REPORTABLE (8)

ZIMASCO (PRIVATE) LIMITED
v
(1) CASPER TSVANGIRAI (2) BAOBAB REAL ESTATE (3) THE REGISTRAR OF DEEDS, BULAWAYO

SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA & GUVAVA JA
HARARE: 31 JULY, 2017 & JANUARY 27, 2020

T. Mpofu with *T. Zhwarara*, for the appellant

L. Nkomo, for the respondents

GUVAVA JA: This is an appeal against the whole decision of the High Court sitting in Bulawayo under judgment number HB 16/14 dated 30 January 2014 in which the appellants' application for absolution from the instance at the close of the first defendants case was dismissed.

BACKGROUND FACTS

The facts which gave rise to this matter are mainly common cause and may be summarized as follows:

On 10 June 2008 the appellant and the first respondent entered into an agreement of sale of a certain piece of land known as stand 1004 Redcliff Township, situate in the District of

Que Que (hereinafter referred to as the property) The property was owned by the first respondent. In terms of the first respondent's summons and declaration before the court *a quo*, the purchase price for the property was said to be set at a local currency equivalent to US$180 000.00. The appellant purchased the property with the aid of the second respondent, a registered real estate agent. The dispute centered on the amount of the purchase price which was payable. The first respondent alleges that it was a term of the agreement that if the payment was to be made by cheque the amount would be based upon the prevailing informal market rate on the date of such payment. It is not in dispute that the appellant paid Z$720 000 000 000 (Z$720 trillion) on 11 June 2008 through an interbank transfer.

The first respondent was thereafter requested to sign a power of attorney to effect transfer of the property by the second respondent. The first respondent alleged that it was his understanding that the transfer would only pass upon receipt of the full purchase price. The first respondent averred that the appellant or the second respondent removed some pages from the written agreement of sale and altered, *inter alia*, the purchase price so that it read the sum of Z$720 trillion without his knowledge or consent. The first respondent further indicated that the appellant and the second respondent then attached the forged pages to the authentic document bearing the first respondent's signature to make a complete "agreement of sale". Following the signing of the power of attorney to transfer the property, the property was transferred into the appellant's name.

According to the first respondent the amount paid by the appellant when he received the money was equivalent to US$96 000.00. This left a balance of US$84 000.00, or its equivalent

in Zimbabwe dollars, in respect of the purchase price. The first respondent alleged that the appellant should pay the difference but the appellant argued that it had paid the purchase price in full in terms of the agreement.

Following this dispute, the first respondent instituted summons seeking the nullification of the purported agreement of sale and cancellation of the deed of transfer in favour of the appellant. In the alternative, the first respondent prayed for the appellant to pay the outstanding balance of US$84 000.00 or its equivalent, together with interest.

PROCEEDINGS IN THE HIGH COURT

After the first respondent instituted summons, the appellant and second respondent entered an appearance to defend. In its plea, the appellant denied allegations of falsifying the agreement of sale. The appellant contended that the purchase price was always in Zimbabwean dollars and not quoted in United States Dollars. The second respondent confirmed the appellant's story. The appellant thereafter filed a counter claim for the eviction of first respondent from the property. It also claimed payment of arrear rentals and holding over damages in the sum of $400 per month plus interest from the first respondent.

At the close of the first respondent's case, the appellant made an application for absolution from the instance. The appellant further asked the court to grant its counter claim. The basis upon which this application was made was three pronged. Firstly, it argued that the respondent could not claim that there was under payment when he had failed to prove the exchange rate on 11 and 12 June 2008, when the payment was made, to sustain the assertion that the payment

made was not enough if converted to United States dollars. Secondly, that the power of attorney contained a purchase price of $720 trillion. The first respondent was not disputing his signature thereon. It thus submitted that the *caveat subscripto* maxim applied regarding the signed power of attorney. Thirdly, that the basis of its claim for eviction was the *rei vindicatio.* It further alleged that because they possessed the title deeds of the property it was *prima facie* the owner of the property and the onus now lay on the first respondent to justify why the eviction sought was not warranted. On that basis it was submitted that it was entitled to the order in terms of its counter claim for first respondent's eviction, arear rental and holding over damages.

