

MBONGENI TSHUMA

Versus

DOMINIC DUBE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 5 & 8 NOVEMBER 2018

Civil Appeal

K. Phulu for the appellant
Respondent in person

MAKONESE J: After hearing argument in this matter we upheld the appeal and set aside the judgment of the court *a quo*. These are the full reasons for the decision.

It is a settled principle of our law that an appeal must be against an order or judgment of the court, and not against the individual findings. In certain instances, however an appeal against certain findings is properly launched, if such findings are decisive of the triable issues before the court.

The facts of the matter are fairly simple. The sole issue before the court *a quo* was whether there was a valid lease agreement between the appellant and the respondent in respect of a property known as stand 56C, Mthwakazi, in Filabusi area. The respondent issued summons against the appellant seeking an eviction order against the appellant. The basis of the claim was that appellant had leased the property, which comprised a shop to the appellant who was refusing to vacate the premises. The respondent claimed that he had leased the premises for the period August 2014 to August 2015. The respondent asserted that it was a term of the oral agreement that respondent would pay rentals at US\$500 per month. The appellant paid the respondent a lump sum of US\$2 500. The respondent who was unwell left for his rural home where he was recuperating. The respondent avers that when he had recovered he approached the appellant seeking his rentals. This was around August 2015. The appellant had by that time taken over occupation of the property and had demolished the old existing structure and had modernized the

building. The appellant contended that he had purchased the property from the respondent and had paid him a sum of US\$7 500 in cash. He had made extensive renovations on the property amounting to US\$19 000 and what was outstanding was the transfer of ownership to him. The appellant denied that he was leasing the premises from the respondent and that in fact there was never such a lease in existence.

The learned magistrate in the court *a quo* ruled in favour of the respondent and ordered the eviction of the appellant. The learned magistrate made a finding that of the two parties, the appellant was the “more sophisticated”, in that he ran various businesses scattered around the Filabusi area. The magistrate reasoned that it was improbable that the appellant would have concluded a verbal agreement for purchase of an immovable property. Further, the magistrate’s view was that the appellant had failed to explain how he managed to have electricity disconnected from the old premises without the assistance of the respondent, and that if respondent had sold the property to him, he would not have refused to assist the appellant. For that reason, the learned magistrate, concluded, “judgment should be resolved in favour of the plaintiff”.

What becomes evident is that, without attempting to analyse the evidence led by the parties, the court *a quo* decided to believe the respondent. The court *a quo* then ordered the eviction of the appellant from the premises. Aggrieved by the decision of the magistrate in the court *a quo*, the appellant lodged this appeal.

Issues for determination in this appeal

The following issues which are raised in the grounds of appeal lie for determination by this court:

1. Whether the court *a quo* made a finding at all on the existence of a lease agreement, and whether the court erred at law in failing to do so.
2. Whether the court *a quo* erred in its analysis and examination of the oral evidence of the witnesses who testified before it.

3. Whether the court *a quo* misconstrued the appellant's defence to the plaintiff's claim in summarizing the parties' positions, and whether this mischaracterisation caused the court to misdirect itself.
4. Whether the court *a quo* erred in its finding on the issue of the failure to put the contract in writing, and the issue of the sophistication of the parties, when such issues were pivotal issues in its findings on the probabilities.

Findings by the court *a quo*

In arriving at his decision, the learned magistrate made adverse findings regarding the appellant's case. By inference he found that the evidence of the contract of sale was false. He found that the evidence of the respondent was true. The learned trial magistrate in summarizing the appellant's case held as follows:

"Defendant opposed the relief and in doing so set up the defence that he had bought the property subject to the claim from the plaintiff."

Clearly, this summary of the appellant's case caused the learned magistrate to fail to appreciate substantive issue of onus and the burden of proof in so far as it related to the respondent's claim that there was a lease agreement between the parties. This was a serious misdirection. Further, and in any event, the respondent's version was riddled with glaring commercial improbabilities which ought to have immediately captured the attention of the court. The court conveniently ignored the improbabilities and proceeded to grant an eviction order. The first issue for consideration was that there was no reason given for the payment of five month's rent in advance, for a business that had not even commenced operations. The respondent upon collecting the advance payment went away to rest at his rural home only to return a year later. When he found that his old building had been demolished and that appellant had erected a new structure he raised no issue. The evidence of the builder, Dumisani Mpofu, is to the effect that the respondent gave positive comments regarding the new building. The respondent did not enquire from the builder why they had demolished his building. The appellant, being a business person would not have constructed a new structure at considerable expense, if the agreement he

had with the respondent was for a lease. This runs against both commercial and good common sense.

