DISTRIBUTABLE (128)

CORISCO DESIGN TEAM (CODET)
v
ZIMSUN LEISURE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, UCHENA JA & KUDYA AJA
HARARE: 3 NOVEMBER 2020 & 29 OCTOBER 2021

A. W. Saunyama with *L. Uriri* for the appellant

T. Mpofu, for the respondent

UCHENA JA: This is an appeal against the whole judgment of the High Court dated 11 July 2018, absolving the respondent from the instance.

FACTUAL BACKGROUND

The detailed facts of the case can be summarised as follows;

Sometime in 2006, the President of Equatorial Guinea while on a visit to this country was accommodated at the Elephant Hills Hotel in Victoria Falls. During his stay at the hotel, he was impressed by its majestic architectural design and quality of service. He thus desired to have a similar hotel constructed and run on the same standards in his home country.

The Elephant Hills Hotel is owned and run by African Sun Leisure (Private Limited), also known as Zimsun Zimbabwe (Private) Limited, which is the respondent in this case.

The President of Equatorial Guinea eventually approached and concluded a conditional agreement with the respondent wherein the respondent agreed to build and run a similar hotel on Corisco Island of Equatorial Guinea. It is, however, common cause that the contract between the parties was subject to approval and payment for the architectural designs by the government of Equatorial Guinea.

In an endeavour to fulfil its part of the bargain, the respondent hired a loose team of experts, who for the purposes of the project, were called Corisco Design Team (Codet) a company which was yet to be formed comprising of:

1. Project management
2. Architect
3. Quantity Surveyor
4. Structural Engineer
5. Electrical Engineer
6. Mechanical Engineer
7. Civil Engineer
8. Interior Designer
9. Information Technologist.

The appellant issued summons in the High Court ("the court *a quo*") against the respondent claiming an amount of $16 175 740.72 being fees allegedly owed to it by the respondent for professional services of architectural designs in terms of their agreement. In its declaration the appellant referred to two written agreements, which it alleged to have entered into with the respondent. They were however not signed by the respondent. The appellant alleged that the agreements were drafted pursuant to an oral agreement between the parties. In the agreements, the appellant was cited as CORISCO DESIGN TEAM (CODET) a company to be formed.

The respondent entered appearance to defend. It, in its plea, denied liability. It alleged that sometime in 2007, the President of Equatorial Guinea engaged the respondent concerning the construction of two hotels and a training school in Equatorial Guinea. The project was, however, subject to the approval by the government of Equatorial Guinea. Pending the approval, the respondent engaged the appellant in preliminary discussions to render the proposed services. The respondent alleged that before the approval by the government of Equatorial Guinea all work undertaken was done at each party's own risk. Further the respondent denied that there was a contractual relationship between the parties as the government of Equatorial Guinea did not approve the project. In short, the contract was subject to a condition precedent which was the approval by the government of Equatorial Guinea.

At the end of the plaintiff's case the respondent applied for absolution from the instance. The court *a quo* granted the application. In granting the application, it found that the appellant could not sue as it was a company yet to be formed. It further found that the appellant had failed to prove the existence of a contract between itself and the respondent. The court

a quo reasoned that the appellant could not enforce a contract that was between the respondent and the government of Equatorial Guinea as it was not privy to it.

Aggrieved by the decision of the court *a quo,* the appellant noted the present appeal.

Though the appellant raised nine grounds of appeal only two issues arise for determination.

1. Whether or not the court *a quo* erred in granting the respondent's application for absolution from the instance?
2. Whether or not the court *a quo* erred and misdirected itself in ordering costs at the legal practitioner and client scale to be borne personally by Ozywell Manyara.

SUBMISSIONS MADE BY THE PARTIES

Mr *Uriri* for the appellant indicated that he would abide by his heads filed of record. The argument which is raised in his heads is that the appellant, in terms of rr 7 and 8 of the High Court Rules 1971 fits well within the definition of an association, whose associates can sue in the name of the association. He submitted that although the appellant was an unincorporated association, it was properly before the court . Mr *Uriri* argued that the correct position is that while it is true that unincorporated associations as the appellant have no legal *persona*, contracts made or purportedly made by unincorporated associations are not mere nullities especially where the person who signed the contract had the express or implied authority of some or all the members of the association as *in casu*. Counsel for the appellant averred that under the principle of *stipulatio alteri*, should a company yet to be formed incur

obligations, the issue of liability attaches to all the parties involved. He averred that the contract may be enforced by or against the person contracting in favour of the third party.

Mr *Mpofu* for the respondent argued that the whole transaction was anchored on the project being approved by the government of Equatorial Guinea. He argued that the project was not approved and consequently, the respondent was not paid. Counsel for the respondent contended that the appellant could not be paid as its payment was on condition that the respondent is paid first. He submitted that the respondent could also not claim specific performance as it was not privy to the initial contract that gave birth to the transaction.

