

REPORTABLE (1)

FIRSTEL CELLULAR (PRIVATE) LIMITED
v
NETONE CELLULAR (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, FEBRUARY 14, 2014 & JANUARY 27, 2015

T Magwaliba and J Muchada, for the appellant
D Ochieng, for the respondent

PATEL JA: This is an appeal against the decision of the High Court granting summary judgment against the appellant in the sum of US\$ 8,330,470.52 together with interest at 2.5% per annum above the prime overdraft bank rate and costs of suit.

The claim against the appellant arose from a service provider agreement concluded between the parties on 10 March 2006 (the agreement). The agreement required the appellant to pay the sums due thereunder within thirty days of receiving the respondent's invoices. It is common cause that the appellant owed the respondent the outstanding amount claimed as at 30 September 2010. The respondent issued summons on 16 November 2010 and, following the appellant's appearance to defend, applied for summary judgment on 14 February 2011.

The court *a quo* held that the respondent's claim was unimpeachable and that the appellant had no plausible defences to the claim. In particular, the court found that there was no supervening impossibility due to the currency regime changeover between January and March 2009, entailing any objective impossibility of recovering debts from the appellant's customers. Additionally, there was no condition precedent in the agreement that those customers should first pay the appellant before it became obliged to pay the respondent. Lastly, there was no principal and agent relationship between the parties to preclude the recovery of payments from the appellant upon presentation of the respondent's invoices.

The grounds of appeal herein arise from the defences raised in the High Court, *viz.* supervening impossibility of performance, recovery from customers as a condition precedent for payment, and the existence of a principal and agent relationship between the parties. In essence, the question to be determined is whether the learned judge was correct in holding that the respondent's claim was unassailable and that the appellant had no *bona fide* defences to that claim.

In addition, the appellant's heads of argument raise a further ground of appeal not pleaded in its notice of appeal. It is argued that the order granted by the court *a quo* is vague as it does not specify the applicable rate of interest and the dates when the amounts due accrued interest.

A further procedural point taken at the hearing of the appeal relates to the respondent's founding affidavit in support of its application for summary judgment. Counsel for the appellant submits that this affidavit is flawed in that the status of the commissioner of oaths before whom it was deposed is not clearly identified.

VAGUENESS OF COURT ORDER

The court *a quo* granted summary judgment as prayed for in terms of the draft order. The latter is regrettably terse and simply orders that summary judgment be entered in terms of the summons. In the summons, the respondent's claim is for payment of the sum of US\$8,330,470.52 with:

"interest thereon at a rate of 2.5% per annum above the prime overdraft rate of the Standard Chartered Bank of Zimbabwe, from the date each payment was due to the date of payment."

Adv. *Magwaliba* for the appellant contends that this part of the court order is vague and unclear as regards the rates of interest applicable and their respective dates of application. As I have already indicated, this is not a ground of appeal that was raised in the notice of appeal. Nevertheless, it is a point of law that can be raised at any stage of the proceedings, provided that the other party is not thereby prejudiced. Adv. *Ochieng* for the respondent accepts that it would not be improper or prejudicial to the respondent for the point to be addressed and determined at this stage.

In my view, there is nothing vague or unclear in the court order as read with the summons. The applicable rates of interest are undoubtedly available from the bank cited and the dates from which those rates apply will be apparent from the relevant tax invoices

presented by the respondent to the appellant. In any event, this is an issue that should most appropriately be agreed between the parties themselves or, failing such agreement, be referred to the court *a quo* for determination and quantification.

IDENTITY AND STATUS OF COMMISSIONER OF OATHS

The respondent's founding affidavit in the court below was sworn before one Raymond Moyo, a registered legal practitioner, who appended his signature above the designation "Commissioner of Oaths". The stamp used for the purpose is one that would ordinarily have been used to certify copies of original documents as being true and correct. However, it also denotes Raymond Moyo as a commissioner of oaths and notary public.

Counsel for the appellant cites the case of *Deyi v The State* [2013] ZAGPPHC 75 for the proposition that the stamp adopted must clearly indicate the status of the commissioner of oaths. In that case, the court was called upon to apply the directory provisions of regulations, made under the South African Justices of the Peace and Commissioners of Oaths Act 1963, which require a commissioner of oaths to state his or her designation and the area for which he or she holds his appointment of office. The commissioner in question was evidently a police constable, but the stamp that was used was that of a magistrate. The court found that this stamp misrepresented the office of the commissioner and was likely to cause confusion in that regard. Consequently, it declined to exercise its discretion in favour of receiving the document relied upon in that case as a sworn affidavit.

It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identify the person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner. *In casu*, it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognised commissioner of oaths. The respondent has therefore verified its cause of action in an affidavit, deposed by its functionary duly authorised thereto, before a clearly identified commissioner of oaths. That, in my view, suffices for the intended purpose of adducing evidence under oath and renders the validity of the respondent's founding affidavit manifestly impervious to challenge.

GROUNDS OF APPEAL

The grounds of appeal set out in the notice of appeal appear to have conflated the three defences raised in the court *a quo*. The essence of these grounds is that the relationship between the parties, based on their conduct after the inception of the agreement, was one of principal and agent, whereby the appellant was an agent of the respondent in sourcing customers for post-paid cellular airtime usage, collecting payments for the airtime used or sold, and then remitting payments to the respondent after deducting its commission. Consequently, since payments to the respondent would only be due upon the appellant recovering the same from its customers, payment by the latter was a condition precedent to any payment to the respondent. This applies to the entire amount of US\$8,330,470.52 claimed by the respondent. Again, on the same

footing, the appellant's failure to recover the payments from its customers constituted a supervening impossibility suspending the appellant's obligation to remit payments to the respondent, there being nothing to remit until such time as payments had been made by or recovered from the customers.

PRINCIPAL AND AGENT RELATIONSHIP

The appellant's position, as I understand it, is as follows. Although not expressly stated in the agreement, the common understanding of the parties was that the appellant would be paid by its customers for network service usage and would then deduct its commission and pass on the balance to the respondent. This position appears to be buttressed by para 3 of the respondent's declaration which states that the appellant would collect payments for airtime used by its customers and remit the collected amounts less its commission to the respondent. In this connection, Adv. *Magwaliba* submits that the Court must look at the true nature and substance of the agreement and not merely at its form. The description of the parties contained in the agreement is not necessarily conclusive as it disguises the true nature of their principal and agent relationship. I note in this regard the remarks of Silke: *The Law of Agency in South Africa* (3rd ed.) at pp. 32-33, where the learned author adverts to the difficulties in ascertaining the true nature of an agency relationship.

Turning to the provisions of the agreement itself, clause 2 thereof sets out the principal rights and obligations of the parties. The respondent undertakes to supply and distribute terminal equipment and network services to the appellant's customers (clause

2.1). In turn, the appellant *may from time to time* order and purchase quantities of smartcards from the respondent (clause 2.2.1). The respondent is then obliged to make the network service available *to the appellant for onward supply to the appellant's customers* (clause 2.2.2 as read with clause 6.1). The smartcards ordered and purchased by the appellant are *allocated by it to its own customers* (clause 4.1). The appellant is liable to the respondent for all charges generated in respect of *each smartcard activated by the appellant* with effect from the date of such activation (clauses 4.5.1 and 4.5.2). The respondent is then entitled to raise call charges, monthly service charges and all other charges *for the account of the appellant* (clause 8.1). Thereafter, all charges invoiced by the respondent to the appellant *shall be paid* by the appellant to the respondent *within 30 days of the date of the relevant tax invoice* (clause 8.3).

My reading of the afore-cited provisions of the agreement is that they clearly spell out the true nature of the relationship between the parties. In essence, it was agreed that the appellant would go to the airtime market and source its own customers for the network services to be provided by the respondent. The respondent did not decide who those customers would be or which of them would receive network service on credit. More significantly, it was the appellant itself that carried the risk of default by its customers. As was quite correctly conceded by Adv. *Magwaliba*, the respondent had no right, except where this was ceded to it by the appellant in terms of clause 17.1, to sue the appellant's customers in order to enforce and collect any payments due and outstanding from them. There was simply no nexus or privity of contract between the respondent and

the appellant's customers. If the appellant was merely an agent for the respondent as its principal, those customers would have been directly liable to the respondent.

The apparent admission of agency emanating from paragraph 3 of the respondent's declaration is not, in my view, of any material significance. The importance of pleadings should not be unduly magnified so long as there is no likelihood of prejudice being occasioned to any of the parties. While the parties should ordinarily be restricted to the averments in their pleadings, the courts should not enslave themselves to the pleadings in complete disregard of their duty to decide the real dispute between the parties so that justice is eventually attained. See in this context the very pertinent observations of Chatikobo J in *Musadzikwa v Minister of Home Affairs & Another* 2000 (1) ZLR 405 (H) at 412H-413H, and the authorities there cited, which were subsequently applied by this Court, *per* Ziyambi JA, in *Moyo & Another v Intermarket Discount House Ltd* 2008 (1) ZLR 268 (S) at 272A-G. In short, pleadings cannot be construed so as to compromise the delivery of justice.

