

(1) THE TRUSTEES FOR THE TIME BEING OF
CORNERSTONE TRUST (2) JULIUS TAWONA MAKONI (3) THE
TRUSTEES FOR THE TIME BEING OF RYVONNE TRUST
v
NMB BANK LIMITED

SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, PATEL JA & MAVANGIRA JA
HARARE: 20 MAY 2019 & 24 SEPTEMBER 2021

T. Mpofu, for the appellants

T. Zhuwarara, for the respondent

HLATSHWAYO JA: This is an appeal against the entire judgment delivered by the Honourable Justice Zhou in the High Court of Zimbabwe.

The order sought to be impugned reads as follows:

“IT IS ORDERED THAT:

1. Judgment be and is hereby given in favour of the plaintiff against the first, second and third defendants jointly and severally the one paying the others to be absolved for:
 - (a) Payment of US\$1 105 748.90 plus interest at the rate of 15 per cent per annum from the 9 September 2015 such interest calculated monthly and in advance on the said sum and capitalized to the date of payment in full.
 - (b) Payment of collection commission in accordance with the Law Society’s By-Laws.
 - (c) Payment of plaintiff’s costs of suit on the legal practitioner and client scale.
 - (d) A declaration that the immovable property being a certain piece of land situate in the district of Salisbury called Remainder of Lot 6 Rietfontein, measuring, 1, 2129 hectares held by the second defendant under Deed of Transfer No. 4388/1991 is executable.
2. The first defendant’s claim in reconvention be and is hereby dismissed with costs on the legal practitioner and client scale.”

The background of this matter may be summarised as follows:

The second appellant is a shareholder in the respondent and has previously occupied the positions of Chief Executive Officer, Executive Director and Director therein. The respondent in this matter issued summons against the appellants in the court *a quo* claiming USD\$1 105 748.90 being indebtedness arising from a loan agreement between the first appellant and the respondent. The second and third appellants bound themselves as guarantors/sureties and co-principal debtors of the first appellant in relation to the loan agreement. As security, the second appellant gave Power of Attorney to register a mortgage bond over his property, in favour of the respondent. As further security, the third appellant pledged certain executable shares.

It was the respondent's case *a quo* that the first appellant defaulted in the performance of its obligations in terms of the loan agreement, necessitating the institution of legal proceedings for the recovery of the outstanding amount. The respondent sought that the appellants be held jointly and severally liable for the indebtedness.

The appellants disputed the respondent's claim on two main premises. It was argued for the first appellant that the person who purported to enter into the loan agreement with the respondent was not authorised to do so. Additionally, the second appellant disputed that he granted the Power of Attorney used to register the mortgage bond over his property. The appellants further lodged a counterclaim against the respondent's claim, which counterclaim was subsequently sought to be withdrawn during the course of the proceedings *a quo*. The application for withdrawal was unsuccessful and the counterclaim was eventually dismissed.

At the conclusion of proceedings, the court *a quo* made adverse credibility findings against the second appellant, who it determined was untruthful. It was found that the first appellant was the *alter ego* of the second appellant, who used the former to secure funds for his benefit from the respondent. Additionally, the court *a quo* was of the view that the second appellant had signed a Power of Attorney for the registration of a mortgage bond in order to secure an advance from the respondent. With regard to the third appellant it was found that it had properly bound itself as surety to the loan facility agreement. Resultantly, it was determined that the appellants were jointly and severally liable for the indebtedness and that the respondent was entitled to recover from the appellants the principal sum owing in terms of the loan facility agreement.

Aggrieved, the appellants have lodged the present appeal on the following grounds:

GROUND OF APPEAL

1. With respect, the court *a quo* erred at law in dismissing the first appellant's Claim-In-Reconvention; which claim was withdrawn before the conclusion of leading evidence. At law the Respondent was not entitled to insist on judgment pertaining a disputation to which not all datum had been made available and the contestation *inter partes* not finalised.
2. The court *a quo* also erred in sustaining the respondent's claim as against the appellants. At law the respondent was enjoined to prove the existence of loan agreement and that the attendant funds were advanced in terms of that agreement. *In casu* the evidence led *a quo* clearly demonstrated that the monies claimed to have been advanced were never paid out in accordance to the structures of the agreement on which the claim was

predicated; resultantly no sustainable claim could have been mounted by the Respondent.