1. **Whether or not the court *a quo* erred in granting the respondent's application for absolution from the instance against the appellant?**

It must be stressed that Mr *Uriri*'s submission that the appellant is an unincorporated association is not supported by evidence. The evidence led establishes that the appelant is a company yet to be formed.

The test for determining an application for absolution from the instance was clearly stated in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5 D-E where the court said:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant…In other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against the defendant?"

In *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343, it was held that:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

The appellant challenged the decision of the court *a quo* in finding that it had failed to prove the existence of a contract between itself and the respondent. In the proceedings *a quo* the appellant was suing the respondent on the basis of an oral agreement. It produced two written agreements in a bid to prove that the parties entered into an oral agreement. The court *a quo* held that the appellant had failed to establish the existence of an oral agreement between the parties. The finding was premised on the fact that the two written agreements did not make any reference to the oral agreement and were not signed by the respondent. I associate myself with this finding. The *onus* to prove the existence of the oral agreement rested on the appellant. In *Delta Beverages (Pvt) Ltd v Pyvate Investments (Pvt) Ltd* HH 135/18 at p 5, the following remarks were made:

> "The courts will not endorse an oral agreement where any of the essential elements of a valid contract have not been proved. The terms of the oral contract must be proved and there must be agreement and understanding of the terms of the contract by the parties. An oral contract that meets all the requirements of a contract is binding on the parties and gives rise to a legally enforceable relationship. There must be a meeting of the minds or a reasonable belief by the parties that there is consensus. A party who alleges the existence of an oral contract has the *onus* to prove the existence of the contract on a balance of probabilities." (emphasis added)

There is nothing on record to prove that the appellant entered into an oral agreement with the respondent. The written agreements did not prove the existence of the contract given that the respondent did not sign them. An inference can be drawn that the respondent did not sign the agreements because it was not in agreement with the terms contained therein. The

respondent alleged that it engaged the appellant to provide services in the event the project it intended to embark on was approved by the government of Equatorial Guinea. Without proof of the existence of the oral agreement, it cannot be said that the court *a quo* erred when it held that the appellant had failed to prove the existence of the oral agreement. It is trite law that he who alleges must prove. The sentiments were clearly stated in *Nyahondo v Hokonya & Ors* 1997 (2) ZLR 457 (S) at 459, where the court held that:

> "The general principle is that he who makes an affirmative assertion, whether plaintiff or respondent, bears the *onus* of proving the facts so asserted." See also *Astra Paints Chemical v Chamburuka* SC 27/12**,** *Book v Davidson* 1988 (1) ZLR 365 (S) at 384 B-F, *Mobil Oil Southern Africa (Pvt) Ltd v Mechim* 1965 (2) SA 706 AD at 711 & *Kriegler v Mintzer & Anor* 1949 (4) SA 821 (A) at 828.

In its judgment the court *a quo* made an important observation about disagreements in the appellant's own camp about their entitlement to make claims against the respondent. It said:

> "According to the respondent's own minutes dated 18 September 2007 at page 106 of Annexure 3 comprising its own bundle of documents, Benox Mugabe was of the firm position that in the absence of approval of the architectural designs by the government of Equatorial Guniea no payment was due to the respondent. Paragraph 2.4 and 2.8 of the minutes read:
>
> '2.4 The meeting was reminded that every consultant agreed to work at risk until the projects were approved and funded. Working at risk means accepting that the project may or may not take place. Should the later happen then no payment can be made. BM (Benox Mugabe) did not see the point of presenting invoices to Zimsun when its known that the invoices cannot be processed until certain events happen-----
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> 2.8 It was suggested that Zimsun be asked to assist consultants by reimbursing expenses as a way of assisting consultants. BM responded that this would be contrary to the original understanding of working at risk and would not be entertained by Zimsun."'

Reference to the respondent in the passages quoted above is to the respondent in the application for absolution from the instance (the plaintiff *a quo* and appellant in this case).

It is therefore clear that the appellant and its members were fully aware of the correct position when they instituted proceedings against the respondent. It proves that the appellant despite correct guidance from its own representative and consultant in the alleged agreements with the respondent, proceeded to issue summons against sound advice.

The appellant failed to make a case against the respondent and the court *a quo* cannot be faulted for granting the respondent's application for absolution from the instance.

