DITRIBUTABLE: (73)

PRORAND ENTERPRISES (PRIVATE) LIMITED
v
FIROZA MOOSA

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & MATHONSI JA
HARARE: 5 MARCH 2020 & 24 JUNE 2021

C. Damiso with R. Mabwe, for the appellant

C. Muchecho, for the respondent

GARWE JA

[1] After considering the submissions of the parties in an opposed matter before it, the High Court found that the removal of the respondent from the directorship of the appellant was unlawful and consequently ordered that the respondent be reinstated to that position. The court further ordered the appellant to pay the costs of the application. This appeal is against that decision.

[2] Having considered all the papers in this matter together with the respective submissions of the parties to this appeal, I have concluded that the court *a quo* erred in making certain findings of fact in the application before it owing to glaring disputes of fact which were irresoluble on the papers. The court *a quo* should have, in the circumstances, referred

the matter to trial so that the various disputes of facts and other unclear issues that had arisen on the papers could be properly ventilated and resolved.

BACKGROUND FACTS

[3] The appellant is a company registered in accordance with the laws of this country. At its formation, it had two directors, namely Guy W. Edmunds and Nicola Wilkinson. At some stage, probably around 2014, Nicola Wilkinson relinquished her position as director of the company. It appears she may also have relinquished her shareholding in the appellant. At some stage, the exact date of which is in dispute, the respondent also became a director of the appellant but was removed from the position at a meeting held on 16 July 2016 attended by Guy W. Edmunds and L.N. Wilkinson. According to the minutes of that meeting, the two shareholders unanimously agreed that the respondent be removed as director of the appellant and that she be replaced by one Lynda Clark as director with immediate effect.

[4] The parties became involved in a labour dispute. The nature of the labour dispute is itself in dispute. The dispute also involved one Sharain Fazilahmed. On 27 July 2017 the parties signed what they termed "a deed of settlement/consent Ruling for full and final settlement of labour damages in *lieu* of reinstatement consequent to a remittal of the matter from the Labour Court of Zimbabwe". Whilst the deed of settlement refers to damages in *lieu* of reinstatement, it gave no further detail as to what positions the respondent and one Sharain Fazilahmed would have been reinstated to. It simply acknowledged that the settlement was in full and final settlement of the labour dispute between the parties. As will become apparent shortly, there is a dispute as to the nature of the dispute related to in the deed of settlement.

It is, however, common cause that, pursuant to the signing of that deed of settlement, the appellant duly paid the amounts agreed upon into the bank accounts of the respondent and Sharain Fazilahmed.

PROCEEDINGS IN THE HIGH COURT

[5] On 10 January 2018, the respondent, as applicant, filed an application for a *declaratur* seeking an order that her removal from the position of director of the appellant was improper and consequently *null* and *void*. She further sought an order reinstating the original CR 14 in terms of which she had been appointed a director of the appellant. In the founding affidavit, she made it clear that the *declaratur* sought was in respect of both positions she previously enjoyed as director and shareholder of the appellant. In the draft order however, the *declaratur* relates only to her position as director.

[6] Her story before the High Court was simple and straightforward. It was this. Upon Nicola Wilkinson relinquishing her shares, she (respondent) was appointed a director on 19 June 2006 and the fifteen ordinary shares held by Nicola Wilkinson were then transferred to her. She attached copies of the relevant company documents reflecting this change as well as income tax returns signed by Guy W. Edmunds, as public officer of the appellant company, for the period 2009 to 2014.

[7] She further averred that, without her knowledge and/or consent, she was then removed as a director of the appellant and relevant forms were then forwarded to the Companies Registry reflecting this removal. She denied ever relinquishing her shareholding

in the company. She further averred that the relevant company returns removing her as director and replacing her with three others were a fraud.

[8] The managing director of the appellant, Guy Edmunds, deposed to the opposing affidavit on behalf of the appellant. He took a point *in limine* that all outstanding issues between the company and the respondent had been resolved pursuant to which a deed of settlement was signed on 27 July 2017 by the parties. Payments were effected into the bank accounts of the respondent and Fazilahmed and such payments were in full and final settlement of all disputes relating to their erstwhile association with the company.

[9] He further denied that the respondent ever owned any shares in the appellant. No shares were sold or allotted to her. Whilst admitting that certain company forms were completed and forwarded by Sharain Fazilahmed to the Zimbabwe Revenue Authority (ZIMRA) and that these showed that the respondent was a shareholder, he stated that this was done at a time when he was unwell and that he had signed the forms without realizing what he was signing for. He further averred that the removal of the respondent as a director of the company was completely above board.

[10] In her answering affidavit, the respondent stated that the deed of settlement only related to the case of unfair dismissal and had nothing to do with the application before the court *a quo*. It was her contention that the ZIMRA tax returns, share certificates and supporting affidavit of Sharain Fazilahmed all confirm that she was a shareholder. She averred that these shares were allotted to her.

