DISTRIBUTABLE (37)

DIPAK PATEL
RAYMOND LOUW
v
HAVELOCK COURT (PRIVATE) LIMITED
KANTORA (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & GUVAVA JA
BULAWAYO, NOVEMBER 25, 2013 & JULY 28, 2014

V. Majoko, for the appellants

E. Jori, for the respondents

PATEL JA: This is an appeal from a decision of the High Court sitting at Bulawayo dismissing the appellants' claim for the transfer of two immovable properties situated in the City of Bulawayo. The background to this matter is fairly complicated but may be simplified and summarised as follows.

The first appellant was the former shareholder and director of the respondent companies, which are the registered owners of the two properties in question. He was persuaded to enter into a business transaction involving one Mahomed Jassat and a company called Allen Wack & Shepherd (Pvt) Ltd [AW&S]. Jassat's dealings with AW&S were conducted through his company known as Youngblood Investments (Pvt) Ltd. In order to reduce his company's indebtedness to AW&S, Jassat agreed to dispose

of ten properties, including the two owned by the respondents, through the sale of shares to AW&S. Consequently, in June 1999, the first appellant concluded two agreements with AW&S for the sale of shares in the respondent companies. At the same time, both appellants also concluded two buy back agreements with the respondents for the repurchase of the two properties within ten years. The purchase price was agreed at ZW$ 9 million and ZW$ 6 million respectively, to be increased by 43.5% per annum from the date of signature to the date when the options to purchase were exercised. Subsequently, the share sale agreements were duly implemented with the issuance of share certificates and changes in the directorship of both respondent companies.

In June 2004, the appellants exercised their options to purchase under the buyback agreements and tendered the sum of ZW$ 30 million in respect of properties, representing ZW$ 15 million capital and ZW$ 15 million interest. However, AW&S rejected this tender and the appellants failed to pay the agreed purchase price within the prescribed three months period. In October 2004, the respondents cancelled the buyback agreements and the options to purchase as having lapsed. The appellants then issued summons for the transfer of both properties.

Following a full trial, the High Court held that the calculation of the option price was not subject to the *in duplum* rule and that the appellants had failed to tender the correct option price within three (3) months of having exercised their options to purchase. Moreover, the options to purchase had lapsed and the respondents were not obliged to give three (3) months' notice of cancellation. They were entitled to cancel three (3)

months after the options to purchase had been exercised by the appellants. In the event, the court dismissed the appellants' main and alternative claims with costs.

The grounds of appeal herein are numerous and repetitive. Nevertheless, the thrust of the appellants' case is that the court *a quo* erred in rejecting the evidence adduced by the appellants and their witnesses. They further contend that the agreements in question were disguised surety agreements rather than agreements of sale. The transaction as a whole amounted to security for debts and the interest accrued thereunder was therefore subject to the *in duplum* rule. Thus, the amounts tendered by the appellants in June 2004 in accordance with the *in duplum* rule constituted full payment of the purchase price due in discharge of the buyback agreements. Alternatively, payment under the options to purchase was to be effected within three months after notification of the purchase price by the respondents and not three (3) months after the options had been exercised.

Quite apart from the merits, the procedural point that arises on appeal is whether the invalidity of the four agreements was properly pleaded before the court *a quo* and duly determinable by that court in light of the original pleadings and the relief originally sought by the appellants. The appellants' argument, in essence, is that the entire transaction was a sham disguised as a sale of shares and immovable properties. However, this argument sharply contradicts their claim for the transfer of the properties. I fully agree with the submission by counsel for the respondents that the appellants should have pleaded the invalidity of all four agreements from the outset. They did

attempt to amend their pleadings to that effect at various stages, but eventually withdrew their proposed amendments and proceeded to trial on the issues agreed for determination before the court *a quo*.

The origin of the appellants' claim lies in the letters from their lawyers to AW&S, dated 17 and 18 June 2004, exercising their options to purchase the two properties in terms of clauses 2 and 6 of the buyback agreements concluded on 16 June 1999. Their summons, as amplified in the declaration, is predicated on the transfer of both properties in terms of those agreements, which they aver were wrongfully and unlawfully cancelled by the respondents on 4 October 2004. It is therefore clear that their pleadings and claim were founded on the specific performance of the buyback agreements on the terms and conditions specified therein. From the outset, their claim was based on the validity of those agreements. They did not aver that the agreements were shams but proceeded on the basis that they were valid and enforceable. Equally significantly, the relief that they seek on appeal, as per their notice of appeal, is that judgment be entered in their favour as prayed for in the summons, *viz.* transfer of the two properties in terms of the buyback agreements. In short, the disposition of this appeal must be confined to their cause of action as formulated in their pleadings. I accordingly take the view that the appeal must fail on this procedural ground alone.

Turning to the merits of the appellants' case, the critical clause that fell for interpretation by the court *a quo* is clause 3 of the two buy back agreements. Its relevant portion provides as follows:

> ".... if the full purchase price is not paid or guaranteed to the satisfaction of the conveyancers within a period of three months from the date of the exercise of the option, the company shall have the right to cancel the sale and all option rights will cease."

The intention of the parties as gleaned from this clause is abundantly clear, *viz.* In the event that the appellants failed to pay the full purchase price within three months of exercising their options to purchase, the respondents were entitled to cancel the sales and the appellants' option rights would cease upon such cancellation. This is precisely what happened in this case. The appellants failed to pay the agreed purchase price within the prescribed period and the respondents duly cancelled the sales and the attendant options to purchase. And this is also what the court *a quo* found had in fact occurred. In my view, the learned judge correctly interpreted the buyback agreements in accordance with the issues agreed for trial. His findings and determinations in this regard cannot be faulted.

As for the equities, it is common cause that the first appellant was not a party to the debt restructuring arrangement between Jassat and AW&S. It is also common cause that he did not receive any consideration from AW&S for the sale of the shares in the respondent companies. Nevertheless, as was intended by all of the parties to the transaction *in casu* and as was eventually conceded by counsel for the appellants, Jassat's indebtedness to AW&S was duly set-off and reduced by the value of the two properties in question. This is clearly confirmed in the debt restructuring agreement between AW&S and Youngblood Investments, dated 15 June 1999, and subsequently reflected in the financial statements of AW&S for the year ended June 1999, prepared by

its auditors on 14 January 2000. All of this serves to negate the appellants' contention that the whole transaction was a mere sham. It follows that the appellants have pursued the wrong parties for redress and should seek appropriate recourse as against the persons who actually benefitted from the transaction, namely, Jassat and Youngblood Investments.

In the result, the Court is of the view that the appeal is procedurally flawed as well as being devoid of substantive merit. It is accordingly dismissed with costs.

GWAUNZA JA: I agree.

GUVAVA JA: I agree.

Majoko & Majoko, appellants' legal practitioners
Wintertons, respondents' legal practitioners