EX-TEMPORE

DENDAIRY (PRIVATE) LIMITED
v
ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA & MATHONSI JA
BULAWAYO: JULY 22, 2019 & AUGUST 1, 2019

G.R.J. Sithole, for the appellant

R. Ndlovu, for the respondent

GWAUNZA DCJ

[1] This is an appeal against the whole judgment of the High Court which dismissed the appellant's claim against the respondent for $162 280,17, interest and costs of suit.

[2] The brief facts of the matter are that the parties entered into a secure power supply agreement which expired on 31 December 2015. In terms of that agreement the appellant was entitled to an uninterrupted power supply save for interruptions occasioned by faults and other factors meaning that the appellant would be spared from planned load-shedding. This would be done at a higher tariff of 0,128 as opposed to an ordinary power supply tariff.

[3] It is not in dispute that despite the respondent's effort to renew the secure power supply agreement including sending the appellant a blank agreement to sign, the appellant did not sign the proposed renewal agreement. In fact, the appellant ignored the respondent's correspondence seeking renewal. By letter dated 30 December 2015 addressed to the appellant's General Manager by the respondent's General Manager (Southern Region), the appellant was notified that the agreement would continue. It reads in part:

> **"Re: Standard Secure Power Agreement**
>
> The above subject refers. We advise that the Standard Secure Power Agreement ends on 31 December 2015. However, the agreement will continue with effect from 1 January 2016 on a month to month basis until the Regulator (ZERA) approves a new tariff. Please do not hesitate to contact us should you require any further information or clarification."

[4] The appellant not having raised any objections the respondent continued to supply electricity at the secured power supply rate of 0,128 throughout 2016. During that period of one year the respondent would issue monthly invoices reflecting the prime rate charged for secured power supply customers. In response the appellant would settle the bills in advance and at times it would pay much more than the amount reflected on the monthly bill.

[5] In December 2016 the appellant raised a query with the respondent through its legal practitioners noting that it had been charged at a higher rate throughout the year and demanding a refund of what it regarded as the over charged amount. By letter delivered to the respondent on 12 January 2017 the appellant stated: -

> "Further to your letter dated 5 January 2017, we wish to advise that we are not agreeable to signing the new memorandum of agreement for 2017. With effect from the 1 January 2017 we would like to be on a Standard Peak and Off Peak rate billing system."

It is significant that at the beginning of 2016 the appellant had not taken the trouble to notify the respondent as it did in the above letter which is a tacit admission that in 2016 it was a ring fenced customer.

[6] When the parties could not agree on the billing rate for 2016 the appellant sued for that refund basing its claim on unjust enrichment. The court *a quo* found that the appellant had failed to prove the requirements of unjust enrichment and that by its silence the appellant had made a representation to the respondent by its conduct. It was therefore estopped from denying the existence of a secure power supply agreement. The appellant appealed to this Court challenging the findings of the court *a quo* on unjust enrichment and estoppel.

[7] It is settled that in order to succeed in a claim for unjust enrichment, the party relying on it must show that:

(a) The defendant was enriched;
(b) The enrichment was at the expense of the plaintiff who was impoverished in the process;
(c) The enrichment was unjustified; and
(d) The case must not come under the scope of one of the classical enrichment actions.

[8] Mr *Sithole* who appeared for the appellant submitted that the unjust enrichment was in the sense that the appellant had been charged at a higher rate. He however could not dispute that the appellant had enjoyed the benefit of a ring fenced customer throughout 2016.

In fact, Mr *Sithole* could not impugn the evidence led for the respondent that the appellant had only endured power cuts on 8 occasions during the whole year none of which were due to load shedding.

[9] In light of the foregoing we find no fault in the finding of the court *a quo* that the appellant failed to satisfy the requirements of unjust enrichment. By the same token the finding of the court *a quo* that the appellant had failed to prove that it was impoverished, cannot be faulted at all. The appeal therefore lacks merit and ought to be dismissed.

[10] Having come to that conclusion we take the view that it is not necessary to consider the appellant's grounds of appeal numbers 2 and 3.

[11] Accordingly, it is ordered as follows: -

The appeal be and is hereby dismissed with costs.

BHUNU JA: I agree

MATHONSI JA: I agree

Mutatu & Partners c/o Mahuni & Mutatu, appellant's legal practitioners

Messrs R. Ndlovu & Company c*/o Kossam Ncube,* respondent's legal practitioners