

DISTRIBUTABLE (58)

(1) DOUGLAS TANYANYIWA (2) DOUGLAS WARRIORS FOOTBALL CLUB

v

LAWRENCE BERNARD GWARADA

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & GUVAVA JA,
HARARE, MAY 23, 2014**

M Kamdefwere, for the appellants

Adv. L Mazonde, for the respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court (MUTEMA J) granting the respondent’s claim against the appellants for payment of \$72 340.00 as well as interest at the prescribed rate from the date of summons to the date of payment in full.

The history of the matter is as follows. The plaintiff runs a tour operator company under the name and style of LED Travel and Tours (Private) Limited. The first appellant owns Douglas Car Sales (Private) Limited and is also the owner of the second appellant (“the club”). At the time of occurrence of the events giving rise to this case, the respondent was treasurer of the second appellant.

In or about December 2008 the first appellant was experiencing considerable difficulty in running the second appellant due to financial constraints. He intimated to the respondent his intention to sell the second appellant's franchise or seek a partnership in order to lessen the financial burden then bedeviling him. The two subsequently concluded a partnership agreement in terms of which the respondent was to purchase 40 000 shares valued at \$49 000.00 representing a 49% stake in the second appellant while the first appellant would retain the balance. 40% of the shares would be paid for by the respondent in 2009 while the balance of 9% would be paid for in January 2010. During 2009, the respondent and the first appellant would contribute to the running costs of the second appellant in the ratio of 40% and 60% respectively based on their respective 'shareholding'.

By 10 October 2009, the respondent had paid, to the first appellant, the sum of \$36 807.00 towards the purchase of his 40% of the shares and \$35 533.00 being his *pro rata* contribution to the running costs of the second appellant. Then, approximately one month later, in November 2009 the deal collapsed. The cause of the collapse is the basis of the dispute between the parties.

The respondent alleged that the collapse occurred when the first appellant, contrary to the terms of their agreement began to claim that the 'partnership' was for the 2009 season only. His contention is that there was no life limit placed on the partnership; that shares could not be bought for one season only; and that purchased shares must be transferred to the buyer. He therefore instituted summons claiming the amounts paid by him under the agreement.

The appellants, on the other hand, were adamant that the alleged partnership was to endure for the 2009 season only and that the respondent was in breach of the agreement by failing to pay the balance of the 40% shareholding. They filed a counterclaim for a total of \$32 953.80 comprising of \$3 193 being the balance outstanding on the purchase of the shares for the 2009 season and \$29 760.80 being a contribution to administrative costs for the 2009 football season. At the trial which followed, the learned Judge disbelieved the evidence of the appellants and their witnesses and granted the order as prayed by the respondent.

THE APPEAL

The grounds of appeal set out by the appellants in their notice of appeal are far from clear and concise as required by the Rules of this Court. The Court was at pains to determine what the grounds of appeal were and Mr *Kamdefwere* appeared to be equally confused. This type of notice of appeal, usually three or more pages long with argument and reasoning which is better tendered at the hearing is becoming the rule rather than the exception and legal practitioners are warned that such notices will be struck off, with an appropriate order of costs, for non compliance with the Rules of this Court. The purpose of the grounds of appeal is to clarify the issues raised on appeal so that the respondent and the court are not inconvenienced by having to read irrelevant matter.

Mr *Kamdefwere* also sought, at the outset of the hearing of the appeal, to amend the grounds appeal by adding an additional ground which he claimed would read:

“That the court *a quo* misdirected itself in making an order against the second appellant in favour of the respondent since the second appellant was the respondent’s partnership.”

He submitted that this was equivalent to a point of law being taken on appeal the point of law being that the respondent could not sue its own partnership. He submitted that no prejudice would be suffered by the respondent even though the point was not taken or canvassed at the hearing as the respondent could advance its arguments before the Court at the appeal hearing. The application was opposed by Mr *Mazonde* on the grounds that the respondent would suffer prejudice if the application were to be allowed.

The Court was of the view that the criteria for a successful application of this nature were not met. Since the point of law was not canvassed at the hearing, a consideration of the merits of it at this stage would, in our view, involve unfairness to the respondent.¹

In any event, the basis of the appellants' case is that the agreement was for a partnership for 2009 only and it was common cause that the first appellant did not sign the agreement which was to bring the partnership into existence. It would follow, therefore, that at the time the summons was issued and *a fortiori* at the date of the judgment of the court *a quo*, the respondent had no partnership in the club.

As to the merits of the appeal, the main point taken by Mr *Kamdefwere* was that the Court erred in disbelieving the appellants' witnesses and accepting the evidence of the respondent.

THE EVIDENCE

¹ See *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S)

The respondent's evidence was to the effect that he had known the first appellant since 2002 through his football club the second appellant. Initially, he was a supporter of the second appellant but later became the treasurer of the second appellant for almost five years until 2008 when the first appellant broached the idea of him buying shares in the second respondent. The idea was attractive to him and the first appellant invited him to lodge a written application which he did on 27 December 2008. The application was written on his company's letterhead and expressed in the following terms:

“Re: APPLICATION TO BUY 49% STAKE IN DOUGLAS WARRIORS FOOTBALL CLUB

I submit my application to buy 49% stake in Douglas FC through my company LED Travel & Tours – coming in as the sponsor.

The value of the shares is USD49 000-00 and as agreed in our meeting of 27 December, 2008 – the payment plan is as follows:

Year 2009 – 40%

- USD 10 000-00 to be paid by 5 January 2009 subject to availability of foreign bank account.
- USD5 000-00 by mid to end of January 2009.
- Payment of balance to be spread over a period of 10 months and mode of payment will be finalized in due course.

