

REPORTABLE (82)

**(1) EASY CREDIT (PRIVATE) LIMITED (2) JUSTIN
TICHIWANGANA (3) MAXINE MANYOWA (4) SHINGIRAI
MAFARA (5) KUDAKWASHE ZUMBIKA (6) TINASHE HERBERT
DZARAMBA (7) BRUCE TARUVINGA.**

v

INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GOWORA JA & GUVAVA JA
HARARE, 18 FEBRUARY, 2019**

P. Kawonde, for the appellants

O. Mutero, for the respondent

Judgment No. SC 85/21
Civil Appeal No. SC 258/18

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GWAUNZA DCJ

[1] This is an appeal against a judgment of the High Court which found that the appellants and the respondent had concluded a loan agreement and consequently ordered the appellants to pay certain amounts of money to the respondent.

After hearing the parties, the court dismissed the appeal with costs and indicated that the reasons for the order would follow in due course. These are the reasons.

FACTUAL BACKGROUND

[2] The first appellant and the respondent entered into a written contract in August 2015 in terms of which the respondent extended to the first appellant a revolving credit facility of US\$500 000.00. The contract signed by the parties was entitled ‘Trade

Finance Agreement for Working Capital’ and referred to the appellants as ‘Borrower’ (first appellant) and ‘Guarantors.’ Interest on the amounts advanced was to accrue at the rate of 15 per cent *per annum* subject to change from time to time. The second to seventh appellants, as directors of the first appellant, bound themselves jointly and severally, as sureties and co-principal debtors with the first appellant for the repayment of any money due under the credit facility.

- [3] In turn, the first appellant entered into separate loan agreements with its own clients (hereinafter referred to as “the sub-borrowers”). *In lieu* of its own bank account being credited with the credit facility funds, the first appellant would instead instruct the respondent to deposit funds directly into the sub-borrowers’ accounts. It averred that Tel-One, the employer of the sub-borrowers, made a written undertaking to effect payroll deductions from the salaries of the sub-borrowers and deposit them into a fund held by the respondent. These deposits would constitute periodic re-payments of the amounts advanced by the respondent under the credit facility.

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In this manner and as of 15 August 2016, the first appellant had re-paid only US\$7 405.49 of the amounts owing to the respondent.

- [4] This circumstance prompted the respondent to institute proceedings against the appellants in the court *a quo* for the repayment of the outstanding amount, interest and costs. In their plea, the appellants did not deny owing the respondent certain amounts of money under the credit facility. They however put the blame for defaulting in making the requisite re-payments on Tel-One, which they accused of dishonouring its written undertaking by refusing to effect payroll deductions from the sub-borrowers’

salaries, for onward transmission to the respondent. This, the appellants aver, resulted in the sub-borrowers defaulting in making repayments of the funds advanced to them. Since the defaults by both Tel-one and the sub-borrowers ‘affected’ the appellants’ ability to repay the funds advanced by the respondent, the appellants pleaded that the parties should share the resultant risk. They further stated that the parties agreed that no default would be continuing nor result from the loan advanced to them.

[5] The respondent’s response to the appellants’ plea was that its claim was not for any profit, that there was no sharing of risk and that in terms of Clauses 5 and 7 of the facility agreement the appellants were obliged to repay the capital amount advanced together with the agreed interest.

[6] The matter was thereafter referred to trial on three issues namely: Judgment No. SC 85/21
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- (i) What is the nature of the agreement between the parties?
- (ii) Whether the first, second, third, fourth, fifth, sixth and seventh appellants jointly and severally are indebted to the respondent as alleged or at all? and
- (iii) Who is liable for payment of costs of suit and on what scale?

[7] At the trial, the appellants submitted that the agreement between the parties was a joint venture agreement in terms of which the parties had to share profits and losses. Through one *Bruce Taruvinga*, the seventh appellant herein, the appellants gave evidence to the effect that the agreement did not capture the true nature of the agreement between the parties. He stated that the “spirit” of the agreement was to carry out a joint venture business. He further indicated that the first appellant had agreed to pay to the respondent a profit share after repaying the total capital and interest in the belief that the agreement in question was a joint venture agreement. He further gave evidence to the effect that the appellants had signed the agreement and

guaranteed repayment of the debt as a way of complying with the requirements of what they believed was a joint venture.

[8] On the other hand, the respondent, through its witness, one *Tichaona Kaseke*, gave evidence to the effect that the agreement in question was a loan agreement in respect of which it anticipated repayment. He stated that the bank was only suing for the capital debt and interest and not for any profits that the first appellant realised. Further, that profit sharing only became an issue after repayment of the debt. In this regard, he stressed that the issue of default in making a payment by the sub-borrowers, who were the clients of the first appellant, had nothing to do with the respondent, neither had it anything to do with the debt in question. The respondent further submitted that, upon the default of the sub-borrowers, it was the responsibility of the appellant, as the lender, to enforce its own agreement against the sub-borrowers.

