GATEHILL ENTERPRISES (PVT) LTD t/a ICONIC MASTERS
versus
CONRAD MAKORE t/a ELITE DRIVING SCHOOL

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 10 November 2015 and 25 January, 2017

Civil Appeal

S. Musapatika, for appellant.
G. Mahlangu, for respondent

CHITAKUNYE J. This is an appeal against the entire judgment handed down at Harare Magistrates' Court on April 2014.

The appellant sued the respondent in the magistrate's court for a sum of USD3 188.00 in respect of vehicle tracking services rendered by appellant to respondent.
The respondent denied liability.

The brief facts are that in December 2012 the appellant and the respondent entered into a verbal contract for the installation of a vehicle tracking system on respondent's driving school motor vehicles. The appellant was represented by Tazvida Gaza whilst the respondent represented himself. The contract did not last long as in January 2013 it was terminated.

A perusal of the record of proceedings shows that the major issue pertained to the terms and conditions of the contract the two parties' entered into.

After a contested trial in which each party called two witnesses, the trial magistrate concluded that the appellant had failed to prove its case on a balance of probabilities and instead found for the defendant. The appellant was aggrieved by the magistrate's decision hence this appeal.

The grounds for appeal were couched as follows:-

1. That the learned trial magistrate erred in failing to appreciate that the vehicle tracking agreement was between Appellant and Respondent and not the former employee of the Appellant one Tazvida Gaza and the Respondent.

2. The trial magistrate erred and misdirected herself in failing to appreciate that there were serious inconsistencies between the evidence of the respondent and his witness one Brighton Chatikita which renders the respondent's case unreliable.
3. The Court further erred in concluding that the Appellant's witnesses were relying on hearsay evidence from one Tazvida Gaza when the witnesses clearly indicated that their testimony were based on personal knowledge of the business dealings between the parties. The first witness was able to give a detailed account of the material terms and conditions of the agreement and the charges payable for the services rendered to the Respondent. No valid reasons were given by the Court for rejecting the evidence of the Appellant's witnesses which was clearly more probable on a balance of probabilities than that of the Respondent and his witness.
4. The Court further erred in finding that the Appellant ought to have led evidence from Econet Wireless when the quantum of the bill was never disputed. All the Respondent disputed was his liability to pay for the internet charges which were incurred in the process of tracking his vehicles.
5. The learned Court further erred in failing to appreciate that the respondent has dismally failed to establish the terms and conditions of the advertising agreement which he alleged.
6. The Court a quo fell into error by accepting the evidence of the respondent's witness when that witness was just a technician whose job did not entail concluding agreements but just fitting tracking devices on motor vehicles.
7. The learned Magistrate erred by adopting an armchair approach in all the circumstances and reasoning that the evidence of Tazvida Gaza was crucial to the success of the Appellant's case and yet the witnesses who were called by the Appellant had testified on all material aspects of the case and were not discredited in any relevant way during cross- examination.

Based on the above grounds of appeal, the appellant sought an order setting aside the Judgment of the court *a quo* and its substitution with an order granting judgment in favour of appellant as claimed in the summons.

It is trite that this court is empowered to interfere with a lower court's decision; such interference must however be guarded. There are limited grounds upon which an appellate court can interfere with the trial court's exercise of judicial discretion. The general rule is that:

> "…. An appellate court will not interfere with the decision of a trial court based purely on findings of fact unless it is satisfied that having regard to the evidence placed before the trial court 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." (per KORSAH JA in Nyahondo v Hokonya 1997(2)ZLR 457@460G-461A)

In *Barros and Another* v *Chimponda* 1999(1) ZLR 58(S) @ 62G-63A GUBBAY CJ reiterated the point in these words:

> "… it is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

The rationale is that the trial court is better placed as trier of fact to assess the credibility of the witnesses and primary evidence brought before it hence the wide discretion granted to it.

In *casu*, it is common cause that the appellant and the respondent entered into a verbal agreement for a vehicle tracking system in December 2012. The tracking devices were duly installed on the respondent's motor vehicles towards the end of December, more specifically, after the 20th December 2012.

It is also common cause that the person who represented the appellant in the conclusion of this agreement is one Tazvida Gaza.

