

DISTRIBUTABLE (45)

BAREND VAN WYK
v
TARCON (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & BHUNU JA
HARARE, JUNE 23, 2016 & JULY 25, 2017

P Paul, for the appellant

R Chingwena, for the respondent

GARWE JA:

[1] This is an appeal against the judgment of the High Court, Harare, dismissing with costs a claim by the appellant against the respondent for payment of the sum of \$62 707,12.

BACKGROUND

[2] The appellant was employed by the appellant as plant manager. In this capacity, he worked for the respondent in Zimbabwe, Zambia and ultimately Mozambique where the respondent had won a tender to construct roads in that country. In 2009, a sister company called Tarcon Limitada was incorporated in Mozambique in order to carry out tenders for road construction that had been awarded by the Government of Mozambique.

- [3] A dispute arose between the appellant and the respondent as to outstanding salaries and allowances, as well as hire charges in respect of an Oshkosh Low Loader vehicle belonging to the appellant's company, Earthquip (Pvt) Ltd. It is common cause that the appellant met with the respondent's finance manager, one Desmond Nhemachena and that the two engaged in some reconciliation of the amounts that the appellant claimed were due to him. The amounts, not having been fully paid, the appellant then instituted civil proceedings in the High Court for the recovery of the same.
- [4] The respondent denied being indebted to the appellant. It alleged before the court *a quo* that the appellant's claim was prescribed and that in any event the appellant had a contract of employment with Tarcon Limitada and that it was to that company that he should look for payment. Further the respondent denied that when Desmond Nhemachena engaged in a reconciliation with the appellant, he did so on its behalf or that the reconciliation binds it.
- [5] The matter went to trial on the following issues (a) whether the appellant was employed by the respondent or by Tarcon Limitada (b) whether the claim for payment had become prescribed (c) whether the reconciliations done by the appellant and Nhemachena were done on behalf of the respondent (d) whether the appellant's company had a hire contract with the respondent or with Tarcon Limitada (e) whether the High Court had jurisdiction to entertain a claim arising out of a labour dispute, and (f) the amount due to the appellant by the respondent.
- [6] At the close of the appellant's case before the court *a quo*, the respondent successfully applied for absolution from the instance. The High Court held that the claim for salaries and allowances was not based on a stated account but on a contract of employment governed by the Labour Act. It further found that the claim had

prescribed after the lapse of two years and that the payments that were to be made to the appellant outside the country were not recoverable because the transactions contravened the Exchange Control Regulations, 1996. Lastly the High Court held that the hire charges should have been claimed by Earthquip (Pvt) Ltd and not the appellant.

[7] On appeal, this court found that at the time the reconciliation statements were signed in November 2008, Tarcon Limitada had not yet been incorporated and that therefore the appellant could not possibly have been employed by that company. The court further found that the claim was based on a stated account. Having regard to all of these facts, this court found that the court *a quo* had erred in granting absolution from the instance. Consequently, this court set aside the judgment of the court *a quo* and remitted the matter for the continuation of the trial.

[8] In closing argument, the respondent submitted that the appellant's claim in respect of hire charges had prescribed. In his heads of argument, the appellant conceded that the claim for hire charges had not formed part of his cause of action and accordingly moved for its abandonment.

[9] At the close of the full trial, the court *a quo* found that the claim was not founded on a stated account, but rather on a purely labour employment dispute. The court also found that the claim for hire charges and for payment of equipment bought had been abandoned. Consequently, the court *a quo* dismissed the appellant's claim with costs. Hence the present appeal.

GROUND OF APPEAL BEFORE THIS COURT

[10] The appellant has listed a total of ten (10) grounds of appeal. I quote these *verbatim*:

“The court *a quo* erred *in all or any* of the following respects:

1. In finding that the dispute was a labour dispute.
2. In finding that even if the dispute was a labour dispute it was a dispute which the High Court had no jurisdiction to deal with.
3. That the claim for the hire of equipment was not included in the summons.
4. That the claim for the hire of the equipment was abandoned.
5. In accepting the evidence of Mr Nyamachena (sic) in so far as it conflicted with the appellant’s evidence.
6. In finding that in respect of both exhibits 2 and 3 the reconciliation required the approval of the Chairman.
7. In finding that Mr Nyamachena (sic) had no authority to bind the respondent.
8. In holding that the reconciliations were done to resolve any dispute.
9. In failing to take into account the unsatisfactory manner in which the defence was conducted.
10. In failing to take into account that the reason for non-payment of monies due by respondent was simply that respondent did not have the money. As appellant continued to be employed by respondent it was unreasonable to criticise him for not taking action in the Labour Court during the period of his employment.”

In his prayer he seeks an order that the respondent pays to him the sum of \$45 267.12 together with interest and costs of suit.

[11] At the hearing of this matter before this court, the propriety or otherwise of the appellant’s notice of appeal became a live issue. In particular, the issue was whether the grounds of appeal, as formulated, comply with the Rules of this court and, if not, whether the appeal stands to be struck off the roll on that score alone. Having heard submissions from both counsel, this court decided to hear submissions on the remaining issues and thereafter deal with all the issues that arise in this appeal.

[12] The issues that arise for determination before this court are the following. Firstly, whether the notice of appeal is valid. Secondly, if it is, whether the court *a quo* was correct in finding, as it did, that the appellant’s claim was not based on a stated account but rather on a purely employment dispute.

WHETHER THE GROUNDS OF APPEAL COMPLY WITH THE RULES

[13] In a recent decision in *Kunonga v The Church of the Province of Central Africa* SC 25/17 this court commented at length on the requirement that grounds of appeal must be clear. This court further confirmed the position it has previously taken that grounds of appeal that are not clear and concise render a notice of appeal fatally defective, the result being that the appeal stands to be struck off the roll in its entirety.

[14] The notice of appeal states that “the court *a quo* erred in *all or any* of the following respects.” The notice then proceeds to list ten (10) instances in which it is suggested the court *a quo* erred. Clearly the use of the words “erred in all or any of the following

respects” suggests that the appellant was himself uncertain of the exact basis upon which he sought to attack the judgment of the trial court. He appears to have been on a fishing expedition, hoping that if one or more grounds did not succeed, then perhaps the remaining grounds would do so.

[15] Most of the grounds of appeal itemised in the notice of appeal are in any event vague. It is very difficult to ascertain exactly what it is the appellant is complaining about in those grounds. Ground 1 states that the court *a quo* erred in finding that the dispute was a labour dispute. No further detail is provided. The reality is that the court *a quo* did not simply find that this was a labour dispute. It found that the appellant’s claim, based on a stated account, had not been proved and that consequently the claim remained one under the Labour Act. In the circumstances, ground 1 is meaningless. The same goes for grounds 2,5,8,9 and 10. A ground that the court *a quo* erred in accepting the evidence of Mr Nhemachena in so far as it conflicted with that of the appellant is meaningless. A ground that the court erred in failing to take into account the unsatisfactory manner in which the defence was conducted is so vague that the

respondent would not understand what it is that is sought to be impugned on appeal. Accordingly, save for grounds 3, 4, 6 and 7, the grounds of appeal are improper and must be struck out.

THE REAL ISSUE BETWEEN THE PARTIES

[16] The appellant's cause of action in the court *a quo* was predicated on a stated account i.e. on an account agreed to by both parties. The issue at the end of the day was whether the parties agreed on the figures claimed by the appellant in his declaration. All the issues raised in the grounds of appeal relate to this fundamental question.

[17] In para 3 of the declaration, the appellant made the following averments. That he and a Mr Nhemachena, representing the respondent, had prepared two reconciliations whose contents were agreed between the parties. One was for \$32 074.13 and the other for \$30 360.26. The two amounts had been reduced following the payment of the sums of \$8 000 and \$9 277.27 respectively. The appellant, in his heads of argument filed with this court, states that it makes no difference whether one describes the reconciliation as a running account or a stated amount because, once the amount of the running amount was agreed upon, the appellant was entitled to rely on that agreement. In short, therefore, the issue before the court *a quo* was whether there was an agreed reconciliation of the amounts due to the appellant. The source of the amounts was irrelevant.

