

DISTRIBUTABLE (9)

N. SVOVA & OTHERS
v
NATIONAL SOCIAL SECURITY AUTHORITY

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA GWAUNZA JA & MAVANGIRA JA
HARARE, MARCH 16, 2015 & MARCH 11, 2016

F. Girach, for the appellants

L. Mazonde, for the respondent

MAVANGIRA AJA: This is an appeal against the whole judgment of the High Court handed down on 4 September 2013. In terms of this decision summary judgment was entered in favour of the respondent for the eviction of the appellants from its premises, St Tropez Apartment Block, Samora Machel Avenue East, Eastlea, Harare.

APPLICATION TO ADDUCE FURTHER EVIDENCE

At the onset of proceedings Mr *Girach*, for the appellants, moved for the determination of the application, filed on 30 January 2014 in SC 27/14 on behalf of the appellants, to lead further evidence on appeal. In essence, the further evidence sought to be adduced on appeal was the evidence, as deposed to in an affidavit by counsel who appeared for the appellants in the court *a quo*.

The criteria to be met in such applications are spelt out in *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (SC) at 380-381. These are briefly:—

- 1 . could the evidence not, with reasonable diligence, have been obtained in time for the trial?
- 2 . is the evidence apparently credible?
- 3 . would it probably have an important influence on the result of the case, although it need not be decisive?
- 4 . have conditions changed since the trial so that the fresh evidence will prejudice the opposite party?

In *casu* the said evidence in effect relates to an earlier understanding or agreement allegedly reached by and between the respective counsel for the two sides. The agreement is said to have been in regard to how the matter, the subject of this appeal, was to be proceeded with in the court *a quo*. This was in view of other similar matters that were also pending in the same court, between the respondent and various other parties who were in similar circumstances as the appellants'. The allegation is that the respondents' counsel in the court *a quo* had reneged on an earlier agreement that had been entered into by and between the appellants' counsel and the respondents' erstwhile or previous counsel, to the detriment of the appellants. On the strength of the alleged agreement, the respondents' counsel had applied in the court *a quo* for the hearing of the matter to be postponed in order to afford the respondents' counsel an opportunity to attend to the pleadings and comply with r 66 of the High Court Rules, 1971. The opposition mounted by the respondents' counsel to the application was thus unexpected and ran contrary to their earlier agreement.

When the court sought Mr *Girach's* submission as to whether the application met the criteria set out above, he submitted that the application must be seen and dealt with as an application to supplement the record. He conceded that by this submission, he was changing

the nature of the application that was before this court; he however did not have any further useful submissions to make.

Mr *Girach*'s dilemma is understandable in view of the fact that the evidence which the appellants sought to have placed before this Court, relates, as stated in the appellants' written submissions, to the alleged understanding or agreement between the parties as to how they intended the matter of their dispute to progress before the court *a quo*. Such understanding or agreement as alleged is not evidence at all, let alone evidence on the issue that was before the court *a quo* for determination. The purported alteration of the application to an application to supplement the record is not only unprecedented but also unsupported by any relevant documentation. It may properly be viewed as a non-event on which no determination could seriously be expected from this Court. Accordingly, the application for leave to adduce further evidence must therefore be, as it is hereby, dismissed.

GROUND OF APPEAL

The appellants raised four grounds of appeal.

The first ground is that the court *a quo* seriously misdirected itself, such misdirection amounting to an error in law in refusing the application for a postponement to allow for the filing of a chamber application for the upliftment of a bar. This was under circumstances where it was clear that the appellants had been misled by the respondent's legal practitioners into believing that the parties were agreed on the issue of security.

The application for leave to adduce further evidence on appeal having been dismissed as indicated above, this ground of appeal loses relevance. The application for postponement that was made before the court *a quo* was based on two grounds. The first was

that the postponement would enable the appellants herein to prosecute a chamber application for consolidation of the four matters then pending before the court *a quo*, with yet another matter. The second was, it would allow the appellants herein to lodge an application for the upliftment of the bar that was operating against them all by reason of their failure to file heads of argument in all the four matters. The court *a quo* was advised that the said application would be filed later on the day of the hearing.