It is further common cause that the contract was terminated in January 2013. Though the appellant's key witness was not sure of the date, he, nevertheless, confirmed this when he said that he could not raise the invoice for February 2013. The termination had been communicated to them by the respondent who indicated that he did not want the tracking system. The respondent gave the termination date as the 9 or 10 January 2013 and so when the appellant sent its first invoice at the end of January 2013 the contract had already been terminated.

It is also common cause that the tracking devices on the driving school vehicles were removed soon thereafter whereas the system on the truck/lorry(Jecha), whose ownership was disputed, was removed in May 2013. This signalled the end of any charges laid against the respondent over the devices.

The major dispute pertained to the nature of the contract that the two parties entered. The appellant's version was to the effect that the contract was for the provision of vehicle tracking system for respondent's motor vehicles for which the respondent was supposed to pay certain amounts.

The respondent, on the other hand, contended that the agreement was for the appellant to install the tracking system in return for the respondent advertising the appellant's vehicle tracking system on its fleet of vehicles. Thus, whilst the respondent benefitted from the tracking system, the appellant would also benefit by having stickers advertising or marketing its vehicle tracking system placed on the respondent's motor vehicles.

These are the two versions the trial magistrate was faced with and for which he concluded that appellant had not proved its case on a balance of probabilities.

In arriving at her decision the trial magistrate alluded to the fact that the appellant ought to have called one Tazvida Gaza as he was key to the terms of contract that the parties entered into. Other aspects she alluded to included the failure to call evidence on the quantum of the claim from Econet Wireless as the provider of the internet service and the bill related thereto.

Grounds of appeal

The grounds of appeal will be dealt with in seriatim.

1. The learned trial magistrate erred in failing to appreciate that the vehicle tracking agreement was between Appellant and Respondent, and not the former employee of the Appellant one Tazvida Gaza and the Respondent.

This ground of appeal is premised on the trial magistrate's remarks that:-

> "It is also not in dispute that the person who entered into the agreement with the defendant was not before the court, and that person is Tazvida Gaza."

According to the appellant, this implied that the trial magistrate viewed Tazvida Gaza as the other contracting party and not the appellant. The fallacy of this interpretation of this remark is that it tends to ignore the other statement by the trial magistrate which shows clearly that all she meant was that it was Tazvida Gaza, as representative of appellant, who had entered into this agreement on behalf of the appellant. A perusal of the record of proceedings confirms this. For instance in commenting on the appellant's first witness, Kudzai Shamba's evidence, the trial magistrate stated that Kudzai indicated, *inter alia*, that:

> "The agreement was concluded by Tazvida Gaza. He however stated that the agreement was strictly for the tracking services not advertising."

It may also be noted that in his evidence in chief, Kudzai Shamba was not clear as to who did what in the contract as he would refer to 'we' or 'I', without being committal as to who did what in the negotiations for the contract. It was only under cross examination that he

revealed in no uncertain terms that it was Tazvida Gaza who concluded the contract with the respondent. Thus the final terms and conditions of the verbal contract were best known by Tazvida Gaza.

The following exchange in cross-examination makes the point abundantly clear at pp 23-24 of the record of proceedings:

"Q. Are you telling the court that you approached the defendant in their offices?

A. I am not the one who concluded the contract.

Q. who is the person who concluded the contract?

A. Tawanda Gaza (Tazvida)"

Upon explaining that they had initially marketed the tracking system to the defendant the witness was asked further that:

"Q. Can you clarify when you went to see the defendant were you with Tazvida?

A. Yes

Q. Is he a marketer?

A. He was a business development manager but would be with us

Q. Would you deny that the business marketer (manager) was the one concluding the contracts?

A. He is the one who communicated with them because his name was on the flyers."

The witness confirmed that he was not involved in the telephone conversations that took place leading to the conclusion of the contract.

Despite acknowledging none involvement in further negotiations leading to the conclusion of the contract, Kudzai was adamant that the contract was in terms of the company's terms of supplying tracking systems for a charge and not in return for advertisement.

The stance by Kudzai was difficult to understand as this was a verbal contract. His stance appeared to be based on his knowledge of the general business terms of the appellant and the initial offer they approached the respondent with and not based on the contract actually concluded as between Tazvida Gaza for the appellant and the respondent through their verbal communications by telephone or otherwise to which Kudzai said he was not privy to.

