

AYAN TRADING (PRIVATE) LIMITED
versus
CLEARSKY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 19 February 2020 and 19 March 2020

Civil Appeal

M Ndlovu, for the appellant
I H Mandikate, for the respondent

MUZENDA J: On 12 November 2019 the court sitting at Mutasa Magistrates Court granted a judgment in favour of the Respondent herein and ordered as follows:

1. That the defendant be ordered to pay US\$314 112-68.
2. That the defendant be ordered to pay interest at a present rate.
3. That the defendant pays costs of suit.

On 18 November 2019 appellant noted an appeal against the whole final judgment and outlined the grounds of appeal as follows:

GROUND OF APPEAL

1. The court *a quo*'s finding is grossly erroneous in that it orders the appellant to pay interest twice to the respondent, contrary to the basic tenets of the law.
2. The award of 0.1% on the gross revenue to the respondent by the court *a quo* is erroneous and ought to be impeached on the following basis:
 - (a) that it was not sought and pleaded in the summons, and,
 - (b) there is no evidence that supports the award.
3. The court *a quo* committed a gross misdirection in calculating 10% commission based on an incorrect figure.
4. The court *a quo* erred and committed a gross irregularity in failing to make a finding that the respondent was in breach and thus was not entitled to the commission awarded to it.

5. The court *a quo* erred and grossly misdirected itself in making a finding that the respondent reduced the tax obligation of the appellant to Zimbabwe Revenue Authority for the year 2013.
6. The court *a quo* grossly erred in awarding the claim in the denomination of United States Dollars instead of real time gross settlement denomination.
7. The court *a quo* erred in misinterpreting the meaning of 10% of the reduced debt.
8. The court *a quo* erred in making a finding a fact that the appellant was liable to pay to the respondent a position of the various amounts claimed contrary to evidence on record that the respondent did not have expertise to carry out such works and that there was non-compliance by the respondent to cause a certificate to be issued by the respondent's accountants certifying reasonable terms of the amended agreement of service.

The appellant prayed that the appeal succeeds and the order of the court *a quo* be set aside and substituted by one dismissing plaintiff's claim with costs.

On 28 November 2019 the respondent filed a cross-appeal and sets out the grounds of the cross-appeal as follows:

"GROUNDS OF APPEAL

1. The court *a quo* grossly misdirected itself in terms of the law wherein it granted costs of suit on ordinary scale despite the parties having agreed that in the event of litigation costs were to be granted on attorney-client scale.
2. The court *a quo* grossly misdirected itself at law by failing to grant interest of 5% per month from the date of default to date of full payment which interest had been agreed by the parties.
3. The court *a quo* grossly misdirected itself in terms of the law by failing to grant the respondent the sum of US\$500-00 being the agreed amount for monthly service fees which the respondent had proved to be due to it and appellant had not contested.
4. The court *a quo* grossly misdirected itself at law by failing to grant collection commission in terms of the Law Society By-Laws which the parties' had agreed upon and respondent had claimed in the summons.
5. The court *a quo* grossly misdirected itself by erroneously calculating the 10% tax reduced fees for the year 2013.

The respondent prays in its cross-appeal that the cross-appeal be upheld and that the relevant part of the judgment of the court *a quo* be set aside and substituted with the following.

- (a) the appellant be and is hereby ordered to pay costs of suit on attorney-client scale.
- (b) The appellant be and is hereby ordered to pay interest at rate of 5% per month from the date of default until the date of full and final payment of the debt as agreed between the parties.

- (c) The appellant be and is hereby ordered to pay US500-00 to respondent being the outstanding service fees for monthly returns VAT, PAYE and QDP.
- (d) The appellant be and is hereby ordered to pay collection commission in terms of the Law Society By-Laws as agreed between the parties.
- (e) The appellant be and is hereby ordered to pay for the tax reduction fees in the sum of the amount of US\$40 848-21 for the year 2013.

