REPORTABLE (44)

GOODWOOD HOTELS (PRIVATE) LIMITED t/a **CUTTY SARK HOTEL**
v
(1) DAVID HUNZVI (2) 3 APPLE INTERNATIONAL (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, CHATUKUTA JA & MWAYERA JA
HARARE, 22 JUNE 2023 & 23 MAY 2024

F. Mahere, for the appellant

T. Mpofu, with *T.L Mapuranga*, for the respondents

CHATUKUTA JA:

1. This is an appeal against part of the judgment of the High Court (the court *a quo*) dated 14 September 2022. The court *a quo* ordered the appellant to pay the second respondent the sum of $885 875.00 together with interest thereon at the prescribed rate per annum from 1 October 2010 to the date of full and final payment. It further ordered the second respondent to pay the appellant a sum of $34 454.00 together with interest thereon at the prescribed rate and holding over damages.

FACTUAL BACKGROUND

2. The appellant and the second respondent are companies duly incorporated in terms of the laws of Zimbabwe. The appellant is the owner of the property known as Cutty Sark Hotel ("the hotel") situated in Kariba. The first respondent is a director in the second respondent. In May 2010, the appellant entered into an agreement with the second respondent relating

to the intended expansion of the hotel. The second respondent was represented by the first respondent. The parties agreed that the first respondent would occupy a room at the hotel for both his boarding and office use, at no charge. The first respondent took occupation of room 10 at the hotel and commenced working on the assignment. On 28 June 2010 he invoiced the appellant in the sum of $1 592. The invoice acknowledged that the appellants paid $500 in cash on 28 June 2010. The balance was subsequently paid in full on 5 July 2010. In September 2010, the appellant decided not to undertake the intended project. The first respondent was advised to vacate the room, failing which the respondents were to pay for the first respondent's continued occupation of the room at the then prevailing rate. The first respondent did not vacate the room. He instead wrote to the appellant claiming payment for work he alleged he had done as a precondition for vacating the room. A written notice to vacate the room was then served on him on 3 May 2011 to vacate the room by 10 May 2011.

3. The first respondent still did not vacate the room after the written notice. The appellant approached the court *a quo* on 14 May 2014 under HC 3910/14 seeking an order for the eviction of the first respondent from the hotel and payment of $34 545, together with holding over damages of $39.22 per day being the charge for room 10 from 1 August 2013 to the date of eviction. The claim was against the first respondent only. On 30 June 2014, the first respondent excepted to the summons on the basis that the appellant had not entered into an agreement with him but with the second respondent. The first respondent filed a counterclaim on the same date. Thereafter, the appellant amended its summons to join the second respondent on 19 July 2018. On 3 August 2018 the respondents filed another counterclaim.

4. The respondents' defence to the claim was that they were entitled to remain in the hotel as they were owed consultancy fees by the appellant and would only vacate the room upon payment of the fees. They counterclaimed for payment of a sum of US$2 880 776.00 for consultancy fees and damages.

5. The respondents alleged in the counterclaim that they entered into a contract with the appellant on 26 May 2010 to render professional and consulting services to the appellant in the planning and management of a project on the appellant's land, on which the hotel is situated, measuring 73 acres and valued at USD $8 858 750. The project was divided into two stages, the planning stage and the implementation stage. The fees were payable at the end of each stage. It was a term of the agreement that the appellant would pay the second respondent 10 percent of the total land value (73 acres) with respect to the first stage. A further 8 percent being the value of the project after its completion was payable at the completion of the project. The project was to run for a period of five years. The parties agreed that the respondents would relocate from Harare to Kariba and the first respondent would occupy a room at the hotel during the subsistence of the agreement.

6. The first respondent alleged that in satisfaction of the agreement, he prepared the project plan document and diagrams (which he referred to as "intellectual property"). He also submitted to the appellant the bill of costs. The appellant soon thereafter prematurely terminated the consultancy agreement between the parties without making any payment for the services rendered. The premature termination was the basis for the claim of damages. The respondents admitted receipt from the appellant of a sum of US $ 1 582 as a monthly allowance and not part of the fees as claimed by the appellant.

7. In September 2011, the second respondent had lodged a claim under HC 9023/11 for the same relief sought in the counterclaim. By court order granted on 9 May 2018, the action

was consolidated with HC 3910/14, which was the matter instituted in the court *a quo* by the appellant.

