

DISTRIBUTABLE (24)

(1) ZIMCOR TRUSTEES LIMITED
(2) BOKA INVESTMENTS (PRIVATE) LIMITED (3)
MATTHEW BOKA
v
WEBSTER TONGOONA RUSHESHA AND OTHERS

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & PATEL JA
HARARE, NOVEMBER 6, 2014 & MAY 18, 2015

A.P. de Bourbon, for the first appellant

F. Girach, for the second and third appellants

T. Mpofu, for the first, second and third respondents

PATEL JA: This judgment consolidates two separate appeals, namely, Case Nos. SC 453/13 and 446/13, which were heard together by special request and consent of all the parties concerned. They both involve the sale of shares and assets in the same company, initially by the first respondent to the first appellant and then subsequently by the first appellant to the second and third appellants, and both emanate from the same judgment of the High Court in Case No. 6829/10 handed down as HH 385-13 on 30 October 2013.

The first appellant, who is the appellant in Case No. SC 453/13, is Zimcor Trustees Ltd (Zimcor), while the second and third appellants, who are the appellants in Case No. 446/13, are Boka Investments (Pvt) Ltd (Boka Investments) and Matthew Boka

(Boka). The first respondent is also the first respondent in both appeals. He is Dr. Webster Tongoona Rushesha (Rushesha) acting in his capacity as the legal guardian of his minor children Panashe and Tivonge. For the sake of convenience, I shall refer to the parties concerned by name rather than their citation as appellants or respondents respectively.

The Background

It is not in dispute that Rushesha acquired Stand 671, Mount Pleasant Township, before proceeding to the United Kingdom for professional employment. What is in dispute is what transpired after the property was initially acquired.

According to Rushesha, he asked his brother-in-law, Alexio Dera, to set up a company called Rasar Investments (Pvt) Ltd (Rasar Investments). The immovable property was then registered in the name of Rasar Investments as its only asset. The directors of the company were Rushesha, his wife and Dera, and the registered shareholders were the two Rushesha minors. When the Rusheshas moved to the United Kingdom in 2003, the property was leased to the South African embassy and the rental income was paid directly into Rushesha's bank account.

In February 2009, Dera concluded an agreement for the sale of shares in Rasar Investments to Zimcor, which was represented by its director, Frank Buyanga. The directors of Zimcor then replaced the previous directors of Rasar Investments.

Subsequently, in September 2009, the new directors of Rasar Investments sold the property to Boka Investments, represented by its director, Boka.

A year later, in September 2010, Rushesha issued summons in the High Court to reclaim the shares in Rasar Investments and the property itself. The claim was founded on the assertions that the sale of shares to Zimcor was a fraudulent sham perpetrated by Dera and that the subsequent sale of the property to Boka Investments was consequently invalid.

The court *a quo* found that the agreement for the sale of shares was a disguised transaction to secure a loan advanced to Dera by Zimcor and Buyanga. Therefore, the transfer of shares to Zimcor, pursuant to Dera's default on his loan, was effected by way of a *pactum commissorium* which rendered the entire transaction illegal and unenforceable. This invalidated the initial sale of shares in Rasar Investments and the consequential alteration of its directorship, as well as the subsequent sale of the property to Boka Investments. The court accordingly declared that the previous directors of Rasar Investments be reinstated and that the original deed of transfer in the name of Rasar Investments remained valid. All the defendants were ordered to bear the costs of suit.

Before addressing the merits of the matter, it is necessary to comment on a letter, dated 7 November 2014, that was forwarded to the Registrar by Advocate *Mpofu* the day after the hearing of the appeal had been concluded. The gist of the letter was, firstly, to contend that one of the arguments advanced by Advocate *De Bourbon* in reply

was misleading and, secondly, to draw the Court's attention to certain passages in the transcript of Rushesha's testimony in the court below.

There can be no doubt whatsoever that the approach taken by Advocate *Mpofu*, without opposing counsel's consent and, more importantly, without seeking the leave of this Court, is highly irregular and profoundly objectionable. It deserves the strictest censure and might even warrant disciplinary action under different circumstances. For purposes of the present appeal, however, it suffices that Advocate *Mpofu* be severely reprimanded and cautioned against any similar conduct in the future.