In the instant case, although para 3 of the declaration is somewhat ineptly worded, it cannot be elevated above the entire declaration and the clear terms of the agreement itself. In any event, that paragraph makes explicit reference to the agreement itself. More importantly, it is immediately followed by para 4 which captures the essence of the appellant's obligation to pay in terms of the agreement, *i.e.* to make payment for all charges within thirty days of receiving the respondent's tax invoice.

Having regard to the agreement as a whole, I am unable to discern from its express provisions anything approximating the principal and agent relationship espoused by the appellant. It was clearly contemplated by the parties that the appellant would be engaged as an independent contractor to distribute to its own customers the network services provided by the respondent.

CONDITION PRECEDENT FOR PAYMENT

The supposed common understanding between the parties is also relied upon by the appellant as the basis for its contention that payment by its customers was a condition precedent to any payment becoming due to the respondent. Although this contention flies in the face of the express provisions of the agreement, it is one that the appellant intends to substantiate by extrinsic evidence to be adduced should the matter be allowed to proceed to trial. As is correctly argued by Adv. *Ochieng*, this is clearly impermissible by virtue of the so-called parol evidence or integration rule. Generally speaking, although the integration rule may not invariably apply where the true nature of an agreement is in issue, extrinsic evidence cannot be allowed to negate the express and clear terms of the agreement. See the remarks of Ziyambi JA in *Nhundu v Chiota & Another* 2007 (2) ZLR 163 (S) at 166C-H. This is particularly so where, as in this case, the agreement constitutes the entire contract between the parties (clause 20.3) and any variation, addition, deletion or waiver is ineffective unless reduced to writing and specifically subscribed by the parties (clause 20.5).

SUPERVENING IMPOSSIBILITY

The final defence advanced by the appellant is that of supervening impossibility – that its failure to recover payments from its customers constituted a supervening event suspending its obligation to remit payments to the respondent. This was occasioned, so it is argued, by the advent of dollarization between January and March 2009 when, for some unexplained reason, a significant number of the appellant’s customers defaulted on their payments.

It is trite that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arms length. Thus, the suspension of a contractual obligation by dint of *vis major* or *casus fortuitus* can only be allowed in very compelling circumstances. The courts are enjoined to consider the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the alleged impossibility. See *Watergate (Pvt) Ltd v Commercial Bank of Zimbabwe* 2006 (1) ZLR 9 (S) at 14B-F. In particular, it must be shown that the impossibility is objective and absolute in contradistinction to one that is merely subjective or relative. See *Chiraga v Msimuko* 2002 (2) ZLR 368 (H) at 380C-E, where it was held that shortage of foreign currency did not constitute an absolute supervening impossibility. Again, the contract must have become finally and completely impossible of performance as opposed to the situation where one party is only temporarily disabled from fulfilling its obligations. See *Beretta v Rhodesia Railways Ltd* 1947 SR 48 at 49-50; *NUST v NUST Academic Staff & Others* 2006 (1) ZLR 107 (H) at 109A-D; *Mutangadura v TS Timber Building Supplies* 2009 (2) ZLR 424 (H) .at 429C-F.

In the instant case, the appellant has dismally failed to demonstrate why its customers failed to meet their bills and how that alleged failure necessarily and definitively precluded it from meeting its payment obligations *aliunde* or from recovering the outstanding amounts from its customers at some later stage. In other words, the appellant's subjective inability to pay its debts cannot be confused with the objective impossibility that must prevail for its plea of supervening impossibility to succeed.

AVAILABILITY OF *BONA FIDE* DEFENCE

It is apparent from all of the foregoing that the appellant has not been able to proffer any plausible defence to the respondent's claim. The court *a quo* was therefore perfectly correct in concluding that the appellant had no *bona fide* defence to the respondent's unassailable claim for summary judgment.

In the result, the appeal must fail and it is accordingly dismissed with costs.

ZIYAMBI JA: I agree.

GARWE JA: I agree.

Dube, Manikai & Hwacha, appellant's legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners