

**DISTRIBUTABLE (23)**

**BIG VALLEY MASTERS (PRIVATE) LIMITED**  
**v**  
**SHI JINWU**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA DCJ, GUVAVA JA & MAVANGIRA JA**  
**HARARE, 29 JANUARY 2018 & 1 APRIL 2021**

*T. Zhuwarara*, for the appellant

*V. Shamu*, for the respondent

**GUVAVA JA:**

**INTRODUCTION**

Judgment No. SC 24/21  
Civil Appeal No. SC 498/171

1. This appeal arises from the judgment of the High Court in which the court *a quo* ordered the appellant to pay the respondent the sum of US\$89 000 with interest at the prescribed rate calculated from 11 December 2012 to the date of full payment.
2. The appellant is a gold mining company. It is registered in terms of the laws of Zimbabwe. It owns a gold mine located in Shurugwi (Sky Rocket 16485).
3. The respondent is a private individual of Chinese origin. He is a foreigner investor based in Zimbabwe.

**BACKGROUND FACTS**

4. On 13 January 2011 the appellant and the respondent entered into a joint venture agreement. In terms of the agreement the parties would constitute a new company. The

appellant would provide mining claims and the respondent would be responsible for exploration and providing investment of capital and equipment in respect to the mining venture.

5. In terms of the agreement, the respondent would get 75 per cent and the appellant 25 per cent of the proceeds from the mine. The respondent was obliged to grant a loan to the new company in the sum of US\$150 000. The loan was to be paid back to the respondent through deductions from profits that would accrue to the appellant when such profit was realized by the company. The respondent had to pay a down payment in the sum of US\$50 000 within ten days of coming into effect of the agreement. In return the appellant would give the respondent 'blocks of claims' certificate and the company certificate "after agreement of signature of ten days". (*sic*)

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The new company was to be established before 1 March 2011 and thereafter the respondent would pay the remaining US\$100 000 to the appellant within ten days after 1 March 2011. Failure by the respondent to bring reasonable mining equipment and to have the project take off by July 2011 would entitle him to be paid back the loaned amount within 6 months.

6. Following signing of this agreement, the respondent through his erstwhile legal practitioners, wrote a letter to the appellant dated 13 May 2011. In this letter the respondent informed the appellant that there was a misconception on the terms and conditions of the agreement which had been agreed to by the parties on 13 January 2011. As such, the respondent informed the appellant that he was cancelling the

agreement and demanded a refund of the sum of US\$88 099,00 which he had paid to the appellant as a loan amount in terms of the agreement.

7. Following the letter cancelling the agreement, the parties thereafter entered into a new agreement on 3 October 2011. In terms of the new agreement, the appellant admitted that it owed the respondent the sum of US\$89 000. It was also agreed that the full loan amount as agreed by the parties was US\$150 000. It was further agreed that the respondent would recover the loan amount through a tribute to operate and extract ores from the mine. The respondent was to take over the appellant's workers and general control of the mine and recover the amount due to him. Payment of the loan balance of US\$61 000 had was to be made before the respondent could take up occupation of the mine.

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8. On 11 December 2012 the respondent issued summons against the appellant claiming the sum of US\$89 000 being the amount advanced to the appellant as well as interest at the prescribed rate and cost of suit. In his declaration, the respondent averred that the new agreement between the parties did not come into fruition due to the appellant's (represented by Philemon Mubata who was cited as the second defendant *a quo*) failure to perform in terms of the agreement by excluding him from the operations at the mine and using the loan contrary to the provisions of the agreement. The respondent further averred that he had no choice but to cancel the agreement as the appellant had breached it.
9. In its plea, the appellant did not dispute entering into a joint venture agreement with the respondent but argued instead that the respondent had not sought to recover his money

by mining ore equivalent to the loan sum of US\$89 000. It was the appellant's argument that according to the agreement, the appellant was entitled to six months in which to repay the loan. The appellant thus stated that the issuance of summons proceedings was premature.

10. On 20 November 2013, the appellant amended its plea and averred that the respondent had breached the agreement and failed to provide equipment necessary to carry out exploration work at the mine. Following breach of the first agreement by the respondent the parties entered into a second agreement. The appellant further averred that the second agreement had a suspensive provision to the effect that the respondent had to pay the full amount of US\$150 000 before he could recover his monies from production on the mine.

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11. The appellant also filed a counter claim against the respondent with the amended plea for the sum of US\$61 000 being payment of the balance of the loan in fulfilment of obligations which the respondent had undertaken in order to fulfill the terms of the agreement.
12. In response to that claim, the respondent alleged that a condition had to be satisfied prior to the payment of the US\$61 000, which condition was his involvement in management and operations at the mine at the inception of the loan agreement. The respondent averred that he was frustrated by the actions of the appellant. This was the reason why he failed to fulfill his obligation and led to the cancellation of the whole agreement.

## PROCEEDINGS BEFORE THE COURT A QUO

13. At a Pre-Trial Conference the agreed issues for determination were stated as follows:
- “a) Whether or not the plaintiff was in accordance with the joint venture agreement obliged to pay the sum of US\$150 000 towards financing the gold mining venture.
  - b) Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> defendants frustrated the contract resulting in non-fulfillment of the terms and conditions of the agreement between parties.
  - c) Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in breach of the fundamental terms of the agreement causing the plaintiff to cancel the whole agreement and demand repayment of the loaned sum of US\$89 000.”
14. During the trial the respondent, Ms. Ding (his assistant at the time when the agreement was made) and one Mr. Wei Ren (the respondent’s mining manager from 2005 to 2010-2011) gave evidence. The three witnesses all testified to the effect that the appellant and respondent entered into two agreements which never materialized and that the appellant denied the respondent access to the mine so that he would recover his monies. Ms Ding further clarified that the second agreement was prepared by Mr Mubata. She denied that the respondent had breached any of the terms of the agreement and insisted that it was the appellant which had breached the terms of the agreement by denying the respondent access to the mine.
15. Two witnesses led evidence on behalf of the appellant. Mr. Mubata (the second defendant *a quo*) testified that the agreement failed to materialize because the respondent failed to bring the requisite equipment to the mine and that the respondent cancelled the agreement because the appellant had refused to sell the mine and transfer the registration certificates to him. The second witness was Mr. Mhere, the appellant’s finance and administration manager. He testified that the respondent failed to pay the full loan amount which had been agreed between the parties leading to the breach of agreement.

16. In its judgment, the court *a quo* found that the respondent had had the agreement explained to him in Chinese and therefore they were valid agreements. The court believed the evidence of the appellant that the respondent paid the loan in ‘drips and drabs’ contrary to the terms of the agreement. The court *a quo* also found that the respondent was in breach of both agreements. The court however decided to apply the principle of equity on the basis that the respondent’s grasp of English was so bad that he may not have understood the terms of the agreement and decided to reimburse the respondent the amount that he had loaned the appellant. The court stated as follows:

“I (sic) persuaded that it would be appropriate to utilize the equitable principle in coming to a resolution of this matter. I hold the view primarily because the court was uneasy with the plaintiff’s level of understanding of the terms of both agreements”

The court made the following order:

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“In the result, it is ordered that:

1. The plaintiff’s claim against the 2<sup>nd</sup> defendant be and is hereby dismissed with costs.
2. The defendant’s counterclaim against the plaintiff, for payment of USD\$61 000, be and is hereby dismissed with costs.
3. Plaintiff’s claim, as against the 1<sup>st</sup> defendant, Big Valley Masters Private Limited, in the sum of US\$89 000-00, is allowed, together with interest thereon at the prescribed rate calculated from 11 December 2012 to the date of payment in full.
4. 1<sup>st</sup> defendant shall bear the costs of suit.”

17. The appellant was dissatisfied and appealed on the following grounds:

1. The court *a quo* erred in law in deeming the partnership dissolved by a letter at a future date contrary to the principle that dissolution of a contract is exercised *ex nunc*.
2. The court grossly misdirected itself in adjudging that the respondent was entitled to recover US\$89 000 when he was in clear breach of the parties’ agreement.

3. The court *a quo* grossly misdirected itself by allowing Respondent to derive a benefit from his own wrong.
4. The court *a quo* erred in failing to uphold the Appellant's defence of the *exceptio non adimpleti contractus*.
5. The court *a quo* further erred in allowing interest on the sum of US\$89 000 to run up to the date of payment thus contravening the *in duplum* rule.
6. The court *a quo* grossly misdirected itself in awarding costs in favour of the Respondent where it had failed to fully succeed in the matter.

In my view, from the appellant's grounds of appeal, and from submissions made, the issue that resolves the appeal is the following:

**Whether or not the court *a quo* erred in applying the principle of equity in resolving the matter.**

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#### **SUBMISSIONS ON APPEAL**

18. Counsel for the appellant, Mr. *Zhuwarara* submitted in the main that the court *a quo* erred in determining the matter before it on the basis of the principle of equity as such principle is not part of the Zimbabwean law. Counsel argued that the principle could only be resorted to where a statute provides for its application. It was counsel's submission that the terms of the agreement were clear and should have been complied with. With these submissions, whilst not abandoning the other grounds, counsel prayed that the appeal be allowed.
19. *Per contra*, counsel for the respondent Mr *Shamu*, argued that the court *a quo* did not misdirect itself when it applied the principle of equity. It was his submission that the principle is part of our law in terms of the common law. Counsel further argued that

the breach of the agreement by the respondent could be attributed to the fact that there had been difficulty in communication as the respondent could not communicate fluently in English. Counsel thus submitted that the case was one which justified the application of the principle of equity so as to ensure that the appellant would not be unjustly enriched.

