REPORTABLE (5)

NICKOLAS VAN HOOGSTRATEN
v
TAPIWA NELOMWE

SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & MATHONSI JA
HARARE: OCTOBER 08, 2019 & JANUARY 16, 2020

S. M. Hashiti, for the applicant

N. Mugandiwa, for the respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 18 July 2018 in which it ordered the appellant to deliver to the respondent 167275 Old Mutual Public Limited Company shares within 10 days of the date of the order. Alternatively, it ordered the appellant to pay damages equivalent to the value of 167275 Old Mutual Public Limited Company shares calculated using the rate determined by the Zimbabwe Stock Exchange as at the close of trading on the last day that Old Mutual PLC traded in Zimbabwe. The appellant was also ordered to pay costs of suit.

THE FACTS

The respondent instituted an action against the appellant for the return of the 167 275 Old Mutual PLC shares (the shares) which shares he had transferred to the appellant or its nominee in pursuance of an asset swap agreement. In the alternative, the respondent sought payment of damages equivalent to the market value of the shares. His case was that sometime in 2008 he had entered into a verbal asset swap agreement with the appellant the terms of which were that the respondent would transfer the shares and a further 110 000 PPC shares to the appellant.

Upon the transfer of the shares the appellant would transfer to the respondent an immovable property known as No. 4 Wroxham Road, The Grange, Harare (the property). Thereafter the respondent would also transfer the 110 000 PPC shares to the appellant. It was the respondent's case that about 22 October 2008, he duly transferred the shares to the appellant's nominee Zimcor Limited under share certificate No. 606776. In breach of the agreement the appellant failed to transfer the property to the respondent as a result of which the respondent cancelled the agreement in January 2011.

Accordingly, the respondent became entitled to the return of the shares he had transferred to the appellant. As the appellant failed to return the shares, the respondent sued for their return. In the alternative, he claimed their value as damages. Before the court *a quo*, the appellant denied ever entering into an agreement with the respondent maintaining that he had only received the shares from the respondent in his capacity as an agent of Zimcor Limited, a company in which he was neither a director nor a shareholder.

The appellant asserted that the shares in issue were not transferred to him and as such he was not liable to the respondent in respect of the shares. The respondent insisted that he dealt with the appellant in his personal capacity and not as an agent and that the shares were transferred to Zimcor Limited on the instructions of the appellant, the respondent himself not having had any relationship with Zimcor Limited.

The court *a quo* found in favour of the respondent and granted an order aforesaid. The appellant was aggrieved. He noted an appeal to this Court on the following grounds:

1. The court *a quo* erred in fact and in law by finding that there was an agreement for the sale of an immovable property in exchange for shares in the absence of any evidence, disregarding the physical evidence which negatived the existence of the alleged agreement.
2. The court *a quo* erred in fact and at law in finding that the appellant was not a credible witness as a result of discrepancies in his evidence without taking into account the fact that the trial was taking place about a decade since the occurrence of the events under scrutiny which time would naturally have an effect on the memory of the appellant.
3. The court *a quo* erred in fact and in law by finding that the plaintiff (*sic*) had proved his case on a balance of probabilities and yet the appellant (*sic*) had in fact not proved the issues for trial.
4. The court *a quo* erred in fact and in law in ordering appellant to return shares which, from the evidence before the court, were never in appellant's possession.

5. The court *a quo* erred in fact and at law in finding that the shares should be compensated by a party who had not been proved to have benefited from same, in the absence of any proof that Zimcor Limited itself had not solely benefited from the shares transferred in its name.

I must state that at the hearing of the appeal Mr *Hashiti* who appeared for the appellant, quickly abandoned grounds of appeal numbers 1 and 3 which were afflicted by invalidity. This left only grounds of appeal numbers 2, 4 and 5 to be motivated.

THE COURT *A QUO'S* FINDINGS

The court *a quo* accepted the evidence of the respondent which it found to have been simple and in support of his averments in the pleadings. It found that although the shares in question had been transferred to Zimcor Limited and not to the appellant, Zimcor Limited was in fact the appellant's nominee to whom the respondent owed no obligation for which he could transfer the shares. The court *a quo* found the existence of a link between an immovable property which the appellant had purchased at a Sheriff's auction and the transfer of the shares. The court *a quo* concluded that the respondent was not only a credible witness, but that his evidence also accorded with probabilities.

The evidence of the appellant in opposition to the claim did not impress the court *a quo* at all. In fact, the court *a quo* was quite critical of the appellant's presentation describing him "as an evasive and in some instances deliberately mendacious witness" who made inconsistent statements. The court *a quo* concluded that nothing turned on the transfer of the shares to Zimcor

Limited because the appellant had inadvertently admitted being in the habit of not registering his assets in his own name. This explained why he directed the respondent to transfer the shares into the name of Zimcor Limited.

ISSUES FOR DETERMINATION

This appeal in essence turns on two issues namely whether the court *a quo* erred in finding that there was a valid agreement between the parties and whether the court *a quo* erred in ordering the delivery to the respondent of the shares or their equivalent value.

WHETHER THE COURT *A QUO* ERRED IN FINDING THAT THERE WAS A VALID AGREEMENT BETWEEN THE PARTIES

It was submitted on behalf of the appellant that he acted as an agent of a disclosed principal namely Zimcor, Limited. For that reason he could not assume personal liability being merely a conduit that fell away the moment the agreement was concluded between his principal and the respondent. In advancing that argument, Mr *Hashiti* for the appellant, relied on the proof of transfer of the shares dated 22 October 2008 showing that the respondent indeed transferred the shares to Zimcor Limited. The document in question was signed by the appellant on the same date and he endorsed that he had received it "on behalf of Zimcor."

Once it was accepted that the appellant acted on behalf of a principal, so the argument goes, the court *a quo* was precluded from ordering the appellant to return the shares which he did not receive in his personal capacity. Mr *Mugandiwa* who appeared for the respondent submitted that the existence of an agency relationship between the appellant and Zimcor Limited

was not established. Riding on the court a *quo*'s finding that there existed no relationship between the respondent and Zimcor Limited as would motivate the transfer of the shares to the later, Mr *Mugandiwa* submitted that the court a *quo*'s findings on that aspect cannot possibly be said to have been irrational as to invite the appellate court to intervene. I agree.

This is a matter which was decided entirely on the credibility of witnesses. The appellant was pitted against the respondent and the court *a quo* made factual findings based upon their presentation of evidence. I have already said that the court *a quo* was critical of the evidence of the appellant. The court *a quo* assessed the quality of the appellant's evidence and concluded at p 5 of the cyclostyled judgment:

> "The defendant's (appellant) demeanor punctuated by evasiveness and the use of impertinent language whenever he was confronted with facts presented him as a witness who was seeking to mislead the court."

Indeed, there is a reason why the court *a quo* came to that conclusion. The appellant's evidence was not only incoherent, it was punctuated by the use of intemperate language. Expressions like: "this is nonsense;" "no it is rubbish, absolute rubbish it is ridiculous…" are all over the record of his testimony which is also replete with situations where the appellant refused to answer questions.

The trial court was required to resolve the factual disputes of whether there was a swap agreement and whether the appellant was acting in his personal capacity, among others. The quality of the appellant's evidence was so poor that the trial court cannot be faulted for rejecting it and embracing that of the respondents. The appellant has himself to thank for that outcome

having done nothing to endear himself in the eyes of the court. In rejecting the appellant's evidence the trial court made factual findings, including the finding that the appellant had acted for himself and not as an agent of Zimcor Limited which was merely his nominee for receiving the shares. It has long been regarded as settled in this jurisdiction that this Court will not interfere with factual findings including findings on the credibility of witnesses, made by a trial court unless the decision is irrational. This Court has, in a number of cases, followed the general rule on whether to interfere or not which was expressed in *Hama v National Railway of Zimbabwe* 1996 (1) ZLR 664 (S0 at 670 C-D, where the court pronounced:

> "The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcoin v Rosenburg* 1936 AD 380 at 395-7; *Secretary of State for Education & Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671 E-H; *CCSU v Min for the Civil Service supra* at 951 A-B; *PF-ZAPU v Minister of Justice* (2) 1985 (1) ZLR 305 (5) at 326 E-G."

When following this principle almost two decades later ZIYAMBI JA restated it more emphatically in *ZNWA v Mwoyounotsva* 2015 (1) ZLR 935 (5) at 940 R-F:

> "It is settled that the appellate court will not interfere with factual findings made by a lower court unless these findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusions; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it ; or that the decision was clearly wrong."

The appellant's case was never that there was no agreement involving the transfer of the shares but that such agreement was between the respondent and Zimcor Limited. He

maintained that he was only an agent of Zimcor Limited. The respondent asserted that the verbal swap agreement was with the appellant and that he knew nothing about Zimcor Limited. He only transferred the shares to the latter as directed by the appellant. The respondent produced proof of the transfer of shares which was in fact signed by the appellant in acknowledgment of receipt. He also produced further documents signifying his pursuit of the transfer of the immovable property at the centre of the dispute or alternatively the return of the shares.

It is the view of this Court that the requirements of a valid contract were satisfied by the evidence. The probabilities favoured the respondent as correctly found by the trial court. This is particularly so given that the appellant was not a credible witness. The court *a quo's* finding on credibility, as I have said, is one which this Court cannot lightly interfere with. The assessment of the credibility of a witness is for the trial court to make and not this Court. That is the view expressed in *S v Mlambo* 1994 (2) ZLR 410 (S) at 413 C:

> "The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense. A careful reading of Ndlovu's evidence, to which no accompanying adverse demeanor finding was made, does not persuade me that the magistrate's assessment was erroneous."

See also *Nzira v The State* SC23/06.

There was no adverse finding on demeanor in respect of the respondent. It was not suggested on behalf of the appellant that the findings of the trial court on credibility could be faulted in any way except the suggestion that the appellant's frailties as a witness should have been excused because of the lengthy passage of time. I disagree because the respondent, who was credible and gave clear testimony, also related to the same events and was also afflicted by the

same lengthy delay. There was no misdirection on the trial court's finding that a valid agreement was concluded by the parties.