FACTS

The plaintiff (now respondent) is Clearsky (Private) Limited trading as Fool-vest Financial Services, a company duly registered in terms of the law of Zimbabwe. The defendant (appellant) is Ayan Trading (Private) Limited, a company incorporated in terms of the laws of Zimbabwe whose registered business office is 113 Herbert Chitepo Street, Mutare.

Sometime in 2016 appellant instructed respondent a tax accounting services contract and entered into a written agreement and key to the agreement,

- (i) respondent was to offer tax accounting service to the appellant.
- (ii) the tax management fees for tax year 2009 to 2013 would be charged at 10% of the tax debt reduced for each year under audit.
- (iii) appellant would pay US\$500-00 per month as services fees for monthly returns of VAT, PAYE and QDP.
- (iv) preparation of ITF12C, Returns including amended ITF12 for the previous years would be charged at 0.1% of Annual Gross Revenue.
- (v) US\$25 per hour would be charged for attending meeting and preparation of reports or any other correspondences.
- (vi) that 5% interest per month shall accrue against any outstanding amount in the event of default of payment by the appellant.
- (vii) that in the event of termination of services respondent shall charge fees for service rendered until such termination and appellant shall be liable to pay 10% of the tax debt reduced at the time of termination which shall be due and payable forthwith.

The respondent rendered its services to the appellant from the date of the agreement until 26 June 2017 when appellant terminated the contract. During the term of the contract respondent would raise its fees from time to time but appellant defaulted payment such that interest at the rate of 5% per month had been accruing on the outstanding amount. At the time of termination of the agreement appellant was cumulatively liable to respondent in the sum of US\$ 554 065-93 inclusive of default interest for services which had been rendered to the

appellant. In terms of the agreement between the respondent and appellant the parties agreed that the appellant shall be liable to pay costs of suit on a legal practitioner-client scale together with collection commission in terms of the tariff of the Law Society of Zimbabwe.

The respondent claimed for the following:

- (a) payment of US\$ 554 065-93 by appellant being the outstanding fees for the services rendered to appellant by the respondent.
- (b) collection commission in terms of the Law Society by-laws.
- (c) costs of suit on legal Practitioner-client scale.
- (d) 5% interest per month to be calculated on the outstanding amount on 27 June 2017 until full payment of the outstanding amount.

The appellant in its plea to the respondent's claim denied entering into any agreement with the respondent. It further denied that respondent was in the business of offering tax accounting services and lacked technical expertise to carry out such tax accounting services. It denied that respondent satisfied its mandate towards the appellant. Appellant also denied that there was never any reduced tax debt after audit by ZIMRA during the period in question which entitled the respondent to a 10% charge on reduced debts. Appellant contended in its plea that respondent did not specifically plead such reduced tax debts to justify the amount of \$50 000 - 00 the appellant also blamed the respondent for miscalculating the amount.

Applicant further denied that respondent rendered services to it. The appellant pleaded that respondent did a disservice for it and contemplated a counter claim. The agreement alluded was relating to provision of financial services as opposed to attending to ZIMRA tax matters. It denied that any invoices were raised and denied owing respondent any money. It stated in its plea that respondent was liable to it in the sum of US\$6 000 000-00 (six million dollars). It prayed that respondent's claim be dismissed with costs on attorney-client scale.

It is necessary to briefly look at the respondent's evidence. Daniel Mahonye testifying for the respondent told the court *a quo* that in 2016 respondent was engaged by the appellant to do tax services, the operative agreement was signed on 1 April 2016 but was to become effective with effect from 1 July 2016. He reiterated the terms of the agreement that the appellant was going to pay a premium of 10% of the reduced tax debt for the period stretching from 2009 to 2013. The appellant also agreed to pay the \$500-00 per month for the services performed by the respondent in meeting appellant's obligations towards ZIMRA. Respondent prepared ITF12C as well as amended ITF12C returns and reiterated that appellant undertook to pay 0.1% of the gross revenue for year accruing to the appellant and according to his

evidence the total for such gross revenue from 2010 to 2016 totalled \$295 070.11. Interest on that capital debt due to the respondent from the annexed schedule attached to respondent's summons added up to \$149 956-60. In 2013 ZIMRA raised a debt of \$408 482-08 and the respondent's charges according to the agreement was 10% which computes to an amount of \$40 848-20 due to the respondent. Much of Mr Mahonye's evidence on these figures was not uncontroverted by the appellant during trial and we take it as issues of common cause and should not detain us.

