

REPORTABLE

(6)

OLIVER MASOMERA

(In his capacity as Executor Dative of Estate late Bryan James Rhodes)

v

(1) GIDEON HWEMENDE (2) HONEY & BLACKENBERG (3) LOURENCE ERASMUS VERMAAK (4) TERRENCE COBDEN RHODES (5) VALENTINE MUSHORE (6) ALFRED CHADEMANA (7) JOEL TENDERERE (8) OLIVER CHIBAGE (9) FARAI MUTIZWA (10) CALISTO VENGESAI (11) REGISTRAR OF COMPANIES (12) MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE

PATEL JA, BHUNU JA & BERE JA

HARARE, 19 SEPTEMBER 2019 & MARCH 23, 2021

Judgment No. SC 06/2021

Civil Appeal Case No. SC 826/2017

T. Zhuwarara, for the appellant

D. Tivadar, for the fourth respondent

No appearance for the first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth respondents

PATEL JA: This is an appeal against the judgment of the High Court dismissing an application for the rescission of an earlier judgment granted in favour of the fourth respondent in Case No. HC 1589/13. The application was dismissed with costs to be borne by the estate of the late Brian James Rhodes, of which estate the applicant (the appellant herein) is the executor dative.

Background

Prior to his demise on 29 July 2006, the deceased, B.J. Rhodes, had established two companies, namely, Beverly East Properties (Pvt) Ltd and Karoi Properties (Pvt) Ltd. The appellant, as I have said, is the executor dative of the deceased estate. He was not a party to the proceedings in Case No. HC 1589/13 wherein the court granted a declaratory order in favour of the fourth respondent. In his application before the court *a quo*, the appellant sought the rescission of that order on the ground that it had been obtained through fraud and, alternatively, that it had been granted in error.

In Case No. HC 1589/13, the court dismissed the claims over the two companies by the first respondent, who had purported to appoint the fifth to the tenth respondents as directors in the companies in order to protect his own interests. The court ruled that the lawful shareholder of the two companies was the Phoenix Trust, the assets of which included corporate stock in the two companies. It found that the fourth respondent was a trustee of the Trust and a Director in both companies owned by the Trust. The court also found that the fourth respondent as trustee had legal title to the trust property and that any benefits accruing to the companies, including accumulated rentals in the sum of US\$70,000.00, in turn accrued to the Trust as the shareholder of the companies. In granting its order, the court imposed the condition that the fourth respondent should furnish evidence that the Trust legally owned the companies before the Registrar could release to the Trust the sum of US\$70,000.00 that was deposited with him.

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In the application *a quo*, the appellant adduced the supporting affidavit of the deceased's widow (Elizabeth Anne Rhodes). The admission of this affidavit was challenged by the fourth respondent on the ground that it did not comply with the provisions of the High Court (Authentication of Documents) Rules 1971. The court *a quo* agreed and held that the affidavit was not admissible as it had not been properly authenticated.

More importantly, the fourth respondent also took the point *in limine* that the applicant did not have *locus standi* to bring the application because he was only the *curator bonis* of the deceased estate. The appellant had initially deposed in his founding affidavit that he was acting in his capacity as the executor dative of the estate. However, he had attached the letters of his confirmation as *curator bonis* rather than his letters of administration in respect of the estate. Subsequently, through his answering affidavit, he then attached the letters of administration appointing him as the executor dative of the estate. The letters of confirmation were issued on 1 November 2013, while the letters of administration were issued on 26 February 2014.

High Court judgment

As regards the appellant's *locus standi*, the court *a quo* found that, as at 20 November 2013, the appellant could not have engaged in Case No. HC 1589/13 in terms of s 22(2) of the Administration of Estates Act [*Chapter 6:01*]. He would therefore not have had *locus standi* to seek the rescission of the order granted in that matter. That rendered his actions *in casu* nugatory as the absence of a cause of action could not be

cured through the substitution of his capacity in his answering affidavit. He could not properly cure the defect in the founding affidavit pertaining to *locus standi* through the production of an authorising document in his answering affidavit. The court accordingly held that his case must fail due to lack of legal standing.

Having found that the application should be dismissed for want of *locus standi*, the court nevertheless proceeded to address the merits of the matter. As regards the alleged fraud, the court observed that this was not a ground for setting aside the earlier judgment under r 449(1) (a) of the High Court Rules 1971. The court found that there was clearly no error committed as envisaged in the Rules, as the earlier judgment had directed that the fourth respondent was to furnish proof that the deceased had transferred the shares in the two companies to the Trust.

