HB 352/17
HCA 51/16

WINNERCON (PVT) LTD

Versus

BRAIN NDLOVU

IN THE HIGH COURT OF ZIMBABWE
BERE & MAKONESE JJ
BULAWAYO 23 NOVEMBER 2017

Civil Appeal

Miss N. Ndlovu for the appellant
S. Sengweni for respondent

MAKONESE J: This is an appeal against the decision of a magistrate sitting at Bulawayo on the 21st of June 2016. The learned magistrate granted judgment in favour of the respondent in the sum of US$4 607. The appellant was dissatisfied with the judgment and filed a notice of appeal. The broad grounds of appeal are that the learned magistrate erred in finding that the appellant had undertaken to pay certain consultancy fees at the rate of 12% on the sun of US$66 232,69. The appellant contends that respondent failed to prove his case on a balance of probabilities. Further the appellant avers that the court *a quo* misdirected itself by finding that there was a written agreement between the appellant and respondent in respect of the payment of a fee of 12% for the work done by the respondent. In the alternative, the appellant argues that one Tendai Garikai who signed an agreement on behalf of the appellant was not authorized to enter into such agreement. It is contended by the appellant that Tendai Garikai acted outside his mandate in order to defraud the appellant.

It is not disputed that the basis of the respondent's claims against the appellant arose from a consultancy agreement in terms of which the appellant was to pay the respondent a certain percentage of the value of the contract entered into between the appellant and the Gwanda Community Share Ownership Trust. On 5 February 2014 appellant and the Trust signed a written contract in terms of which appellant undertook to supply materials and construct science laboratories at Selonga , Sibonga and Gungwe High Schools. The appellant performed the contract in part and was paid a sum of US$66 236,69 by the Trust. The appellant paid the

respondent the sum of US3 340 as fees for his services. The respondent argued that appellant was supposed to pay him 12% of the value of the contract which amounted to US$79 470. The appellant denied this contention and averred that respondent was to be paid 4% of the value of the contract in terms of a verbal agreement between the parties. The issue that was before the court *a quo* for determination was whether or not the respondent was to be paid a commission of 12% or 4% of the value of the contract.

After a careful perusal of the record of the proceedings in the court *a quo* it is clear that the court *a quo* was correct in entering judgment in favour of the respondent. The respondent successfully proved his case on a balance of probabilities. It is trite law that in civil disputes, the standard of proof is on a balance of probabilities. The respondent was required to prove that the evidence before the court was sufficient to tilt the scales in his favour. The court *a quo*, correctly, in my, view came to the conclusion that appellant undertook to pay him 12% of the value of the contract. During the trial respondent tendered exhibits, namely a written contract between appellant and the Gwanda Community Share Ownership Trust and a written contract between appellant and respondent. It is clear from these exhibits that the total value of the contract between the appellant and the Trust was $268 4,80. It was also evident that appellant undertook to pay respondent a total sum of US$10 708,49.

The principles governing the interpretation of written contracts are well settled in our law. Written contracts are interpreted by giving the ordinary grammatical meaning of the words used in the contract unless this would result in some absurdity or inconsistency with the rest of the contract. See *Madoda* v *Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (SC).

In this matter, notwithstanding the fact that 12% was not expressed in the written contract, the court *a quo* adopted a contextual interpretation of the figures in the written agreement to arrive at the conclusion that 12% of the amount in the signed agreement translated to the sum of US10 708,49, being the amount respondent was intended to receive from the appellant for his services.

In *Secretary for Justice & Constitutional Affairs* v *A.Nass & Co(Pvt) Ltd* 1981 ZLR 427 the court held that a term can only be implied in a contract if it is necessary to give efficacy to the contract, that is, if it can be confidently said that if at the time of the contract was being negotiated, an officious bystander had asked the parties " What would happen in such- and such a case?", and both parties would have replied, "Of course so- and- so will happen if we did not say so as it is too clear."

In the circumstances of this case, we are satisfied that the appeal is wholly devoid of merit. The court *a quo* came to a correct finding. The respondent's claims were proven on a balance of probabilities.

Accordingly, the appeal is hereby dismissed with costs.

Bere J …….. I agree

Messrs Ncube & Partners, appellant's legal practitioners
Sengweni Legal Practice, respondent's legal practitioners