AD GROUND 1 OF APPELLANT'S NOTICE OF APPEAL

WHETHER THE COURT *A QUO* GROSSLY ERRED IN ORDERING APPELLANT TO PAY INTEREST TWICE TO THE RESPONDENT CONTRARY TO BASIC TENETS OF THE LAW:

The appellant submitted that the amount of \$14 957-75 constitutes 5% interest and that interest was added to the capital debt when the court in its final order further granted an order directing appellant to pay interest at a present rate it erred. On the other hand the respondent submitted in opposing that ground of appeal that the parties in their own agreement agreed that 5% interest per month on the amount outstanding was chargeable, the duty of the court *a quo* was simply to extend that clause of the agreement into the final judgment. Respondent goes further in its cross appeal (ground no 2) on this aspect to contend that the court *a quo* only granted interest from the date of default to the date of the judgment. The court ought to have provided for interest until the date of full payment as agreed by the parties in clauses of their contract.

The issue for determination by this court is whether the court *a quo* misdirected itself by ordering 5% interest on the capital amount due to the respondent on an amount which had been taken into account by the parties in their agreement.

In the matter of *Administrator Transvaal v JD van Nierkerk en Genote BK*¹ it was held that:

"Interest on a judgment debt is levied from the day on which the debt is payable, not from the date of the judgment itself. This is the case unless the court orders otherwise..."

We therefore come to a conclusion that the court *a quo* in dealing with the issue of interest applicable from the date of judgment it had a discretion whether to consider that the

¹ 1995 (2) SA 24 (A)

capital debt still remains unpaid and in such a scenario to order the rate of interest agreed upon by the parties, or to deem the debt due to be fully capitalised and order interest to be paid at the prescribed rate from the date of judgment. We looked at the parties' heads as well as oral submissions and did not discern any misdirection by the court *a quo*. Both the main appeal as well as the cross appeal on this aspect of the order relating to interest from the date of judgment have no merit.

WHETHER THE COURT A *QUO* ERRED IN AWARDING 0.1% OF GROSS REVENUE TO THE RESPONDENT ON THE GROUNDS THAT IT HAD NOT BEEN PLEADED NOR PROVED BY THE RESPONDENT:

The appellant submitted that the respondent did not plead to the issue of 0.1% of the annual gross revenue in its summons. Its claim was for \$554 065-93 being the outstanding fees for the services rendered to the appellant. Hence the court erred in granting the amount of US\$ 295 070-11. Appellant further added that the court *a quo* could not have granted that relief *mero motu*, hence in doing so it committed a gross misdirection. It was further submitted on behalf of the appellant that the court erred in granting an order where the respondent had not disclosed any cause of action. There was no evidence in the plaintiff's bundle of documents to show the gross revenue upon which 0.1% was calculated from.

The respondent opposes that ground of appeal. It contends that the amount of \$554 065-93 owed to it included the 0.1% gross revenue, the 0.1% annual gross revenue was cumulatively included. The respondent added that on p 31 of its bundle of documents it shows how the amount of \$295 070-11 was arrived at. The respondent went on to lead evidence in court to prove that amount, it submitted the matter of 0.1% gross revenue was debated from the start stretching to the closing submissions of both parties and hence the trial court had to make a decision in that aspect as argued by the respondent. Respondent also alluded to the judgment of the court *a quo* on p 20 of the record of proceedings where it dealt with the 0.1% gross revenue.

The question for determination is whether the court *a quo* granted a relief which had not been pleaded by the respondent or alternatively whether there was no evidence adduced by respondent to be relied upon by the trial court?

On p 31 of the record of proceedings is an annexure attached to the respondent's summons commencing action, the first column of that document shows a computation of how the amount of \$295 070-11 was arrived at. Paragraph 3 of the agreement between the appellant

and the respondent provides for the ITF12C and amended ITF12C returns from 2010 to 2013 where the respondent was entitled to 0.1% of the annual gross revenue. Page 20 of the record, the judgment of the court *a quo*, extensively dealt with that aspect. The bundle of documents discovered by the respondent shows the type of work done by the respondent and the annual gross revenue for each year from 2010.

On page 386 of the record, during the re-examination of Mr Nyabvure, by appellant's counsel the following exchange occurred:

“Q: How was plaintiff supposed to be paid by the defendant.

A: \$6 million of 10% for tax reduced, 0.1% of annual gross revenue, \$25-00 per hour for attending meetings at ZIMRA and \$500-00 per month” (my emphasis)

The \$295 070-11 is the total of the annual gross revenue claimed by the respondent in its papers and admitted by the appellant. The summons, the declaration as well as the annexures of the respondent refer to the amount. The appellant's plea is poorly drafted in our respectful view and it is but a bare denial. The appellant did not ask questions to Mr Mahonye about the 0.1% of gross revenue, if it did it did not seriously do so. So we conclude that what is not challenged is indeed admitted.²

The appellant pleaded to respondent's declaration without asking for further particulars more particularly asking the respondent how that amount of \$554 065-00 was arrived at. We infer that it had understood the respondent's nature of claim.³ The appellant proceeded to make submissions relating to that claim and the court *a quo* believed the respondent and awarded the order relating to that aspect. We failed to understand the basis upon which the appellant attacked the trial court. The second ground of appeal, we conclude, lacks merit.

WHETHER THE COURT A QUO COMMITTED A GROSS MISDIRECTION IN CALCULATING 10% COMMISSION BASED ON AN INCORRECT FIGURE.

The tax audit for 2013 was \$408 482-08, the respondent contends that its commission was 10% of this amount which would come up to \$40 848-20. The appellant contends that what was due to the respondent is 10% of the 40 848-20 which would be the figure of \$4 084-82 on p 20 of the record. It now becomes a matter of rendition in our view. Clause 3 (1) of the agreement provides that “Tax management fees for tax year 2009 to 2013 is 10% of tax debt

² Tetrad Investments Bank Limited v Bindura University 2009 WSC – 5.

Fawcett Security Operations (Private) Limited v Director of customs & Excise & Ors 1993 ZLR 121 (S)

³ See Sakunda Energy (Private) Limited & Anor v mayor Logistics (Pvt) Ltd HH 226-18

reduced for each year under audit...” on p 31 of the record of proceedings the respondent clearly indicates under the 5th column “Tax Debt Reduced” the amount of \$408 482-08 and Amount due to the respondent under column 6 is \$40 848-21. The court *a quo* correctly granted the 10% collection commission, but committed a miscalculation of 10% of the tax debt reduced coming out with the figure of \$4 084-82. We agree with the respondent in its cross appeal that there was a mathematical calculation error and conclude that the correct amount of collection commission due to the respondent is \$40 848-21 not \$4 084-82. Appellant’s third ground of appeal fails and the respondent’s cross appeal on that aspect ought to succeed.

WHETHER THE COURT A *QUO* FAILED TO MAKE A FINDING THAT RESPONDENT WAS IN BREACH OF THE AGREEMENT AND HENCE NOT ENTITLED TO COMMISSION AWARDED.

The appellant argued that respondent did not deserve a commission at all for it had failed to perform its obligations. The appellant added that the respondent was in fact in breach of the contract. Respondent did not reduce appellant’s tax debts and since it failed to meet what was expected of it by the appellant it should not have been awarded any commission.

It is ideal to join this 4th ground of appeal with ground of appeal number 5 which states that the court *a quo* erred in making a finding that the respondent reduced the tax obligation of the appellant to ZIMRA for the year 2013.

These are issues of fact which were dealt with by the court *a quo*. The court *a quo* believed the respondent and dealt with the issue of reduced tax in its judgment on p 20 of the record. The trial court concluded that the respondent was entitled to the 10% commission and calculated the figure due albeit erroneously so. However the issue is that of the liability of the appellant to pay 10% commission on reduced tax debt. The pleadings, the bundle of documents as well as the reasoning of the learned magistrate *a quo* shows that the respondent managed to prove on a balance of probabilities why she was entitled to the 10% commission and we fail to see where the court *a quo* misdirected itself.

On the question of breach, the appellant did not file a counter claim where it ought to have sought the court to have an order declaring the respondent to be in breach of contract in any case in our view that was not necessary anyway because it was the appellant who had terminated the agreement and indicated in its pleadings that it had sued the respondent in the High Court claiming millions of dollars for breach. The issue for breach though alluded to by the appellant in cross examination of the respondent’s witness was not specifically isolated for

decision by the trial court as per the issues for trial reflected on the Pre-trial Conference Minute on p 48 of the record. The trial court resolved the issue of whether the appellant was liable or not to the respondent and accepted some of the claims of the respondent and dismissed others. We see no misdirection in the manner the trial court dealt with the matter.

Both grounds of appeal 4 and 5 have no merit.

Grounds 6 and 8 of the Notice of Appeal were abandoned by the appellant's counsel on the date of hearing.

We now deal with the grounds of the cross appeal filed by the respondent.

Grounds 2 (b) on the issue of the 5% per month interest has since been dispensed with when dealing with the main appeal. This equally applies to the \$40 848-21 for the year 2013 on grounds 2 (e) of the cross appeal.

WHETHER APPELLANT SHOULD PAY COSTS OF SUIT ON ATTORNEY-CLIENT SCALE

Clause 6 of the agreement between the appellant and respondent provides that in the event of liquidation instituted by the respondent the debtor shall be liable to pay all legal costs on attorney client scale based on the current Law Society of Zimbabwe tariff. The court *a quo* having ruled that the contract between the parties was binding between them the misdirected itself in awarding respondents costs on party and party contrary to what the parties had agreed. In tandem of the decision the court incorrectly alluded to in its judgment pertaining to the sacrosanct nature of contracts the appellant should pay attorney-client scale and it is so ordered.

WHETHER APPELLANT SHOULD PAY COLLECTION COMMISSION IN TERMS OF LAW SOCIETY BY-LAWS AS AGREED BETWEEN THE PARTIES

This ground of cross-appeal is related to the foregoing ground on the issue of costs, clause 6 of the agreement provides for that and the court *a quo* did not show why it did not grant that relief to the respondent in its judgment. We conclude that in failing to grant that relief as per the summons the court *a quo* misdirected itself that ground of cross appeal has merit and it ought to succeed.

WHETHER APPELLANT OWED RESPONDENT \$500-00 OUTSTANDING FEES.

This amount was claimed by the respondent and not disputed by the appellant. The trial court ought to have granted. As already indicated by this court hereinabove, Mr Nyabvure at p

368 acknowledged that the respondent was to be paid \$500 for attending ZIMRA meetings and the court *a quo* on p 19 of the recorded listed that amount as one of the respondent's claims. It is not clear on record why no decision was made by the court relating to the claim for \$500-00. The respondent had managed to prove on a balance of probabilities the amount of \$500-00 fees outstanding and that unground of cross appeal has merit in our view.

As a result the following order is granted:

1. Appellant's appeal be and is hereby dismissed with costs.
2. Respondent's cross appeal partially succeeds and in addition the order of the court *a quo* is amended in clause 3, by setting aside that clause and substituted it by the following.
3. The defendant is ordered to pay the plaintiff's costs on attorney-client scale.

In addition:

4. Defendant is ordered to pay \$500-00 to the plaintiff being the outstanding service fees for monthly returns for VAT, PAYE and QPD.
5. The defendant to pay collection commission in terms of the Law Society of Zimbabwe By-laws as agreed by the parties.
6. Defendant is to pay the amount of \$40 848-21 for the reduction fees for year 2013 to the plaintiff.

MWAYERA J agrees _____

Mutamangira & Associates, plaintiff's legal practitioners
Mugadza Chinzamba & Partners, respondent's legal practitioners