The court *a quo* was of the view that the appellants (respondents in court *a quo*) were buying time as it should have been apparent to them that there was a bar requiring upliftment which should have been attended to earlier. The court *a quo* declined to postpone the matter on the grounds that the respondent could not be prejudiced because of the appellants' dilatoriness. The court *a quo* thus proceeded in terms of r 238 (2b) to deal with the application on the merits. The rule allows the High Court or a judge of the High Court, to deal with a matter on the merits or direct that it be set down for hearing on the unopposed roll, where heads of argument which are required to be filed in terms of subrule 2 of 238 are not filed within the specified period.

The court *a quo*'s reasons for refusing the application have not been refuted, save for the averment that the court seriously misdirected itself. The alleged misdirection is then related to the court's refusal having been made in the face of clear circumstances that the "*appellants had been misled by the respondent's legal practitioners into believing that the parties were agreed on the issue of security*". It appears that these are the "circumstances" that the appellants have unsuccessfully sought to adduce as further evidence on appeal before this Court. It does not make sense for the court *a quo* to be now "accused" of having not paid heed

to “circumstances” that were not before it. No misdirection has thus been established on the part of the court *a quo*.

The second ground of appeal is that the court *a quo* erred in dealing with the matter on the merits under circumstances in which the Registrar had not declined the bonds of security placed before him which it was his duty to determine on the date of the hearing of the matter.

In terms of r 66 of the High Court rules, upon the hearing of an application for (summary) judgment under r 64, the defendant has two options. He may:-

- a . give security to the satisfaction of the registrar to satisfy any judgment which may be given against him in the action; or
- b . satisfy the court by affidavit or with the leave of the court by oral evidence of himself or any other person who can swear positively to the facts, that he has a good *prima facie* defence to the action.

Rule 68 further provides that if the defendant does not find security or satisfy the court, as provided in r 66, that he has a good *prima facie* defence to the action, the court may enter summary judgment for the plaintiff, and thereupon, the plaintiff may sue out of the office of the Registrar, a writ or process of execution in terms of any rule of court.

In terms of r 69, if the defendant finds security or satisfies the court as provided in r 66, the court shall give leave to defend, and the action shall proceed as if no application had been made.

In *casu*, no evidence was placed before the court that the appellants had given security to the satisfaction of the Registrar to satisfy any judgment which may be given against them in the action.

At p 2 of the High Court's judgment the following is stated:

"I must point out for completeness that the respondents have failed to find security to the satisfaction of the registrar in terms of r 66(1) as notified and Mr Mpofo conceded that fact....Clearly therefore the security bonds filed by the respondents did not satisfy the requirements of r66(1). This is simply because the satisfaction of the registrar was not secured. For that reason the respondents could not be given leave to defend in terms of r69. I therefore proceeded on the merits of the matter to determine whether the respondents have shown a good *prima facie* defence to the action." (emphasis added)

Against the lack of evidence or proof that security was given as notified to the court *a quo*, and the concession by the appellants' counsel in the court *a quo*, that security had not been paid, this ground of appeal only serves to expose self-contradiction on the part of the appellants. As no security had been given in compliance with r 66 (1) (a), the court *a quo* had to proceed, as it did, in terms of r 66 (1) (b), and enquire into the *bona fides* of the appellants' defence.

In the circumstances, the appellants have failed to show misdirection by the court *a quo* in the manner alleged.

The appellants' attempt to purport to indicate that they had a good and *bona fide* defence was unsuccessful, the learned judge stating at p 3 of his judgment:

"... Despite the respondents' bizarre averment in their pleas that they paid \$24 million (Zimbabwe Currency), as the purchase price for the block of flats, it is common cause now that they did not pay a single penny towards the purchase price and they have belatedly offered to pay the applicant a sum of \$650 000-00 as purchase price, which offer the applicant has rejected insisting that the flats are no longer for sale."

