

**DISTRIBUTABLE (22)**

**METALLON GOLD ZIMBABWE  
v  
GOLDEN MILLION (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE  
ZIYAMBI JA, GARWE JA & PATEL JA  
HARARE, FEBRUARY 13, 2014 & MARCH 31, 2015**

*T Tandi*, for the appellant

Advocate *T Mpfu*, for the respondent

**ZIYAMBI JA:** This is an appeal against a judgment of the High Court which ordered the appellant to pay to the respondent the sum of USD 301 000 for goods sold and delivered as well as interest thereon at the prescribed rate and costs.

The background facts are set out in the judgment of the court *a quo*. The appellant, a company with limited liability incorporated in terms of the Companies Act [Chapter 24:03], is a mining conglomerate in Zimbabwe. It owns, among others, the four mines which are the subject matter of this litigation which commenced with the issue of summons by the respondent as plaintiff in the High Court on 13 December 2013. The claim as initially set out was made up of goods to the total value of US\$360 764.41 as follows:-

US\$78 485-61 delivered to Shamva Gold Mine;

US\$ 245 467-82 delivered to How Gold Mine;  
US\$ 626-96 delivered to Redwing Gold Mine; and  
US\$ 36 184-02 delivered to Mazoe Gold Mine.

The claim was denied by the appellant. In para 4 of its plea it averred:

“While the defendant accepts that certain electrical goods were purchased by it from the plaintiff, defendant denies receipt of most of the goods to which the claim relates and puts plaintiff to the proof thereof. The defendant further avers that plaintiff has been requested to provide a proper and correct summary of goods delivered in order for payment to be made but plaintiff is still to do so. The defendant further denies that any proper demand for payment had been made by the plaintiff as alleged.”

During April 2012, three pre-trial conferences were held at which the parties attempted to reconcile the figures in order to arrive at some consensus as to the amount owing and a possible settlement. The figures having been so reconciled, the amount claimed was reduced to \$301 342.73. However, the parties were unable to agree on the outstanding issues and, on 30 April 2012, the matter was referred to trial on three issues, namely:-

- (i) Whether the defendant is indebted to the Plaintiff in the sum claimed or any other sum at all;
- (ii) Whether the defendant received all the goods forming the subject of the plaintiffs claim; and
- (iii) Whether due and proper demand for payment was made to the defendant prior to the issue of summons.

After a full trial in which evidence, including expert evidence from engineers, was led by both parties, the learned Judge made factual findings in favour of the respondent on the

first two issues. With regard to the third issue, he found that proper demand had not been made and that therefore interest should run from the date of summons.

In addition, the court considered, and dismissed, a belated attempt by the appellant to set off the amount claimed by the respondent against amounts allegedly owing to it in respect of some of the goods which it was claimed were returned for being substandard and unfit for the purpose for which they were purchased. Set off was at no stage of the proceedings pleaded although it was canvassed in the proceedings.

### **THE GROUNDS OF APPEAL**

The grounds of appeal essentially attack the various findings of fact made by the trial Judge.

Ground 1, makes the vague allegation that the trial court misdirected itself in granting judgment in favour of the respondent when it was common cause that the respondent had failed to deliver some equipment to the appellant's Shamva mine.

Ground 2 attacks the court *a quo* for not finding that all the contracts of sale had been rescinded.

Ground 3 attacks the court's finding that set off had not been established.

Ground 4 takes issue with specific findings of fact made by the trial Judge.

There was a concession by Mr *Tandi*, for the appellant, that the contracts of sale had not been rescinded. Accordingly ground 2 need not detain us any further.<sup>1</sup>

**GROUND 1: THE DELIVERY OF GOODS TO SHAMVA MINE.**

The learned Judge made a thorough analysis of the evidence obtained from the ledgers and purchase orders in respect of the Shamva Mine account. It is unnecessary to repeat the detailed evidence. Suffice it to say that a reading of the record reveals no misdirection on his part in this regard. In addition, as the learned Judge observed, Fore, the appellant's witness,<sup>2</sup> admitted that all the goods in respect of the claim in the summons for Shamva Mine were delivered. That fact was a sufficient basis for the finding by the learned Judge that the goods in respect of which payment was claimed in the summons were delivered to Shamva Mine.

**GROUND 3: WHETHER SET-OFF WAS ESTABLISHED**

Set off must be pleaded and proved. The appellant, while challenging the quantity of the goods received, did not plead set off. The doctrine was explained by INNES CJ in *Schierhout v Union Government* 1926 AD 286 at p 289 – 290 as follows<sup>3</sup>:-

“The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognized principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the court – as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established,

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<sup>1</sup> See also Fore at Record pp 464, 466. He admitted that the order for the motor control system in respect of which he sought a set-off was not cancelled.

<sup>2</sup> Record pp 463 and 513.