The appellant's 2nd witness, Tinashe Chimwaradze, had nothing of substance to say on this issue. He was not privy to the contractual discussions. His evidence was mostly to counter Brighton Chatikita's evidence on the role of a technician and stating that such a technician would not be involved in contract negotiations. It was clear that regarding the terms of the verbal contract it was only the evidence of Kudzai Shamba that had some relevancy.

It is this evidence that the trial magistrate had to juxtapose with the respondent's version.

The respondent's evidence, as reflected on page 41 of the record of proceedings, was to the effect that he came to know the appellant and Tazvida through an advert in the Herald Newspaper. He stated thus:

> "I phoned and had appointment with Gaza and I indicated we were looking for a tracking device system. Gaza then came to our office and had a meeting and I proceeded to suggest using driving school as his direct way of making his job advertised. I sold him the idea and I then stated we were not in a capacity to pay the full amount. After two days he indicated we could come and have partnership. I asked him to draw up the contract and reduce everything to writing and he said he was going to work on that. He indicated he would have his guys starting building up the contract and we were introduced to one Mr. Chatikita as the person who was to deal with the installation. It took them 4-5 days for vehicles in Harare. After the 22 after completion I phoned Gaza for the contract and he was not picking up the calls. The second day I would access the vehicles on the tracker after I was approached by a certain guy who came from their office.
> Q. How was he to advertise?
> A. He was to put stickers and he did."

It was when faced with the above versions that the trial magistrate opined that the appellant should have called Tazvida Gaza. It was apparent that from both Kudzai and the respondent's versions, there were some discussions Kudzai was not privy to including the final terms of the contract.

Whilst the appellant may have advertised seeking clients on its terms, it is not unusual to have a potential client who puts up counter business proposal in the way respondent claimed to have done. In the circumstances can it be said that the trial magistrate's conclusion that the appellant's evidence on this aspect was inadequate in the absence of Tazvida Gaza, was unreasonable or that no sensible person could have come to such a decision given the evidence adduced.

I am inclined to agree with the trial magistrate that as this was a verbal contract, one where only those privy to the final terms of the contract would know, Tazvida Gaza's evidence was crucial.

A perusal of the record of proceedings does not clearly show why this witness, even if he may have left the company, could not have been called to testify.

2. The trial magistrate erred and misdirected herself in failing to appreciate that there were serious inconsistencies between the evidence of the respondent and his witness one Brighton Chatikita which renders the respondent's case unreliable.

The appellant argued that there were serious inconsistencies between the respondent's evidence and that of his witness Brighton Chatikita which rendered the respondent's case manifestly unreliable and improbable. In this regard reference was made to alleged inconsistencies on the terms of the advertising agreement. It is true the witnesses' evidence may not have been at all fours on some aspects of the alleged advertising agreement. It is however important to note that in his evidence Brighton alluded to the fact that he was told most of this version by Tazvida who is not a witness here. It is thus clear hearsay. It is also apparent that the said Brighton, not having been part of the discussions on the terms of the contract between the parties, could only get snippets from those who were privy to the contract. For instance at pp 50-51 of the record of proceedings the following evidence was led from Brighton:

> "Q. Can you explain to court if you had knowledge of the contract?
>
> A. Yes, the contract was different and Tazvida Gaza he then agreed tracking devices would be put and the driving school would benefit by putting adverts.
>
> Q. Is it your evidence defendant was not to pay anything?
>
> A. Yes, Tazvida advised me the same."

Later on the witness reconfirmed that he was being told by Tazvida Gaza.

The general rule is that hearsay evidence is not admissible to prove the truth of the matters stated. See *Cotton Company limited* v *Mobil Oil Zimbabwe (Pvt) Ltd & Anor* HH 66-10 at p 8 where MAKARAU JP as she then was stated that:

> "Any first hand hearsay evidence purporting to give the details of the transaction is inadmissible".

I am also of the view that the alleged inconsistencies do not make up for the missing link in appellant's case regarding the terms of the contract between the parties.

3. The Court further erred in concluding that the appellant's witnesses were relying on hearsay evidence from Tazvida Gaza when the witnesses clearly indicated that their testimony were based on personal knowledge of the business dealings between the parties. The first witness was able to give a detailed account of the material terms and conditions of the agreement and the charges payable for the services rendered to the respondent. No valid reasons were given by the court for rejecting the evidence of appellant's witnesses' which was clearly more probable on a balance of probabilities than that of the respondent and his witness.

I have already alluded to aspects of the appellant's 1st witness's evidence on the terms of the contract. At the most what the witness could testify on is what they approached the respondent with in terms of their offer. He was unable to testify on the final terms of the contract after the respondent had come up with a counter proposal. The witness clearly acknowledged that he was not privy to subsequent verbal negotiations between Tazvida and the respondent leading to the conclusion of the contract. By virtue of that he would not know the final terms agreed to by the parties. Any evidence this witness or any other witness on behalf of the appellant could have would have been told to them by Tazvida. In his judgement the trial magistrate noted this when she stated that: -

> "From the evidence the plaintiff's witnesses were not the ones who concluded the agreement with defendant but only heard from Tazvida Gaza…"

Another aspect note commenting on is the short-lived nature of the contract. It is clear that the contract was entered into in December 2012, between the dates of 15-20. The tracking devices took 4-5 days to install thus taking us to 26-27 December. The contract was then terminated on about 9-10 January 2013. The respondent's position was that the Person with whom he had reached agreement with was no longer picking his calls as he pursued his request for a written contract. When Naboth Gaza came on board they just could not agree hence the contract came to an end. The devices were subsequently removed from the motor vehicles within that same month serve for the one installed on the Truck. The truck did not belong to the respondent but to a person who had seen an advert on the respondent's motor vehicle and was then referred to the appellant. As far as the respondent's contract was concerned it was terminated in January 2013. The contract thus lasted less than a month. That

in my view would lend credence to the assertion that whatever agreement the respondent may have entered into with the appellant through the representation of Tazvida Gaza did not find favour with those who remained after Tazvida left or was simply not picking his calls. Had the parties agreed on the terms alluded to by the appellant, the probabilities are that the contract would not have terminated so quickly at the failure of the respondent to contact Tazvida.

4. The court erred in finding that the appellant ought to have led evidence from Econet Wireless when the quantum of the bill was never disputed. All the respondent disputed was his liability to pay for the internet charges which were incurred in the process of tracking his vehicles.

It is my view that not much turns on this aspect. It is clear that the respondent denied owing the appellant anything. He also denied being allocated the Econet line and he in his plea put the appellant to the strict proof of this fact. It was thus for appellant to call evidence that such a line was allocated to the respondent and through its use so much was incurred.

5. The learned Court (*sic*) further erred in failing to appreciate that the respondent has dismally failed to establish the terms and conditions of the advertising agreement which he alleged.

The above ground of appeal is not easy to understand as the onus was on the plaintiff to prove its case on a balance of probabilities not on the respondent to prove its defence. The respondent did not make any counter claim but merely raised a defence to the appellant's claim. Had the appellant called the crucial witness to establish the nature and terms of the final contract entered into it probably would have succeeded in its claim.

6. The court *a quo* fell into error by accepting the evidence of the respondent's witness when that witness was just a technician whose job did not entail concluding agreements but just fitting tracking devices on motor vehicles.

I am of the view that not much turns on the evidence of this witness. As a technician tasked with installing the devices he may have come across information on the subject matter but as already alluded to the major issue is on the terms of the contract. I have already referred to the hearsay aspect of his evidence and that such is inadmissible. As for what he personally witnessed that is admissible but is not central to the decision not to grant the appellant's claim.

8. The learned magistrate erred by adopting an armchair approach in all the circumstances and reasoning that the evidence of Tazvida Gaza was crucial to the success of the appellant's case and yet the witnesses who were called by the Appellant had testified on all material aspects of the case and were not discredited in any relevant way during cross examination.

This ground is without merit. I have already indicated that Tazvida Gaza was confirmed by witnesses for the appellant and respondent as the person who concluded the verbal contract on behalf of the appellant. It is him who finalised the terms of the agreement. Kudzai Shamba, whilst being portrayed as the witness to carry the appellant's case on the terms of the agreement, clearly could only testify on the terms that the company was offering to the respondent and not on what the parties finally agreed to after the respondent had made a counter proposal.

After a careful analysis of the evidence adduced in the court a quo, I am of the view that it cannot be said that the trial magistrate's findings are so outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind o the question at hand could have arrived at such a decision. Any reasonable person faced with such a case could easily have come to the same conclusion.

Accordingly the appeal be and is hereby dismissed with costs.

NDEWERE J. I concur……

Danziger & Partners, appellant's legal practitioners
Bherebende Law Chambers, respondent's legal practitioners.