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[9] The court *a quo* found that it was the first appellant who had come up with the idea of giving loans to employees of qualifying organizations and not the respondent. The court also found that it was the first appellant who would direct the bank to fund its clients and that this resulted in the respondent offering the first appellant a revolving fund facility. Further, the court observed that the appellant had no funds to ‘roll out the scheme’ and had in fact not ‘provided a cent’ to what it termed a joint venture. On the basis of these findings, the court *a quo* concluded that the agreement between the parties was a loan agreement as it clearly spelt out that the respondent was lending money to the first appellant who was the borrower and not a partner in a joint venture

agreement where parties share the risks. The court *a quo* accordingly ordered the appellants to pay the outstanding debt.

[10] Aggrieved, the appellants approached this Court on appeal, on the following grounds:-

1. The court *a quo* held that the Defendants (*sic*) “did not provide a cent to what it termed a joint venture.” That was a mis-direction in that the Defendants’(*sic*) contribution to the joint venture was not money but money’s worth.
2. The court *a quo* therefore erred in dismissing the Appellants’ contention that the agreement between the parties was a joint venture agreement instead of a loan.
3. The court *a quo* misdirected itself by failing to deal with the question whether the Respondent was legally authorised to enter into a loan agreement with the Appellants and at the same time participate in the profits generated from such a loan. Resolution of this question was central to the determination of whether the agreement at issue was a joint venture agreement or a loan.
4. The court *a quo* misdirected itself in failing to deal with the question of whether section 32A(i) of the Banking Amendment Act No. 12 of 2015 applied to the transaction the subject of the trial.

[11] I will consider, firstly, grounds of appeal 1, 3, and 4 before adverting to ground No.2 which in my view raises the only valid issue for determination in this appeal. The first ground of appeal attacks a factual finding of the court *a quo* concerning whether or not the appellants contributed cash to what it termed a joint venture. However, it seems to me that the same ground of appeal confirms that very same factual finding by stating that the first appellant did not contribute money but ‘money’s worth.’ There can therefore be no proper basis for impugning the court’s factual finding in this respect. The first appellant perhaps intended to, but did not, question the fact that the court *a quo* regarded the lack of a cash injection by the first appellant into the supposed joint venture, as one indication of the absence of such a venture between the parties. Be that as it may, this ground of appeal can, in my view, be merged with

ground number 2 without blurring the real issue for determination, which is whether or not the court *a quo* erred in its finding that the agreement between the parties was one for a loan and not a joint venture.

[12] In relation to the appellants' 3rd and 4th grounds of appeal, the respondent submits, correctly, that the issues raised therein were not pleaded in the court below, nor were they on the list of issues that the court *a quo* was mandated to determine. The appellants themselves confirm these assertions by stating that the two issues were, in fact, raised in their closing submissions *a quo*. In view of this circumstance, the respondent contends that the court *a quo* was correct in not determining these issues.

[13] A consideration of the papers and submissions before the court *a quo* supports the respondent's contentions. The agreed issues placed before the court *a quo* for its determination did not include the issues raised in the appellants' grounds of appeal 3 and 4. While it is evident from the record that, at the end of the trial, the parties filed closing submissions which *inter alia*, addressed these issues the court *a quo* in its judgment however, did not relate to them.

[14] While the court *a quo* could have commented on the impropriety of the appellants raising the issues in question in their closing submissions, its failure to do so does not detract from the effect of such infraction. This is because the court could not, in any case, have properly dealt with the issues. The court was called upon to determine three issues and these were the nature of the agreement, whether the appellants were jointly and severally liable to the respondent and, lastly, which party had the liability to pay costs of suit. The issues raised in grounds of appeal 3 and 4 were not pleaded, nor taken on board in any way in the pleadings leading up to the trial *a quo*. Nor was

an application made to amend the pleadings so as to introduce additional defences to the respondent's claim. The appellants, in defining their case upon receiving summons only stated that the sub-borrowers had defaulted in making re-payments leading to their failure to pay back the loan in terms of the agreement. Clearly the appellants sought to advance, at the stage of closing submissions *a quo*, a completely new line of defence in relation to the case brought against them by the respondent. This they could not do. Accordingly, this Court finds no fault with the fact that the court *a quo* did not relate to those issues in its judgment.

[15] The importance of properly setting out one's case in the pleadings was highlighted in the case of *Medlog Zimbabwe v Cost Benefit Holding* SC 24/18 where GARWE JA stated as follows at p 10-12 of the cyclostyled judgment: -

“In general, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.