WHETHER THE COURT *A QUO* ERRED IN ORDERING THE DELIVERY TO THE RESPONDENT OF THE SHARES OR THEIR EQUIVALENT VALUE

Mr *Hashiti* for the appellant strongly submitted that it was incompetent for the trial court to order the appellant to return the shares which were never transferred to him, they having been transferred to Zimcor Limited and not the appellant. In a way, the conclusion already made that the parties entered into a valid agreement involving the transfer of the shares, resolves this issue as well. In fact that argument is not well taken to the extent that it ignores the primary transaction between the parties. The appellant did not meaningfully refute that there was an underlying agreement in terms of which he was selling to the respondent a house he was in the process of purchasing from a Sheriff's sale.

I have already adverted to the trial court's factual findings which were adverse to the existence of an agency relationship between the appellant and Zimcor Limited. I have said that there is no legal foundation for interfering with that finding. If there was no agency, as the trial court correctly established, the consequences of an aborted swap agreement, namely the return of the shares or their value, cannot be shared with any other party. They are for the appellant alone.

When giving evidence, the appellant was unable to show that he was an agent of Zimcor. Quite to the contrary, he stated clearly under cross examination at p 148 of the record, that he did not get any authority from Zimcor Limited. Pressed further, he dithered stating: "I cannot

remember." There can be no doubt that the obligation to make good the shares fell on the appellant. In fact, that he was an agent of Zimcor was a claim made by the appellant himself. He was therefore under an obligation to lead evidence to establish that claim. His failure to lead evidence from Zimcor which, presumably was available, further warranted the drawing of an adverse inference that no such evidence existed or that the evidence would not support his case.

The respondent sought an order compelling the appellant to transfer the shares to him given the cancellation of the swap agreement. In the alternative, he sought payment of damages equivalent to the market value of the shares. The trial court issued the following order:

> "In the result, it is ordered that:
> 1. Judgment be and is hereby given in favour of the plaintiff and against the defendant for:
>   a. Delivery to the plaintiff of 167 275 Old Mutual Public Limited Company shares within ten days of the date of this order; or alternatively,
>   b. Payment of damages equivalent to the value of 167275 Old Mutual Public Limited Company shares calculated using the rate determined by the Zimbabwe Stock Exchange as at the close of trading on the last date that that company traded in Zimbabwe.
> 2. Defendant shall pay the costs of suit."

It is not clear why the trial court made such a disposition given that the fourth issue for trial, which it was required to resolve, was the value of the shares. Apart from that, it was common cause at the trial that Old Mutual PLC had ceased to operate in Zimbabwe and had delisted from the Zimbabwe Stock Exchange before commencement of trial. Not only that, it was also common cause that the shares forming the dispute between the parties no longer existed.

According to a letter of 9 March 2015 by Corpserve Registrars (Pvt) Ltd to the respondent's legal practitioners, the shares were transferred to Stanbic nominees NNR on 4 June 2009.

Mr *Hashiti* for the appellant submitted that a court of law sits to resolve disputes and should not sub-contract its duties to a third party. The trial court should have determined the value of the shares and issued a holistic order instead of delegating the task to the Zimbabwe Stock Exchange. He further submitted that the Court ordered the determination of the value to be as at the close of trading on the last day Old Mutual PLC traded in Zimbabwe. That date was not determined and the parties had not made any submissions in that regard. In his view the matter should be remitted to the trial court to complete the case.

Mr *Mugandiwa* in a way conceded that the order of the trial court presents some difficulties. He however took the view that the value of the shares is ascertainable because all stock brokers have an index which can be used to determine the date of the delisting of Old Mutual PLC. As to why all that was not canvassed during the trial and resolved by the trial court, Mr *Mugandiwa* would not say.

Clearly the trial court did not resolve all the issues for trial and in the end gave an order which did not bring the dispute to finality. It should have determined the value of the shares from evidence presented to it. If such evidence was not presented, there are remedies available for such eventuality. It could not assign the resolution of a trial issue to a third party who was not even cited in the proceedings. More so in a case such as the present where it was common cause that

restitution of the shares was, to the knowledge of the parties and the court, no longer possible, they having been disposed of 17 years earlier.

The matter has to be remitted for resolution of the outstanding issues.

In the result, it is ordered that;

1. The appeal partially succeeds to the extent described below:
   a. The appeal on the merits is dismissed;
   b. Paragraphs 1 (a) and (b) of the order of the court *a quo* relating to the delivery of the 167 275 Old Mutual Public Limited Company shares and payment of damages are set aside and in their place is substituted the following:

      "The defendant shall pay to the plaintiff damages equivalent to the value of 167 275 Old Mutual Public Company Shares."

2. The matter is remitted to the court *a quo* for a determination of the value of the 167 275 Old Mutual Public Limited Company Shares to be paid.
3. Each party shall bear its own costs.

GARWE JA: I agree

MAVANGIRA JA: I agree

Mushoriwa Pasi Corporate Attorneys, appellants' legal practitioners

Messrs Kantor & Immerman, respondents' legal practitioners