REPORTABLE ZLR (36)

Judgment No. SC. 36/06

Civil Appeal No. 312/05

CHEVRON INVESTMENTS (PRIVATE) LIMITED v (1) SHUPIKAI CHIHURI (2) THE REGISTRAR OF DEEDS N.O.

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA, & GWAUNZA JA

HARARE, MAY 9 & SEPTEMBER 26, 2006

A Moyo, for the appellant

T Mangena, for the first respondent

No appearance for the second respondent

GWAUNZA JA: This is an appeal against a judgment of the High Court, in terms of which the appellant was ordered to sign all papers necessary to effect transfer of certain property in Harare, to the respondent. The court a quo also set aside the purported cancellation, by the appellant, of the agreement in terms of which the disputed property had been sold to the respondent.

The following background to the dispute is not disputed-

On 15 February 2005, the respondent responded to a newspaper advertisement concerning the sale of immovable property at No.48 Tungsgate Road, Northwood. The property belonged to the appellant and had been advertised for sale, at the appellant's instance, through an estate agent. Having decided to buy the property, the respondent attended on the estate agent and signed an irrevocable offer form, offering to buy the property for $765 million. He offered to pay a deposit of $400 million, with the balance being payable upon transfer.

On 16 February 2005 the irrevocable offer form was signed on behalf of the appellant. Even though in the space provided for this purpose on the form, it is indicated that the offer had been accepted for the appellant by Innocent Muchenje and Mordeline Nedziwe, there is a dispute as to whether the latter actually signed the form. It is, however, not disputed that Innocent Muchenje signed it. I will address this dispute later.

The respondent, on the same day, signed a formal agreement of sale and paid the deposit of $400 million the following day. A day later, on 18 February 2005, the appellant wrote to the estate agent, instructing them to cancel the contract of sale. The opening paragraph of the letter read as follows:

> "We wish to formally put aside our acceptanceof the offer put forward, of ZW 765 million as the purchase price of the property…"(my emphasis).

The letter went on to state that a review of the selling price was

necessary given "the rate of inflation". The letter was signed by the appellant's three directors, including Innocent Muchenje, who had signed the irrevocable offer form two days previously.

In response to this development, the respondent, through his lawyers, rejected the withdrawal of the appellant's acceptance of his offer and insisted on the latter abiding by the contract of sale. The appellant responded by letter dated 22 February 2005 and advanced new grounds for wishing to have the agreement cancelled. These were that no company resolution had been passed to dispose of the property in question; that the respondent had failed to disclose the fact that his offer to purchase the property was conditional upon obtaining mortgage finance; and that, in accepting the offer, the appellant had acted on incorrect information supplied by the estate agents in respect of the Capital Gains Tax payable by it.

The respondent after this resorted to the application whose determination is now being appealed against.

In the court *a quo*, the learned Judge correctly determined that the issue to be decided was whether a valid contract between the parties existed and if so, whether the appellant *in casu* had a basis for cancelling such agreement.

Application to adduce fresh evidence on appeal

As already indicated, the appellant, in the court *a quo,* advanced a number of reasons for wishing to rescind its earlier acceptance of the respondent's offer.

Now, on appeal to this Court, the appellant seeks to advance yet another ground for revoking the sale, and has for that purpose filed an application, which is opposed by the respondent, to adduce fresh evidence.

I will deal with this application first before considering the merits of the appeal.

The fresh evidence that the appellant seeks to adduce on appeal is in the form of a report from the Registrar of Deeds, to the effect that the property in dispute is the only immovable property registered in the name of the appellant. The appellant relies on this report to contend that the property in question forms the sole asset of the appellant. In paragraph 4 of its founding affidavit, the appellant submits that the court *a quo* had proceeded on the assumption that it (appellant) had no property, movable or otherwise, outside of the disputed property. Later in the same affidavit, (paragraph 7), the appellant seemingly contradicts itself by stating that the allegation to the effect that the

house in question constituted the sole asset of the appellant, was not made in the court *a quo*. The appellant does not explain how the court *a quo*could have proceeded on that assumption if the matter was not specifically alleged, and if, as the appellant itself concedes, it was not an issue then. In any event, there is no indication in the judgment of the court *a quo*that the implications of the appellant owning that or any other asset had exercised the learned Judge's mind, much less that she had proceeded on the assumption that the appellant owned only one asset. Simply, the matter was not placed before her as evidence, and therefore was not considered at all.

