

TINOS HWAI
versus
GANRES ENTERPRISES (PVT) LTD

HIGH COURT ZIMBABWE
UCHENA & MWAYERA JJ
HARARE, 17 March 2015, 27 May 2015

Civil Appeal

S. Simango for the appellant
Z.M. Kamusasa, for the respondent

MWAYERA J: This appeal challenges the order of payment of \$600 and costs on Attorney-Client scale granted by the magistrate court.

The appellant and respondent entered into an agreement wherein the appellant was to refund the respondent expenses incurred in sinking a borehole at the appellant's premises. The respondent was a tenant at appellant's premises on agreed rental terms. Upon issuance of summons by the appellant seeking for `eviction and arrear rentals the respondent counter claimed refund for expenses for sinking a borehole. Basing on set off principles per evidence adduced on record the magistrate ordered the appellant to pay the outstanding amount to the respondent as counter claimed.

The grounds upon which the appeal is brought are as follows:

1. The honourable court *a quo* erred when it ordered the appellant to pay US\$600.00 to the defendant notwithstanding the fact that the appellant had no obligation to refund the respondent for the costs that it incurred when it sunk the borehole on appellant's premises. It was never a term of the agreement of lease when the respondent took occupation of the premises that appellant would compensate the respondent for expenses incurred on drilling the borehole. The appellant had enough water on his premises, however, because of the respondent's nature of business it had to drill its own borehole at its own expenses.

2. The honourable court *a quo* further grossly erred when it awarded costs against the appellant on a higher scale notwithstanding the fact that he appellant was justified to claim arrear rentals and unpaid utility bills. In fact the court *a quo* acknowledged that the respondent was
3. owing the appellant in arrear rentals and utility bills but extinguished the debt by set off. In light of that there was no legal basis to award costs against the appellant on a higher scale.

The appellant's prayer is that the respondent be ordered to pay arrear rentals and unpaid utility bills as claimed in the summons and particulars of claim and that the respondent pays costs of suit on a higher scale.

This prayer is formulated despite the finding of the court *a quo* that the appellant breached his part of contract by not contributing or compensating for the borehole expenses hence set off of the outstanding arrear rentals and utility bills leaving the appellant owing the respondent.

The appellant argued that there was only verbal offer to the respondent as regards compensation. The appellant argued that the communication between the parties constituted an invitation to treat and nothing more should be read there from. Even though as shown from evidence the appellant at some stage assisted in financing the drilling of the borehole, that according to appellant would not mean implied consent to compensate the respondent. The appellant contributed \$1 891-75 for further drilling of the borehole.

It is apparent from the record that there was a meeting of minds of the parties when they entered into the arrangement of borehole sinking. A proper offer and acceptance constituting a contract was established. *Christ The Law of contract Zimbabwe* p 24 clearly spells out when minds meet following on offer and acceptance a contract will have been entered In the present case exh 3 the email communication extract. The appellant agreed to pay and this is certainly more than just invitation to treat. The appellant agreed to pay \$500 per month towards extinguishing total invoices for the borehole expenses.

“As for the borehole the total amount for the invoices that you gave us is 5 924 therefore will manage to pay \$500 per month starting this July, reason being are also contributing to buy some of the material for the borehole” p 77 email from the appellant to the respondent”

When viewed in conjunction with the totality of evidence especially the business relationship between the parties shows existence of an agreement. If the appellant had nothing to do with the borehole drilling then there would have been no reason for furnishing

him with invoices/receipts. Further there would have been no drive for the appellant to make offer of part payment towards compensation for the borehole. Clearly the probabilities reveal the appellant on whose land a borehole was drilled agreed to have the borehole sunk deeper and agreed to reimburse for the drilling of the borehole at the rate of \$500 per month.

Given the common cause aspect that the parties entered into an oral agreement wherein the respondent was to pay rentals and utility bills per month. Further common cause aspect that the respondent was in arrears as regards rentals while at the same time having by agreement drilled a borehole at the appellant's premises at a total costs of \$6 550-00. Also not in dispute is that appellant having contributed \$1 891-75 leaving an outstanding contribution per agreement the trial court made a finding with the common knowledge aspects in mind. The trial court alive to the claim for arrear rentals and counter claim for compensation for borehole drilling applied the set off principle. Set off or compensation is a recognised method by which contractual and other debts may be extinguished. The learned Author R. H Christie in his book *The Law of Contract in South Africa* 2nd ed 1991 at p 565 stated that set-off comes into effect when two parties are reciprocally indebted to each other, if the debts are equal, both are discharged, if they are unequal the smaller is discharged and the large is reduced by the amount of the smaller. Set-off may be regarded as a form of payment and even as the equivalent of payment in cash. The court *a quo* in the present case extinguished the smaller debt and reduced the larger debt by that amount coming up with the outstanding \$600 due to the respondent. I am guided and take solace in the remarks by the honourable Gubbay CJ as he then was in the case of *Cot v First Merchant Bank Ltd* 1997 (1) ZLR 350 at 353 C. He stated:

“At common law, set off or compensation is a method by which mutual debts, being liquidated and due may be extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished: if unequal, the smaller is discharged and the larger is proportionally reduced”.

The court *a quo* correctly appreciated the principles of unjust enrichment and set off. The borehole is in existence at the appellant's premises and the appellant approached the court claiming what was due to him fully conscious he at the end of the day owed the respondent for borehole drilling. The court *a quo* exercised its discretion on the issue of costs and it cannot be faulted for ruling that costs on a higher scale were justified. This is moreso given the court's finding that the appellant approached the court with dirt hands and that he displayed incredible conduct during the trial.

The court *a quo* does not seem to have improperly exercised its discretion and there is no misdirection on the legal principles applied. It is in fact, the appeal which lacks merit and must fail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall bear the respondent's costs of the suit.

Nyikadzino Simango & Associates, appellant's legal practitioners
Kamusasa & Musendo, respondent's legal practitioners