PROCEEDINGS IN THE COURT *A QUO*

Appellant's case

8. The appellant led evidence from Andrew Henderson, one of its directors. He testified that the respondents took occupation of room 10 at the hotel pursuant to an agreement that they were to carry out a feasibility study. The agreement was terminated by a letter dated 3 May 2011. The respondents issued an invoice for US$ 1 592.00 which was paid in full. The respondents failed to vacate room 10, hence the claim for US$34.545.00 as at 31 July 2013 and holding over damages as from 1 August 2013. Mr Henderson disputed that the appellant entered into any other agreement with the respondents, be it oral or written, and that it owed them any consultancy fees.

It was argued by the appellant's counsel that, the *quantum* of the counterclaim was itself a matter which ought to have been established on evidence.

RESPONDENTS' CASE

9. The first respondent testified that he was a property developer and architect. When he was approached by the appellant, the second respondent had an office in Harare and they were in the process of relocating to South Africa. The parties entered into an oral consultancy agreement with the appellant on 24 May 2010. They closed shop in Harare, abandoned the relocation to South Africa and moved to Kariba to undertake the project for the appellant. The terms of the agreement were put in writing in a document dated 25 May 2010 prepared by the first respondent and sent to the appellant. The document was prepared the following day after the appellant had accepted the respondents' terms. The document was not signed by the appellant.

10. The respondents' counsel argued that the appellant had breached the consultancy agreement by its failure to pay fees which were due to them. Further, they argued that if there were any rentals due, they must be set off against the outstanding fees due by the appellant as set out in the counterclaim.

FINDINGS OF THE COURT *A QUO*

11. The court *a quo* found that the respondents had failed to prove that they had a right to remain in occupation of the room at the hotel. It held that the appellant was entitled to the arrear charges for room 10 and holding over damages with respect to the second respondent. It however found the first respondent not liable as he was in occupation of the room as the second respondent's representative.

12. It further found that the respondents had managed to prove the existence of an oral agreement between the parties and that they undertook some work for the appellant. It held that the appellant had acknowledged the agreement in its declaration and by providing the respondents with a room at its hotel to work from. It assessed the damages that were to be awarded to the respondents to be in the sum of $885 875.

13. The court *a quo* issued an order for the eviction of the respondents. The second respondent was ordered to pay the appellant, the sum of $ 34 545 together with interest thereon at the prescribed rate per annum from 1 August 2013 to the date of full and final payment and holding over damages calculated at the rate of $35 per day from 1 August 2013 to the date of final eviction. The appellant was ordered to pay the second respondent $885 875 together with interest thereon at the prescribed rate per annum from 1 October 2010 to the date of full and final payment for services rendered and for the amount payable by the second respondent to be set off against the money owed to it by the appellant.

Aggrieved by this outcome, the appellant filed the present appeal on the following grounds:

"GROUNDS OF APPEAL

1. The High Court grossly erred in awarding amounts which were claimed by the appellant in United States dollars without specifying whether such amounts were awarded in that currency in paras 2 and 3 of the operative part of its judgment.
2. The High Court further grossly erred in finding that a contract existed in terms of which the second respondent was entitled to payment of the sum of $885 875 in para 4 of the operative part of its judgment where the pleadings of the second respondent and the evidence led on its behalf did not show that such a contract had been concluded.
3. The High Court further grossly erred in finding that Sadie Lambourne was an agent for the appellant and that she concluded an agreement with the second respondent on behalf of the appellant.
4. The High Court further grossly erred in finding that the second respondent had performed in terms of the alleged agreement and provided the alleged professional services to such an extent as to deserve payment of the sum of $885 875.
5. The High Court further grossly erred in absolving the first respondent from liability in respect of the appellant's claims on the basis that he dealt with the appellant in his capacity as a representative of the second respondent when he had not pleaded that defence.

RELIEF SOUGHT

WHEREFORE the appellant prays that:

1. The present appeal be allowed with costs and paras 2, 3, 4, 5 and 6 of the judgment of the High Court be set aside and substituted with the following:-

"2.The defendants shall jointly and severally, the one paying the other to be absolved pay the plaintiff the sum of US$34 545 together with interest thereon at the rate of 5 percent per annum from 1 August 2013 to the date of full and final payment.

3.The defendants shall jointly and severally the one paying the other to be absolved pay the plaintiff the sum of US$35 per day from 1 August 2013 to the date of their ejectment from the plaintiff's premises namely Cutty Sark Hotel, Kariba.

4.The second defendant's counterclaim against the plaintiff be and is hereby dismissed.

5. The defendants shall bear the costs of this suit jointly and severally, the one paying the other to be absolved. "

SUBMISSIONS BEFORE THIS COURT

Submissions by the appellant

14.Miss *Mahere*, for the appellant, submitted as follows. The court *a quo* erred in that it failed to specify whether the amount awarded to the appellant was in United States dollars or in Zimbabwe dollars. It was therefore uncertain in which currency a writ would be issued.