20. The court *a quo* found in favour of the respondent on the basis of the principle of equity.

The court stated as follows;

“A modern interpretation of the equitable principle, one that takes into account the situation prevailing in our economy, may not favor an insistence that the plaintiff cannot succeed in his claim until he has performed in full, the terms of the October agreement. The court can exercise its discretion in the plaintiff’s favor despite his partial performance of the January agreement (by advancing a loan up to US\$89 000,00) and his non - performance of the October agreement.”

21. The appellant has argued that the court *a quo* erred in applying the principle of equity in this matter as the principle is foreign to this jurisdiction. With that the appellant seeks to show that the court misdirected itself in finding for the respondent resulting in him deriving a benefit from his own wrong.

The second agreement had a provision under paragraph 8 which stated as follows:

“(8) PAYMENT OF LOAN BALANCE (\$61 000) SHOULD BE PAID TO SUM IN FULL BEFORE OCCUPATION OF PLANT WILL BE TAKING AFTER MR SHI IS BACK”(sic)

22. It was not in dispute that the provision under paragraph 8 was not fulfilled by the respondent. It was also an agreed fact that at no point did the respondent mine or recover any profits from the mine. The appellant submits that the court *a quo* erred by ordering it to pay the respondent his money in circumstances where he had breached the contract.



23. The respondent argued before the court *a quo* that he was denied entry on to the mine by the appellant. This prevented him from being productive to recover his monies as agreed between the parties in the second agreement. The appellant counter argued that the respondent was never refused access to the mine from the date when the first agreement was signed to the signing of the second agreement. The court *a quo* believed the appellant's arguments and found that the respondent failed to honor some of the provisions of the agreement and was never denied access to the mine.

24. It is a settled principle that this Court will not easily interfere with factual findings made by a lower court unless the findings are grossly unreasonable. (See *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S), *Hama v NRZ* 1996(1) ZLR 664 (S), *Reserve Bank of Zimbabwe v Corrine Granger and Another* SC 34/01) The lower court enjoys the opportunity to see the witnesses on the stand, assess their demeanour and credibility. Such findings of fact cannot easily be interfered with by an appellate court as it is limited to the record of proceedings. See *Mtimukulu v Nkiwane and Another* SC 136/01.

25. The respondent in making his claim for the amount which had been advanced to the appellant had to prove that he was owed such money. It is pertinent to note that the standard of proof in all civil matters is on a balance of probabilities. The concept of proof on a balance of probabilities was enunciated in *British American Tobacco Zimbabwe v Chibaya* SC 30/19 wherein the court quoted with approval the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, 374 and explained the concept of balancing probabilities as follows:

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more

probable than not', the burden is discharged, but if the probabilities are equal it is not."

This was further emphasized in the book, *Principles of Evidence*, 4th ed (2016) Juta:

Cape town, wherein the authors Schwikard P.J and van der Merwe S.E stated that:

"In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference."

The rule on *onus* of proof was pronounced in *ZUPCO Ltd. v Pakhorse Services (Pvt)*

*Ltd* SC 13/17 where the Court stated that:

"The cardinal rule on *onus* is that a person who claims something from another in a Court of law has to satisfy the Court that he is entitled to it."

26. The respondent managed to discharge the onus of proof which was required of him in making his claim. Indeed, it was conceded by the appellant that the sum of US\$89 000 was paid to it by the respondent. It was also conceded that during the subsistence of the agreement the respondent did not mine any gold or recover any profit from the use of that money. The resultant effect was that the appellant ended up unjustly enriched by the respondent's US\$89 000 which the respondent did not benefit from.

27. The appellant, in motivating the point that the court *a quo* erred in finding that the respondent could recover money he had paid to the appellant, relied on the ground that the court erred in failing to uphold its defense of exception *non adimpleti contractus*. This point was not pursued in the appellant's heads of argument and was never pleaded *a quo*. Clearly the appellant was wrong in submitting that the court *a quo* erred by not dealing with the point.