The Issues on Appeal

The principal issue for determination by the High Court, as set out in the Joint Pre-Trial Conference Minute, and upon which all the other major issues were dependent, was framed as follows:

“Whether or not a valid agreement of sale of shares allegedly belonging to the minor children (herein represented by first plaintiff) was entered into between first and second and third defendants.” (The underlining is mine).

No doubt, the core question arising from this issue relates to the validity of the agreement for the sale of shares between Dera and Zimcor. Nevertheless, the words underlined above make it clear that the alleged ownership of the shares was intrinsic to the dispute between the parties. This is particularly so in light of the initial representation by Dera as the seller, in the preamble to the sale agreement, that he was the beneficial owner of the 2 issued shares in Rasar Investments, followed by his subsequent retraction

and admission of fraud in the affidavit relied upon by Rushesha to challenge the validity of the sale. Moreover, none of the appellants admitted or accepted, either in their pleadings or in their evidence, that the minor children were the legal or beneficial owners of the shares.

The grounds of appeal herein, in respect of both appeals, raise several other issues which are ancillary to the validity of the agreement between Dera and Zimcor. However, they all derive from the correctness of the decision *a quo* on that specific point.

Disposition

It cannot be disputed that Rushesha's claims were premised on the assertions that the total issued share capital of Rasar Investments was 2 shares registered in the names of his minor children and that they were the only persons vested with title to sell the shares. This appears clearly from paragraphs 1(a) and 1(b) of the Summons and paragraphs 9.1 and 9.2 and Prayer 1 of the Declaration. In my view, this contention was an essential element of Rushesha's cause of action in the court below. It was therefore necessary for him to adduce the requisite proof on a balance of probabilities to establish that element or, at the least, to counter the appellant's averments to the contrary.

In the proceedings before the court *a quo*, ownership of the shares in question was canvassed by reference to the share certificates issued in respect of Rasar Investments, through the testimony of Simon Chareva, who took over from Buyanga as

Zimcor's public officer. Under cross-examination, Chareva accepted that Dera had handed over the share certificates upon sale of the shares. However, he was unable to produce the certificates because, according to him, they had been taken to England by Buyanga for safe-keeping and he had not taken any steps to secure them despite the proceedings in the court *a quo*. In these circumstances, it seems reasonably clear that Rushesha himself would have been unable to tender the share certificates in order to establish ownership of the shares in Rasar Investments. Therefore, he cannot be found wanting in that regard.

The only materially relevant documentary evidence adduced on the point in the court below was Rasar Investments's Memorandum of Association (the Memorandum). It is trite that such memorandum is an essential document for the formation of every company and constitutes a public document accessible through the Companies Registry. In terms of section 8(3) of the Companies Act [*Chapter 24:03*], each subscriber to a company must sign its memorandum and in his own handwriting state the number of shares being taken by him in that company.

The Memorandum *in casu* was tendered as part of Rushesha's bundle of documents in the court below. It is dated 13 February 2003 and purportedly bears the signatures of the two minor children, Panashe and Tiwonge, each of whom is described by occupation as being a "manager". The number of shares taken up by each subscriber is stated to be "fifty". It is common cause that, as at the date of signature of the Memorandum, Panashe was aged 9 years and 8 months and Tiwonge was not yet 7

months of age. Whatever one might surmise as to the authenticity of their respective signatures, their capacity as emancipated adults was quite obviously misrepresented in the Memorandum.

This misrepresentation was acknowledged by Dera under cross-examination at the trial. He was unable to explain how the minor children could have appended their signatures to the Memorandum. He also confirmed that it had not been signed on their behalf by their guardian. Eventually, he grudgingly conceded that the Memorandum was probably invalid.

Soon after the Memorandum was executed, the company's Register of Directors (Form CR 14) was then lodged with the Registrar of Companies on 13 March 2003. The original directors are reflected therein as being the two minor children, with effect from 17 February 2003. The younger child is also shown as being one of the company secretaries, with effect from the same date. The two minors are stated to be residing at an address different from that of their parents, presumably to demonstrate that they were mature adults. There can be no doubt that the appointment of the minors as directors and/or secretaries was patently unlawful, being expressly prohibited by sections 173(1)(b) and 173B(1)(a) of the Companies Act.

The same Form CR 14 reflects the appointment of new directors, being Dera and Rushesha's wife, with effect from 10 March 2003, and Rushesha himself is designated as the newly appointed secretary as from that date. The two children are also

shown as having resigned their respective positions with effect from the same date, notwithstanding their legal incapacity to do so as minors.

There is a further anomaly that arises from the Memorandum of Association. As I have already indicated, it states that the minor children had subscribed to 50 shares each. This appears to be confirmed by the share transfer certificate signed by Dera in favour of Zimcor on 10 February 2009. The supposed existence of 100 shares in Rasar Investments clearly contradicts the assertion of only 2 shares as being the total issued share capital of the company, not only in the Summons and Declaration but also in the agreement for the sale of shares concluded between Dera and Zimcor and signed by Dera on 11 February 2009. None of these discrepancies was satisfactorily explained by Rushesha, either in his testimony or in the documentary evidence furnished to the court *a quo*.

For the sake of completeness, it is necessary to scrutinise Dera's evidence insofar as it purported to corroborate and buttress Rushesha's claim that the sale of shares to Zimcor was invalid. Dera deposed to an affidavit in June 2010, three months before Rushesha instituted proceedings in the High Court. The nub of his affidavit is that the 2 shares in Rasar Investments were beneficially owned by the minor children, that he purported to sell the shares to Zimcor without being duly authorised to do so, and that the sale agreement was in reality a loan agreement.

Apart from the uncertainty as to the actual number of shares issued in Rasar Investments, which Dera does not even attempt to dispel, his allegation that the sale transaction was a disguised loan is utterly belied by the fact that the amount in question (US\$36,350) was not paid to him but to a company owned by Rushesha's brother in South Africa. Equally significantly, there is a crucial and unexplained discrepancy in the receipt that Dera signed to acknowledge the payment allegedly made to him. The receipt which was produced in Rushesha's bundle of documents is dated 12 February 2008, a full year before the disputed sale agreement was executed, while the receipt forming part of Zimcor's bundle is correctly dated 12 February 2009.

What is also critical is Dera's admission in his affidavit of having committed several very serious offences. These include his alleged misrepresentation to Zimcor as to the beneficial ownership of the shares, his fraudulent and corrupt acquisition of replacement title deeds, and his failure to pay capital gains tax or obtain exchange control authority for the sale of the shares.

In my view, all of the foregoing demonstrates that Dera was not a credible or reliable witness. Apart from the contents of his dubious affidavit, there is nothing of probative value to show that he was not the legitimate owner of the shares in Rasar Investments. Having regard to the totality of the evidence before the court *a quo*, I am inclined to agree with counsel for the appellants that Rushesha decided for purely tactical reasons to cite Dera as a defendant and not to seek any relief from him, other than an order for costs.

To sum up, the net effect of all of the aforementioned evidential deficiencies was to irremediably undermine Rushesha’s case as pleaded in the Summons and Declaration. They demonstrate that the formation of Rasar Investments and its subsequent control and administration were severely afflicted by misrepresentation, probably fraudulent, rendering it almost impossible to ascertain the precise status and ownership of the company’s shareholding. In short, Rushesha failed to establish his core contention that his minor children were the lawfully registered owners of the total issued share capital of Rasar Investments. The court *a quo* clearly erred in upholding his claim and consequently invalidating the sale and transfer of shares to Zimcor and the subsequent sale of the property to Boka Investments.

In light of this conclusion, it is unnecessary to consider the additional and ancillary grounds of appeal raised by the appellants. It is accordingly ordered that:

1. The appeals in Case No. SC 453/13 and Case No. SC 446/13 be and are hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
“The plaintiffs’ claims are dismissed with costs.”

MALABA DCJ: I agree.

GARWE JA: I agree.

Costa & Madzonga, 1st appellant's legal practitioners

Scanlen & Holderness, 2nd and 3rd appellants' legal practitioners

Dube, Manikai & Hwacha, 1st, 2nd and 3rd respondents' legal practitioners