

EDELIN TRISH MASHIRI
versus
SIMON SVINURAI

HIGH COURT OF ZIMBABWE
MAWADZE J and ZISENGWE J
MASVINGO, 12 OCTOBER, 2022
Written reasons provided on 12 June 2023

Civil Appeal

T Nyoka; for the Appellant
J Mandevere; for Respondent

ZISENGWE J: On 12 October 2023 we delivered an *ex tempore* judgment dismissing the appellant's appeal and upholding the respondent's cross appeal with costs. The following are the full reasons informing that decision. We supply them at the instance of the appellant who has since made a written request for the same.

The Background

The perils of relying on an oral contract with its attendant risk of disputation regarding the terms thereof are all too evident in this matter. The parties to this dispute have always agreed that they entered into an oral agreement wherein the respondent was to construct a four roomed house for the appellant and that consequent to that agreement the former did construct the house but only up to window level. They however remained poles apart on practically everything else. Of significance they were in total disagreement on three key issues. Firstly, they differed on why the respondent discontinued the building project mid-stream, secondly, they bickered on what the consideration for respondent's services was and thirdly they disagreed over whether respondent's payment was to be made upon completion of the construction of the house or whether it was to be made at every stage in the construction process.

The appellant's position both in the court *a quo* and in this appeal with regard to those issues can be summarised as follows; that the respondent would be paid his remuneration in full upon completion of the project and that the agreed consideration was the sum of US\$1200 in cash (or US\$800 in cash and the balance in the form of a beast *in lieu* of that amount). She claimed that the respondent abruptly stopped the construction when he reached window level and started demanding payment for work done thus far. She therefore insisted that the respondent by unilaterally and without just cause abandoning the project was in flagrant breach of the agreement.

The respondent's position on the other hand was simply that although they did not agree on any specific amount to be paid to him as consideration for his professional services, the two of them nevertheless agreed that he would be paid an amount that was just and reasonable in the circumstances. He also averred that the expectation was that he would be paid at every successive stage in the building project. He claimed that the the appellant's failure to pay him coupled with her failure to procure the requisite materials needed for the completion of the project (particularly water and cement) was in breach of the agreement and that left him with no option but to abandon the project and seek legal recourse therefor.

It is common cause that after respondent served the appellant with a letter of demand demanding payment in the sum of US\$2 450, which letter went unheeded, the respondent sued out summons in the Magistrates court sitting at Chiredzi (the court *a quo*) for the payment of the sum of US\$ 2450 representing consideration for the work done in constructing the home up to window level.

The appellant reacted by entering appearance to defend and in her plea averred the position articulated above. She specifically denied having failed to procure the materials required for the completion of the home. She disputed the amount claimed and insisted that she was still eager to honour the agreement subject to the respondent completing the house for the fee of US\$1 200 as initially agreed.

The evidence led in the Court *a quo*

In the trial which ensued, the respondent (then as plaintiff) testified in support of his claim and called one other witness one Maniki Knowledge a builder under his employ. The appellant (then as defendant) was the sole witness for her case.

Their respective accounts generally mirror the summaries outlined earlier. Suffice is it to reiterate that the respondent insisted that the contract collapsed on account of the failure by respondent to supply the materials needed for the completion of the project. He broke down this claim as follows; drawing the plan - US\$100, setting out - US\$150, trenching and footing- US\$300, "boxing" - \$450, backfilling - US\$250, slabbing - \$300 and construction of the walls up to window level US - \$600. He would deny under cross examination that the amount agreed upon for the construction of the house up to completion was US\$1 200. He would also insist under cross examination that although the appellant supplied sand needed for the installation of the ring beam, she failed to supply water, quarry stones and cement.

His witness Maniki Knowledge also essentially testified the effect that the appellant failed to pay them for the work they did on the project and that she failed to supply the materials required to complete the construction of the house.

The appellant on the other hand insisted that the agreed figure for the construction of the house was US\$1 200 payable upon completion of the house. She indicated that it was agreed that she would be responsible for the supply of all materials. For the latter purposes she claimed that she hired a 30-tonne truck to bring the materials on site. She also indicated that the respondent started demanding payment before the completing the house and it was at that stage that she informed the respondent that he could take the beast as part payment but that the respondent apparently spurned that offer and abandoned the project before commencing legal proceedings against her. Under cross examination she would deny that she failed to supply the requisite materials and insisted that water was readily available from the well and a borehole situated within her homestead.

At the conclusion of the trial the court *a quo* found for the respondent. In doing so it concluded from the evidence that the defendant had breached the contract by failing to provide the materials required to complete the house. The court however found that the figure claimed by the respondent was inflated as it did not correctly reflect the amount agreed upon which in its view as US\$1200. Accordingly, it ordered appellant to pay the appellant the sum of US \$1 200 (as its equivalent at the interbank rate) with no order s to costs.

Both parties were clearly unhappy with that conclusion and filed an appeal and cross appeal against the same respectively.

The appeal

Appellant's grounds of appeal were couched in the following terms;

1. *The Honourable Court grossly erred and misdirected itself when it granted the plaintiff's judgement in the sum of US\$1 200 when the respondent [had] failed to prove his case on a balance of probabilities.*
2. *The Honourable Court a quo grossly misdirected itself in granting judgment in favour of the respondent and picked figures which were not supported by the evidence.*
3. *As a result, the court a quo grossly misdirected itself in granting judgment in favour of the respondent and plucked figures which was not supported by any evidence.*

She therefore sought an order setting aside the decision of the Magistrate and substituting it with one dismissing the claim with no order as to costs.

The cross- appeal

The respondent's grounds of appeal were stated as follows:

1. *The court a quo erred and misdirected itself at law by awarding respondent US\$1 200 when he had presented cogent evidence justifying entitlement to US \$2 450 which was uncontroverted by Appellant.*
2. *The court a quo erred by exercising its discretion improperly in refusing to award costs into respondent's favour in the absence of any justification for that.*

His prayer was therefore that the decision of the court a quo be set aside and substituted with one ordering the appellant pay him the sum of US2450 with costs on the attorney and client scale.

In her heads of argument, the appellant opted to combine grounds 1 and 3 and advanced arguments whose general thrust was that the court *a quo* should have accepted that the parties agreed on a figure of US\$1 200 for the completion of the house. Alternatively, it was averred that if the parties agreed on "*a reasonable amount*" for the work done, the contract was void for vagueness.

Regarding the second ground of appeal wherein it was contended that the court merely sucked the amount it awarded out of its thumb, so to speak, it was argued that the payment was subject to a condition precedent- namely the completion of the house.

After a few exchanges with the court, Mr Nyoka for the appellant conceded that the appeal lacked merit. However, for the completeness of the judgment, brief reference will be made to the reasons regarding why we believe that the concession was properly made.

The half-hearted suggestion that the contract was subject to a condition precedent, same being supposedly the completion of the house was quite clearly unsustainable. A suspensive condition (or condition precedent) in a contract is one that suspends or postpones the full operation of the obligation which it qualifies until certainty is reached, in that the condition is fulfilled or that it fails. A typical suspensive condition would be where one party agrees to purchase a house on condition she obtains a mortgage bond, the condition precedent being the obtainment of the mortgage bond. In the present matter the requirement that the respondent was to construct the house to completion, before he could be paid as alleged by the appellant, would not constitute a suspensive term of the contract but a substantive obligation on the respondent to fulfil. It would be illogical to say the agreement would only come into existence upon the respondent constructing the house to completion.

Regarding breach, we found that the court *a quo* was indeed correct in finding that it was the appellant who breached a material term of the contract by failing to provide the requisite materials needed to finish the house. Appellant's assertions that she provided everything that was required runs against the grain of the evidence led. The evidence undoubtedly shows that she was in financial dire-straits. Not only did she testify that she had to borrow money from certain persons in order to purchase some of the materials but also that when respondent demanded payment, she resorted to offering him a cow in lieu of cash. There are factors indicative of an inability to procure the required materials.

The evidence of the respondent was corroborated by that of his employee who testified that the appellant failed to supply the required material.

There was no reason why the respondent would abruptly abandon the project if all the materials had been duly supplied.

The contention that the court *a quo* should have found that the governing term of the contract was that payment for work done was only to be effected upon completion of the house as testified by the appellant and not as any stage earlier as testified by the respondent could not find traction. This was in essence an attack on the factual findings of the court *a quo* on this issue. It is however an established principle that the appeal court is not at liberty to interfere with the factual findings of the trial court unless same is grossly irrational.