It was common cause that the appellant made a payment in the sum of $ 720 trillion dollars through an interbank transfer commonly known as an RTGS. The appellant contended that even if it was accepted that the purchase price was pegged in United States dollars, which was denied, where payment is made through a bank transfer, the date of the payment was the date when the application to pay is made to the bank and not the date the money is reflected in the account of the transferee. The appellant thus submitted that payment of the full purchase price was made on the date that the application for transfer of the funds was made with the bank.

The first respondent contended that the purchase price for the property was the equivalent of US$180 000.00 and that the time of payment would be the time that he received the money in his bank account and was able to use the money and not when the application for an interbank transfer was made. He argued that, because of hyperinflation at the time, when he received the money in his account on 13 June 2008, it was less than the agreed amount when converted into United States dollars. He submitted that the appellant therefore had not paid the

purchase price in full. It was also his submission that the original agreement of sale that he signed indicated that the purchase price was the Zimbabwe dollar equivalent of US$180 000.00 but the agreement was tampered with such that the amount that was eventually reflected in the agreement was Zimbabwe $720 trillion.

The court *a quo* refused to grant the application for absolution from the instance made by the appellant The court reasoned that in view of the letter written by the appellant's legal practitioner in respect to the purchase price being quoted as equivalent to US$180 000 it was necessary for the appellant to explain what the exchange rate was on 11 and 12 June when payment was made. With regards to the allegation that the signed power of attorney was proof of the purchase price the court held that the issue could not be determined because of the allegation of fraud. The court also found that it was necessary for the appellant to prove its counter claim for damages in respect to the arrear rentals and holding over damages. As a result the court also declined to grant the appellant's counter claim.

Dissatisfied with the determination of the court *a quo*, the appellant, having been granted leave, noted an appeal to this court on the following grounds:

> "The court *a quo* erred in placing upon the appellant the onus to prove what the exchange rate was on the 11th and 12th June 2008 under circumstances where the onus was upon the 1st respondent and had to be discharged by him. It so erred in failing to grant absolution from the instance on the basis of 1st respondent's failure to prove that he had not been paid the contract sum.
>
> 1. The court *a quo* further erred in not giving effect to the fact that 1st respondent had signed transfer documents knowing what those were and which bore the purchase price which he had already paid and which he now sought to discount. It particularly erred on coming to the conclusion that the issue could not be dealt with at that stage.
> 2. The court *a quo* further erred in failing to come to the conclusion that as appellant sought a *rei vindicatio* in its claim in reconvention, the failure by the 1st respondent

to rescind the agreement would ipso jure entail the success of the action for vindication.

3. The court *a quo* further erred in failing to come to the conclusion that the damages for unlawful occupation could competently be awarded at least on the basis of the 1st respondent's confession."

THE APPELLANT'S SUBMISSIONS ON APPEAL

In its submissions before this court, the appellant argued that the first respondent bore the onus to prove *prima facie* that the sum of $720 trillion dollars that he received was not the full purchase price for the property. The appellant further argued that the first respondent also had the onus to prove the exchange rate that was applicable as at the date of payment so as to successfully argue that $720 trillion dollars did not amount to the US$180 000.00 that he alleged had been agreed to as the purchase price. It was the appellant's contention that the approach of the court *a quo* in holding that the onus lay on the appellant to prove the exchange rate on 11 and 12 of June 2008 was erroneous.

The appellant also submitted that by signing the power of attorney to effect transfer, the first respondent had accepted that he had been paid the full purchase price and that he was estopped from denying same. The appellant also stated that, in any event, the power of attorney was quoted in Zimbabwean dollars in the amount of $720 trillion and that was therefore the purchase price.

The appellant further submitted that the court *a quo* should have granted its application for absolution from the instance and thereafter granted its claim for eviction of the first respondent together with holding over damages as claimed.

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

The first respondent argued that the decision of the court *a quo* was appropriate in the circumstances. The first respondent asserted that he had proved a *prima facie* case of fraud and forgery which the appellant was called upon to answer.

The first respondent further submitted that he had proved that the original agreement of sale was fraudulently altered without his knowledge. The purchase price clause which stated that the purchase price was the equivalent of US$180 000.00 was altered to reflect the purchase price of Z$720 trillion. The first respondent stated that this was proved by correspondence between the parties when they discussed the issue of the purchase price. He further submitted that he was not obliged to prove the exchange rate on 11 and 12 June as he was of the view that payment was made on 13 June. He also alleged that he had successfully proved the exchange rate on the date he received the money.

The first respondent also denied that the appellant was entitled to its counter claim for eviction as the basis of the eviction was based on the contract which stipulated that the first respondent was to grant appellant vacant possession upon payment of the full purchase price.

ISSUES FOR DETERMINATION BEFORE THIS COURT

Two issues arise from both the grounds of appeal and the submissions made by counsel before this Court. The issues to be determined by this court are as follows:

1. Whether or not the requisite evidentiary burden required to grant absolution from the instance at the end of the first respondent's case was discharged.

2. Whether or not the appellant was entitled to an order for the first respondent's eviction and damages.

1. WHETHER OR NOT THE REQUISITE EVIDENTIARY BURDEN REQUIRED TO GRANT ABSOLUTION FROM THE INSTANCE AT THE CLOSE OF THE FIRST RESPONDENT'S CASE WAS DISCHARGED

As stated above the first respondent instituted proceedings against the appellant seeking the nullification of the agreement of sale in terms of which he had sold a piece of property to the appellant. His claim was also that the deed of transfer that had been made in favor of the appellant should be cancelled. The first respondent prayed in the alternative that the outstanding balance for the property be paid. After leading evidence to the effect that he had not been paid the full purchase price in accordance with the agreement of sale, the respondent closed his case. The appellant then applied for absolution from the instance on the basis that the respondent's claim had not been established as insufficient evidence had been led to show that the agreement of sale had been altered. It was also alleged by the appellant that the agreed purchase price of the property was always in Zimbabwean dollars and not the United States dollars equivalent as claimed by the first respondent.

It was submitted on behalf of the appellant that, in the event that the court accepted that the purchase price was pegged in United States dollars, then insufficient evidence had been placed before the court by the first respondent to establish a valid claim as he was unaware of the prevailing market exchange rates on 11 and 12 of June 2008.

It is trite that after a plaintiff has closed its case, a defendant, before commencing his own case, may apply for absolution of the plaintiff's claim. Should the court accede to this application, the judgment will be one of 'absolution from the instance'. See *Cilliers AC, Loots C and Nel HC, Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa (4th edn, Juta and Co Ltd) p681.* A decree of absolution from the instance is derived from Roman Dutch law. It is the appropriate order to make, after all the evidence led by the plaintiff has not laid out a *prima facie* case upon which a court may find for the plaintiff. If at the end of the plaintiff's case there is insufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution. See *LH Hoffman, DT Zeffert, The South African Law of Evidence (4th ed) p 507,* who notes the following:

> "It has also been said that the term 'absolution from the instance' is used to describe the finding that may be made at either of two distinct stages of trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant."

It is trite that the court cannot *mero motu* consider whether absolution must be granted. It is an option which is available to the defendant, upon application. When an application for absolution from the instance is made at the end of the plaintiff's case the test is**:** what might a reasonable court do, that is, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case the test is: what ought a reasonable court do?

In deciding what a court may or may not do, it is implied that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence.

In the case of *Nobert Katerere v Standard Chartered Bank Zimbabwe Limited* HB 51-08, it was stated thus:

> "The court should be extremely chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim-Claude neon Lights (SA) Ltd v Daniel 1976 (4) SA 403(A); Marine & Trade Insurance Co Ltd v Van Der Schyff 1972 (1) SA 26(A); Sithole v PG Industries (Pvt) Ltd HB 47-05".

What flows from the above cases is that absolution from the instance will not be granted if there is sufficient evidence, which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.

In casu, the first respondent averred that after the appellant paid him the equivalent of US$96 000.00, there was a balance of US$84 000.00. It is common cause that payment was done through an interbank transfer on 11 June 2008. The first respondent received payment on 13 June 2008. The first respondent, in his evidence, did not prove what the exchange rate was on 11 and 12 June 2008. The first respondent alleged that he was not obliged to do so as his case was that he was only obliged to prove the exchange rate on the date that the money reflected in his account.

The evidence before the court *a quo* showed that as soon as the $720 trillion reflected in his account, the first respondent quickly contacted the appellant to inform it that the money

deposited into his account had a shortfall of US$84 000. The appellant did not respond only to do so sometime in December 2008 indicating that the deposited amount was equivalent to the US$180 000. The first respondent testified that the amount of US$96 000.00 was arrived at using the rate he was given by Trust Bank on 13 June 2008. At the time the first respondent received the amount transferred, it was less than the United States dollar stipulated amount. There was however no evidence on which rate was being used at the time the money was transferred. The appellant seems to suggest that the money it paid was equivalent to the United States dollar amount agreed to by the parties. The rate however was not stated in the agreement. Once the appellant stated that the amount deposited was equivalent to US$180 000.00, the onus shifted from the first respondent to the appellant, as it now carried the evidentiary burden to prove that the transfer that it had made into the first respondent's account was equivalent to the US $180 000.

It was the view of the court *a quo* that it was incumbent upon the appellant to lead evidence to buttress its allegation that the amount it paid on 11 June 2008 was equivalent to the United States dollar amount. This was on the basis that the appellant had submitted that the amount paid on that date was equivalent to US$180 000. It was thus incumbent upon the appellant to state the rate that it used in coming up with that assertion.

The court *a quo* made a finding that the appellant had to answer the question regarding the rate of exchange on 11 and 12 June 2008. This finding was made in light of the letter written by the appellant's legal practitioners affirming that the Zimbabwean dollar purchase price paid by the appellant to the first respondent was equivalent to US$180 000.00. This position taken

by the appellant's legal practitioners, had to be established by evidence of the exchange rate on 11 and 12 June 2008.

It is trite that "he who alleges must prove". The maxim was applied in the cases of *Circle Tracking v Mahachi* SC 4/07 and *Goliath v Member of the Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA). In the absence of such evidence, the court as the adjudicating authority cannot make its determination. I share the sentiments expressed in *Delta Beverages (Pvt) Ltd v Murandu* SC 38/15, where it was stated that:

> "I take the time to point out that parties are expected to argue their cases so as to persuade the court to see the merit, if any, in the arguments advanced for them. They are not expected to make bald, unsubstantiated averments and leave it to the court to make of them what it can."

It is common cause that when the first respondent was asked what the exchange rate was on 11 and 12 June 2008 he indicated that he did not know. This was after first respondent had indicated that he had received a sum less than the agreed US$180 000.00 on 13 June 2008. In my view this was a pertinent question which had to be answered by the first respondent. This is so regard being had to the argument by the appellant that the rate had to be calculated on the date that the money was paid into the bank. This position is premised on the principle stated by Christie R.H in *Business Law in Zimbabwe* (1st edn, Juta &Co Ltd, Cape Town, 1998) which stated that;

> "If payment by cheques is permissible under the contract, its acceptance by the creditor as held in Marshall v Ivory 1951 SR 76, 82, 1951 (2) SA 555 at 558, is conditional on it being subsequently honoured, so if it is honoured, however, the time of payment is taken to be the time at which it was delivered to the creditor, even if it would not be possible to present it to the debtor's bank for payment until some later date." (my emphasis)

Payment by interbank transfer is similar in all respects to payment by cheque. Proof of payment is calculated on the date that the transfer is accepted by the bank and not on the date that it is received by the recipient. Based on the above the relevant date in the circumstances is therefore 11 June when the transfer was processed. The onus thus lay with the first respondent to show that the amount paid on that date was not equivalent to the purchase price as agreed.

The court *a quo's* decision was clearly premised on the assertion by the appellant's legal practitioners that the amount paid by the appellant was equivalent to US$180 000.00. The relevant part of the letter which was written by the appellant's legal practitioners read as follows:

> "17 December 2008
> Mkushi Foroma and Maupa
> Legal Practitioners
> **KWEKWE**
>
> **RE: ZIMASCO (PRIVATE) LIMITED V C. TSVANGIRAI STAND 1006 REDCLIFF TOWNSHIP**
>
> Your letter of 17 November 2008 refers.
> We now have our client's instructions and respond thereto as follows;
> 1. That Zimasco is aware of only one Agreement of sale which is the one they signed for $ 720 trillion.
> 2. That the purchase price of $ 720 trillion paid was then equivalent to an amount of US $180 000. (which was discussed and agreed to by the parties). Using an agreed rate of $ 4 billion to a US$
> 3. That the Agreement of sale was signed in the afternoon of the 10th of June 2008 by Zimasco. Payment was effected on the 11th June 2008 within 24 hours of signature of the Agreement of Sale.
>
> ....."

Having alleged the above, it was the first respondents duty to prove to the court *a quo* that the amount paid was not equivalent to US$180 000 that had been agreed. It was him, as plaintiff, who claimed that the amount paid to him was equivalent to US$96 000 only. The exchange rate which was proved by the first respondent related to the date when the money

reflected in his account. The rate proved was of no consequence in view of the fact that the rate had to be determined on the date that it was paid into the bank by the appellant. The date when it reflected in his account was of no moment to the resolution of the dispute between the parties.

It was the first respondent as plaintiff, who alleged that he had not been paid in full and that what was paid was equivalent to US$96 000 only. The burden was on him to show how the sum of Z$720 trillion equaled to US$96 000 only. The duty was on the first respondent to prove that insufficient money had been paid warranting the cancellation of the agreement of sale or ordering the appellant to pay the alleged balance. It seems to me that the court a quo erred and misdirected itself in finding that the appellant had to prove the exchange rate on 11 and 12 June 2008. It was for respondent to prove his case. Accordingly, absolution from the instance should have been granted by the court *a quo.*

3. WHETHER OR NOT THE APPELLANT WAS ENTITLED TO AN ORDER FOR THE FIRST RESPONDENT'S EVICTION AND DAMAGES.

Having found that the court *a quo* erred in declining to grant absolution from the instance, the question of whether the appellant was entitled to an order for the eviction of the first respondent, arear rentals and holding over damages as counter claimed must be heard and determined by the court *a quo*.

It is common cause that, following payment of the purchase price, the property was transferred into the appellant's name. Once the claim for eviction is brought two requirements must be proved. Firstly, that the appellant had ownership of the property and secondly, that the

first respondent was in unlawful possession of the property. It was thus incumbent upon the appellant to lead evidence in support of the claim for eviction of the respondent.

With respect to the holding over damages and the arrear rental the appellant has to lead evidence to prove the amounts claimed. They cannot be accepted on his mere say so.

DISPOSITION

The court *a quo* erred when it failed to grant absolution from the instance in this case.

The appellant had claimed costs in the event that it succeeded. In my view costs must follow the cause.

Accordingly the appeal be and is hereby allowed in part with costs.

The judgment of the court *a quo* is hereby set aside and substituted with the following:

"1. The defendant is hereby absolved from the instance with costs.

2. The matter is hereby remitted to the court *a quo* for a determination of the counter claim.

GARWE JA: I agree

HLATSHWAYO JA: I agree

Wilmot & Bennet, appellant's legal practitioners

Mavhiringidze & Mashanyare, respondent's legal practitioners