ANTHONY HICKEY
v
(1) DMC HOLDINGS (PRIVATE) LIMITED (2) CHRISTMAS GIFT (PRIVATE) LIMITED (3) ROGERIO BARBOSA AZEVEDO DE SA (4) NATIONAL SOCIAL SECURITY AUTHORITY

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, FEBRUARY 14, 2014

Mr *T. Mpofu*, for the appellant
Mr *P. Ranchod*, for the first, second & third respondents
Mr *F. Girach*, for the fourth respondent

ZIYAMBI JA: This is an appeal against a decision of the High Court dismissing an urgent application brought by the appellant in which he sought certain interim relief.

The learned judge found firstly, that the matter was not urgent, and secondly, that the appellant had no *locus standi* to make the application.

The facts which are common cause are that the appellant holds a 30% shareholding in the first respondent. The first respondent, in turn, is a 100% shareholder in the second respondent. It is also common cause that the only asset of the first respondent are its shares in the second respondent and that the only asset of the second respondent is the land the subject of the litigation before the High Court.

On the question of urgency, the papers reveal that in 2010 there was a meeting followed by correspondence between the appellant's then legal practitioners and the third respondent at which the appellant sought an assurance from the third respondent that in the event the land in question was to be sold he would be fully involved and his 30% interest secured. No response was received by the appellant to that letter despite a threat by the appellant in a further letter to "take the matter further".

Nothing further occurred until August 2013 when the appellant learnt that a portion of the land had been disposed of to the fourth respondent. It was then that he filed the urgent application in question seeking the interim relief as set out in the draft Provisional Order filed of record. The learned Judge agreed with the third and fourth respondents that the matter was not urgent because, so he found, the need to act arose in 2010 and not in August 2013.

In our view the need to act clearly only arose in August 2013 when the appellant got to know that the land had been actually sold without his involvement. In this regard the need to act could not have arisen in 2010 because no definite steps had been taken to sell or otherwise dispose of the land. It should be stressed that the appellant was not opposed to the sale of the land. His stance was that such sale should not take place without his involvement. The court *a quo* was therefore wrong in concluding that the matter was not urgent.

We pause to mention at this stage that having found the matter not to be urgent the court *a quo* should simply have issued an order that the matter be removed from the roll. In

these circumstances it serves no purpose to proceed to deal with the other issues raised in the application.

Having found, as we have, that the matter was urgent it becomes necessary to deal with the question of the appellant's *locus standi*. The court *a quo* accepted that the appellant had an interest in the affairs of first respondent by virtue of his 30% shareholding as well as an indirect interest in the second respondent but nevertheless went on to find that the appellant had no *locus standi* to make the application and dismissed the application on that additional basis.

We are satisfied that the court *a quo* erred in so doing. All that was required of the appellant at that stage was to establish a *prima facie* right to the relief sought. In our view the appellant did establish such a right by virtue of the fact that he was a 30% shareholder in the first respondent which held all the shares in the second respondent which in turn wholly owned the land in question. It having been established that part of the land had been sold there can be no doubt that he had a legal interest in the determination of the application in the High Court.

The question of the misjoinder of fourth respondent was not an issue before the Court *a quo* nor was it a ground of appeal but has been raised in the heads of argument and in submissions before us. In view of the order sought by the appellant in the court *a quo* which if granted would clearly impinge on the rights and obligations of the fourth respondent, we find no merit in this argument.

Regarding the order sought, Mr *Mpofu* has conceded that paragraph 6 of the interim relief sought is inappropriate at this stage and should be deleted. Accordingly paragraph 6 is hereby deleted from the draft order.

In the result it is ordered as follows:-

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:

   "The Provisional Order is granted in terms of the draft order as amended by the deletion of paragraph 6 thereof."

GARWE JA: I agree

PATEL JA: I agree

Mtetwa & Nyambirai, appellant's legal practitioners

Hussein Ranchod & Company, 1st, 2nd & 3rd respondents' legal practitioners

Sawyer & Mkushi, 4th respondent's legal practitioners