3. The court *a quo* grossly misdirected itself in conflating the affairs of the first appellant with those of the second appellant. At law the first and second appellant's obligation to the respondent were independent of each other. More critically, no evidence was led substantiating the notion that first appellant ever received funds from the respondent thereby actuating the need to resort to the second and third Respondent's suretyship and securitisation.
4. The court *a quo* grossly misdirected itself in dismissing the second appellant's evidence on the back of its anomalous finding that he was dishonest and not a credible witness. Such findings are palpably irregular in that the court *a quo* did not take full cognisance of all the second appellant's evidence and attendant explanation regarding the existence of his independent loan with the respondent which loan the respondent was not relying on.

From the foregoing, two identifiable issues are before the court. Firstly, there is need to determine whether or not the court *a quo* properly dismissed the appellants' counterclaim given their application for withdrawal of the same. The second issue for determination is whether or not the court *a quo* misdirected itself in holding the appellants jointly and severally liable to the respondent for the indebtedness arising from the disputed loan facility agreement.

On the first point for consideration, it is common cause that the appellants withdrew their counterclaim pursuant to the commencement of proceedings but prior to the close of their case. It is also common cause that the respondent objected to the purported withdrawal. It is

accepted by both parties that a party is only entitled to withdraw a claim after the matter has been set down and the hearing has commenced subject to the court's leave or the parties consent to do so. The position of the law is well articulated in the case of *Liberal Democrats & Ors v President of the Republic of Zimbabwe E.D Mnangagwa N.O & Ors* CCZ 7/18 at page 8 of the judgment wherein it was stated:

“The case of *Meda v Sibanda and Ors* 2016 (2) ZLR 232 (CC) is authority for the principle that a party cannot withdraw at will a matter that has been set down for hearing. The party intending to withdraw the matter must obtain the consent of the other party and the leave of the Court. The purported withdrawal would otherwise have no legal effect. Rule 53 (2) of the Rules gives effect to the principle by providing as follows:

‘53. Withdrawal

(2) A person instituting any proceedings may, at any time before the matter has been set down and thereafter, by consent of the parties or leave of the Court, withdraw such proceedings, in either of which event he or she shall deliver a notice of withdrawal and shall embody in such notice an undertaking to pay costs.’” (Emphasis added)

In urging the court to exercise its discretion in their favour, the appellants submitted that a court ought to except to an application for withdrawal in cases where, for instance, the withdrawal amounts to an abuse of court process. While the position of the law as captured by the appellants cannot be faulted, a court is imbued with wide discretionary powers in determining whether or not an application for withdrawal will be granted. The said discretionary powers include a variety of considerations by the court in the pursuance of ensuring justice between litigating parties.

The respondent submitted that the application for withdrawal of the appellants' counterclaim was appropriately denied, given the fact that evidence had already been led thereon. It is apparent from the record that at the time that the appellants sought to withdraw

their counterclaim, the matters therein had already been substantively canvassed in evidence. The court *a quo*'s refusal to grant the application for withdrawal was predicated on a consideration of the very same fact, namely that the counterclaim was already the subject of the hearing before it and substantive submissions had already been made thereon.

In my view, there is no palpable misdirection in the court *a quo*'s decision to deny the appellants application for withdrawal. Given the broad discretionary powers conferred upon the court in electing to grant or deny said application, there do not appear to me justifiable grounds to interfere with the determination of the court *a quo* in that regard.

With regard to the second issue for consideration before the court, that is, whether or not the court *a quo* misdirected itself in holding the appellants jointly and severally liable to the respondent for the indebtedness arising from the disputed loan facility agreement, the findings made *a quo* turned on considerations of fact. It is settled at law that this Court will only interfere with factual findings of a lower court in limited circumstances. The case of *Zimre Property Investments Limited v Saintcor t/a V. Track & Anor* SC 59/2016 at page 11 para 36 of the judgment is instructive, wherein it was stated:

“The position is now settled that an appellate court will not interfere with the findings of fact made by a trial court unless the court comes to the conclusion that the findings are so irrational that no reasonable tribunal, faced with the same facts, would have arrived at such a conclusion. Where there has been no such misdirection, the appeal court will not interfere. This position was aptly captured by this Court in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). At 670, Korsah JA remarked:

“The general rule of 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 that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion...”

