

**DISTRIBUTABLE** (27)

**RONALD BAKARI**  
**V**  
**TOTAL ZIMBABWE (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**

**BEFORE: GARWE JA, GUVAVA JA & BHUNU JA**

**HARARE, JANUARY 24, 2017 AND MARCH 4, 2019**

*T. Mpofu*, for the appellant

*Z. Chadambuka*, for the respondent

**GUVAVA JA:** This is an appeal against the entire judgment of the High Court sitting at Harare dated 30 March 2016 wherein it was held that there was a valid and binding surety agreement between the appellant and the respondent. On that basis the appellant was ordered to pay the respondent the sum of US\$37,497.42.

### **BACKGROUND FACTS**

The brief facts of the matter may be summarised as follows:

On 28 December 2006, the respondent, Total Zimbabwe Limited and a company known as SM Tyres (Pvt) Ltd (hereinafter referred to as SM Tyres) entered into a marketing licence agreement in terms of which SM Tyres was permitted to enter, operate and utilize one of

the respondent's service stations at Nyamapanda Border Post. Following the agreement between the respondent and SM Tyres, the appellant and one Shadreck Mawire entered into a surety agreement on behalf of SM Tyres.

In terms of the agreement SM Tyres was entitled, among other things, to purchase petroleum based products exclusively from the respondent. SM Tyres was granted a credit facility for the supply of the products and it was obliged to make daily payments of all sale proceeds into the respondent's bank account. It was also to pay all taxes and rates charged in respect of its use of the service station.

SM Tyres failed to honour its obligations in terms of the credit facility as it did not settle an outstanding balance for fuel deliveries, electricity bills, unit tax for water reconnection and the Environmental Management Agency application fees which resulted in SM Tyres attracting a spot fine for storing fuel without a licence. The debts that accrued to the service station during the time that SM Tyres operated it amounted to US\$37 497, 42. On 26 July, 2011, the respondent terminated the agreement and demanded payment of the amount owing. On 12 June, 2012 the respondent obtained judgment against SM Tyres in judgment number HH245/12. SM Tyres failed to pay.

Having failed to obtain its money from SM Tyres, the respondent then issued summons in March 2014 out of the High Court against the appellant for payment of the amount owing because SM Tyres had failed to pay the judgment debt. It sued on the strength of a surety document. It alleged that the appellant and Shadreck Mawire stood as sureties on behalf of SM

Tyres as was required of SM Tyres when it signed the marketing licence agreement. The appellant denied having stood surety for SM Tyres and the matter proceeded to trial.

The respondent's sole witness, Esther Verenga, the General Trade Manager for Total Zimbabwe, testified that the respondent entered into an agreement with a company called SM Tyres trading at Nyamapanda Service Station. She averred that she was not responsible for the preparation of the surety document because a template was used. She further testified that she was not present when the document was signed neither was she aware of who was present at the signing of the agreement. She however stated that the surety document had a signature belonging to the appellant and his contact details. She stated the amount that was owing and how it had accrued.

At the end of the respondent's case, the appellant applied for absolution from the instance. The appellant's argument was that the respondent's witness was not present when the surety document was either prepared or signed therefore the evidence she presented before the court could not be relied upon. It was also his argument that the marketing licence agreement presented to the court made reference to a "licencee" yet the principal debtor in the surety document was referred to as an "operator". The appellant argued that the respondent had failed to prove a *prima facie* case against him. The application was opposed and subsequently dismissed.

The matter proceeded to the defence case on the basis that since the appellant did not dispute signing the surety document, the onus now lay on him to show that he had not stood as surety for SM Tyres.

The appellant testified that he did not owe the respondent because he stood as surety for a company known as Limpopo Investments and not for SM Tyres. He testified that he did not know SM Tyres. He signed a surety agreement at the request of a friend, one Mr Wycliffe Chiunda (Chiunda) who, at that time, was a Marketing Executive with the respondent. Limpopo Investments was Chiunda's company and he wanted a surety agreement in order for him to negotiate with the respondent so that he could use the respondent's Nyamapanda Service Station.

The appellant admitted that he wrote his name and that of Shadreck Mawire on the surety document. He confessed that he did not know Shadreck Mawire but the name was dictated to him by Chiunda. When Shadreck Mawire subsequently signed the document the appellant was not present. He accepted having endorsed his contact details on the document and the name Nyamapanda Service Station. He denied having been present when the witnesses signed and when the document was dated. It was his position that he signed the document in 2004 as opposed to 2006 the date that appeared on the document.

The appellant denied ever seeing the marketing licencing agreement that the respondent referred to. Upon being asked if he could produce the marketing licence agreement which related to Limpopo Investments he stated that he was not in a position to do so. He stated that Chiunda had communicated to him that there had been a mix up at the office which is why the two documents were together. Chiunda was not one of the witnesses that testified in court on behalf of the appellant. The appellant stated that there was an affidavit from Chiunda which could substantiate his story but it was not produced before the court *a quo* as evidence. It was

also his evidence that the failure to endorse “Limpopo Investments” on the surety document was an oversight on his part.

The court disbelieved the appellant and judgment was entered against him. Aggrieved by the decision of the court *a quo* the appellant launched the present appeal.

### ISSUES FOR DETERMINATION

It seems to me, from the grounds of appeal, that the following issues arise for determination in this matter.

1. Whether the Appellant bound himself as surety for SM Tyres when he signed the surety agreement?
2. Whether the court *a quo* erred in holding that the onus lay on the appellant to prove that he had signed for Limpopo Investments and not SM Tyres.
3. Whether the respondent’s single witness was credible?
4. Whether judgment entered against the principal debtor novated the appellant’s liability as surety?
5. Whether the court *a quo* erred by not granting absolution from the instance at the close of plaintiff’s case (herein respondent)?

1. Whether the Appellant bound himself as surety for SM Tyres when he signed the surety document?

In determining this issue I will first consider what constitutes a valid surety and whether or not the agreement in question met the prescribed requirements. In the event that I find

that it does, I will then consider whether appellant bound himself as a surety for SM Tyres when he signed the suretyship document.

According to Caney LR, Forsyth CF and Pretorious JT, *Caney's The Law of Suretyship in South Africa*, (Juta and Co, 2010) a suretyship involves three parties; the creditor, the principal debtor and the surety. It is a contract between the surety and the creditor in terms of which the surety binds himself to perform the obligations of the principal debtor to the creditor, if the principal debtor fails in whole or in part to fulfil his obligations. Suretyship is a contract and as such the principles of contract law apply to suretyships. The requirements of the suretyship are as follows; the identity of all parties (that is: -creditor, principal debtor and surety); and the nature and amount of the principal debt. It is important to note that all three parties must be different parties as a person cannot stand surety for his own debt.

Having examined the above I am satisfied that the agreement signed does meet the requirements of a valid suretyship. The creditor was Total Zimbabwe Limited, the principal debtor was SM Tyres and the sureties are in the person of the appellant and Shadreck Mawire. It was a written document and all parties were clearly identified. I therefore turn to the second part of the question before me.

It is not in dispute that the appellant signed a surety document. It is also not in dispute that it was the appellant who wrote his name and that of Shadreck Mawire on the surety document. Further, the appellant is the one who entered the name Nyamapanda Service Station

on the document. Having done so, the appellant went on to put his contact details and signature to the document.

What appears to be in dispute however, is, on whose behalf was the surety document signed. The appellant alleges that the surety document that he signed was on behalf of Limpopo Investments and not SM Tyres. He alleges that his friend one, Chiunda, is the one who asked him to stand as surety for his company, Limpopo Investments. Having made those submissions no further evidence was adduced on his behalf to support his averments. He simply made an averment to the court *a quo* that he had an affidavit in his possession that had been deposed to by Chiunda but the affidavit was not produced in court. Chiunda was not called by the appellant to testify.

It seems to me that the appellant could only have escaped liability if, having realized that he had signed a document on behalf of someone he had not intended, he had sought to rectify the surety document. The remedy for persons who find themselves in a position that the appellant purports to have been, that of signing a document thinking that it is meant for one thing when in actual fact it means another, is the defence of rectification. According to Caney LR, Forsyth CF and Pretorious JT, *Caney's The Law of Suretyship in South Africa*, (Juta and Co, 2010) p 73-74 "extrinsic evidence ...in regard to the central issue of consensus may be admissible when one of the parties seeks rectification of the suretyship document."

In the case of *Northern Cape Co-operative Livestock Agency Ltd v John Roderick and Co Ltd* 1965(2) SA 64 (O) it was stated that, with rectification, the party seeking to have the contract rectified claims that the contract does not reflect what the parties agreed on and seeks to have the matter put right. Clearly this is a matter of evidence and it was imperative that Chiunda must have testified in support of the appellant's case.

In *casu*, the suretyship document that was the centre of this dispute contained the relevant elements that formed a binding suretyship agreement. The principal debtors, the amount of the debt and the creditor were all clearly identified. *Prima facie*, the document substantially met the requirements of a valid suretyship document therefore it was binding. The only way that the appellant could have escaped liability was through rectification.

The appellant could have led evidence in order to rectify the agreement but chose not to do so. It seems to me that the only logical conclusion under the circumstances is that the appellant was fully aware about what he was getting himself into when he signed the document in question. The court *a quo* cannot therefore be faulted in finding that the appellant bound himself as surety in accordance with the agreement.

2. Whether the court *a quo* erred in holding that the onus to prove that the appellant was surety for Limpopo Investments and not SM Tyres was on appellant



Under the law of suretyship, a surety who seeks to escape liability for one reason or another has the onus to prove his defence. In the case of *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd 2000 (1) SA 167* the court held as follows:

“Where a party who has signed a contract wishes to escape liability on the ground of justified error as to the nature or contents of the document he must show that he was misled as to the nature of the document or as to the terms of which it contains by some act or omission of the other party.”

In the case of *Langeveld v Union Finance Holdings (Pty) Ltd 2007(4) SA 572 (W)*, the court held that the onus was on a surety to prove that he was not aware that he was signing a document as a surety. The court further held that there was a strong *praesumptio hominis* that anyone who has signed a document, has the *animus* to enter into the transaction, and this person was burdened with the onus of convincing the court that he or she had not in fact entered the transaction. In the case of *Prins v ABSA Bank Ltd 1998(3) SA 904(C)* a surety sought to rely on the defence that he believed at the time of signing the surety agreement, that it was for a limited duration and a limited amount yet in actual fact he had signed for an unlimited amount and an unlimited period. The onus was placed on him to prove that it was unreasonable to allow the creditor to rely on unlimited suretyship. Although the above cited cases are not on all fours with the facts of this case, it is quite clear that the legal principle is the same.

The respondent’s claim was clear and unequivocal. The respondent tendered the requisite evidence which showed that appellant had signed a suretyship document on behalf of SM Tyres. Applying the above cases it became the appellant’s duty to refute that evidence. The appellant failed to explain why there was no reference to Limpopo Investments on the surety document. He simply attributed this material omission to oversight on his part. As a result of that

oversight the appellant bound himself to pay SM Tyres' debts. He also argued that the information relating to his domicile was not accurate and therefore he was not liable. However, the suretyship agreement shows his domicile as at 2004 and not his current address. In my view this argument is without substance because the agreement was entered into in 2004. The fact that he subsequently relocated is immaterial.

In view of the above, the first and second grounds of appeal have no substance and the court *a quo* correctly found that the appellant had the onus to prove that the surety document that he signed was not on behalf of SM Tyres.

3. Whether the respondent's single witness was credible?

In the proceedings *a quo* the respondent (who was plaintiff *a quo*) led evidence from a single witness, Ester Verenga. It was submitted on behalf of the appellant that the court *a quo* erred in holding that respondent's sole witness was credible and lacked probity. He further averred that the sole witness's credibility was negated by the fact that she proffered no direct evidence with regards to the facts in issue.

In my view the presence or otherwise of the respondent's witness when the surety agreement was either prepared or signed is inconsequential. What is clear is that the appellant failed to produce evidence that substantiated his defence.

The entire respondent's case was based on the evidence of a single witness, Ester Verenga, the General Trade Manager for the respondent. The appellant challenged the credibility of this witness on the grounds that she was not present when the agreements were signed.

The law relating to a single witness was set out in *R v Mokoena 1956 (3) SA 81 (A)* at 85-86. It was held that:

“The uncorroborated evidence of a single witness should only be relied upon if the evidence was clear and satisfactory in every material respect. Slight imperfections would not rule out reliance on that evidence but material imperfections would.....However, in the latter case of *S v Sauls & Ors 1981 (3) SA 172 (A)* the Appellate Division stated that there was no rule of thumb to be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The approach adopted in the Sauls case was followed in the case of *Nyabvure S-23-88*. See also *Worswick v State S-27-88*, *S v Mukonda HH-15-87*, *S v Nemachera S-89-86* and *S v Corbett 1990(1) ZLR 205 (S)*.”

The evidence of a single witness was also discussed by BECK JA in his article in the *1986 Vol 1 No 1 Prosecutors Bulletin* at p 18 where he says:

“In assessing the quality of the single witness' evidence, to decide whether the accused should be convicted on the basis of this evidence, the court should be most attentive to the nature of the witness, looking at his apparent character, his intelligence, his capacity for observation, his powers of recall, his objectivity and things like that. The evidence should be carefully weighed against the objective probabilities of the case, and against all the other evidence which is at variance with it. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting the accused.”

The court *a quo*, stated on page 3 of the judgment as follows:

“The respondent's witness maintained her story under cross examination. The witness gave her evidence well. Although this was a single witness case, the evidence of the witness was clear, truthful and satisfactory. Her version was corroborated by the

contents of the surety document and other documents produced. She was a credible witness and I believed her.”

It is trite that an appellate court will not lightly interfere with findings of credibility by a lower court unless such findings are clearly unreasonable and not supported by the evidence led. This is because the trial court will have had the opportunity to see the witness and make its assessment. *In casu*, the evidence adduced by the respondent’s witness was clear and unequivocal. She stated that at the time the respondent entered into the agreement with SM Tyres she was not yet the General Trade Manager but the Retail Manager. She further stated that she was aware of the agreement that was entered between the respondent and SM Tyres as well as the surety agreement entered on behalf of SM Tyres by the appellant and Shadreck Mawire. Although she was not present when the agreement was drafted and signed she confirmed that the agreement was available and produced it before the court. Her evidence was in accordance with the undisputed evidence that was before the court and it accordingly was satisfied that she was a credible and reliable witness.

On the other hand the court *a quo* found that the appellant was not a candid witness. The court found that considering his level of education he should have grasped the repercussions of entering into a surety agreement in the manner that he did. His failure to write Limpopo Investments and attributing the failure to an oversight was not truthful. The only conclusion that this court can make is that the appellant was well aware to whom he was standing as surety.

The appellant also based his defence on Chiunda, a former Marketing Executive of the respondent indicating that it was Chiunda who had asked him as a favour to stand as surety

for his (Chiunda's) company called Limpopo Investments yet he failed to call Chiunda to corroborate his evidence.

In light of the above, the court *a quo* was correct to query his credibility considering his level of intelligence. The court *a quo* correctly took into account the educational qualifications that the appellant possessed. It was therefore not unreasonable for it to expect him to know the consequences of affixing his signature to the contract.

In this respect the judge *a quo* held that:

“A litigant who challenges a surety deed on the premise that he signed it for a different entity or person can only discharge the onus resting upon him to show that he never intended to sign the document on behalf of the plaintiff and be bound by it by calling evidence to support his assertion. He is required to do more than make a bare denial of the surety deed or simply make a challenge to the surety deed and leave it there. It was incumbent upon the defendant to call Mr. Chiunda to show that the deed was done for Limpopo Investments and that he indeed did sign the deed for Limpopo Investments. The defendant failed to call Mr. Chiunda to come and substantiate his version and hence the defendant failed to discharge his onus.....”

In light of the above, the court *a quo* cannot be faulted in arriving at the conclusion it did.

4. Whether judgment entered against the principal debtor novated the appellant's liability as surety?

The appellant, in his sixth ground of appeal takes the position that the granting of a judgment against SM Tyres, novated the surety agreement that established his liability to the

respondent. The respondent's argument is that the granting of a judgment against a principal debtor does not prohibit a creditor from claiming the same amount against the surety if the principal debtor has failed to perform.

Novation was defined by ZIYAMBI JA in the case of *Mupotola v Southern African Development Community* SC 7/06 where she stated as follows:

“Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged. See *The Law of Contract in South Africa Third Ed* by R.H Christie at p498. The above definition presupposes that both the existing obligation and the new one arise out of valid contracts. When parties novate they intend to replace a valid contract by another valid contract. See *Swadif (Pvt) Ltd v Dyke* 1978(1) SA 928 (A) at 940 quoted by Christie in the *Law of Contract in South Africa, supra.*”

The *Mupotola case (supra)* is to the effect that novation arises where there are two contracts. In *casu*, it is my view that the judgment against the principal debtor did not create a new agreement that set aside the suretyship agreement entered between the appellant and the principal debtor. The approach suggested by the appellant that where a creditor sues a principal debtor separately from his surety and judgment is subsequently entered in favour of the creditor; the surety's obligation is at that stage discharged is clearly an incorrect position of the law. It is trite that as long as the judgment debt has not been paid and the matter has not prescribed the judgment creditor may recover the debt from a surety.

In any event, as evidenced in the judgment of the court *a quo*, the issue of novation did not arise before the court *a quo*. The appellant sought to raise it for the first time on appeal.

In respect to raising issues for the first time on appeal CHIDYAUSIKU CJ in *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd. And Ors* SC 80/06 stated as follows:

“The general rule, as I understand it, is that a question of law maybe advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed. See *Estate Lala v Mohamed* 1994 AD 324. The principles applicable to the raising of a point of law for the first time on appeal were succinctly set out by KRIEGLER in the case of *Donnelly v Barclays National Bank Ltd* 1990(1) SA 375 at 380H-381B, where the learned judge had this to say:

.....generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one raised on the pleadings in the court below. In this regard I need do no more than refer to Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa* 3ed at 736-737. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it. Generally it will decline to do so unless;

1. the point is covered by the pleadings;
2. there would be no unfairness on the other party;
3. the facts are common cause or well-nigh incontrovertible; and
4. there is no ground for thinking that other or further evidence would have been produced that could have affected the point.”

The issue of novation was never raised in the pleadings filed *a quo* nor was the issue argued during trial. In my view it is clearly unfair and prejudicial to the respondent for it to be raised for the first time on appeal especially in circumstances where the facts are in dispute.

5. Whether the court *a quo* erred by not granting absolution from the instance at the close of plaintiff’s case (herein respondent).

The respondent (then plaintiff) led evidence before the court *a quo* to the effect that the appellant (then defendant) had signed a surety agreement on behalf of one SM Tyres and produced the surety document which had been signed by the appellant in support of its claim. After leading its evidence, the respondent closed its case. The appellant applied for dismissal of the respondent's case, on the basis that the respondent's claim, had not been established, as insufficient evidence had been led to prove that the surety agreement was binding on the appellant. It was submitted on behalf of the appellant that a plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could find for him.

The appellant argued that the respondent failed to show the link between the surety agreement presented in evidence and the marketing licence agreement upon which SM Tyres accrued the debt. Counsel for the appellant, Mr. Mpofu argued that the onus was on the respondent to prove its case on a balance of probabilities. As respondent had failed to do so the appellant should have been granted absolution from the instance. I was not persuaded that the respondent had failed to establish its case at the close of its case.

It is accepted that after a plaintiff has closed its case, a defendant, before commencing his own case, may apply for dismissal of the plaintiff's claim. Should the court accede to this application, the judgment will be one of 'absolution from the instance'. See *Cilliers AC, Loots C and Nel HC, Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa (4<sup>th</sup> edn, Juta and Co Ltd) p681*. A decree of absolution from the instance is derived from Roman Dutch law. It is the appropriate order to make, when, after all the



evidence is led the plaintiff has not discharged the ordinary burden of proof. If at the end of the plaintiff's case there is insufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution. See *LH Hoffman, DT Zeffert, The South African Law of Evidence (4<sup>th</sup> ed) p 507*, who notes the following:

“It has also been said that the term ‘absolution from the instance’ is used to describe the finding that may be made at either of two distinct stages of trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant.”

It is trite that the court cannot *mero motu* consider whether absolution must be granted at the close of the plaintiff's case. It is an option which is available to the defendant, upon application. When an application for absolution from the instance is made at the end of the plaintiff's case the test is: what might a reasonable court do, that is, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case, the test is: what ought a reasonable court do?

In deciding what a court may or may not do, there is an implication that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence.

In the case of *Nobert Katerere v Standard Chartered Bank Zimbabwe Limited HB 51-08*, the court stated:

“The court should be extremely chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be

established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim—*Claude neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403(A); *Marine & Trade Insurance Co Ltd v Van Der Schyff* 1972 (1) SA 26(A); *Sithole v PG Industries (Pvt) Ltd* HB 47-05”.

Since the respondent was suing the appellant in his capacity as a surety, all that the respondent had to place before the court *a quo* was that it had a surety agreement which was signed by the appellant in which the appellant stood as surety for SM Tyres being the debtor for an amount that the appellant had guaranteed to pay to the respondent on SM Tyres' behalf in the event that the amount became owing and that the respondent was a creditor.

Such evidence was placed before the court *a quo* and that evidence in my view formed a reasonable basis for the court to find in respondent's favour. The respondent had discharged its obligation as plaintiff in the proceedings *a quo*.

The finding of the court *a quo* that where a surety challenges an agreement and makes an application for absolution from the instance at the close of plaintiff's case, that application cannot, from a practical standpoint succeed, because once the court is satisfied that a *prima facie* case was established the onus shifted to the appellant was clearly correct. Whether or not respondent's allegations were true could only be established by the court after the appellant led evidence to dispute the respondent's case. The court was satisfied that the respondent had placed the requisite evidence before the court.

In a civil case the court has the duty to balance the scales of probabilities in favour of either the plaintiff(s) or defendant(s). In this particular case the balance could only be struck

after the court heard both sides of the story. In my view, granting the appellant absolution from the instance would have been improper. The appellant's application for absolution from the instance was not sustainable considering the evidence that has been placed before the court. It is common cause that the appellant's defence was that he had signed a surety agreement but it was not for SM Tyres but for "Limpopo Investments Company". Under the circumstances the court could not have asked the respondent to prove appellant's defence on his behalf. It was appellant's duty to prove his defence. It is trite at law that a party has to motivate their own defence.

## **DISPOSITION**

It seems to me that the court *a quo* could not have granted the appellant's application for absolution from the instance given that the respondent had established a *prima facie* case. During the trial the appellant failed to prove his defence on a balance of probabilities. He failed to provide evidence before the court to sustain his arguments. There was no misdirection by the court *a quo* in accepting the evidence from respondent's single witness as the court found the witness credible. The issue of novation raised by the appellant in a bid to evade liability cannot stand because the issue was never raised in the court *a quo*. The Supreme Court, as an appellate court, save in exceptional circumstances, only deals with matters that have been dealt with by the court *a quo*. Its appellate powers do not stretch to dealing with matters as a court of first instance.

With regards to costs. The respondent did not seek for costs in the heads of argument or during the hearing. Accordingly no costs will be awarded although the respondent has been successful in defending the appeal.

In the result I find that the appeal is without merit and it is accordingly dismissed with no order as to costs.

**GARWE JA:** I agree

**BHUNU JA:** I agree

*M.C. Mukome*, appellant's legal practitioners

*Gill, Godlonton and Gerrans*, respondent's legal practitioners