<sup>3</sup> At pp289-290

the claim would be regarded as extinguished from the moment the mutual debts were in existence together”<sup>4</sup>.

See also *Commissioner of Taxes v First Merchant Bank Ltd*<sup>5</sup> where GUBBAY CJ said:

“At common law, set-off or *compensatio* is a method by which mutual debts, being liquidated and due, may be extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced”.

For set-off to operate the defendant must be in a position to say “the plaintiff owes me a debt” rather than “I have a claim against him”. The debt must be capable of easy and speedy proof.<sup>6</sup>

The learned Judge considered the defence of set-off on the basis that, while it was not pleaded as a defence, it was sufficiently ventilated by the parties before the issue of summons and during the trial.

The appellant raised this defence in respect of mixers delivered to Mazowe Mine and a motor control centre system purchased for Shamva Mine but which remained undelivered at the date of summons. Regarding the motor control system it was common cause that the appellant had made prepayments to the respondent totaling USD149 006,10 for the system which comprised of a motor control centre and six variable speed drives; that the respondent did not appropriate that amount to the debt alleged in the summons or the proved debt of USD301 342.

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<sup>4</sup> Confirmed in *Mahommed v Nagdee* 1952 1 SA410 (A) at 416H

<sup>5</sup> 1997 (1)ZLR 350 (S) at 353C

<sup>6</sup> See *Treasurer-General v Van Vuren* 1905TS 582 at 589; R.H.Christie *The Law of Contract in South Africa* 3ed at p 530.

73 but used it rather in the manufacture of the motor control system; that at the close of pleadings on 3 February 2012 the manufacture of the motor control system was still in progress; and that the appellant did not cancel the contract of sale of the motor control system<sup>7</sup>. In addition, the court found that the appellant had not placed the respondent *in mora* and that the failure to deliver in these circumstances did not amount to a debt due for the purposes of set off.

The appellant's contention that it was entitled to set off on the basis of non-delivery of the motor control system was in my view correctly rejected by the court *a quo* on the basis of its finding that the appellant had neither cancelled the contract nor placed the respondent *in mora*.

As to the mixers delivered to Mazowe mine, the defence of set off was raised against the amounts claimed by the respondent on the basis that the mixers had failed to function because of latent mechanical defects. However, after hearing expert evidence, the court *a quo* was satisfied that the problems bedeviling the functioning of the mixers were the result of operational ineptitude by the appellant's employees as opposed to latent mechanical defects. Indeed, correspondence on record indicates that the parties were working together to resolve the problem<sup>8</sup>. After a detailed analysis and careful assessment of the evidence, the learned Judge rejected the evidence of the appellant's witnesses which evidence he found to be unreliable and unworthy of belief and concluded that the appellant had failed to establish the fact that the goods

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<sup>7</sup> There was in fact a concession in the court *a quo* by Mr Tandi that the contract for the sale of the motor control center and 6 variable speed drives had not been cancelled. See Record p518. See also footnote 1 (supra)

<sup>8</sup> Record pps 307, 311,312, 313

were returned by the appellant because of latent defects and, therefore, the defence of set off based thereon.

At p 12<sup>9</sup> of the cyclostyled judgment the court observed:-

“The report of Sana (the appellant’s witness) defies his conclusion that the mixers at both Mazowe and Shamva were a total failure. They were running but faced problems that appear to me to be operational in the sense that the defendant’s (appellant’s) employees failed to follow laid down operating procedures in running the equipment.”

The court noted also, and that was the uncontroverted evidence of the respondent, that the appellant only took the position that the problems were of a mechanical nature after the issue of summons. Before that, the appellant was content with repair of the damaged equipment in terms of the warranty. I find no misdirection in the approach of the trial court and its conclusion, in my view, accords with the evidence on record.

**GROUND 4: FACTUAL FINDINGS.**

It is settled that an appellate court will not interfere with factual findings made by a trial court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.<sup>10</sup>

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<sup>9</sup> Record p518

<sup>10</sup>Herbstein and Van Winsen The civil Practice of The Superior Courts at page 738-9; Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) at 670

The factual issues raised by the appellant in its notice of appeal were carefully considered by the learned Judge who gave detailed reasons for his decision on the facts. None of the established grounds for interference as set out above has been established. On the contrary, the judgment of the court *a quo* is detailed and well-reasoned and his findings accord with the probabilities of the matter. His preference of the evidence of the respondent's witnesses against that of the appellant's witnesses is amply supported by the record. No basis, therefore, has been established for interference with the judgment of the court *a quo*.

The appeal is, for the above reasons, dismissed with costs.

**GARWE JA:** I agree

**PATEL JA:** I agree

*Machingambi Legal Practitioner*, plaintiff's legal practitioners

*Kantor & Immerman*, defendant's legal practitioners