15.The appellant had prayed *a quo* for an order against the first and second respondents jointly and severally, but the court *a quo* issued an order against the second respondent only yet all the evidence pointed to the fact that it was the first respondent who was in illegal occupation of the room and he failed to move out when requested to do so. The court *a quo* ought to have found the first respondent liable for payment of damages jointly and severally with the second respondent.

16.There was no basis for the court *a quo* to grant an order in favour of the respondents for the payment of $ 885 875. The respondents did not claim such an amount in any of the pleadings before the court *a quo*. Further, there was no agreement between the parties for the payment

of the amount for professional services by the respondents. The first respondent failed in his evidence-in-chief to establish what the terms of the agreement were and when and where the agreement was concluded. The court *a quo* erred in holding that an oral agreement existed between the parties and in granting the respondents the award when there was no basis for such award. The court *a quo* effectively computed consultancy fees on the basis of a non-existent agreement between the parties and therefore concluded an agreement between the parties. The court *a quo*'s findings were therefore contrary to the evidence before it.

RESPONDENTS' SUBMISSIONS

17. *Per contra*, Mr *Mpofu*, for the respondents, submitted that the court *a quo* granted the appellant what it sought in its pleadings before the court *a quo*. The court *a quo* therefore did not misdirect itself when it did not specify the currency of the award.

18. On the question whether the court ought to have found the first respondent jointly liable with the second appellant, it was submitted that the appeal was against findings of fact. The appellant failed to meet the requisite test. It was argued that the appellant admitted in its declaration the existence of an agreement between the appellant and the second respondent and that the first respondent took occupation of room 10 as a representative of the second respondent. As per its amended claim, the appellant's claim was against the first respondent and in the alternative against the second respondent. The court *a quo* found the person that the appellant concluded an agreement with was the second respondent. The finding was in accordance with the appellant's claim. The appellant therefore did not have a right to appeal against that finding.

19. It was further argued that the appellant had the onus to prove that the agreement was not binding on the parties and that it has failed to discharge the onus. The terms of the oral agreement were reflected in the letter dated 25 May 2010 written by the first respondent to the appellant. The appellant had admitted in the pleadings before the court *a quo* that an agreement existed between the parties. The respondents carried out significant work pursuant to the agreement and were entitled to payment.

ISSUE FOR DETERMINATION

20. The following four issues call for determination:

1. Whether the court *a quo* misdirected itself in granting an order which did not specify the applicable denomination.
2. Whether the court *a quo* misdirected itself in not finding the first respondent jointly and severally liable with the second respondent.
3. Whether an oral agreement was concluded between the parties, and
4. Whether or not the court *a quo* erred in finding that the respondent had proved the amount due to the second respondent.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred in awarding amounts which did not specify the currency to be used.

21. The appellant argued that the court *a quo* erred when it failed to specify, in the order, the denomination of its award, that is, whether it was in United States Dollars or Zimbabwe dollars. It argued that the court *a quo* ought to have specified the currency and additionally state the rate at which the conversion would be undertaken. *Per contra*, the respondents argue that the court *a quo* did not misdirect itself in awarding the appellant what it had prayed for. It was argued that the appellants did not indicate in the prayer the currency of their claim and the prayer was never amended such that the court would have no right to grant any other claim in the absence of an amendment. They sought to rely on the case of

Nzara & Ors v *Kashumba N.O & Ors* 2018 (1) ZLR 194 (S) which states that the court cannot grant a relief that has not been sought by the parties.

22. However, the record speaks for itself that the amount in issue was denominated in US dollars. The invoice dated 15 September 2010 and issued by the appellant to the respondents reflects on its face that the applicable currency was the United States dollar. The invoice related to the charges in the sum of US$11 725.00 for the period between 1 October 2010 to 31 August 2011. The amount was carried over in a subsequent invoice, being a reconciliation from 1 August 2011 to 5 July 2013. The testimony of Andrew Henderson, one of its directors, refers to the claim as being in United States dollars.

23. Although the appellant's prayer did not state the denomination of the claim, the evidence did. The evidence adduced in the court *a quo* is clear that the parties were aware that the charges for the room were in United States dollars and not in Zimbabwe dollars. The respondent did not put into issue Andrew Henderson's evidence on that aspect. It can be concluded that the evidence was therefore common cause that what was due was to be denominated in United States dollars.