In any event, the appellant's plight is further compounded by the clear facts of the matter. The record proves that the initial agreement for the construction of a hotel on Carisco Island was between the respondent and the government of Equatorial Guinea. The appellant could only be engaged and paid for its provision of services by the respondent if the project was approved. Evidence on record proves that the project was not approved by the government of Equatorial Guinea. Approval by the government of Equatorial Guinea was a condition precedent in the agreement between the respondent and the appellant. The rights and obligations in the appellant's alleged agreement did not come into effect and the appellant could not enforce the same. This position was clearly stated in *Hativagone & Anor v CAG Farms (Pvt) Ltd & Ors* SC 42/15, where the court held that:

> "Turning to the common law, it is an established principle of the law governing contracts that an agreement of sale that is subject to the fulfilment of a condition precedent that has not been fulfilled is not a valid sale. The aforesaid principle was referred to in *Sithole v Khumalo & Ors* HB 28/08, a judgment by NDOU J wherein he remarked as follows at p 5:
>
> > 'This agreement is subject to an important reservation. A contract of sale subject to a condition precedent that has not yet been fulfilled is not a sale – *Leo v Loots* 1909 TS 366 at 370-1…'" (my emphasis).

Although that case is not on all fours with the one *in casu*, the principle of conditions precedent in contracts is of general application. *In casu*, as the project approval which was a condition precedent to the agreement between the parties did not materialise, it follows that there was no agreement between the parties to enable the appellant to lay claims against the respondent. Correspondence from the government of Equatorial Guinea makes it clear that the Carisco project was not approved. In its letter dated 16 September 2010 the government of Equatorial Guinea said:

> "After a visit to the island, a delegation of the mentioned company, in the year 2007, presented at the National Office of Projects of Equatorial Guinea the project Eliphant Hill, which (*sic*) total cost was 300 000 000 USA dollars that was rejected for being too expensive"---

This proves that the condition precedent was not satisfied. The appellant's claim against the respondent could not be granted. The court *a quo* correctly granted the respondent's application for absolution from the instance.

The initial agreement was between the respondent and the government of Equatorial Guinea. The appellant, as a company yet to be formed, was not privy to the initial contract and could not seek specific performance against the respondent. An order for specific performance is the primary remedy for breach of contract. This is an order directing the defaulting party to perform what they had agreed to do under the contract. However, the remedy is only available to a person who is a party to the contract. This is known as the doctrine of privity of contract. The doctrine restricts the enforcement of contractual rights and remedies to the contracting parties, excluding third parties. In *TBIC Investments (Pvt) Ltd & Anor v Mangenje & Ors* SC 13/18 at p 11**,** it was held as follows:

> "The learned author Innocent Maja in his book *The Law of Contract in Zimbabwe* at p 27 para 1.5.3 graphically explains the doctrine as follows:

> 'The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it."'

The appellant cannot therefore enforce the contract between the respondent and the government of Equatorial Guinea. It also failed to present a believable case before the court *a quo.* The court *a quo* therefore correctly granted the respondent's application for absolution from the instance.

2. **Whether or not the court a quo erred and misdirected itself in ordering costs at the legal practitioner and client scale to be borne personally by Ozywell Manyara.**

The explanation by the court *a quo* of how Ozywell Manyara who was a mere witness in the alleged agreements produced by the appellant, took over the representation of the appellant when Benox Mugabe did not agree that the appellant could make claims against the respondent, answers this question.

The appellant issued summons against the respondent against the sound advice of its then representative and consultant Benox Mugabe. Ozywell Manyara took over from Benox Mugabe and led the company still to be formed into litigation against the respondent fully aware that his predessessor had advised against such litigation. He took a risk of being ordered to pay costs on behalf of the appellant a company yet to be formed.

In my view the court *a quo* correctly exercised its discretion when it ordered the appellant to pay the respondent's costs at the legal practitioner and client scale to be borne personally by Ozywell Manyara.

DISPOSITION

In light of the above, the appellant could not sue the respondent in terms of a contract it was not privy to. The appellant failed to establish a *prima facie* case against the respondent and there was no evidence upon which a reasonable man could find for it. The court *a quo* correctly granted the respondent's application for absolution from the instance.

The court *a quo* correctly exercised its discretion when it ordered the appellant to pay the respondents costs on the legal practitioner and client scale.

The respondent urged this court to grant it costs on the legal practitioner and client's scale. I am of the view that the appellant represented by Ozywell Manyara pursued a hopeless appeal fully aware that the agreement entered into by the parties did not entitle the appellant to make any claims until the government of Equatorial Guinea had approved the project. Inspite of being fully aware that the government of equatorial Guinea had not approved the project the appellant noted and pursued this hopeless appeal against the respondent.

The appeal has no merit.

It is accordingly dismissed with costs at the legal practitioner and client scale to be borne personally by Ozywell Manyara.

GWAUNZA DCJ: I agree

KUDYA AJA: I agree

Dube, Manikai & Hwacha Commercial Law Chambers, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners