

REPORTABLE (42)

CONSTRUCTION RESOURCES AFRICA (PRIVATE) LIMITED
v
CENTRAL AFRICAN BUILDING CONSTRUCTION COMPANY
(PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & PATEL JA
HARARE, 19 MARCH 2015

T. Mpofo, for the applicant

S. K. Chivizhe, for the respondent

PATEL JA: The applicant in this matter (Case No. SC 402/13) filed an application to adduce further evidence on appeal in the main matter (Case No. SC 88/12). Both matters were set down to be heard together on 19 March 2015. After hearing counsel, the application to adduce further evidence was dismissed with costs. Thereafter, counsel for the applicant sought a postponement of the main matter in order to consider the applicant's constitutional rights, in particular, the right to a fair hearing, in relation to the dismissal of the application.

Following further submissions, it was ordered by consent that the appeal in the main matter be postponed on condition that the applicant be given until 25 March 2015 to

file such constitutional matter as it considers to have arisen from the refusal of the application to adduce further evidence on appeal. In the event that the applicant failed to comply with this condition, the Registrar was directed to reset the appeal down for hearing. The applicant was ordered to pay the costs occasioned by the postponement of the appeal.

On 25 March 2015, the applicant duly filed an appeal to the Constitutional Court (in Case No. CCZ 21/15) against the judgment of this Court handed down on 19 March 2015. In that appeal, the applicant seeks the reversal of the decision of this Court and a substituted order granting the application to adduce further evidence on appeal. Following the noting of the constitutional appeal, the respondent's legal practitioners has sought written reasons for the dismissal of the application. Those reasons are as follows.

Factual Background

On 29 November 2004, the respondent (plaintiff in the court *a quo*) concluded two separate agreements with the applicant (defendant in the court *a quo*). The first was for the sale of plant equipment and goodwill at the price of US\$219,000-00. The second was for the sale of three immovable properties at the price of US\$296,000-00, US\$97,000.00 and US\$88,000.00 respectively. A portion of the purchase price was to be paid in Zimbabwe Dollars converted from United States Dollars at the so-called auction rate.

On 7 November 2006, the respondent, through its lawyers, addressed a letter by registered mail cancelling the agreement for the sale of the three immovable properties. It then issued summons seeking an order for *rei vindicatio* and the eviction of the applicant

from the properties. The applicant's defence was that the properties were not occupied by the applicant company as such but by the current shareholders and directors of the respondent company, and that, in any event, the respondent had been fully paid for the properties.

Following the trial of the matter, the court *a quo* found that the applicant had not paid for the assets in full within the agreed time frames. The court also found that the shareholding and directorship in the respondent company had not been validly transferred to the applicant company or its representatives. Moreover, the respondent's notice of intention to cancel the agreement of sale was not invalid and the agreement had been properly cancelled by the respondent. The court accordingly held that the respondent was entitled to vindicate all three properties, including the two properties that the applicant had sold to third parties after the matter had been referred to trial. In the event, the eviction order was granted and the applicant and its lawyer were ordered to pay costs on a legal practitioner and client scale.

The applicant subsequently appealed against the judgment of the High Court, citing a multiplicity of grounds of appeal. It later filed the present application to adduce further evidence on appeal, which application, as I have already indicated, was dismissed with costs by this Court.

The Application

The application to adduce further evidence on appeal pertains to evidence given in the Regional Magistrates Court in criminal proceedings against Mr. Musukuma

(the Managing Director of the applicant) on a charge of fraud. In particular, it consists of the affidavit evidence of Mr. Vieira (a director of the respondent) and Mr. Paul Paul (the respondent's lawyer) together with the entire record of proceedings in the criminal matter.

The deponent to the founding affidavit (Mr. Musukuma) averred that this record of proceedings was not available at the time of the civil trial before the High Court. He further averred that this evidence is relevant to the control of the respondent company. It is also relevant to the agreed purchase price for the three properties sold by the respondent to the applicant, the currency of purchase, the sufficiency of the amount tendered by the applicant, and other issues relating to the agreement of sale. The applicant sought an order allowing the application and incorporating the Magistrates Court record of proceedings in the main matter (Case No. SC 88/12).

The respondent opposed the application on the basis that the evidence of Mr. Vieira before the Magistrates Court shows no material difference with his evidence in the High Court. The dispute between the parties, according to the respondent, is not about what payments were made or in what currency they were made. It is about what value to assign to the Zimbabwe Dollar payments made and tendered by the applicant vis-à-vis the agreed United States Dollar figures. The respondent averred that the application was merely designed to delay the finalisation of the appeal and should, therefore, be dismissed with costs on a higher scale.

Point in limine

Before addressing the merits, Mr. *Mpofu*, for the applicant, pointed out that on 30 June 2010 the High Court had issued an order prohibiting Mr. Paul from continuing to act for the respondent in this matter because of his irregular conduct. However, in defiance of that order, Mr. Paul filed a notice of opposition to this application on 28 July 2014 and, therefore, the respondent's opposition should be struck out. Mr. *Chivizhe*, for the respondent, contended that the High Court only prohibited Mr. Paul from appearing in the matter. The court did not require him to renounce agency or prohibit him from filing a notice of opposition. In any event, Mr. Vieira's opposing affidavit was deposed to by him in Australia and not in Mr. Paul's presence.

