CELSHED TELECOMMUNICATIONS (PVT) LTD
versus
DORCAST INVESTMENTS (PVT) LTD
and
BENDROSE INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 23 February 2017 and 1 March 2017

Civil Appeal

Appellant in person
C.C Mumba, for the respondent

MUNANGATI-MANONGWA J: It being the court's considered view that this appeal was without merit, vexatious and abuse of court process we dismissed the appeal with costs on an attorney-client scale on 23 February 2017.

The reasons for such a decision are herein provided:

On 14 February 2017, the date of the initial hearing the appellant had engaged a legal practitioner to represent him. The legal practitioner requested for a week's postponement to familiarize with the case.

On the day of hearing she indicated that she had advised the appellant to withdraw the appeal as same had no merit. Whilst appellant had initially agreed to take that route he then reneged and insisted on making representations. We duly excused the legal practitioner and proceeded to hear a Mr *Nyoni* the appellant's representative.

The facts of this matter are as follows:

In 2007 the appellant entered into a lease agreement with the respondent to lease commercial premises from the second respondent. Same expired in 2008, however, the appellant remained in occupation until 2015, when the respondents applied to court for its ejectment, payment of US$2 125-00 outstanding rentals and levies, payment of holding over damages at

US$41-00 per day from 1 September to date of ejectment, interest costs and collection commission. The appellant counter claimed for payment of interest it alleged was illegally charged being US$1 400-00, US$1 450-00 rent refund, US$4 300-00 unjust enrichment and US$2 800 illegal water charges and US$10 000-00 loss of business.

The court *a quo* granted the respondent's claim in the sum of US$1 840-00 outstanding arrear rentals having deducted an amount which respondents had added as interest, yet the interest was usurious in nature. The appellant's counter claims were all dismissed. The appellant lodged this appeal on the following grounds:

"**GROUNDS OF APPEAL**

1. The court erred by confirming rentals which were not based on evidence before the court.
2. The court erred by confirming water charges which were not based on evidence before the court.
3. The court misdirected itself by ruling that the appellant agreed to all claims by the respondents through conduct but did not make same ruling on claims against respondents by the appellant.
4. The court misdirected itself by upholding rentals figures which were not based on a lease agreement or any written document.
5. The court misdirected itself by ruling that former employees of the respondent had bad blood with their former employer even though there was no evidence before the court to support that position.
6. The court misdirected itself by judging that failure to discover automatically leads to failure to put evidence before the court though cognizance was to be taken of the viva voice by witnesses.
7. While the court established that usurious interest was charged, it failed to prove payments of the whole period in question to get the full amount paid as usurious interest.
8. The respondents did not grant an equivalent amount in United States dollars since the Plaintiff received such monies.
9. The court misdirected itself by denying to grant appellant on improvements yet there respondents never denied that improvements were done."

The appellant submitted that rental in Unites States dollars was never agreed on, since the lease agreement was done during the Zimbabwean dollar era, parties were supposed to approach the Rent Board for the determination of rentals. He argued further that as the premises were for commercial use, the documents used by the respondent to prove or indicate amounts paid by the appellant, in particular a schedule of payments was not acceptable. The appellant submitted that the refusal by the court to accept documents which had not been discovered was a misdirection. It is also clear from his appeal that the appellant challenges the water charges which it felt should have been determined on a pro-rata basis.

The appellant's denial that there was a lease agreement is without basis. It is common cause that the parties entered into a written lease agreement which expired and appellant became a statutory tenant. There is evidence on record that the appellant was paying rentals in United States dollars specifically $1 250-00 for which receipts would be issued by the second respondent. Receipts furnished to court dating back as far as the year 2010 show payment of rentals in United States dollars. The schedule before the court shows that the appellant religiously paid US$1 250-00 for rent and US$100-00 for water. The schedule further shows how the appellant would reduce accrued arrears by making several payments which were duly receipted. Further, in response to correspondence from the respondents to pay arrear rentals, the appellant responded as follows on 21 April 2015 "We are kindly asking for removal of interest and we will pay the rent in full." Earlier in 2014 the appellant had apologized for delaying to pay rentals on time and offered to reduce arrears by way of $500-00 instalments. To then deny the existence of a lease agreement and deny that rentals in United States dollars were agreed on, is not only being dishonesty but being mischievous.

The magistrate deducted interest which had been wrongly credited to the appellant's account.

There was no evidence which on a balance of probabilities established the appellant's claims. No documentary evidence was formally produced to buttress the claim by the appellant that it had paid a rental deposit, the lease agreement had a blank space where the deposit figure was meant to be. It not being the court's duty to convert any Zimbabwean dollar amount paid into United States dollars, coupled with no evidence led on the equivalent the court *a quo* did not misdirect itself in throwing away the claim.

On discovery, it is on record that twice the appellant who was then represented was given the opportunity to effect discovery but same was not done. As correctly put by the court *a quo*, there is a limit beyond which a litigant can escape the result of his attorney's lack of diligence. The appellant suffered the consequences flowing from the relationship between legal practitioner and client where rules were not followed. *See S* v *McNab* 1986 (2) ZLR 280 (S) at 284A.

As was rightly stated in *Nyahondo* v *Hokonya*[1], it lies not within the appellate court's hands to interfere with a decision of a trial court based purely on findings of fact. The appellate

[1] 1997 (2) ZLR 457 @ 460 G – 461A

court can only interfere where it is satisfied that regard being made to evidence placed before the court *a quo* "the findings complained of are so outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at that decision."

We find that evidence in this matter was properly considered and assessed. In the absence of manifest misdirection in the manner and proportion articulated in the Nyahondo case cited (supra), the court has no basis to interfere with the court *a quo*'s decision. Suffice to say, the appellant who received counsel from his legal practitioner took risk to pursue a merit-less appeal in the process abusing court process and putting the respondents to unnecessary expense. For such conduct appellant has to pay costs on a higher scale to discourage such like-minded persons from pursuing hopeless cases despite advice on the weaknesses of the case.

Accordingly we dismissed the appeal with the appellant bearing the respondent's costs on an attorney-client scale.

MWAYERA J agrees _____

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Wilmont Bennet, respondent's legal practitioners