One of the leading cases on the subject is *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-D where the following was said;

“The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of the 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 as of acceptable moral standards that no sensible person who had applied his mind to the question to be could have arrived at such a conclusion”

See also *Reserve Bank of Zimbabwe v Corrine Granger and Another* SC34/01, *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S) *Divvyland Investments (PVT) Ltd v David Chiweza* SC 250/19.

In the present matter we could not find any such gross irrationality. The respondent's contention that payment was to be as per each stage accords with the general practice in the industry.

Equally untenable was the alternative argument that if the parties agreed on a reasonable fee for the construction then the construct was void for vagueness. It is established that a stipulation in an agreement of contract that a reasonable price be paid is acceptable and enforceable in contracts for the rendering of a service, the “*Locatio Conductio operis*” This is to be distinguished from an agreement of sale where the failure to stipulate a price renders the contract unenforceable and therefore void. This distinction in this regard was made on *Old Mutual Properties Corporation (PVT) Ltd V Twain Holdings (PVT) Ltd* SC 30/99 where GUBBAY CJ stated the following,

“The distinction between a contract of sale and that of locatio conductio operis has long given rise to controversy. Norman's Purchase and Sale in South Africa 4 ed at 14-16 mentions four situations with movables in which there may be difficulty in

deciding which side of the line a contract falls. It is only where a person has performed services for reward without supplying the materials as well that causes no problem. The contract is purely one of locatio conducio operis.”

In a contract *locatio conducio operis* where there is a stipulation that the owner is to pay a fair and reasonable price such a stipulation is usually referred to as a *quantum meruit*, See *Inkin v Borehole drillers* 1949 (2) SA 366 (A) & *Middletown v Carr* 1949 (2) SA 374. This term is unknown to Roman-Dutch law but has its origins in English law, see *Inkin v Borehole drillers* (supra) and is predicated either on such reasonable remuneration constituting an implied term of the contract, see *Chamotte (Pvt) v Carl Coetzee (Pvt) Ltd* 1973 (1) SA 644 (A) and *Inkin v Borehole drillers* (supra) or is based on the doctrine of unjust enrichment. Claims based on the quantum meruit have been accepted in this jurisdiction. In this regard the learned author RH Christie in his book *Business law in Zimbabwe* on page 103 said the following:

“It being now settled that a claim based on incomplete performance is a claim for a reduced contract price, it should no longer be described as a quantum meruit, a description which is appropriate for a claim based unjust enrichment and a claim for remuneration for performing a contract in which no price was agreed, such as the common case mentioned by BEADLE CJ in Ellison’s Electrical Engineers Ltd v Barclay 1969 (2) RLR 461 463-4, 1970 (1) SA 158 AT 160 of taking one’s car to a garage without prior quotation”

Where work has already been done, as in the present case, refusing to uphold the contract purportedly on the basis of its vagueness results in the owner being unjustly enriched at the expense of *Locatio* (the workman). The words of SCHREINER JA in *Middletown v Carr* (Supra) at pp386 succinctly capture the situation which obtains in *casu*. He had this to say:

“Claims for unliquidated amounts as fair or reasonable remuneration or compensation in cases of locatio conductio operis or operarum are often referred to as quantum meruit claims. This expression is not technical, that is to say, it has not a hard and fast legal meaning but is descriptive of a type or types of claim which have certain features in common (see Inkin v Borehole Drillers (1949 (2), S.A.L.R. 366)). One such type of claim arises where a contract of locatio conductio operis or operarum has failed or has remained incomplete after part of it has been carried out; in such cases our law normally approaches the problem of adjusting the rights of the parties from the angle of unjust enrichment. A considerable number of cases have been decided on these lines and the principles on which the presence or absence of unjust enrichment may be decided, its extent assessed and its correction

achieved have become fairly well established. In such cases it may not be difficult to conclude that to avoid unjust enrichment a sum of money ought to be awarded to the conductor of the job or the locator of his services even though no express claim of that kind appears on the pleadings.”