28. It is a trite principle that it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive as this is a matter of public policy. (See *Magodora and Others v Care International Zimbabwe* SC 24/14)

29. This Court must interpret the second agreement literally. It can be deduced from the agreement that the respondent had to pay the full loan amount first before taking occupation of the mining claims. The respondent failed to do so and this resulted in a breach of the contract. Once the respondent failed to fulfil his end of the agreement and a breach occurred the agreement was terminated and the respondent would ordinarily not be entitled to recover his money.

30. However, for a wholesome resolution of this matter, it is in the interests of justice that the principle of equity be looked at as that was the basis of the court *a quo*'s decision. The scholar R.H. Christie, *Business Law in Zimbabwe*, 2<sup>nd</sup> Ed, Juta & Co Ltd at p 103 provides that the principle of equity may be resorted to where there is incomplete performance of a contract. The principle is based on unjust enrichment. The court in *Carlis v McCusker* 1904 T.S 917 observed that:

“In view of the well-known maxim of law that no man should be allowed to enrich himself at the expense of another, this court would not permit a man who had verbally agreed to sell landed property, and had, on the faith of that agreement, received the whole or portion of the purchase price, to retain both the money and the land. It would under such circumstances come to the relief of the purchaser” (See also *Matipano v Gold Driven Inv (Pvt) Ltd* SC 225/12)

31. This principle is clearly discretionary and is applied by a court on the basis of the particular circumstances of a case which warrant the use of such a principle. I would

however venture to suggest that the principle of equity should be sparingly used as it has the effect of undermining the contract entered into between the parties.

32. In this case the respondent paid a known sum of money to the appellant on the basis of the first agreement. The respondent never acquired any minerals from the appellant's mine. Although the first agreement was dissolved the court *a quo* in the exercise of its discretion took into account that the second agreement did not have an operational clause to deal with what would happen if any of the parties breached the agreement. In the first agreement it was an agreed provision that in the event that the respondent failed to bring equipment to the mine he would be entitled to a refund of his money within six months. The appellant in its own plea stated that it was an agreed provision that if there was failure to pay the debt it would settle the debt over a period of six months.

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33. It seems to me that even though the second agreement did not have a provision for settlement between the parties in the event that the respondent failed to fulfill his obligations the court *a quo* was correct to exercise its discretion and be guided by the spirit of the provision in the first agreement. It was quite apparent that the second agreement flowed from the first agreement between the parties.

34. This is a matter where equity may properly be applied. It would be unjust for the appellant to remain in possession of the US\$89 000 which was paid to it by the respondent when the respondent himself did not get anything from the deal. The agreement between the parties was an investment on the part of the respondent that was going to jointly benefit both parties. The loan paid by the respondent was to be paid back through production on the mine. Production did not happen. Despite the

respondent's breach of the agreement, justice will be met if the parties are returned to their status *quo ante*.

35. The appellant did not either in its grounds or in argument seek to challenge the application of discretion by the court *a quo* in applying the principle of equity in these circumstances. Indeed, in my view, the appellant would have been hard pressed to make such a submission in view of the concession it had made that it had received the money.

36. It would appear however that an order for interest on the sum is not justified. The respondent accepted in his evidence that he was in breach of the agreement between the parties. He did not fulfil his obligations which would have resulted in him occupying the mine and getting his money back. He thus cannot benefit by being awarded interest in view of the fact that he did not comply with the terms of the agreement.

37. However, the special circumstance of the respondent justifies the approach by the court *a quo*. The respondent's understanding of the English language was so bad that the court felt the need to intervene. It would be a travesty of justice to hold the respondent to the terms of the agreement in circumstances that clearly show that he did not grasp that he was obliged to pay the full amount before he could recover his money. This was in circumstances where the appellant not only retained the profits from the mining operations but also retained the respondent's money.

## **DISPOSITION**

38. The court *a quo* did not err in finding that it was just and equitable for the appellant to return the respondent's loan of US\$89 000. Indeed, it was clearly accepted by the appellant that it had received the money from the respondent. The court however erred in awarding interest on the sum at the prescribed rate when such interest was not justified where the court was applying principles of equity. The appeal thus succeeds on this point. With regards to costs, the respondent has successfully defended the appeal in the main and I thus find no reason why costs should not follow the cause.

39. In the result, it is accordingly ordered as follows:

1. The appeal be and is hereby partially allowed with costs.
2. Paragraph 3 of the judgment of the court *a quo* be and is hereby set aside and substituted with the following:

“3. Plaintiff's claim, as against the 1<sup>st</sup> defendant, Big Valley Masters Private Limited, in the sum of US\$89 000 is allowed.”

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**GWAUNZA DCJ**

I agree

**MAVANGIRA JA**

I agree

*Mhaka Attorneys*, appellant's legal practitioners

*Vasco Shamhu & Associates*, respondent's legal practitioners