In a case where there are two mutually destructive versions of events, the learned magistrate's duty was to make a definite choice as to which side was being truthful. There was no question of one side having misunderstood what the other alleged happened between them. There was either a sale or lease between the parties. For some strange reason the learned magistrate decided not to analyse the evidence of the witness. The learned magistrate simply went along and agreed with the evidence of the respondent without analyzing the evidence of each of the witnesses. See the case of *Mtimkulu v Nkiwane & Anor* A SC-136-01.

In this matter MALABA (JA) (as he then was) stated at page 3 of the cyclostyled judgment as follows:

“The principle that governs the approach of an appellate court on the question of the correctness of the trial court's findings of fact is that as a general rule the trial court's findings on the credibility of the witnesses should not be lightly disturbed because the court would have seen the witnesses give evidence and from that position was better placed to comment accurately on their demeanour. An appeal is, however a re-trial on the recorded evidence.”

In the appeal before this court, the court may disagree with the findings of the trial court, if on examination of all the circumstances (such as inferences from unquestioned facts and probabilities) of the case it comes to the conclusion that the trial court's findings on credibility cannot be supported. The appeal court requires cogent and substantial reasons for it to hold that the trial court was wrong in its assessment of witnesses. See ; *National Suppliers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.

In this matter, five witnesses gave oral testimony in the court *a quo*. Their versions were aligned with the case of the party they testified for. The parties to the litigation maintained mutually destructive versions. Faced with such a situation, the court was enjoined to apply the test set out in; *Stellenbosch Farmers Winery Group Ltd & Anor v Martell Etcle & Ors* 2003 (1) SA 11 (SCA), where the court held as follows:

The technique generally employed by courts in resolving factual disputes of this nature may be commonly summarised as follows: To come to a conclusion on the disposed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities ... As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues ..."

The learned magistrate in the court *a quo* did not apply any of the tests referred to in the above case law. The court seemed to focus only on the evidence of the appellant and the respondent. He did not analyse the evidence of the rest of the witnesses. In the end the trial magistrate dwelt on the "sophistication" of the parties. This approach led the trial magistrate to come to wrong conclusions on the facts and the law. The failure to assess all the evidence and to apply the proper legal tests to the evidence was a material misdirection. As a result, the discrepancy between the evidence of the respondent and that of his witness, Sothini Mlalazi, regarding the amount paid by the appellant to the respondent on 5th August 2015 went without comment, mention or notice. This discrepancy was material, and ought to have been weighed by the court *a quo*. If the witness was present she would have known the exact amount and what currency was paid. She would not have testified to payment of ZAR2 500 instead of US\$2 500. The court totally ignored this piece of evidence. The issue which the trial court dwelt with in detail in assessing probabilities in this matter was done in an unusual and unprecedented manner. The approach by the learned magistrate is unique and I must say unconventional and without precedent or logic. The entire case was decided on the level of sophistication of the parties. The learned magistrate had this so say on this aspect.

"In this particular case, the court had to look at the sophistication of the parties, neither displayed an advanced degree of sophistication".

The magistrate then continued:

"It was, however, appeared that the defendant is an astute businessman (sic)".

Of great concern to this court, however, is the fact that the learned magistrate did not attempt to decide the issue that was before him. The single issue for determination was whether there was lease agreement between the appellant and the respondent. The learned magistrate did

not make any specific findings on the substantive issue of the existence of the lease agreement. There was no attempt to deal with the issue of the burden of proof on the respondent to prove the existence of the lease agreement on a balance of probabilities. Trial magistrates ought to remind themselves that in a trial the court has the duty to determine the triable issue or issues before it. They must determine the issues and make specific findings on them based on a careful analysis of all the evidence. That is the essential purpose of a trial. It was incumbent upon the court *a quo* court to make findings on the terms and nature of the lease entered into by the parties as alleged by the respondent. In the absence of evidence establishing the existence of a lease agreement, respondent did not discharge the burden of proof. The two destructive versions of the parties were not properly dealt with in that the court did not analyse the totality of the evidence before it. This misdirection was so fundamental and this court on appeal, is entitled to interfere with the findings and order of the court *a quo*.

For the foregoing reasons the following order is made:

1. The appeal is upheld.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
“The plaintiff’s claim is dismissed with costs.”
3. The respondent is ordered to pay the costs of suit.

Takuva J I agree

Vundhla-Phulu & Partners, appellant’s legal practitioners