The lease agreements in terms of which the appellants occupied the flats lapsed in 2000 after which they were given an option to purchase them. The respondents exercised the option but

failed to pay the purchase price within the stipulated period. For that reason their action for specific performance, through their residents association in HC 4633/05 was dismissed. Their appeal to this Court in SC 19/10 was equally unsuccessful, the Court holding that the respondent had not waived its right to cancel the agreement when they failed to pay the purchase price by the set date, 31 July 2000.

In the court *a quo* the submission was made that the appellants had made a counterclaim in which they seek an order directing the respondent to transfer the flats to them on the basis that they purchased them for \$24 million (Zimbabwean currency) and as such they are entitled to take transfer. The learned judge aptly commented:

“Just how the respondents hope to sustain the counter claim they have made is an unfathomable mystery. These are the same respondents who are offering to pay the applicant \$650 000-00 as purchase price for the flats because it is common cause that they did not pay anything towards the purchase price. They then have the temerity, in the same breath to submit a counter claim alleging having paid \$24 million as purchase price. This trifling with the court must simply stop. It is the kind of kindergarten behaviour which should find no place in our courts and must be suppressed with an order for punitive costs as a seal of the court’s disapproval of such abuse of court process.”

On these very cogent reasons the court *a quo* found that the appellants, having no sale agreement to enforce and no lease agreement in terms of which they could remain in occupation, could only do so by the grace of the respondent. The respondent had withdrawn that grace and was instead seeking their ejection. On the basis of the clearly stated reasons, the court *a quo*, correctly in my view, found the respondent’s claim for the appellants’ ejection to be unassailable.

The third ground of appeal raised by the appellants is to the effect that the court *a quo* erred in failing to find that the option that was granted to the appellants by the respondent had remained open and been exercised and that the resultant agreement between the parties had not been cancelled.

In raising this ground of appeal the appellants totally ignored the findings made by the Supreme Court in *St Tropez Residents Association v National Social Security Authority & Anor* SC 19/10. The appellants herein were parties in that matter as members of the St. Tropez Residents Association. The cited case is one of several in the chain of litigation involving these parties over the same property. At p 9, 10 and 11 the following was said by SANDURA JA:

“The main issue in this appeal is whether the NSSA waived the right to cancel the agreement in terms of clause 4 of the MOA (Memorandum of Agreement) when the Association failed to pay the purchase price by July 31, 2000. In my view, the answer to that question is in the negative.

As already stated, clause 1 of the MOA provided that the purchase price was to be paid by July 31, 2000, and clause 4 provided that if the Association failed to comply with any of the terms and conditions of the MOA the NSSA had the right to cancel the agreement.

There is, therefore, no doubt that when the Association failed to pay the purchase price by July 31, 2000 the NSSA had the right to cancel the agreement. However it was submitted on behalf of the Association that in view of the correspondence between the parties after July 31, 2000, which I have already set out in this judgment, the NSSA waived its right to cancel the agreement. I disagree with that submission. In this regard, clause 6 of the MOA is pertinent. Although this clause was set out at the beginning of this judgment, for the sake of convenience I will again set it out.

It reads as follows:

‘It is recorded that no agreement at variance with the terms and conditions of this agreement shall be binding unless confirmed in writing by the parties, and any indulgence which the authority may grant to the Purchaser shall not in any way prejudice its rights to be construed as a waiver of the same by the Authority (emphasis added)’

SANDURA JA proceeded -

In my view, bearing in mind the provisions of clause 6 of the MOA, it is quite clear that the NSSA did not waive its right to cancel the agreement in terms of clause 4 on the ground that the Association had failed to pay the purchase price by July 31, 2000.