Counsel for the appellant, *Mr Moyo*, submits that it was an "oversight" on the part of the appellant's then legal practitioner in the court *a quo,*not to tender the evidence now being sought to be adduced. He also concedes that the evidence concerned was available at the time the matter was heard *a quo*and could have been obtained, except that no effort had been made to do so. From this, it can in my view be safely assumed, and I so find, that the evidence could have been obtained without any due diligence at all.

I however, find Mr *Moyo's*submissions to be quite instructive, in that they suggest clearly what the motivation was for the application to adduce fresh evidence on appeal. It was, evidently, the wish to present the appellant's case differently from the manner it was presented in the court *a quo* a different legal practitioner. The intention, in the light of the new arguments now being advanced for the appellant, is to lay the ground for the contention that an order upholding the agreement of sale would result in a contravention of Sec 183 of the Companies Act, (Chapter 24:03) ("the Act")

As both counsel indicate in their heads of argument, the law, and the authorities, are quite clear on what constitutes good grounds for the adducing of fresh evidence on appeal.[1] The grounds do not include the need to argue the dispute on the basis of new facts not prsented in the court *a quo*. To the contrary the law expressly frowns upon such attempts as is succinctly stated by McNALLY JA in *Kearns v Waltes Enterprises* S160/90

"In the circumstances we do not wish to set a precedent for litigants to treat the

[1]1See for instance, Leopard Rock Hotel Co.(Pvt) Ltd vs Wallen Construction (Pvt) Ltd,1994 (1) ZLR 255(S) and Farmers" Corp Ltd vs Borden Syndicate (Pvt) Ltd 1961 R&N 28

Supreme Court as a second court of first instance, a court in which they can try out the issues again on fresh facts if the first set proved to be inadequate".

These words can aptly be applied to the circumstances of this case. By asserting that the appellant's counsel in the court *a quo*, through an oversight, failed to adduce the evidence now being sought to be introduced, the appellant is clearly stating that the evidence it presented in support of its case in the court *a quo*was inadequate. Hence its desire to complete or supplement that evidence by adducing additional evidence on appeal. Apart from giving the appellant another chance to argue its case differently, granting the application would result in unduly delaying finalisation of the matter. As WESSELS CJ correctly stated in *Colman v Dunbar*1933 AD 141 at 161:

"It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances."

Incasu, the appellant has not shown that there are special circumstances to warrant a departure from the general rule. The evidence was available and could have been easily accessed. No effort was made to obtain

the evidence because it did not occur to the appellant's counsel that it was relevant to the dispute, and it is being brought up now simply because another legal practitioner considers it to be relevant after all. In addition to this, I am not persuaded, as indicated below, that the evidence in question would have had an important influence on the result of the case.

In view of the foregoing, I find that the applicant has failed to prove a case for adducing fresh evidence on appeal.

The application is accordingly dismissed with costs.

Merits

I will turn now to the merits of the appeal, and note from the outset that the appellant has abandoned its first ground of appeal and now relies on the remaining two grounds, which are, that the honourable court erred by;

(i) finding that one of the directors had ostensible authority to sell the property in question; and

(ii) finding that two directors signed the irrevocable offer form.

The argument concerning the lack of authority that the appellant now alleges in respect of its director, Innocent Muchenje, has been expanded upon on

appeal. The appellant now argues that the authority in question could only have been that referred to in s 183 of the Act.

Section 183 of the Act provides as follows:

> "(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting –
>
> (a) …
>
> (b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.
>
> (2) No resolution of the company shall be effective as approving … of a disposal in terms of paragraph of subsection (1) unless it authorizes, in terms, the specific transaction proposed by the directors."

The appellant contends that s 183 of the Act renders unenforceable any agreement entered into for and on its behalf by one of its directors to dispose of the company's undertaking or the whole or greater part of its assets, without the sanction of the shareholders as provided for in that section. The appellant advances this argument even though, by its own admission, it led no evidence in the court *a quo* relating to the applicability or otherwise, of s 183 of the Act, nor the extent of the appellant's assets. Despite what counsel for the appellant, Mr *Moyo*, now wishes to advance as one of the appellant's grounds of appeal, it is very clear from a

reading of the evidence presented in the court *a quo*that the appellant's reference to "authority" had nothing to do with the provisions of s 183 of the Act. This in reality explains why the learned trial judge made no reference to s 183 and determined the matter on the basis of ostensible authority, which she was satisfied the respondent properly relied on in seeking to hold the appellant to its acceptance of his offer. The learned Judge *a quo,* my view correctly analysed the evidence as follows:

> "The letter of 18 February 2005 purporting to withdraw the acceptance of the offer was signed by all three of the company directors. In that letter the three directors acknowledge that they were aware that the property was on sale, that a party had offered to buy the property at $765 million and that they had accepted the offer but they now wish to resile from the contract. They do not raise the issue of lack of authority. The applicant was entitled to have assumed that the directors, who signed the acceptance form, must have authority in one form or another to bind the company and that all acts of internal management or organisation on which the exercise of such authority is dependent may, in terms of the Turquand's[2] rule be assumed by a *bona fide* third party to have been properly and duly performed".

Except for her reference to 'directors' having signed the irrevocable offer form, I find the reasoning

[2] *Royal British Bank v Turquand* 1856 6E 2B 327, 119 ER 886

and decision of the learned Judge *a quo*, based as it was on the evidence that was presented before her, to be correct. In any case, it is irrelevant in this respect, whether one or two directors signed the acceptance form. The appellant therefore cannot, as it now seeks to do, be heard to argue that the court *a quo*erred by ordering specific performance when to do so would contravene s 183 of the Act. Nor is there any basis for the appellant to argue that the court *a quo*erred in finding that the *Turquand*rule prevailed over s 183 of the companies Act. The *onus*was on the appellant in the court *a quo*to draw the learned Judge's attention to s 183 and its possible effect on the transaction complained of. The appellant did not do so, and the Judge proceeded to determine the matter on the basis of the evidence that was placed before her.

As a general rule, an applicant's case falls or stands on the evidence that he or she places before the court. While the court might, *mero motu,*properly go outside of this evidence to consider other legal aspects pertinent to the dispute before it, it is not in every case that the failure by the court to do so amounts to a misdirection at law.

I am satisfied, when all is told, that the court a quo properly determined the matter on the basis of ostensible authority. Consequently, I find there is no merit in the appellant's first ground of appeal.

Having said this however, I am mindful of the fact that one may raise a point of law at any stage of the proceedings in dispute before the court, including the appeal stage. The applicability or otherwise of s 183 of the Companies Act is a point of law. It is on this basis, and in order to put the matter beyond any doubt, that I will consider the merits or demerits of the appellant's argument that the order of specific performance granted by the court *a quo* would offend against the provisions of s 183 of the Companies Act.

Section 183 of the Companies Act, from a closer reading thereof, is contravened when the directors of a company go behind the back of its shareholders and dispose of the undertaking of the company or of the whole or the greater part of its assets. Where the directors, in so doing, purport to act on the basis of a company resolution, their actions shall be *null* and *void* unless the resolution in question, "in terms", specifically authorises the transaction.

In the case at hand, it is not in dispute that the directors of the appellant who, according to the evidence before the court, were three in number, commissioned an estate agent to advertise for sale, and sell, on their behalf, the property in question. After the respondent offered to buy the property on certain payment terms, the offer was accepted in writing on behalf of the appellant. Even though the appellant now disputes that the irrevocable offer form was signed on its behalf by two of its directors, what is relevant and significant is that at some point not specifically indicated, but to be inferred from paragraph one of their letter of 18 February 2005, all the three directors of the appellant ratified and confirmed the acceptance.

The effect of this ratification in the light of s 183 of the Act is that all three directors of the appellant purported to dispose of an asset of the company. What has not been established, because that information was not placed before the court *a quo*nor was point argued, was what percentage of the total assets of the appellant was represented by the immovable property in question. The argument, which, in my view is valid, is made on behalf of the respondent that without an indication of the extent of the appellant’s assets, it is not possible for the court to ascertain, for purposes of s 183 of the Act, whether the property constituted the whole or a greater part of the assets of the company.

I interpret para 1(b) of s 183 to mean that the

directors of a company can properly dispose of minor assets of the company without the authority of the shareholders. Therefore, in order to establish that the asset in question constitutes a quantity the disposal of which would contravene the section, it is, in my view, necessary to place before the court evidence concerning the full extent of the company's assets. This the appellant has not done. The fact that the appellant already owned one immovable asset did not of itself mean it did not own other assets, both movable and immovable. As long as it has not been, and cannot on the papers be, established that the property in question constitutes a percentage of the assets that sub paragraph 183 1 (b) provides should not be disposed without authorisation, s 183(1)(b) will not apply. If that paragraph does not apply, it follows that subs 183(2), which provides for specific authorisation of the transaction in question, does not apply. The authorisation relates only to the quantity of assets specified in subs 1. It is evident therefore that the order for specific performance, that the court *a quo*made, would not have offended against S 183 (1)(b) of the Companies' Act.