Year 2010 – 9%

- As agreed, the remaining 9% will be reserved for me in 2010 at same value. By then the team will be in Premier League.

My stake will be registered under my wife Gracious Mawungwa and in future will be managed by my two sons Bernard Gwarada Jnr and Lawrence Gwarada.”

In response, the first appellant wrote to him on 5 January 2009, in the following terms:

“Re: APPLICATION FOR A 49% STAKE IN DOUGLAS WARRIORS FOOTBALL CLUB.

The above matter refers and I acknowledge receipt of your application requesting for a 49% stake in Douglas Warriors Football Club.

I am pleased to notify you that your request has been accepted of which the conditions would be spelt out in the agreement document which will be availed to you upon receipt of the first installment of USD10 00-00.

I would want to express my appreciation for showing interest of running Douglas Warriors Football Club jointly with the current administration.

I look forward to a cordial working relationship.”

The cash payment of \$10 000, 00 was made and receipt thereof acknowledged by the first appellant. In the letter acknowledging payment of the deposit the first appellant stipulated how the balance was to be paid. A balance of \$5 000.00 was to be paid on or before 31 January, thereafter the remainder of \$25 000 was to be paid thus:

“USD5 000.00 cash on or before 31 March, 2009
USD5 000.00 cash on or before 31 May 2009,
USD5 000.00 cash on or before 31 July 2009,
USD5 000.00 cash on or before 30 September 2009,
USD5 000.00 cash on or before 30 November 2009.”

The final 9% stake was to be paid on or before 31 January 2010. The respondent faithfully made payment until November 2009 when the deal collapsed.

Regarding the conclusion and signature of the agreement of sale, he told the court that the document given to him by the first appellant and which contained the terms of the agreement was drafted by Mr *Gigima* the legal practitioner for the appellants. Once he had perused the document he was called to Mr *Gigima*'s office to sign the agreement. He went with his legal practitioner Mr *Mujeyi*, signed the agreement and left it with Mr *Gigima* who was going

to procure the first respondent's signature thereon. That was the last time he saw the document as it was never returned to him or to Mr *Mujeyi*. He produced a letter from the second appellants' administrator acknowledging receipt of the payments made by him as claimed in the summons.

Mr *Mujeyi* gave evidence confirming the respondent's evidence that he had perused the agreement. Though he was of the view that it was inelegantly drafted, he was satisfied that it expressed the intention of the parties as communicated to him by the respondent. He confirmed that he accompanied the respondent to Mr *Gigima*'s offices where the respondent signed the agreement. The first appellant was not present but Mr *Gigima* promised to procure his signature and thereafter send a signed copy of the agreement to his offices for transmission to the respondent. The agreement was never sent to him. Subsequently, in or about November 2009, the respondent reported to him that the agreement had fallen through and he needed assistance to recover his money. He advised the respondent to seek independent legal advice. The agreement signed by the respondent was an exact replica of the one produced by the respondent in evidence.

The background facts as recounted by the respondent were largely common cause. Where the parties differed was on the tenure of the agreement. The respondent said that in terms of the agreement the tenure of the partnership was indefinite whereas the appellants' stance was that the partnership was to endure for the 2009 season only and that if the second appellant made it to the Premier League the respondent would have the option to purchase a further 9% of the shareholding in the second appellant. The appellants took the view that it was the respondent

who had reneged on the agreement hence the counterclaim for the unpaid balance outstanding on the shares as well as the administration expenses for the 2009 season.

Mr *Gigima* was called to give evidence on the appellants' behalf. He sought to corroborate the first appellant's testimony but made a bad impression on the Court which found him to be contradictory and disbelieved his evidence. He told the court that the agreement was drafted at his office and it was indeed to endure for one season only. As to the document which was signed by the respondent, he averred that he sent it to the first appellant for signature and it was returned to him and sent to the respondent so that the latter would alter the date of signature from January to November 2009. Thereafter he did not see the agreement again.

The court found the evidence of the respondent to be not only credible but in accordance with the probabilities of the matter. I agree. It also found that the first appellant had, by fraudulent misrepresentation, induced the respondent to enter into the agreement of partnership and part with his money when it was clear from his evidence and that of his legal practitioner Mr *Gigima* that there were never any shares for sale. That finding is supported by the evidence.

The draft agreement which the respondent was given to sign clearly tendered a 49% shareholding in the second appellant valued at \$49 000.00. The first appellant received some \$36 000.00 of that money and pocketed it. In addition, the first appellant received some \$37 000.00 by way of contribution to the administrative expenses of the second respondent.

Where a court at first instance makes findings of fact with regard to the credibility of the parties and their witnesses an appellate court will be loathe to interfere with such finding in the absence of a misdirection by the lower court.²

Not only has no misdirection been proved to exist but the finding of the court accords with the probabilities. For example it is highly improbable that the respondent would expend such a large sum of money in the first appellant's club for one season only and with no return on his investment. The very fact that the respondent's infant child and his wife were mentioned as the persons who would own the shares in future as well as the provision for disposition of the shares first to family members suggests this was meant to be a long term enterprise.

We are therefore of the view that the appellants established no valid basis for interference by this court with the judgment of the court *a quo*.

It was for the above reasons that after hearing counsel we dismissed the appeal with costs.

GOWORA JA:

I agree

² Beckford v Beckford 2009 (1)ZLR 271 (S)

GUVAVA JA: I agree

Muringi Kamdefwere Legal Practitioners, appellants' legal practitioners

Scanlen & Holderness, respondent's legal practitioners