However, as the agreement was not cancelled it is necessary to consider whether the remedy of specific performance sought by the Association ought to be granted.

The learned judge then concluded as follows –

In *Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* SC21/09 this Court, in the exercise of its direction, declined to order the delivery of two hundred and eighty cattle to the appellant in the case because, due to hyperinflation, the appellant would have got the two hundred and eighty cattle for nothing, which would have been unjust.

In my view, the reasoning of that case applies to the facts of the present case with equal force. As Mr *Mafusire* submitted, “to order specific performance as demanded by the appellant would mean the appellant getting almost an entire township for absolutely nothing”. Undoubtedly, that would be an unjust result which would operate unduly harshly on the NSSA. Accordingly, the order sought by the Association cannot be granted.”

It is clear that SANDURA JA considered the issue and came to the conclusion that even though the agreement had, as at that time, not been cancelled, the NSSA (respondent herein) had not waived its right to cancel the agreement for breach. The court also found an order of specific performance could not be granted as that would produce an unfair result and operate unduly harshly on the NSSA, the purchase price not having been paid.

Thus, when the court *a quo* in HH 269/13 (the judgment the subject matter of this appeal) determined that the Supreme Court had, in SC 19/10, determined all rights of the parties, this was a finding based on and supported by a reading of the said judgment SC 19/10.

The learned judge in the court *a quo* said, *inter alia*:

“The respondents have also sought to argue that the Supreme Court did not determine the rights of the parties and that they are still with a chance to take another crack at goal (sic) as it were. I do not agree. What the Supreme Court did was settle the dispute once and for all. It made it clear that the respondents have no right over the properties arising out of their option to purchase because they did not effect payment of the purchase price by 31 July, 2000. What this means is that the respondents are left with nothing. They do not have a sale agreement in terms of which they can remain in occupation. They can only remain in occupation by the grace of the applicant, which grace the applicant has withheld and is instead seeking their ejection. I am satisfied that the applicant’s claim for ejection is unassailable.”

It is a basic tenet of our jurisprudence that there must be finality to litigation. In this case, since the merits of the dispute between the parties had already been pronounced upon by the Supreme Court, the court *a quo* was justified in taking note of the same and proceeding to deal with NSSA’s application in the manner in which it did. Accordingly, the court *a quo*

correctly held that the appellants had no *bona fide* defence to the claim for their ejection. On this ground alone the appeal ought to be dismissed.

The fourth ground of appeal is that the court *a quo* misdirected itself in proceeding as if the matter before GOWORA J (as she then was) had not been finalised when judgment had in actual fact been granted dismissing the exception taken by the respondent.

In the court *a quo* the appellants argued that summary judgment should not be granted on the basis of *lis alibi pendens*, in view of an application that had been made by the respondent for the striking out of their pleas as being bad in law. They stated that judgment in that application which had been argued before GOWORA J was still pending. This ground of appeal appears to be of no moment in this matter. This is, firstly, because GOWORA J's judgment in HC2330/09 was delivered some two years before the judgment of the court *a quo*. The court *a quo* was thus mistaken or ill-informed when it accepted as a fact and stated that the judgment in GOWORA J's matter had not been handed down. More importantly, however, the matter before GOWORA J is described in the first paragraph of her judgment HC2330/09 as:

“In this application the plaintiff (NSSA) seeks summary judgment against the respondent J Mapanga and sixty four others.”

No other pleadings relating to the matter that was argued before GOWORA J appear to have been placed before the court *a quo* and none was placed before this Court.

At p 2 of her judgment GOWORA J stated that the plaintiff only cited one defendant who was not before the court by virtue of being deceased. She further stated that all the defendants had been sued under seven separate case numbers and the respondent had, without leave of the court, joined all the defendants to an application for summary judgment.

She found that the papers before her were not in order due to these irregularities. She thus withheld jurisdiction and ordered the respondent to pay costs of the application.