While the Court acknowledged that Mr. Paul's involvement in this matter was questionable and that he should not have filed the notice of opposition, we took the view that this did not affect the determination of this application on its own merits. We accordingly proceeded with the matter on that basis.

Argument on the Merits

Mr. *Mpofu* argued as follows in support of the application. At the time of the trial in the High Court, Mr. Vieira had already testified before the Magistrates Court. Although his evidence in the criminal proceedings was known, it was not available in record form at the civil trial stage. Again, there was nothing to suggest that the affidavits of Messrs Paul and Vieira before the Magistrates Court were available to be produced before the High Court. The Magistrates Court record of proceedings was now available. It

shows that both Messrs Paul and Vieira had accepted the agreed purchase price in Zimbabwe Dollars and that payment of the balance outstanding in Zimbabwe Dollars would suffice. In the High Court, however, the respondent took the position that the applicant's tender in Zimbabwe Dollars was not acceptable. If such tender were to be accepted as valid, the decision of the High Court on the propriety of the cancellation of the agreement of sale would be wrong. In the main appeal, therefore, this Court should have regard to the record of proceedings in both the Magistrates Court and the High Court and, if necessary, the relevant witnesses could be required to testify again on remittal to the High Court.

Mr. *Chivizhe* countered as follows. The State case in the criminal proceedings was closed on 25 January 2011. Both Messrs Vieira and Paul had testified by that date. The criminal trial ended in May 2011. The applicant's defence in the High Court case was concluded in June 2011. Thus, a period of five months had elapsed between the closure of the State case in the criminal matter and the conclusion of the defence case in the civil trial. The applicant could have sought an adjournment of the trial or applied to adduce further evidence in the High Court before the trial was completed. Alternatively, it could have applied to reopen its case in the High Court before judgment was delivered on 14 March 2012. The applicant did not exercise any of these options. In any event, the affidavits of Messrs Vieira and Paul were respectively sworn and signed on 5 June 2009 and 18 August 2009. Both affidavits were used in the criminal trial before the Magistrates Court and were available long before the civil trial in the High Court. Finally, the present

application was filed on 21 October 2013, more than nine months after the main appeal was lodged. In short, there was a flagrant lack of diligence on the part of the applicant.

Principles Governing the Adduction of Further Evidence

In England, the test for adducing further evidence or ordering a fresh trial was lucidly enunciated by Denning LJ in *Ladd v Marshall* [1954] 3 All ER 745 (CA) at 748A-C:

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an influence on the outcome of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible.”

This test has been followed by our courts, with marginal amplification, in *Farmers’ Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 (FS) at 31D and in *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction(Pvt) Ltd* 1994 (1) ZLR 255 (SC) at 260-261.

In South Africa, the requirements for the adduction of further evidence on appeal are essentially the same, albeit differently phrased. They were set out by Holmes JA in *S v de Jager* 1965 (2) SA 612 (A) at 613C-D:

- “(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a *prima facie* likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.”

These requirements have been applied by this Court in several cases over the years. See *S v Mutters & Anor* 1987 (1) ZLR 202 (S) at 204G-205B; *S v Osborne* 1989 (3) ZLR 326 (S) at 336C-G; *S v Kuiper* 2000 (1) ZLR 113 (SC) at 116A-C; *Petho v Minister of Home Affairs, Zimbabwe, & Anor* 2003 (3) SA 131 (ZS).

Drawing from the above-cited authorities, I venture to paraphrase the governing principles as follows. The evidence to be adduced must have been unobtainable with due diligence or unavailable for adduction at the trial stage; it should be probably influential or materially relevant to the outcome of the trial; and it must be apparently credible or *prima facie* likely to be true.

Disposition

Insofar as concerns the affidavits of Messrs Vieira and Paul, they were respectively sworn and signed in June and August 2009. Both affidavits were undoubtedly available long before the inception of the civil trial in the High Court.

Turning to the criminal proceedings in the Magistrates Court, the State case was closed in January 2011 and both Messrs Vieira and Paul had testified by that date. The criminal trial ended in May 2011 and the applicant concluded its defence in the High Court case in June 2011. In the intervening period of five months, *i.e.* between the closure of the State case in the criminal matter and the conclusion of the defence case in the civil trial, the applicant was at large either to seek an adjournment of the civil trial or to apply to adduce further evidence in the High Court before the trial was completed. There appears

to be no plausible reason in the circumstances of this matter, and no such reason has been proffered by the applicant, why neither of these options was exercised.

Even at the end of the civil trial, during the period when judgment in the matter was reserved, the applicant could quite conceivably have applied to reopen its case in the High Court. In short, the evidence sought to be adduced in the main appeal was available and adducible from the time it was produced to just before the High Court delivered its decision in March 2012.

In the premises, the applicant has failed to demonstrate that it exercised due diligence in obtaining and availing the affidavit evidence and record of criminal proceedings that it now, very belatedly, seeks to adduce. Consequently, it has dismally failed to cross the very first hurdle in meeting the established tests for the adduction of further evidence on appeal.

For the forgoing reasons, the application to adduce further evidence in this matter was dismissed with costs.

MALABA CJ: I agree.

GARWE JA: I agree.

Manase & Manase, applicant's legal practitioners

Wintertons, respondent's legal practitioners