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With reference to the allegation that the fourth respondent had fraudulently claimed that the deceased had transferred the shares, the court found that the appellant did not produce any authentic documents to counter the alleged fraudulent documents. No documentary evidence was adduced to prove what the appellant alleged to be the correct shareholding in the two companies. The appellant simply attacked the authenticity of the official documents produced by the fourth respondent, which showed that the Trust owned the entire shareholding in the companies, without any proof to controvert the fourth respondent's evidence. Consequently, the earlier judgment must stand because it had not been shown that the court had relied on fraudulent evidence in assessing the facts

before it. In the event, the court *a quo* held that the relief of rescission sought by the appellant must be refused and accordingly dismissed the application on the merits.

Grounds of appeal and relief sought

There are three grounds of appeal in this matter. The first is that the court *a quo* erred in holding that the appellant had no authority to institute the application *a quo* but nevertheless proceeding to dismiss the matter on the merits. The second impugns the court *a quo* for holding that the appellant had no authority to institute proceedings, despite the presence of letters of appointment evincing such authority, and for refusing to accord the appellant an opportunity to furnish further evidence and proof of authority. The third ground is that the court erred in holding that no basis had been established for seeking rescission on the ground of fraud, despite the absence of proof of the donation or transfer of the shares in the company to the Trust.

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The relief sought by the appellant is that the appeal be allowed and that the order of the court *a quo* be set aside and substituted with an order dismissing the point *in limine* relating to authority and granting the application for rescission with costs or, alternatively, striking the matter off the roll for want of proof of authority.

Issues for determination

In the course of argument, Mr *Zhuwarara*, for the appellant, submitted that the court *a quo* erroneously conflated issues relating to cause of action and *locus standi* by disregarding the correct letters of administration annexed to the appellant's answering

affidavit. In any event, even though the widow's supporting affidavit was defective, the facts therein were made available to the appellant as the administrator of the estate and he was therefore entitled to make averments relating to the status of the estate. The averments contained in the founding affidavit were stated to be within his personal knowledge, without reference to the contents of the supporting affidavit. Mr *Zhuwarara* also argued that there was an error within the contemplation of r 449(1) of the High Court Rules relating to the details of the Trust deed. Had all the material facts been presented to the High Court in the earlier matter, it would not have granted the order that it did. Furthermore, the appellant had a direct interest in safeguarding the assets of the estate and should therefore have been cited as a party in the first case.

In reply, Mr *Tivadar*, for the fourth respondent, submitted that the first ground of appeal was irrelevant. There was no impropriety or harm occasioned by the court *a quo* declining *locus standi* and still dealing with the merits of the matter. As regards the second ground of appeal, Mr *Tivadar* initially took the position that the court was correct in finding that the appellant had no *locus standi*. However, at the close of his submissions, he was prepared to concede this ground of appeal. With reference to the alternative argument premised on supposed error in the earlier proceedings, Mr *Tivadar* quite correctly submitted that the third ground of appeal only related to the alleged fraud. There was no appeal founded on error within the scope of r 449(1) of the High Court Rules.

In his response, *Zhuwarara* agreed that the first ground of appeal was irrelevant. He also conceded that the third ground of appeal was confined to the allegations of fraud and that sub-ground (c) of the third ground was meaningless and was therefore to be abandoned. In light of these concessions by both counsel on what are essentially technical issues, which concessions were properly made so as to obviate the trappings of formalism, the Court remains seized with the critical and substantive nub of this appeal. And that is whether or not the appellant had established an adequate basis for seeking the rescission of the earlier judgment on the ground that it had been obtained by fraud.

Rescission on the ground of fraud

It is trite that he who alleges any positive fact carries the burden of proving that fact. Put differently, a party who makes a positive allegation bears the onus of proving such allegation. See *Astra Industries Ltd v Chamburuka* SC 258/11; *ZUPCO Ltd v Pakhorse Services (Pvt) Ltd* SC 13/17. In the particular context of an application for the rescission of a judgment at common law, it is settled that the party seeking rescission must demonstrate sufficient cause for the relief sought to be granted. A judgment can only be rescinded under the common law on one of the grounds upon which *restitutio in integrum* would be granted, such as fraud or some other just cause, including *justus error*. See *Mudzingwa v Mudzingwa* 1991 (4) SA 17 (ZS).