[18] The court *a quo* was alive to the need to resolve the question whether the amount claimed was agreed. The court appreciated the fact that both reconciliations had been signed by the appellant and Mr Nhemachena, the respondent's finance manager. The court was also aware that on both reconciliations, Mr Nhemachena

had endorsed that payment would be made in the agreed instalments, but this was subject to the approval of the chairman.

[19] After analysing the evidence given by both sides, the court *a quo* reached the conclusion that the contention that the reconciliations had been accepted by the respondent had not been proven. The court remarked: -

“Given the long history of the dispute pertaining to the alleged outstanding salaries and allowances between the parties, the time frame between the drafting of exhibit 2 on one hand and exhibits 3 and 4 on the other, the court accepts Nhemachena’s evidence which was not controverted, that when he sat down with the plaintiff to draft the so called reconciliations he was not acting on behalf of the defendant. He said the plaintiff was a friend who approached him to enlist his help in having the long running issue brought to finality what the plaintiff and himself agreed upon was subject to approval by the chairman. Indeed, no evidence was adduced establishing that Nhemachena was mandated by the defendant to resolve the dispute

[20] Now, the above were findings of fact made by the court *a quo* after considering the evidence and the probabilities of the matter. The basis upon which the above findings can be interfered with by an appellate court is now firmly established. An appellate court will not, as a general rule, interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no reasonable person who had applied his mind to the question to be decided could have arrived at such a conclusion – *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S), 670. An appellate court must always bear in mind that the trial court enjoys certain advantages that it does not, particularly when it comes to the assessment of the credibility of witnesses. Unless it is clear from the record that the reasons given are based upon a false premise or where the trial court has ignored some fact which is clearly relevant – errors which

are generally referred to as misdirection of fact, then an appellate court will not interfere – *Rich v Rich* SC 16/01.

[21] The finding by the court *a quo* that the two reconciliations were never agreed between the appellant and the respondent cannot be said to be irrational, given the evidence availed during the trial proceedings.

[22] It is clear that the reconciliations were subject to approval by the chairman. According to Mr Nhemachena such approval was never given. Further, even the reconciliations – and in particular the one claimed in respect of Mozambique – show that the figures were not agreed at the time Nhemachena signed them. The reconciliation makes it clear that there were claims thereon that required verification with Jordan and R Mandiwanzira in Mozambique. As it turned out some of the claims were paid whilst others were not. The figures in the reconciliation could not therefore have been agreed upon as at the date the parties signed the document on 7 November 2008.

[23] It was argued that the fact that payments were made to the appellant after the two parties had signed the reconciliations is indicative of an agreement having been reached on all the figures. That cannot possibly be correct. The amounts paid appear to have related to specific items claimed by the appellant and not the specific instalments to be paid in terms of what the documents refer to as the payment plan.

[24] In all the circumstances therefore, I find that there is no basis upon which this court can interfere with the findings made by the court *a quo*.

[25] It becomes unnecessary to determine the issues raised on the hire of equipment and the charges raised consequent thereto.

[26] Lastly, comment is called for on the remark by the court *a quo* that the claim was founded on an employment dispute. The appellant, as plaintiff, had predicated his cause of action on a stated or agreed amount. Once he failed to prove that the amounts were agreed, then that was the end of the matter. There was no need to consider whether the dispute was labour related and, if so, whether the High Court had jurisdiction to entertain the matter.

DISPOSITION

[27] For the above reasons, the appeal lacks merit and therefore cannot succeed.

[28] It is accordingly dismissed with costs.

MAVANGIRA JA: I agree

BHUNU JA: I agree

Wintertons, applicant's legal practitioners

Ziumbe & Mutambanengwe, respondent's legal practitioners