The essence of the matter that was heard by GOWORA J was thus not accurately captured in the proceedings and in the judgment of the court *a quo*. Of even more importance is the following apposite observation of the learned judge in the court *a quo* when he was commenting on the appellants' contention that summary judgment should not be granted on the basis of *lis alibi pendens*:

“... that argument cannot defeat a summary judgment application. ... summary judgment is available to a litigant whose claim is unanswerable and who should not be delayed by a trial for that reason. The attack on the respondent's plea was in pursuance of what the applicant perceived was an unassailable claim.”

It seems to me therefore, that reference to GOWORA J's judgment is misplaced, both in the court *a quo* and in the appellants' grounds of appeal. This ground of appeal is also predicated on erroneous facts and is of no relevance to this matter.

The appeal noted by the appellants has no merit. Mr *Mazonde*, for the respondent prayed for the dismissal of the appeal with costs on the higher scale, *de bonis propriis* against Kawonde and Company Legal Practitioners. He submitted that the appeal was frivolous and vexatious and that Kawonde and Company Legal Practitioners' persistence with this appeal when they were aware of the futility of it in view of the judgment by SANDURA JA in SC19/10 called for such sanction.

In his response Mr *Girach* submitted that the conduct of the NSSA post the year 2000 made the appellants believe that it was accepted by the respondent that they were the purchasers of the property. He submitted that in defending litigation brought against it by the Zimbabwe Republic Police, (ZRP), in which the ZRP sought an order for the same property

to be transferred to it, the respondent stated under oath that the order sought by the ZRP could not be granted as the NSSA was in the process of transferring the same property to the appellants who had purchased it. This submission was not disputed. In my view this conduct on the part of the respondent is a significant factor to be taken into account in the determination of whether or not the award that should be made in favour of the respondents ought to be on the higher scale and in addition, *de bonis propriis*.

An award of costs is within the discretion of the court. In the exercise of its discretion the court is guided by certain principles and guidelines. One of the general principles is that the successful party is entitled to costs. See *Mudzimu v Municipality of Chinhoyi & Anor* 1986 1 ZLR 12 (HC) at 18C. In *casu* the court will also be guided by the principle that an award of costs at the legal practitioner and client scale is a drastic measure, and one which should not be lightly resorted to except where the court is satisfied that there has been an attempt to abuse the process of the court or for some other good reason. See *P. v C.* 1978 ZLR 80 at 88A. There have to be exceptional circumstances to justify such an order. See *Gwinyayi v Nyaguwa* 1982 (1) ZLR 136 at 138F.

The respondent seeks not merely costs on the higher scale, but has also urged this court to order that Messrs Kawonde & Company Legal Practitioners bear such costs *de bonis propriis*. It is settled that such costs are awarded against a legal practitioner as an exceptional measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself. Such costs are only awarded in reasonably grave circumstances. Generally speaking, dishonesty, *mala fides*, wilfulness or professional negligence of a high degree fall into this category. See *Matamisa v Mutare City Council (A-G Intervening)* 1998 (2) ZLR 439 (S) at 447E.

In view of the conduct of the respondent (NSSA) referred to above, it appears to me that no justification has been established for the nature and level of the award of costs that the respondent seeks to attach to the dismissal of the appeal. The respondent conducted itself in a manner that reasonably made the appellants believe that their cause was not lost. Coupled with the interpretation, erroneous or otherwise, that they placed on SANDURA JA's judgment to the effect that their agreement had not been cancelled it appears to me that at the worst, the conduct of their case might be viewed as being no more than borderline. It does not appear to be conduct of the nature contemplated in the guidelines cited above. No such reprehensible conduct appears to have been established on the part of Kawonde and Company Legal Practitioners. An order of costs on the ordinary level will thus be awarded in favour of the respondent.

It is accordingly ordered as follows:

'The appeal is dismissed with costs.'

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

Kawonde & Company, appellants' legal practitioners

Scanlen & Holderness, respondents' legal practitioners