Alternatively, as earlier stated claims for *quantum meruit* may be based on the principle that an agreement to pay a fair and reasonable amount for the services rendered is an implied term of the agreement. In *Chamotte (Pvt) v Carl Coetzee (Pvt) Ltd (supra)* the contract did not specify the amount to be paid for the extra work to be done by a workman on an overhang. In deciding on what on whether the claim for remuneration for work done could be sustained the court said the following:

There is certainly authority for the view that where there is an agreement to do work for remuneration and the latter is not specified (expressly or tacitly), the law itself provides that it should be reasonable (cf. Wessels, Law of Contract, 2nd ed., para. 3498; De Zwaan v Nourse, supra; Middleton v Carr, supra; Angath v Muckunlal's Estate, 1954 (4) SA 283 (N) D at p. 284 A - H)

See also *Diamond v Kernick* 1947 (3) SA 69 (A); *Branch v Vic Diamond & Sons (Pvt) Ltd* 1957 R&N 11.

Similarly, in *Willes Principles of South African Law* 9th edition at pages 942-947, The learned authors du Bois *et al* discuss building contracts. At page 945 under the heading “*Payment to the builder*” have this to say in this regard:

*“The owner’s chief obligation is to pay the builder remuneration due to him at the proper time. The amount is generally fixed in a lump sum for the whole work, in aversion but it may be calculated according to the measurement of the work done, namely at a certain rate per foot or yard, in pedes mensurasve, or in accordance with a schedule of prices for each item or according to time devoted to the work e.g. at a rate of so much a day. **If the amount has not been fixed, it is implied that the builder is entitled to a reasonable remuneration, Laidlaw V Crowe 1935 NPD 241”.** (emphasis mine)*

Therefore, even if the parties had not agreed on fair and reasonable remuneration for work done and had left the question of such remuneration open ended, such an agreement would be regarded as being one for a reasonable price being paid as remuneration. It was for that reason that

we rejected the argument that because there was no fixed amount stipulated, then the agreement was void for vagueness.

The cross-appeal

The main thrust of the cross appeal was that there was no rational basis for the court *a quo* to discard the respondent's claim for US\$2 450 and award him US\$1 200. The respondent insisted that he was able to and did justify the amount he sought and that the figure of USD\$1200 which the court *a quo* awarded did not accord with the evidence.

The error which the court *a quo* fell into was to accept in one breath that the figure of US \$1 200 put forward by the appellant as having been agreed upon for the *completion of the house* yet awarded that same figure when the building was *only constructed up to window level*. The reasoning of the court *a quo* in this regard was clearly muddled up. The court *a quo* could not reason that the sum payable for the construction of the house to completion was exactly the same as the amount payable for half the job i.e. construction of the house up to window level.

Related to this was the fact no reasons were given by the court *a quo* for rejecting the respondent's figures for the work he carried out at each stage of the construction of the building. The probabilities clearly favoured the respondent's position that the parties had not agreed on payment of a specific figure but on a fair reasonable amount for his services. This explains in part why when the appellant offered the respondent a cow *in lieu* of cash, no specific amount was attached thereto. This cow is not to be confused with the cow which appellant claims constituted part of the initial remuneration for the work done. Such an arrangement to our mind meant that the parties as a matter of fact intended the remuneration to be fair and reasonable in the circumstances.

Ultimately therefore it was our view that a material misdirection occurred in deciding the amount payable as of the time of breach. We therefore stated in our *ex tempore* judgment that in the absence of evidence controverting the amounts charged by the respondent there was no justification in awarding him less than what he sought. In any event we observed that those figures could not be regarded as either unfair or unreasonable.

Regarding costs we similarly found that there was no justification on the part of the court *a quo* to withhold costs against for the respondent. The general rule is that the successful party is entitled to his or her costs. Such costs can only be withheld for good reason. The court *a quo* did

not in the least address the issue of costs apart from stating that there was to be no order as to costs. That constituted a misdirection on its part in this regard.

Ultimately therefore it was for the above reason that we gave the following order.

IT IS HEREBY ORDERED THAT:

1. The appellant's appeal be and is hereby dismissed with costs
2. The Respondent's cross-appeal be and is hereby upheld and the judgment of the court *a quo* is hereby set aside and substituted with the following"

a) The Appellant (that is, Defendant in the court a quo) is hereby ordered to pay respondent the sum of US\$2 450 or its equivalent in Zimbabwe dollars at the interbank rate with costs.

ZISENGWE J.....

MAWADZE J agreed.....

Manyika Law Chambers- Appellant's Legal Practitioners

Kadzere Hungwe and Mandevere, Respondent's Legal Practitioners