

DISTRIBUTABLE (23)

MWAMI MULIZI SIAMSIPA N.O.
v
KUNGANDA FARM (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
PATEL JA, BHUNU JA & BERE JA
HARARE, 24 JANUARY & 12 MARCH 2019

P. Kawonde, for the appellant

S.M. Hashiti, for the respondent

Judgment No. SC 26/2019

PATEL JA: This is an appeal against the judgement of the High Court in Case No. HC 9914/15 handed down as Judgement No. HH 599-17. There is also a related judgement of the High Court, to which I shall revert later, in Case No. HC 9438/15 handed down as Judgement No. HH 609-17.

Factual Background

In the present matter, *i.e.* in Case No. HC 9914/15, the applicant, Kunganda Farm (Pvt) Ltd, was represented by its liquidator. The applicant sought the eviction of the respondent, who is the executor of a deceased estate, from two pieces of land owned by the applicant company and held under one title deed.

The deceased, Francis Siamsipa, was until his demise a shareholder of the applicant company, together with one Owen Maswela. On 22 October 2003, the applicant

was placed under liquidation and Cecil Madondo was appointed as its liquidator. At that stage, the deceased used to live on the company land carrying on his own farming activities.

In order to amicably resolve the interests of the two shareholders, the liquidator suggested two options, either to subdivide or sell the two pieces of land. In the absence of agreement between the shareholders, the liquidator decided to subdivide the property and to sell one piece of land to a purchaser that had already been found. The deceased refused to vacate the farm. Hence, the applicant mounted an application for his ejection in the High Court. After the application was instituted, the deceased passed away and was subsequently represented by the executor of his estate, *i.e.* the appellant herein.

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Judgement in Case No. HC 9438/15

In a separate but related matter, *i.e.* Case No. HC 9438/15, the applicant was the present appellant, the executor of the deceased estate. In that matter, the applicant sought the nullification of the appointment of Cecil Madondo as the liquidator of Kunganda Farm (Pvt) Ltd and his removal from that position as well as the setting aside of all liquidation proceedings instituted by him. More importantly for present purposes, the applicant in that matter also sought the setting aside of the sale and transfer, if any, of one of the pieces of land owned by Kunganda Farm.

Both matters were heard and determined at the same time by the same judge. In Case No. HC 9438/15, the learned judge dismissed various points *in limine* that had

been raised by the liquidator. However, he upheld two other objections *in limine* relating to the citation of the liquidator and the citation of Owen Maswela who was no longer alive at that stage. Consequently, the applicant in that matter was granted leave for the citation of Cecil Madondo to be corrected. The applicant was also granted leave to apply for the joinder of the executor of the estate of Owen Maswela. It was further ordered that these applications should be instituted within 10 days from the date of the order, failing which the application would be deemed to be dismissed. In the meantime, the matter was removed from the roll. Subsequently, the applicant having failed to institute the requisite applications timeously as ordered, the Registrar of the High Court duly notified the parties that the main application was deemed to have been abandoned and dismissed.

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In the present matter, *i.e.* in Case No. HC 9914/15, the High Court found that the authority of the liquidator to recover the assets of the applicant company was firmly entrenched in s 276(2) of the Companies Act [*Chapter 24:03*]. The court did not agree that this provision did not apply to the recovery of company assets for the purposes of the sale of any of those assets.

The court also held that there was no legal basis for the respondent, as shareholder, to contest the liquidator's entitlement to recover possession of company property where he was exercising his powers in terms of the law. Thus, the fact that the land to be recovered had been or was being sold did not clothe the respondent with any right to occupy the land.

In the event, the court *a quo* granted an order evicting the respondent and all persons claiming occupation through him from both pieces of land. The respondent was given 10 days to vacate the farm, failing which the Sheriff was directed to take all steps necessary for his eviction. The respondent was also ordered to pay the costs of the application.

Grounds of Appeal

There are three grounds of appeal in this matter. It is necessary to set them out in full for reasons which will become apparent later in this judgement. The grounds of appeal are as follows:

1. The court *a quo* erred in holding that the respondent had power to subdivide and subsequently sell the immovable property without the leave of court. The court *a quo* therefore erred in granting an application for the ~~Judgment of the Supp 26/2019~~ which was predicated on the sale of property which the court ~~ne Casappo Scd. 757/17~~
2. The court *a quo* erred in placing undue emphasis on Cecil Madondo's capacity as the liquidator of the respondent company when in actual fact the basis of the appellant's contention was not so much that he was the liquidator of the respondent company but that the property had been sold improperly without an order of the court thus rendering the sale a nullity.
3. The learned judge in the court *a quo* misdirected himself at law in that he relied on the provisions of s 276(2) of the Companies Act in granting the application, when the facts which ought to have given rise to such reliance were never placed before him.