Remaining mindful of the foregoing, it is evident from the record that there existed a loan facility agreement between the first appellant and the respondent, and to which the second and third appellants were sureties. Although the first and second appellants disputed the authority upon which the loan facility and the mortgage bond were entered into on their behalf, they did not challenge the allegation that they were indebted to the respondent and that the said indebtedness had not been extinguished. In terms of the law, it is generally accepted that what is not denied is taken to be admitted. See *Fawcett Security Operations P/L v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F; *Nhidza v Unifreight Ltd* SC-27-99; and *Minister of Lands and Agriculture v Commercial Farmers Union* SC-111-2001 at 60.

In view of the factual nature of the findings of the court *a quo*, it is necessary to consider the evidence presented and the relevant findings made thereon. On the issue of the validity of the loan facility, the evidence of record establishes that a trustee of the first appellant, named Mr D. Higginson, concluded the loan facility agreement on behalf of the first appellant. The second appellant sought to dispute Mr Higginson's authority to enter into the purported agreement with the respondent and, ultimately, the validity of the entire loan facility agreement.

A perusal of the record makes it apparent that there was scant evidence to support the submissions of the second appellant. It was found *a quo* that the second appellant accessed and utilised the loan overdraft facility on numerous occasions, leading the court to the conclusion that there was no merit to the second appellant's contention that Mr D. Higginson entered into the loan agreement without the requisite authority to do so. Further to that, it was the court's view that the first appellant was merely a vehicle of the second appellant in order to access funds from the respondent.

I am of the view that the finding of the court *a quo* is supported by the fact that the second appellant utilised the accessed loan facility funds (through the medium of the first appellant) to attend to his personal expenses. In light of the foregoing considerations, it does not appear to me, that the second appellant can seek to avoid liability on the premise that the loan facility was not validly entered into. To do so would essentially constitute an exercise in which the second appellant seeks to approbate and reprobate. In other words, the second appellant cannot seek to dispute the validity of the loan facility agreement from which he consistently sought and derived benefit. The position was well articulated in the case of *S v Marutsi* 1990 (2) ZLR 370 at page 374B wherein it was stated that:

“It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other, not both.”

Moreover in the case of *Alliance Insurance v Imperial Plastics (Pvt) Ltd. & Another* SC 30/2017, the court took the view that such conduct amounts to a classic display of *mala fides*. An application of the mind to the facts would dictate that had the loan agreement been improperly concluded, the second appellant would have, at the very first opportunity have alerted the respondent to the fact and sought to resolve the situation as opposed to accessing and deriving benefit from the agreement, then denying liability when called upon to service the said debt. Significantly, the second appellant undertook to repay the outstanding loan when called upon to do so by the respondent, which makes plain the fact that the second appellant was aware and a willing participant to the loan agreement. The evidence is overwhelming and the conclusions of the court *a quo* in that regard cannot be said to have been improperly arrived at.

In determining that the first appellant acted as the second appellant’s alter *ego* for the purpose of accessing funds from the respondent; the court *a quo* took cognisance of witness

evidence that established that the funds availed to the first appellant by the respondent were utilised by the second appellant for his personal expenses. As both the Founder and Director of the first appellant and the respondent respectively, the second respondent was, in my view not only involved in a conflict of interest but actively abusing his status and position in order to access funds from the respondent.

It is equally telling that the loan facility was regarded as an “insider loan” by the respondent when it sought recovery of the indebtedness due to it from the second appellant. It is also established that the second appellant did not seek to dispute that it was indeed an insider loan. In the circumstances, the court *a quo*'s findings appear well grounded in evidence and cannot be said to be irrational or a misdirection.

It is worth mentioning that the court *a quo* took a step further in determining that the Power of Attorney granted by the second appellant to register a mortgage bond over his property in favour of the loan facility agreement was properly concluded. The court *a quo* arrived at that decision pursuant to an identification of the second appellant's signature on the disputed Power of Attorney. The fact that the registration of the mortgage bond was directly beneficial to the second appellant does not help his case.

With regard to the third appellant, its liability as surety was never challenged and therefore remains extant.

In the light of the above considerations, it is the court's view that the appeal lacks merit and is hereby dismissed with costs following the cause.

PATEL JA : I agree

MAVANGIRA JA : I agree

Thompson Stevenson & Associates, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners