latter would make payment in liquidation of the account.

[5] All amounts would be charged at the USD equivalent on the date of purchase and converted to Zimbabwe dollars on the date of payment at the rate obtaining then.

[6] It appears that all went well until July 2008. The respondent and Summerfield were agreed that as at May 2008 the account showed a nil balance. By June 30, there was a balance of \$5 338.00 which increased to \$37 603.00 in July 2008. Payment of invoices forwarded to the appellant was not forthcoming and the respondent was becoming anxious for payment as it needed the finance for restocking.

[7] Letters and emails were written on a regular basis and showed the pressing concern presented by the failure by the appellant to pay the amounts owing. This correspondence was punctuated by many meetings the results of which were referred to in the correspondence, and expressed the anxiety being experienced by the respondent. All letters were written to the appellant and addressed, in particular, to Cobi Summerfield. At no time did the appellant deny liability for the debt owed to the respondent.

[8] Things came to a head in December 2008. The respondent's financiers were in turn pressing for payment from the respondent. Respondent was of the view that an acknowledgement

of debt would provide some form of security for the outstanding debt. The issue was discussed with Summerfield. The response was the following letter dated 15 December 2008 from HHK Safaris (Pvt) Ltd. It read:

“Njere Trading (Pvt) Ltd
t/a Telford Mica Hardware
20 Telford Rd
Graniteside
Harare

Dear Sirs

OUTSTANDING ACCOUNTS

We write to confirm that JG Construction (Pvt) Ltd and Tabor Tanks (Pvt) Ltd (“the contractors”) have been making purchases from yourselves on our behalf.

We further confirm that we will settle all proformar(sic) invoices submitted to the contractors in our name and with a due date of 5th December 2008 will be paid(sic) directly to your suppliers from our FCA account on or before the 30th January 2009.

Yours faithfully

HHK Safaris (Pvt) Ltd”

[9] Still no payment was made. By the end of December 2008 the amount owing had escalated to \$59,591.84. On 23 February 2009 the respondent’s Kelvin Weare held a meeting with Summerfield to discuss the situation. By letter of even date Weare confirmed the meeting and their agreement. He wrote:

“Att Mr C Summerfield
J G Construction
HARARE

Dear Cobi

**RE: OUTSTANDING ACCOUNT OF US\$ 59,591.84 AS AT 31ST
DECEMBER 2008**

Thank you for seeing Alex van Leenhoff and I this morning, 23rd February 2009, further to the meeting this morning I write to recap on our discussion.

I once again reiterate our discussions earlier this year and again today, that in order for us to do business in good faith, an “Acknowledgment of Debt” and “Suretyship” is required from your good selves for the full amount stated above, to which you have agreed today that this is the amount outstanding and due. It would be in your interests to obtain a similar document from your debtor, namely HHK Safaris. Whilst we understand your predicament that you have not been paid by your client, I stress again that we cannot carry this amount as a debtor in our books and will in due course demand payment. We have on file a letter written by HHK Safaris stating that they would settle all profoma’s that we have submitted to you prior to the 5th December 2008, by the 31st January 2009. These payments have not been done despite their letter. As agreed, I attach an “Acknowledgment of Debt” and “Suretyship” for your signature.

Whilst we acknowledge that you have been proactive in resolving this issue, to (sic) which we thank you, please be advised that we are now in a position that cannot be allowed to continue. I am sure that you will speak with your debtor urgently and as agreed, advise me by email the outcome of your discussions.

I await your urgent reply and update,

Yours sincerely

Kelvin Weare

Director

*Njere Trading P/L t/a Telford Mica Hardware
& Golden Stairs Hardware*

[10] The acknowledgement of debt was not signed. Instead, on 4 March 2009, Summerfield wrote to the respondent advising that:

“Mr Hingeston has unfortunately put all payments on hold until further notice. While we realize that Graham holds the goods you have supplied, we have put a property on the market to try to generate the income to afford us to pay you regardless of whether or not Graham pays us. ... We as JG Construction are doing absolutely everything we can to ensure that you receive your payment in the fastest possible time we thank you for your support over all these years, and ask you to understand that this is the first time that this has happened to JG Construction and can only hope that your support for us has not diminished due to this.” (My underlining).

[11] On 18 October 2010, the respondent issued summons in the High Court for the recovery of the outstanding amount.

[12] The appellant's defence as pleaded is that the respondent had sued the wrong entity and that the proper Defendant was Chikwenya Safari Lodges/Mr Hingeston¹.

THE FINDINGS OF THE COURT A QUO

[13] The learned Judge, having heard evidence from Kevin Weare and Alexander Van Leehoff (on behalf of the respondent, plaintiff in the court *a quo*) and Cobi Summerfield (for the appellant), preferred the evidence led on behalf of the respondent and found that the probabilities were in the respondent's favour.

[14] He found that the appellant changed its defence depending on when it was presented. For example, in the appellant's plea and the summary of evidence proposed to be led at the trial, the appellant was adamant that the credit sale agreement was concluded by the respondent with HHK Safaris and not with itself. When it became apparent that there was no privity of contract between the respondent and HHK Safaris, Summerfield sought in evidence to argue that the agreement was concluded with Diverse Enterprises and that HHK Safaris merely made arrangements to pay. He found further that all the evidence pointed to the liability of the appellant; for example, the account was in its name and from that account it ordered various goods using references of its clients. While the invoices were drawn in the name of Diverse Enterprises it had not been shown that Diverse Enterprises was more than just a trade name or that the latter operated from a separate account from that of the appellant. In any event, Weare's evidence that the

¹ Defendant's Plea at pages 9 and 19

invoices were issued in that name for tax purposes was not rebutted by the appellant. He found that the appellant and Diverse Enterprises were run by one person, Summerfield, and that the two appeared to have been ‘fishing from one pond, an account in the name of the defendant’. He dismissed the allegation by the appellant that the letter of 4 March written on the appellant’s letterheads and penned by Summerfield was a forgery. If anything, it was ‘clearly an admission of liability by a contrite debtor, well aware of its obligations’.

[15] In any event, the learned Judge added, the respondent was entitled to rely on that admission in terms of r 188 (1) of the High Court Rules, the appellant having failed to reply to the notice to admit documents. The Rule provides:

“188. Effect of failure to reply or refusal to admit documents

- (1) In the case of failure by the party to reply within ten days when called upon to admit that any documents was properly executed or is what it purports to be, then as against such party the party giving the notice shall be entitled to produce the documents specified at the trial without proof other than proof that the documents are the documents referred to in the notice and that notice was duly given, if those facts are disputed”

The letter of the 4 March 2009 was one of the documents listed in the notice.

THE ISSUE ON APPEAL

[17] The main issue to be determined on appeal is whether the court *a quo* was correct in holding that the appellant was liable to pay the amount claimed or whether another entity was in fact the correct defendant.

Mr *Goba* sought to convince the court that the findings of the court *a quo* as set out above were wrong. He maintained that a wrong entity had been sued and, at the

beginning of his argument, submitted that Diverse Enterprises was the correct defendant. He later submitted that HHK Safaris was the correct defendant. Indeed he followed the pattern set by the appellant at the trial before the court *a quo*. He vacillated.

[18] As I see it, two hurdles confront the appellant. The first is, that in the light of the clear and straightforward case presented by the respondent, the court *a quo* cannot be faulted for preferring the latter to that of the appellant which changed at its convenience. The second is the approach of this court, on appeal, to factual findings made by a lower court. It is, that an appellate court will not interfere with such findings unless they are irrational or clearly wrong or so outrageous in their defiance of logic that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion².

[17] Nothing in the grounds of appeal or the submissions made before us by counsel on behalf of the appellant has established a basis for interference by this court with the judgment of the court *a quo*.

The appeal is accordingly dismissed with costs.

GARWE JA: I agree

HLATSHWAYO JA: I agree

Messrs Venturas & Samukange, appellant's legal practitioners

²Herbstein and Van Winsen The civil Practice of The Superior Courts at page 738-9;
Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) at 670; Metallon Gold Zimbabwe v Golden Million SC 12/15

Messrs Coghlan Welsh & Guest, respondent's legal practitioners