Sale of Property without Leave of Court

The first two grounds of appeal herein bemoan the absence of any order of court granting the liquidator leave to sell one of the pieces of land belonging to the respondent company. It is not in dispute that such leave of court must be obtained, as is required by s 221(2)(h) of the Companies Act, before the liquidator of a company in

liquidation can sell, deliver or transfer the movable or immovable property of the company. What is in issue, according to the grounds of appeal, is whether the actual or impending sale of company property precludes the liquidator from recovering into his possession all the movable and immovable assets and property of the company, as is specifically enjoined by s 276(2) of the Companies Act. Before addressing that issue, however, it is necessary to determine whether or not it is properly before this Court in the first place.

It is common cause that the present appeal concerns the judgement of the High Court in HH 599-17 and not its judgement in HH 609-17. It is also common cause that the application in the latter case *i.e.* Case No. HC 9438/15, was dismissed for failure to comply with the time frame prescribed by the court in its judgement No. SC 26/2019. The dismissal was duly communicated to the parties by the Registrar of the High Court through his letter dated 19 December 2017.

Nevertheless, despite conceding that the judgement in HH 599-17, which is the subject of the present appeal, deals with the respondent's claim for eviction of the appellant rather than the sale of the respondent's property, Mr *Kawonde*, for the appellant, persists with the contention that such sale remains pertinent for the purposes of this appeal. This contention is premised on the assertion that the court *a quo* made its ruling on the basis of the subdivision and sale of the property. It is argued that the permit to subdivide the property, which permit was granted on 26 January 2015, is reflected in paragraph 1 of the order made by the court *a quo*. Furthermore, so it is argued, this

subdivision necessarily implicates the sale of the property as appears from the respondent's founding affidavit in the proceedings below.

A perusal of that affidavit demonstrates the following. The deponent, being the liquidator, sets out the background to this matter, to wit, the options available to him pursuant to his appointment as the liquidator of the respondent company. He indicates that after subdivision was completed, he opted to sell the farm. He was issued with a subdivision permit dividing the property into two separate pieces of land. He has already sold one piece of land and there are prospective purchasers interested in the other piece of land. He avers that he has an obligation to give the purchasers vacant possession of the farm. Lastly, he avers that the respondent (the appellant herein) has failed, refused and/or neglected to vacate the farm. Consequently, he prays for the eviction of the respondent and all those claiming occupation through him on the farm.

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What emerges from this affidavit is that the liquidator has subdivided the property, sold one subdivided portion and wishes to dispose of the other remaining portion. He states quite clearly that following the non-cooperation of the appellant, he used his powers in terms of the Companies Act to subdivide and sell the farm. He also makes it clear that it was the appellant's refusal to vacate the farm that has prompted him to seek the eviction of the appellant.

It is relatively clear that the subdivision of the farm and the sale of its subdivided portions are the inevitable consequences of the powers and functions vested in

the liquidator to liquidate the assets of the respondent company. These are things that the liquidator is enjoined and duly entitled to do in terms of the Companies Act. They did not, in my view, constitute the cause of the application before the court *a quo*. The true *causa* in those proceedings was the appellant's refusal to vacate the farm and the relief sought therefor was his eviction from the property. As was clearly recognised by the liquidator in his answering affidavit, the duty of a liquidator in the winding up of a company is to ensure that "the assets of the company are realised and its liabilities minimised to the best possible advantage of the creditors and contributories of the company". Moreover, in granting the relief sought, the court *a quo* had no option but to precisely identify the property in its present subdivided form. The fact that these subdivided portions were so identified does not mean that the court based its judgement and eviction order on the subdivision and sale of the property. Judgment No. SC 26/2019
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As I have already highlighted, the application instituted by the appellant in Case No. HC 9438/15 sought, amongst other things, the setting aside of the sale of one of the subdivided portions of the respondent's farm. The principal basis of that application was that the liquidator had imposed liabilities upon the respondent company and had sold a portion of its property without the leave of court having been obtained. The application was disposed of by the High Court in HH 609/17 having regard to the preliminary objections raised by the respondents, and the appellant was granted leave to apply for the citation of the liquidator to be corrected and for the joinder of the executor of the deceased estate of the other shareholder. The appellant was given 10 days to institute these applications but failed to comply with the stipulated deadline. Consequently, the

application was dismissed in accordance with the specific terms of the court's interlocutory order.

It is indisputable that the appellant questioned the legality of the sale and sought its nullification in Case No. HC 9438/15. In his opposing affidavit in Case No. HC 9914/15 he expressly acknowledges that fact by stating that he has made a separate application to have the disposal of any portion of the farm without court approval declared null and void. That separate application, having been dismissed by reason of the inaction of the appellant himself, the question of the validity of the sale was never finally determined. What the appellant now attempts to do, through his first two grounds of appeal, is to improperly smuggle that question into the determination of the present appeal. In my view, this stratagem is totally unacceptable and ~~Judgment No. SC 26/2019~~ ~~Case No. SC 757/17~~ follows that the first two grounds of appeal are not properly before this Court and must therefore be struck out.

For the sake of completeness, even assuming that those grounds are properly before us, I take the view that they are entirely devoid of merit. They are not sustainable for the simple reason that the motives of a liquidator in seeking the eviction of an unlawful occupier of company property is entirely irrelevant and cannot found any defence to his claim for eviction. Moreover, the fact that the liquidator has subdivided or sold any of the company's assets, whether with or without the leave of court, is wholly immaterial to the functions vested in him and the powers lawfully conferred upon him in the exercise of those functions. His statutory duty, in terms of s 276(2) of the Companies

Act, is to “proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable”. Thus, even if the appellant had succeeded in his application to set aside the sale of the property, this would not have served to prevent his eviction from that property. The two processes, namely, the sale of the property and the eviction of the appellant therefrom, are two entirely distinct and separate processes. The former does not present any impediment or avail any defence to the latter. Accordingly, in the instant case, the actual or impending sale of the respondent’s property, even without the leave of court, would not preclude the liquidator from seeking and obtaining the eviction of the appellant from that property. For this reason, I would have dismissed the first two grounds of appeal, even if they had been properly advanced herein.

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Reliance on Section 276(2) of the Companies Act

The third and only remaining ground of appeal impugns the reliance placed by the court *a quo* on the provisions of s 276(2) of the Companies Act. It is contended that the facts which might have justified such reliance were never placed before the court. Furthermore, the court made its determination in this regard without the benefit of any argument thereon.

Mr *Kawonde* submits that the relevant facts for the purpose of s 276(2) would include the following: the dates when the liquidator was appointed; that the liquidator acted forthwith to recover all the property of the respondent company; and the refusal of the party in possession, *i.e.* the appellant, to comply with the process of recovery. Mr

Kawonde further submits that the liquidator was appointed in 2009 and the application for ejection *in casu* was only launched in 2015. The liquidator therefore did not act “forthwith” to recover the respondent company’s property.

It is difficult to comprehend Mr *Kawonde*’s contentions regarding the date when the liquidator was appointed and the refusal of the appellant to vacate the farm when called upon to do so. These facts are amply articulated in the founding affidavit alluded to earlier as read with the supporting documents contained in the founding papers.

With respect to the liquidator’s obligation to act forthwith, the salient facts also appear relatively clearly from the founding papers. The Judgment No. SC 26/2009 Case No. SC 757/17 liquidation of the respondent company was handed down on 22 October 2003. That judgement was then appealed against. At the stage when the provisional liquidator was appointed in 2009, the appeal was yet to be determined. The appeal was only finalised by this Court on 26 March 2012, when it was struck off the roll, with costs to be borne by the deceased, Francis Siamsipa. On 31 August 2015, Cecil Madondo was appointed as the final liquidator of the respondent company. He attempted to communicate with the appellant at that time to no avail and consequently instituted the application in Case No. HC 9914/15 on 15 October 2015.

From the foregoing facts, it is clear that the liquidator acted without delay in the given circumstances. After being appointed as the provisional liquidator and after the

appeal against the order of liquidation had been finalised, he attempted to resolve and settle the matter by obtaining the consent of both shareholders to the subdivision and/or sale of the property. Later, after his appointment as the final liquidator, he requested the appellant to vacate the property, but the latter refused to accede to his request. He then sought the eviction of the appellant through the application *in casu* within a period of less than two months. In the circumstances, I am satisfied that he acted forthwith to recover and repossess the assets and property of the respondent company in conformity with his statutory obligation under s 276(2) of the Companies Act.

Disposition

I have concluded that the first two grounds of appeal raise issues that were determinable *aliunde* and are therefore not properly before this Court. Judgment No. SC 26/2019
Case No. SC 757/17 If these grounds of appeal were properly raised herein, they are not legally or factually sustainable.

As for the third ground of appeal, I am of the view that the salient facts supporting the invocation of s 276(2) of the Companies Act were adequately adduced and canvassed before the court *a quo*. Moreover, the court was amply justified, on those facts and in the circumstances of this case, in granting the order sought by the respondent for the eviction of the appellant from the property in question.

As regards costs, I am persuaded by Mr *Hashiti* that an order of punitive costs is warranted by the conduct that the appellant has displayed in this matter. He has resisted

every overture made and action taken by the liquidator without just cause. Moreover, he has inexplicably abandoned his application in Case No. HC 9438/15. In effect, he has delayed his eviction and removal from the respondent's property without any modicum of *bona fides* through this frivolous and vexatious appeal.

It is accordingly ordered that the appeal be and is hereby dismissed with the appellant to bear costs on a legal practitioner and client scale.

BHUNU JA: I agree.

BERE JA: I agree.

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Kawonde Legal Services, appellant's legal practitioners

Henning Lock & Associates, respondent's legal practitioners