It is also well established that an appellate court will not readily interfere with findings of fact made by a lower court. See *Beckford v Beckford* 2009 (1) ZLR 271 (S).

The appellate court will only interfere with such findings in very limited circumstances, for instance, where the lower court has misdirected itself by failing to appreciate the facts at all or by making findings of fact that are contrary to the evidence presented. See *Reserve Bank of Zimbabwe v Corrine Granger* SC 34/2001.

Mr *Zhuwarara* refers to the condition imposed by the High Court in the earlier judgment requiring the fourth respondent to lodge the Trust deed in question. What this deed shows is that the properties concerned were never transferred to the Trust by the deceased. This, so he submits, is where there was fraudulent misrepresentation by the fourth respondent.

Mr *Tivadar* refers to the relevant share certificates and register of share allotments and transfers. He argues that the first two shares were probably issued in anticipation of the Trust being created two months later. The remaining bulk of the shares were issued to the Trust a year later. This is the reason why the list of Trust assets only includes the assets of the Trust when it was created and does not cover the assets acquired by the Trust thereafter. Mr *Tivadar* further submits that the appellant never produced any evidence, including the forensic audit that he allegedly carried out, to prove that the Trust was a sham. The onus was on the appellant to make out his case and he did not produce any document or affidavit to prove that there was any fraud.

Mr *Zhuwarara* retorts that not all the relevant share certificates have been produced by the fourth respondent. The duty of the appellant, as executor dative of the

estate, is to ensure that all the relevant documents and assets are accounted for. The facts placed before the court in the first case were not correct. There was clear misrepresentation and the court in that case would not have granted the order in favour of the fourth respondent had it been made aware of all the relevant facts.

It is pertinent, at this juncture, to capture the two critical components of the order granted by the court in the first case. Firstly, it was declared that the fourth respondent “as claimant in his capacity as Trustee of Phoenix Trust in whom [sic] the companies are held is the lawful shareholder of the two companies”. Secondly, it was ordered that the fourth respondent “upon lodging with this court a valid Trust document effected by the deceased during his life time transferring the properties to the Trust” would become entitled to the sum of US\$70,000.00 deposited with the Registrar.

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The crucial instrument in *casu* is the notarial deed of donation and trust, executed by its signatories on 13 April 1988. It was signed by the deceased, B. J. Rhodes, as the donor and as trustee and also as a beneficiary of the trust. The deceased appointed himself and two others, namely, N. J. MacDonald and N. C. Ralston, as trustees. The beneficiaries, apart from the deceased himself, were his children and their lawful issue. In the event of the deceased ceasing to be a trustee for any reason, T. C. Rhodes, the fourth respondent, was to succeed him as a trustee.

In terms of clause 4 of the Trust deed, the settlement and donation took effect on the date of execution of the deed. By virtue of clauses 3 and 5, the Trust fund was

constituted by the assets set forth in the Schedule, as well as any further assets or shares or income accrued or received by the fund from time to time, including any further assets donated by the deceased before his demise. As at 13 April 1988, the Schedule of Assets listed two items, *i.e.* a loan account of \$110,720.93 in Brian Rhodes (Pvt) Ltd and a loan account of \$41,052.93 in Karoi Properties (Pvt) Ltd. The company known as Beverly East Properties (Pvt) Ltd was not mentioned in the Schedule.

Turning to the relevant share certificates, the record shows two certificates executed on 1 February 1988. The first certificate (No. 3) states that Phoenix Trust is the registered proprietor of one fully paid share (No. 1). The second certificate (No. 4) states that B. J. Rhodes, as nominee for the Trust, is the registered proprietor of another fully paid share (No. 2). Both certificates relate to the shareholding in Beverly East Properties (Pvt) Ltd. The third certificate (No. 5), also relating to the shareholding in the same company, states that Phoenix Trust is the registered proprietor of 499,998 shares (Nos. 3 to 500,000 inclusive). It is common cause that the first two certificates were executed before the Trust was created, on 13 April 1988, while the third certificate was executed thereafter, on 20 July 1989.

A further relevant document is a special resolution of the company, passed on 14 April 1988 and confirmed on 21 April 1988, increasing the nominal share capital of the company from \$32,000.00 to \$500,000.00 by the addition of 468,000 shares, to rank *pari passu* with the existing shares. The resolution was passed by B. J. Rhodes (the deceased) and N. J. MacDonald and signed by the former as Chairman of the company.