24. The appellant was sluggard in drafting its declaration. The court *a quo* was at liberty to state the obvious and grant the relief sought in United States dollars bearing in mind that the relief sought in any matter is a mere draft. It however did not address its mind on the evidence before it when it gave its judgment and omitted to specify the denomination of the award.

25. In the case of *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) at 487 F-G the Court quoted Lord Denning in the case of *Beswick v Beswick* [1967] 2 All ER 1197 (HL)). At 156g-157a and held that:

> "The time has now come when we should say that when the currency of an agreement is a foreign currency — that is to say, when the money of account and the money of payment is a foreign currency — the English courts have power to give judgment in that foreign currency; they can make an order in the form: 'It is adjudged this day that the defendants do pay to the plaintiff so much in foreign currency (being the currency of the contract) or the sterling equivalent at the time of payment'."

26. In *Eke* v *Parsons* [2015] ZACC 30 at paras 73-75, the Court highlighted the essential features of a court order as follows:

> "[73] A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance.
>
> [74] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done.
>
> [75] …..But the improper exercise of the discretion does not free the parties on whom the order applies from complying with it, to the extent that they may ascertain what it requires them to do."

27. The respondents referred to the case of *Nzara & Others* v *Kashumba N.O & Others* (*supra*) in support of their proposition that the order *a quo* was exactly as requested by the appellant and the court *a quo* would have misdirected itself if it had granted an order not sought by the appellant. That case is distinguishable from the present matter. In *Nzara & Others* v *Kashumba N.O & Others* (*supra*) this Court was confronted with the issue that the High Court had granted an order part of which consisted of relief that neither party had made submissions on and found that the court *a quo* acted outside of its mandate by determining issues not placed before it by the parties. The issue before the court *a quo* did not relate to

the wording of an order which had been sought by either party. The case therefore has no bearing on the matter at hand.

The argument that the court *a quo* erred in failing to give an award in the currency established by evidence is therefore merited.

28. This is a case where the appellant would have properly sought a correction of the judgment in terms of r 29 of the High Court Rules, 2021. However, this Court is empowered in terms of s 22 of the Supreme Court Act [*Chapter 7:13*] to give such judgment as the case may require. What is in issue is merely the currency of the award. Given the common cause evidence on the currency, there would be no prejudice to the respondents if the judgment of the court *a quo* is corrected by the insertion of the appropriate currency.

Whether or not the first respondent ought to have been held jointly and severally liable with the second respondent

29. The appellant contended that although the first respondent was a representative of the second respondent, he ought to have been held liable for holding over damages as well since he was the one who was physically in occupation of room 10 of the hotel.

30. The appellant claimed payment of the arrear charges and holding over damages against the "first defendant and/or the second defendant." It was therefore required to prove that it had entered into an agreement with the first respondent in his personal capacity. It, however, acknowledged in its declaration that it entered into an arrangement with the second respondent, that being the basis on which the first respondent took occupation of room 10. It further acknowledged that the first respondent was at all times acting on behalf of the second respondent. The appellant stated in para 3 of its amended declaration that:

> "In or about June 2010, the plaintiff made available and the **first defendant, alternatively**, **the second defendant represented by the first defendant,** took occupation of room 10 at plaintiff's said hotel to enable him to have a place to reside in Kariba whilst the **first defendant and/or second defendant through the first defendant** rendered services to the plaintiff in connection with a potential development project which the Plaintiff and its proprietors were considering undertaking**. (**my emphasis)

31. Thereafter it continued throughout the declaration using the phrase "the first defendant and/or the second defendant represented by the first defendant". The appellant had initially sued the first respondent only. The first respondent excepted to the summons on the grounds that the appellant had cited the wrong party as it entered into an agreement with the second respondent and not the first respondent. The appellant thereafter amended its summons by joining the second respondent. The first respondent was therefore occupying the room in the furtherance of the second respondent's interests as its agent and with the knowledge of the second respondent. There is no evidence in this case of the first respondent having entered into any agreement with the appellant in his personal capacity.

32. It is trite that a company, being an artificial person "with no body to kick or soul to damn", acts through individuals. See *Commissioner of Inland Revenue* v *Richmond Estate* 1956 (1) SA 602 (A) at 606 G and *Pumpkin Construction (Pvt) Ltd* v *Chikaka* 1997 (2) ZLR 430 (H). In view of the appellant's assertions in its own pleadings that the first respondent was representing the second respondent, the court *a quo* cannot be faulted for absolving the first respondent from liability for the arrear charges and holding over damages.

Whether or not there was an oral agreement between the parties.

33. The appellant argued that there was no agreement between the parties thus the court *a quo* erred in granting the respondents the award of $885 875 for professional services when there was no basis for such award. It was further argued that the court *a quo* erred in finding that

there was an oral agreement between the parties yet the evidence in the court *a quo* did not substantiate such findings.

34. It is common cause that the parties concluded an agreement in terms of which the respondents were required to set out the proposal for the development of the project. Pursuant to that agreement, the respondents took occupation of room 10. The issue for consideration is whether it was agreed that the first respondent was to carry out the work he conducted as alleged in his counterclaim.

35. It is necessary to state at the onset that the onus to prove the existence of the oral agreement pleaded in the respondents' counterclaim and in HC 9023/11 rested with the respondents. It is a settled position of law that he who alleges must prove. In *Mbira* v *Civil Service Commission* SC 32/21, MAKARAU JA (as she then was) held that:

> "The law applicable in the determination of this appeal is trite. It is the bedrock of all civil trials in this and other sister jurisdictions which have adopted adversarial trials as the main formal dispute resolution mechanism. That the law places the burden to prove any allegation on him or her who makes the allegation. Thus, the general proposition has always been that he who asserts must prove on a balance of probabilities, but prove he must."

36. As stated by DUBE J (as she then was) in the case of *Delta Beverages (Private) Limited* v *Private Investments (Private) Limited* HH 135/18 at p 4:

> "The oral contract, sometimes referred to as the invisible contract, is one of the most difficult to prove. What makes this so is the lack of hard evidence of the existence of the contract. The essentials of a verbal contract are the same as those of a written contract. There must be an offer and an acceptance of the contract, existence of consideration, the parties must have the capacity to enter into the contract and the parties must intend to enter into the contract and create a binding relationship. The courts will not endorse an oral contract where any of the essential elements of a valid contract have not been proved. The terms of the oral contract must be proved and there must be agreement and understanding of the terms of the contract by the parties. An oral contract that meets all the requirements of a contract is binding on the parties and gives rise to a legally enforceable relationship. There must be a meeting of the minds or a reasonable belief by the parties that there is consensus. A party who alleges the existence of an oral agreement has the onus to prove the existence of the agreement on a balance of probabilities."

37. The respondents argued that on 24 May 2010 the parties had entered into an oral agreement for the provision of consulting services to the appellant in the planning and management of the appellant's expansion project. The terms of the agreement were as reflected in the letter written by the first respondent dated 25 May 2010. The first paragraph of the letter reads:

> "Pursuant to the subject matter above and in response to your request for a more detailed breakdown on the Consulting Services and timeframe on the work program and expectancy of the project **subject to both parties agreeing to the terms and conditions contained in the Draft Memorandum submitted to you yesterday for consideration and prior to obtaining the final written document from your attorneys for mutual consent and compliance by all parties…….** (Own emphasis)

38. The use of the phrase "subject to" means that the breakdown of the consulting services and timeframe of the work program was dependent on the parties agreeing to the terms and conditions set out in the draft agreement. This is consistent with the letter again written by the first respondent on the previous day, 24 May 2010. The first paragraph reads:

> "Pursuant to the subject matter above we would want to confirm that after our meeting held at your offices on 21 May 2010, we are pleased to inform you that 3 Apple International Plc is willing to perform and provide the Consulting services **subject to both parties agreeing to the terms and conditions contained in the Memorandum of Agreement when signed and mutually agreed upon**." (Own emphasis)

This letter is explicit that the performance of the project was conditional upon the parties signing the draft memorandum of agreement. It is common cause that the parties did not sign any agreement. The respondents cannot therefore speak of an oral agreement where the first respondent wrote a letter indicating otherwise.

39. The record is replete with other communication between the parties and particularly from the first respondent indicating that there was no agreement between the parties. One such

communication is a letter from the first respondent dated 20 July 2010. Part of the letter reads:

> "The status of the project to date is as follows:
> 1 …
> 2 …
> 3. Outside all the above, we can then negotiate whether you will require further assistance from us in terms of coordinating the physical elements of the project which is roads, water reticulation, on and offsite infrastructure and the actual housing & construction phase.
>
> The grey areas since the inception of the project have obviously been how it was going to be funded and without that clarity we merely devised a failsafe method which is a PHASED outlook where the first was going to be sold off-plan to the fund (*sic*) the rest of the ensuing PHASES etc.
>
> So given the limitation and scarcity of capital to fund the project including the Planning exercise which in essence is the process that unlocks the value of the Land Proprietor, Real Estate Agents @ 7.5 percent and many other sub-Contractors @ 10 percent we then devised a method governed by our Planning Industrial stipulations being 15percent of gross property value when operating on a cash basis and 18 percent on account basis. **However, all this is negotiable and subject to all parties agreeing to applicable mutual terms given what's practical.**
>
> Terms vary from 10 percent as project settlement either 50 percent as cash with balance in the form of land for example and a further contract to manage property development to amortise the deficit while providing business continuity for the Planner. **So I implore you to find a comfortable scenario**. (Own emphasis)"

40. The letter in fact corroborates the appellant's evidence that there was no agreement on the implementation of the project. Paragraph 3 of the letter refers to the project management phase which the first respondent alleged in the letter of 25 May 2010 to have been agreed upon and for which the appellant was required to pay "***Cost Estimate*** *@ 10-15 percent of gross development value over 2-3 years but not exceeding 5 years."*

41. The letter solicited an email from Henderson to the first respondent on 2 August 2010, in which the appellant requested for a quotation from the respondents in order to know whether it could afford to finance the implementation of the project and whether the respondents' services would be required. Henderson lamented the respondents' failure to produce a

'simple quote' and warned the respondents that the first respondent would be asked to move out of room 10 should he delay in producing the quotation. The email reads

> "Morning David
>
> This is totally incorrect. I did not ask you for this. I have paid you for what you did originally and of which you presented me the papers. When you were in the meeting in Harare I asked you for two costings on what you would charge me to get the paperwork through the next 2 steps we discussed. Only when we have done this can we discuss any other payments. You are wanting to do business with me on an advisory level and expecting me to pay all your costs, this is not how business works. We need to get real here!!! I asked you for 2 quotes to have 2 jobs completed which we could then further discuss. Please send me the 2 quotes that I requested and we can move from there……. .only once you have send these and we have discussed them can we move forward again in this venture. As is I am waiting for the quote so we can move forward in this business matter and until I get this quote I assume that you are funding yourself."

It makes sense that the appellant would not proceed with a project of the magnitude referred to by the respondents without a budget for it. It is therefore inconceivable that the appellant would have concluded an agreement not knowing how much it was going to cost and how it was going to be funded. In fact, the respondents took it upon themselves to decide how the project would be funded by devising a method to raise the funds in spite of the request by the appellant to provide the two quotes.

42. Part of another letter by the first respondent dated 6 August 2010 reads:

> "If you feel that what I am asking for is ridiculous then check in Harare with Shasha Jorgi & Associates and other planners to simply get the industrial charges at play to date. In fact none of them will commence work without a down payment and an agreement in place to secure their return yet I did all this in good faith. For example Architects charge 10 to 12.5 percent of the total finished value of the entire building that's their industrial average. The Planning and Surveying fraternity also has similar guidelines there is nothing new. **The only difference is I have tabled a 10 percent which is still subject to negotiation and above it all 5 to 8 cheaper than some of my peers**." (Own emphasis)

43. The letter showed that further negotiations were still to be conducted on the implementation stage of the project three months after the alleged oral agreement. The appellant was expected to indicate whether it would require the second respondent's services in the

implementation of the project. This was contrary to the respondents' assertion that the parties had agreed on that aspect.

44. For a party to be able to claim an amount there must be an agreement where the parties had agreed on the terms and how the amount was to be calculated. The first question is whether the parties agreed upon those terms which are essential for the existence of a valid agreement.

45. In their attempt to prove the second respondent's claim, the respondents encountered several difficulties. The first difficulty was that they failed to establish when the oral agreement was concluded. The letter of 25 May 2010 does not state when the oral agreement was concluded. The date of the agreement first appears in his counterclaim issued on 30 June 2014. The first respondent averred in paragraph c) of his declaration that he entered into an agreement with the appellant on 26 May 2010. This could not have been so in the light of his evidence-in-chief that he wrote the letter to the appellant dated 25 May 2010, the day after concluding the alleged oral agreement. The second respondent did not plead in the counterclaim issued on 3 August 2010 the date when the agreement between the parties was concluded. It merely stated that by 4 June 2010, it had closed its operations in Harare and relocated to the hotel. However, in its declaration in HC 9023/11, it averred that the agreement was concluded on 4 June 2010. Indeed, according to the letter by the first respondent dated 6 August 2010, the parties were still haggling over the terms. The respondents' version as to when the agreement was concluded was not a consistent one.

46. The second difficulty encountered by the respondents related to proving the agreed remuneration for the services to be provided. There were also inconsistences as to what was the remuneration due to the second respondent. The court *a quo* found that the respondents had proved their entitlement to the sum of US$885 875.00. However, the evidence adduced

before the court *a quo* failed to establish an agreed remuneration. The letter of 25 May 2010 relied on by the respondents as containing the terms of the agreement shows that the respondents were not certain as to the computation of the remuneration. The remuneration for the planning stage was captured as:

> "**Cost Estimate** @ 10-15 percent of gross land value or 18 percent if operating on credit terms."
> and for the Project management as:
>
> "**Cost Estimate** @ 10-15 percent of gross development value over 2-3 years but not exceeding 5 years."

47. It cannot be said that the parties were *ad idem* on the remuneration where it was based on "cost estimates". In fact, counsel for the respondents faced a challenge in eliciting evidence from the first respondent on the amount that the respondents were claiming. He had to literally extract the amount claimed *a quo* and was still not able to get the exact amount. The following was the exchange between the first respondent and his counsel:

> "Q: So it was 10 percent of what value? What was the figure that you were working on and you wanted 10 percent of it after accomplishing work?
> A: That was going to be firmly established by in any case we had a number that we were working with but the market was obviously going to decide what the 10% would be.
> Q: What figure was available?
> A: 10 percent of the gross figure
> Q: What was the gross figure?
> A: The gross figure was about 8 point something million, if I am not mistaken. It has been a while and 10 percent of that would have been $820 000 US and by the way this was not going to come out of their pocket. It was going to come out of the sale of the job or work that I would have completed.
>
> Q: I just want you to have cognisance of the fact that you referred to 10 percent of the gross value of the property then to be 8 million and you wanted 10 percent as your remuneration
> A: Yes
> Q: Is that 8 million the same value that is there now?
> A: No the market swings so essentially they need somebody to re-evaluate."

This was the respondents' claim and only the respondents could testify on what the claim was and how it had been arrived at.

48. The value of the land was estimated at US$ 8.8million. The first respondent admitted in cross examination that there was no valuation report showing the actual value of the land which would have formed the basis for computing the 10 percent.

> "Q: So how can you calculate 10 to 18 percent of a value which is not proven?
> A: But proven by what, by market dictates or because all I am saying is that the value which was used was the prevailing value of the land within the particular precinct at the time. So the value then I think was US$39 per square metre. So it was me now working out the total hectarage which they did not know to then thumb suck the reins of the value (sic)
> Q: That is a beautiful cause (*sic*), thumb suck
> A: Yes
> Q: So the court is seated to deal with a thumb sucked figure
> A: No it is not thumb sucked as in …
> Q: That is what you used is it not? You used that term.
> A: The plaintiff desired to know the general land value at that moment in time. So surely if they wanted something thorough they would have gone to the relevant who would have given them the proper evaluation."

49. The parties were not even agreed on the payment terms. They had not agreed on whether the appellant was to pay 10-15 percent of the gross development value or on credit terms in which case it would have had to pay 18 percent of the gross land value. Different payment terms are found in paragraph (x.) of the letter of 25 May 2010 which reads:

> "(x.) All projected incomes calculate to be 3 Apple's remuneration shall be settled as follows 65 percent in convertible value @ 15-18 percent of 73 acres of 3.5 acres & 7.3 acres respectively as CASH and the balance in the form of Real Estate. Should any late payment exceed 30 days the appropriate interest shall be levied and compounded."

50. In para (c) of the counterclaim to HC 3910/14 issued on 30 June 2014, the first respondent averred that he entered into the agreement with the appellant on 25 May 2010. The respondent relies on paragraph (xi.) of the Terms and Conditions set out in that letter which reads:

> "NB
> Please be advised that our Terms and Conditions do not require signing but any confirmation or communication from you INSTRUCTING us to move on site in

writing or verbatim will be regarded as your acceptance of these stipulations as a whole."

51. The draft agreement placed before the court shows the scope of work the respondents were to undertake. The draft clearly relates to the planning stage only. The scope of work would have included the physical planning stage which the appellant stated it had paid for. The draft agreement did not stipulate it would extend to the implementation stage. Paragraph 13 of the draft reads:

> "13. Immediately upon completion of the work relating to the remainder of Cutty Sark separate agreements can be ventured into from architectural designs, civil and structural engineering and direct real marketing."

Further para 18 of the draft reads,

> "The parties acknowledge that this agreement constitutes the entire first phase of the agreement between them and that no other terms, conditions, stipulations, warranties or representations whatsoever have been made, expressly or by implication by either party or by such party's agent other than those incorporated herein."

There is nothing on record to show that the parties had successfully moved on to the next phase and that the agreement had been revised in terms of para 18 above.

52. Therefore, after evaluating the evidence on record, it becomes apparent that there was not a single document that proved that there was an oral agreement for the respondents to undertake the implementation of any work. As stated in *Mbira* v *Civil Service Commission* (*supra*), he who alleges must prove. The respondents dismally failed to discharge the onus on them.

53. In the case of *Divvyland Investments (Pvt) Ltd* v *Chiweza* SC 138/21 at para 39 and 40, the Court held that:

> "[39] Firstly, it should be noted that it is an accepted principle of our law that it is not open to a court to rewrite terms of an agreement for the parties. A court cannot infer or imply terms of a contract between parties but must simply interpret the terms of the agreement in the event that a dispute arises. In *Magodora & Others* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403C-D it was reiterated by the Court that:

> 'In principle, it is not open to the courts to re-write a contract entered into between the parties or to excuse any of them from the consequences of the agreement that they have freely and voluntarily accepted…'
>
> [40] Paragraph 3 of the order of the court *a quo* clearly shows that the court fell into error in failing to appreciate the sacrosanct nature of the contract which existed between the parties. Even if it was clear that the agreement between the parties was marred by different versions of events, the court could not dictate the terms of the agreement as the court was not party to the agreement.'"

54. The above remarks are apposite *in casu*. The court *a quo* made a finding of fact that there was an oral agreement between the parties. It is a settled principle that this Court will not easily interfere with factual findings made by a lower court unless the findings are grossly unreasonable. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC) at 670A-E and *ZINWA* v *Mwoyounotsva* 2015 (1) ZLR 935 (S) at para 16.

55. In *Proton Bakery (Pvt) Ltd* v *Takaendesa* 2005 (1) ZLR 60 (S) at p 62E-F, GWAUNZA JA (as she then was) noted the following:

> "The appellant argues, in light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite. I am, for the reasons outlined below, persuaded by this argument… The misdirection on the part of the court *a quo* is left in no doubt. It is in my view, so serious as to leave this Court with no option but to interfere with the determination of the lower court."

In my view, the findings of the court *a quo* in granting the respondents' counterclaim notwithstanding the failure to prove an oral agreement was so irrational as to warrant interference by this Court.

56. From the record, there is not a single shred of evidence that establish a meeting of the minds in relation to the implementation of the project in issue. The record is replete with evidence, which shows that the parties were not in agreement, such as the appellant's persistent demands for the respondents to vacate room 10. Moreover, the record of proceedings clearly

shows that the disputes between the parties commenced at the planning stage and by September 2010, when the agreement was terminated, there had been no progress on the implementation of the proposal. Therefore, there was no agreement that would have allowed the court *a quo* to assess the amount due to the respondents.

57. Having found that there was no agreement between the parties, it follows that there was therefore no basis for awarding the respondents the sum of $885 875. 00. In the circumstances it is therefore not necessary for the Court to determine the fourth issue, *viz*, whether or not the court *a quo* erred in finding that the respondents had proved that they were owed a sum of $885 875.00.

DISPOSITION

58. The appellant's appeal is merited in so far as it relates to the denomination of the judgment *a quo* and the dismissal of the second respondent's claim. The court *a quo* grossly misdirected itself by issuing an order that did not reflect the currency of the amounts due to the appellant.

59. It is trite that he who alleges must prove. The respondents have merely asserted that an oral agreement existed with the appellant which agreement they failed to prove. The respondents did not, therefore, prove their claim on a balance of probabilities. The appellant, however, failed to establish a basis for claiming that the first respondent was liable. It conceded in its own pleadings that the first respondent had been acting on behalf of the second respondent.

Costs follow the cause.

60. In the result, it be and is hereby ordered as follows:

1. The appeal is allowed in part with costs.

2. Paragraph 5 of the judgment *a quo* is deleted.

3. Paragraphs 2, 3, and 4 of the judgment *a quo* are set aside and substituted with the following:

> "2. The second defendant shall pay the plaintiff the sum of US$34 453.00 together with interest thereon at the rate of 5 percent per annum from 1 August 2013 to the date of full and final payment or its equivalent at the prevailing interbank rate reckoning at the time of payment.
>
> 3. The second defendant, shall pay the plaintiff the sum of US$35.00 per day together with interest thereon at the rate of 5 percent per annum from 1 August 2013 to the date of their ejectment from the plaintiff's premises namely Cutty Sark Hotel, Kariba or its equivalent in the local currency at the prevailing interbank rate reckoning at the time of payment.
>
> 4. The second defendant's counterclaim against the plaintiff be and is hereby dismissed with costs."

GUVAVA JA : I agree

MWAYERA JA : I agree

Atherstone and Cook, appellant's legal practitioners

Mapaya & Partners, respondents' legal practitioners