However, even had the appellant placed before the court, evidence to show that the property in question was the whole or a major part of its assets, I am not

persuaded it would have succeeded in its attempts to resile from the agreement of sale. I am in this respect persuaded by the respondent's contention that the doctrine of unanimous assent would have been successfully invoked against the appellant. It is not disputed that, while calling themselves directors, the three signatories to the letter of 18 February 2005 were also the only shareholders of the appellant. Indeed Mr Moyo for the appellant was not able to submit that there were other shareholders of the appellant besides the three. In their joint capacities as directors and shareholders, the three commissioned the estate agent concerned to sell the property in question, on their behalf.

It has been submitted, and not disputed, that all the three directors/shareholders were present during the viewing of the property by prospective buyers who included the respondent. After the latter made an offer for the property and one of the directors accepted it in writing, the rest of the directors, as I have found, ratified his actions, thereby and effectively giving their authority in retrospect. I am indebted to counsel for the respondent, who has cited in his heads of argument, authorities for the proposition that a provision like s 183 would not make any transaction entered into without the approval of a company in a meeting, *null*and *void*, so long as it was capable of ratification by the shareholders[3]. Further, that there

[3] See, among others, Tett & Chadwick, *The Zimbabwean Company Law*, 2 ed

was nothing in the Companies' Act to prohibit the authority required for purposes of the provision being given retrospectively.

The situation in which the only directors of a company have disposed of the major assets of the company without the resolution referred to in the Companies Act, was dealt with in *Sugden v BeaconhurstDiaries (Pvt) Ltd and Ors*1963 (2) SA 174. The principle of mutual assent was described as follows:

> "In my view, where the only two shareholders and directors express – whether at the same time or not – their joint approval of a transaction contemplated by s 70 sec (2) [equivalent of our s 183(1)(b)] their decision is as valid and effectual as if it had been taken at an effective general meeting convened all the formalities prescribed by the Act".

Applying these words to the circumstances of the case at hand, it cannot be disputed that all the three directors/shareholders approved the sale of the property in question, albeit at different times. They later sought to rescind such approval. On the basis of the authorities cited, they clearly cannot do so. Their approval has the same effect as compliance with s 183(2).

The respondent, I find, is correct in his submission that the purpose of s 183 of the Act is to protect the shareholders of a company against unscrupulous directors who might wish to dispose of its assets at will, and to the shareholders' on p 117; *In re Olympus Consolidated Mines Limited* 1958 (2) SA 381

detriment. Its purpose is not to provide the directors of a company with the means to resile from an agreement they would have validly entered into with an innocent party, when they realise that they may have made a bad bargain.

Therefore, even if the property in question constituted the sole asset of the appellant as envisaged in s 183 of the Act, the appellant would still not have been able to avoid the consequences of having retrospectively approved the sale of the property to the respondent.

The signature(s) on the offer form

I will now consider the appellant's second ground of appeal, which concerns the signature affixed on its behalf, to the irrevocable offer form. The appellant charges that the court *a quo* erred by finding that two of its directors signed the irrevocable offer form.

A perusal of the irrevocable offer form shows there is one space for the signature of the seller. That space is clearly filled in by Dr Innocent Muchenje's signature. The relevant portion of the offer form reads as follows: "*The above offer is hereby accepted by me* …"and leaves space for the details of the seller to be filled in. Into this space it is indicated that the offer was accepted by Dr I Muchenje and Mordeline Nedziwe on behalf of the appellant. Despite the reference to

Mordeline Nedziwe it is evident that she did not sign the offer form, as the only other signature was affixed to the space marked 'witness.' A comparison of this signature with that of Mordeline Ndeziwe, as it appears in the directors' letter of 18 February 2005, makes it clear that the signature is not hers. To put the matter beyond doubt, the signature does not resemble that of the other director of the appellant, Mr I Muchenje, again as it appears at the end of the letter of 18 February 2005.

Even if Mordeline Ndeziwe, who was apparently Dr Muchenje's spouse, was in the company of the former when he signed the offer form at the offices of the estate agents, and despite her name being printed on the form, it is evident that she herself did not sign the form. Therefore, for what it is worth, I find there is merit in the appellant's ground of appeal alleging misdirection on the part of the court *a quo*, when it found that two directors of the appellant had signed the irrevocable offer form.

This finding however, is not of much help to the appellant. It is in my view, irrelevant whether one or two directors signed the offer form. What is relevant and crucial is the fact that even by their own admission, the other two directors ratified the actions of Dr Innocent Muchenje.

Taking all of the foregoing into account, I am satisfied there is no merit in the appeal.

It is in the result ordered as follows;

"The appeal be and is hereby dismissed with costs."

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Wintertons, first respondent's legal practitioners