The Form CR 14 signed by the Secretary of the company on 29 March 1988, shows that the abovenamed two individuals were Directors of the company, appointed to those positions on 1 February 1988. The Form CR 2, *i.e.* return of allotments, filed on 20 July 1989, shows that there were 2 shares previously allotted and 499,998 shares freshly allotted to Phoenix Trust. This is confirmed by the minutes of a Directors meeting, held on 20 July 1989 and attended by the same two directors, B. J. Rhodes and N. J. MacDonald, where it was resolved to allot 499,998 shares to Phoenix Trust. The above status of directorships and total shareholding in the company is further confirmed by various company returns filed between 14 July 1989 and 17 April 1997.

Lastly, there is the company's register of allotments and transfers. This shows that two individuals, N. C. Ralston and C. A. Mollatt, the original holders of the first two shares (Nos. 1 and 2), held those shares by virtue of the founding share certificates (Nos. 1 and 2) executed on 25 January 1988. These two shares were then transferred to Phoenix Trust and B. J. Rhodes, as nominee for the Trust, under new share certificates (Nos. 3 and 4) executed on 1 February 1988. The register also reflects the allotment of 499,998 shares (Nos. 3 to 500,000 inclusive) to Phoenix Trust under the last share certificate (No. 5) executed on 20 July 1989, resulting in the Trust holding the total of 500,000 shares in the company.

As is evident from the appellant's letters of confirmation and administration, B. J. Rhodes died on 29 July 2006. The foregoing analysis of the documents furnished by the fourth respondent demonstrates that, during the deceased's lifetime, Phoenix Trust

became the sole shareholder of all 500,000 shares in Beverly East Properties (Pvt) Ltd. In this regard, the appellant's assertion that the relevant share certificates and company resolutions are fraudulent and/or fabricated is difficult to comprehend. The special resolution of the company confirmed on 21 April 1988 was signed by the deceased himself, while the share certificates executed on 1 February 1988 and 20 July 1989 were signed by N. J. MacDonald. The latter also signed the minutes of the Directors meeting held on 20 July 1989, whereat it was resolved to allot 499,998 shares to Phoenix Trust. It is not in dispute that he was a Director of the company at the relevant time as well as being a trustee of Phoenix Trust.

While it is clear that the Trust was, at the relevant time, the sole shareholder of Beverly East Properties (Pvt) Ltd, there is nothing in the documents filed of record to demonstrate the shareholding of the Trust in the second company, Karoi Properties (Pvt) Ltd. This is obviously a critical issue in satisfying the condition imposed by the High Court in the earlier Case No. HC 1589/13. As I have already indicated, the order granted in that case requires the fourth respondent to lodge with the court "a valid Trust document effected by the deceased during his life time transferring the properties to the Trust". What the court presumably intended was for the fourth respondent to furnish proof that the shareholding in both companies had been transferred to the Trust. Although this is strictly not an issue for consideration in the present appeal, it may well arise for determination in any future litigation between the parties, insofar as concerns ownership of the properties held by the two companies and entitlement to the rentals accrued from those properties.

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Be that as it may, what is clear for present purposes is that the appellant has failed to substantiate his allegation of fraudulent misrepresentation by the fourth respondent as the basis for seeking the rescission of the earlier judgment on the ground of fraud. In short, the appellant has made the allegation of fraud but failed to discharge the onus of proving that allegation. Consequently, it cannot be said that the court *a quo* misdirected itself, whether grossly or otherwise, by failing to appreciate the facts at all or by making findings of fact contrary to the evidence presented, in dismissing the application for rescission on the ground of fraud. It follows that the third ground of appeal lacks merit and must therefore be dismissed.

Disposition

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As I have stated earlier, the first ground of appeal was found to be irrelevant, while the second ground was conceded. The third ground has been dismissed. In the event, I think it just and equitable that each party should bear its own costs.

It is accordingly ordered that:

1. The appeal is allowed in respect of the second ground of appeal, relating to the appellant's *locus standi* in the proceedings *a quo*, and dismissed in respect of the first and third grounds of appeal.
2. Each party shall bear its own costs.

BHUNU JA : I agree

BERE JA : (No longer in office)

C. Nhemwa & Associates, appellant's legal practitioners

Bherebhende Law Chambers, 1st respondent's legal practitioners

Honey & Blanckenberg, 2nd respondent's legal practitioners

Kevin Arnott, 3rd and 4th respondents' legal practitioner

Tavenhave & Machingauta, 5th, 6th, 7th, 8th, 9th and 10th respondents' legal practitioners

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