In *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 898 the court cited with approval the following remarks by the authors *Jacob and Goldrein* in their text *Pleadings: Principles and Practice* at p 8-9: -

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings.... **For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves.** It is not part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. **Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties.....the court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda**

for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.”

... . The position is therefore settled those pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore, a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent.” (*emphasis added*)

[16] Applying the above to the circumstances of this case I find that the court *a quo* cannot be faulted for not determining issues that had not been properly pleaded and argued before it. It should be noted that the mere raising of an issue does not mean that a court should deal with it. It has to be raised in accordance with the procedures prescribed by the law. This did not happen *in casu*, nor did the appellants bring the issues up before this Court, as new points being raised on appeal. The appellants only took issue with the court *a quo*'s failure to determine the issues in question. SC 85/21
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Grounds of appeal 3 and 4 are accordingly dismissed.

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Whether the court *a quo* correctly found that the agreement between the parties was a loan agreement.

[17] The appellants in their first and second grounds of appeal contend that the court *a quo* erred in finding that the agreement between the parties was a loan agreement when in fact it was a joint venture agreement. It was submitted that the agreement was *sui generis*, and that, from a careful analysis thereof, it could be implied that it was a joint venture agreement. Further, the appellants asserted that the court *a quo* erred in holding that the appellants “did not provide a cent to what it termed a joint venture” as the appellants’ contribution to the joint venture was not money but money’s worth.

[18] In making a finding that the agreement was a loan agreement, the court *a quo* took into account a number of factors. These included the fact that it was the first appellant who successfully approached the bank for funding and was advanced the sum of \$500 000.00. Also, that the first appellant came up with a list of sub-borrowers and would direct the bank to transfer funds to their union. The court further noted that the agreement spelt out that the bank was advancing money to the first appellant, for the grant of payroll-based loans to eligible sub-borrowers. It also took into account the fact that it was the first appellant who proposed clients to the bank and the fact that any default by the sub-borrowers would be met by the first appellant.

[19] The court *a quo* considered the fact that the second to seventh appellants had bound themselves as sureties and co-principal debtors for the repayment of the capital amount. With these findings, the court reached the conclusion that the terms of the agreement leaned more towards a loan agreement than a joint venture. It reasoned that, had it been a joint venture agreement, it would not have contained clauses referring to the first appellant as the borrower and the respondent the lender of the funds. The court thus made factual findings concerning the nature of the agreement entered into by the parties.

[20] It is an established principle of law that an appellate court is slow to interfere with the factual findings of a trial court unless the findings are so grossly unreasonable that no reasonable tribunal, applying its mind to the same facts, would have reached the same conclusion. The *locus classicus* on this is *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) where the court held as follows at 670C-E: -

“The general rule of the law, as regards irrationality, is that an appellate court will not 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 or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion." (my emphasis)

See also *Metallon Gold Zimbabwe v Golden Million (Pvt) Ltd* SC 12/15 at p 7 of the cyclostyled judgment.

[21] The question that arose was whether the finding that the parties concluded a loan agreement was so grossly unreasonable that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion. The gist of the appellants' submissions was that the nature of the agreement was a joint venture and not a loan. Clause 3 of the agreement is to the following effect: -

"3. Purpose

3.1 The Borrower shall apply the Loans borrowed by it under the facilities towards the making of payroll based sub-loans to eligible sub-borrowers."

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This was in addition to the heading of the agreement which was couched as "US\$500 000.00 REVOLVING TRADE FINANCE". In clause 5, the agreement prescribed the repayment regime for the loans made pursuant to the facility. Clause 7 on profit sharing is also worth noting and it reads: -

"Over and above the repayment of capital sum and interest as specified above, the borrower and funder shall share the Gross Income realised from the sub-loans and created out of the facility after deducting cost of funds at the ratio of 60:40 respectively. The profit portion due to IDBZ shall be due and payable on a monthly basis." (*emphasis added*)

[22] The court takes the view that a reading of the agreement as a whole and the clauses referred to above suggests clearly that the agreement between the parties was a loan and not a joint venture agreement as contended by the appellants. The wording and

terminology used in the agreement further reinforce this interpretation. These include terms such as ‘main borrower’ and ‘sub-borrowers’. Pertinent to note also is the fact that the respondent’s claim in the court *a quo* was for monies arising from the appellants’ failure to repay the loan and interest thereon. It is noted in this respect that clause 7 of the agreement, cited above, distinguishes the repayment of the capital debt and interest, from any other payments that might be made. The respondent’s claim was concerned only with the repayment of the capital sum advanced, and interest. The claim was not couched in any terms that suggested that it was based on a joint venture agreement between the parties. This would seem to accord with clauses 5 and 7 of the agreement, with the latter, as already indicated, making it apparent that the issue of sharing profits was a separate ‘portion’ of the agreement from that relating to the repayment of the capital sum and interest.

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[23] Further to this, in their plea, the appellants did not plead anything to suggest that the agreement was a joint venture agreement. It is pertinent to quote the relevant pleading in question. Paragraph 2 of the appellants’ plea was to the following effect: -

“No issues arise from these paragraphs save to state that it was a condition precedent to delivery of a utilization request to the plaintiff by the first defendant that no default would be continuing or would result from the proposed loan. However, the sub-borrowers of the loans defaulted. In terms of the agreement the first defendant procured from Telone, the employer of the sub-borrowers, a written undertaking that all monthly payroll deductions from its respective employees towards loan repayments would be made into a fund held by the Plaintiff. However, Telone wrongfully refused to make monthly payroll deductions from its employees towards loan repayments. The default affected the agreement entered into by and between the parties. In the circumstances, the parties ought to share the risk.”

[24] It was thus the appellants’ defence that the sub-borrowers of the loan defaulted in making repayments because Telone, the employer of the sub-borrowers, had failed to make monthly payroll deductions from its employees towards the loan repayment.

This therefore led to the appellants' failure to repay the funds advanced under the credit facility. Be that as it may, the first appellant's witness gave evidence to the effect that the agreement did not capture the true nature of what was agreed between the parties. He further stated that the "spirit" of the agreement was to carry out a joint venture business.

[25] The court heard and considered evidence on this point, from both sides to the dispute. It found that the appellants had failed to establish that the terms of the agreement in question constituted a joint venture. The court clearly could not read into the parties' agreement, terms and conditions that were not explicitly stated. Nor was the court in a position to determine whether or not the document had failed to capture the true nature of the agreement the parties intended to enter into. It was surely up to the parties to clearly, and without ambiguity, incorporate into their agreement the terms and conditions that would bind them.

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[26] Against this background it cannot, in the court's view, be said that the factual finding made by the court *a quo* as to the nature of the agreement was one that no reasonable tribunal applying its mind to the same facts would have arrived at.

The court finds, accordingly that no fault can be attributed to the conclusion by the court *a quo* that the averment that the contract was a joint venture agreement was without merit.

[27] The court also notes that the appellants did not dispute the sum claimed. Their contention was that the parties ought to share the risk, whether it was a profit or a

loss, emerging from the failed agreement between the first appellant and its sub-borrowers. The court takes the view that the appellants are simply trying to evade liability by attempting to raise the issue of risk sharing and asserting that the agreement was a joint venture instead of a loan agreement. The appellants ought to be reminded of the adage “signer beware”, or the *caveat subscriptor* rule. *R. H. Christie* in his book *Business Law in Zimbabwe*, 1998, Juta & Co at p 67, had this to say regarding the rule: -

“The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as the *caveat subscriptor* rule is therefore that a party to a contract is bound by his signature, whether or not he has read and understood the contract....and this will be so even if he has signed in blank...or it is obvious to the other party that he did not read the document.”

See also *Tindwa v ZB Bank Ltd* SC 3/19.

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[28] The fact that the appellants understood the nature of the agreement to be a joint venture, contrary to what the agreement expressly stated as being its nature, is to their own peril. The court, as already indicated, could not be expected to read into the parties’ agreement, terms and conditions that were not there. The appellants are bound by the terms of the loan agreement which they freely signed. They admitted that they borrowed money from the respondent. They undertook to repay it and should accordingly do so. The words of MATHONSI J (as he then was) in *African Banking Corporation of Zimbabwe Limited t/a BANCABC v PWC Motors & Ors* HH 123/13 at p 5 of the cyclostyled judgment are worth restating *in casu*: -

“I find it utterly deplorable that business people are very quick to receive money from banks undertaking to repay on certain terms. When they have expended the money and enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and then refuse to pay. As they say, the time to pay the piper has come.”

[29] The above remarks are entirely apposite to this matter. The appellants borrowed money from the respondent, and they now try to avoid paying it back. They should not be allowed to do so.

DISPOSITION

[30] Taking the foregoing into account, the court *a quo* was correct in finding that the parties concluded a loan agreement. Further, the court *a quo* cannot be faulted for not dealing with the issues raised in the appellants' grounds of appeal 3 and 4 as the issues were not raised in their pleadings, and were hence improperly before the court.

It was for the above reasons that this Court dismissed the appeal with costs.

GOWORA JA : I agree

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GUVAVA JA : I agree

Kawonde Legal Services, appellants' legal practitioners

Saywer & Mkushi, respondent's legal practitioners.