[11] After considering the papers before it, the court *a quo* was satisfied that the respondent had proved, on balance, that she was a shareholder of the appellant company. In coming to this conclusion the court relied on the annual tax returns for the years 2010 up to 2014 which were signed by Guy Edmunds. The court was not persuaded by Guy Edmunds' claim that, at the time he was asked to append his signature on the tax returns, he was unwell and did not fully appreciate the import of his signature. The court also found that the deed of settlement was of no relevance to this case as it related to the respondent's status as an erstwhile employee of the company. Lastly, the court found that the meeting at which the respondent was removed as director was irregular in that no notice had been given to the respondent as a shareholder of the appellant. Consequently, the court *a quo* made the order declaring the removal of the respondent as director of the company to have been *null* and *void*. The court granted further consequential relief the nature of which is unnecessary to delve into for purposes of this appeal.

PROCEEDINGS BEFORE THIS COURT

[12] Aggrieved by the determination of the court *a quo*, the appellant noted an appeal to this court. It avers that the court *a quo* misdirected itself in a number of respects, more particularly in:-

- basing its determination on the finding that the respondent had proved that she was a shareholder on the basis of evidence not admissible in terms of the Civil Evidence Act.
- relying on patently conflicting evidence in concluding that the respondent was a shareholder in the appellant company.

- finding that the "appellant's principal" had admitted to the respondent's shareholding in the absence of such admission.
- finding that the case of *Gomwe & Anor* v *Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 ZLR + 15 (H) was distinguishable from the facts before it and, as a result, not finding that the deed of settlement had finally determined the dispute between the parties and that the matter was therefore *res judicata*.

[13] In oral submissions before us, the appellant made the same submissions it had made before the High Court. In addition however, the appellant also submitted that the photocopy of the share certificate that the respondent had relied upon in the court *a quo* was inadmissible, in the absence of the original in terms of s 11 of the Civil Evidence Act [*Chapter 8:01*]. The issue had been raised in oral submissions before the court *a quo*. In its view the court *a quo* should have, at the very least, referred the matter to trial in view of the fact that there were disputes of fact. The respondent had been a director working for the company and earned a salary as a director.

[14] Mr *Mucheche, per contra*, submitted that the respondent wore two hats – one as a director and the other as a shareholder. The basis of her directorship was rooted in her shareholding and it is that issue that formed the basis of her claim. The deed of settlement related to an employment relationship as an administrator and not to her position as a non-executive director and shareholder. He too accepted that in view of the numerous disputes, the matter should more properly been referred to trial.

THERE WERE OBVIOUS DISPUTES OF FACT

[15] There are a number of issues in this case that remain unclear. There are also clear disputes of fact in a number of areas.

[16] In her founding affidavit, the respondent stated that she was appointed director of the appellant company on 19 June 2006 and that, at that stage, fifteen (15) ordinary shares previously held by Nicola Wilkinson were transferred to her. In the same affidavit, however, she also avers that the appellant had two directors from 2003, namely Guy W. Edmunds and Nicola Wilkinson and that, of the issued shares of 100, Guy W. Edmunds owned sixty (60) whilst Nicola Wilkinson owned the remaining forty (40). She further states unequivocally that Nicola Wilkinson was retrenched in July 2014 and that it was only at that stage that she wrote to the company relinquishing her shareholding in the company. Clearly, there was a contradiction as to when she acquired the shares and the number of shares she owned. If Nicola Wilkinson only relinquished her shareholding in 2014 and if the shares transferred to her were the same shares previously owned by Nicola Wilkinson, then the claim by the respondent that she became a director in 2006 and that fifteen (15) shares previously owned by Nicola Wilkinson were transferred to her cannot be a correct reflection of what happened.

[17] Further, there was no explanation in the founding affidavit as to how the fact of a retrenchment would have caused Nicola Wilkinson to relinquish her shares. Shares have value and are owned. Why would Nicola Wilkinson relinquish the shares in the first place? What was their value? Was she paid for those shares? Further, when those shares were transferred to the respondent, did she pay any consideration for them? The founding affidavit

did not attempt to resolve all these questions surrounding the shares previously owned by Nicola Wilkinson.

[18] There was a further difficulty with the respondent's founding papers. In order to substantiate her claim that she was a shareholder, she attached a copy of a share certificate in her name. That share certificate made things even worse. It stated that the respondent was the owner of forty (40) fully paid-up shares in the appellant. The date of the share certificate is 19 June 2006. It goes without saying that the share certificate is not consistent with the respondent's averments under oath that she was the owner of only fifteen shares and that she acquired these only after Nicola Wilkinson had left the appellant in 2014.

[19] The confusion did not stop there. The income tax returns she attached to her founding affidavit reflected her as the owner of only fifteen shares. The same papers reflect her as a mere shareholder and not a director as she avers in her founding affidavit. The directors are reflected as Guy W. Edmunds and Nicola Wilkinson.

[20] It is important to stress at this juncture that the copies of the share certificate and income tax returns were annexed by the respondent to her founding affidavit in order to bolster her case that she was not only a director but also a shareholder. But, as already noted, these documents were not consistent with her averments.

[21] Further, she attached a supporting affidavit by one Sharain Fazilahmed who was employed by the appellant company as a bookkeeper. Sharain Fazilahmed also became

involved in a labour dispute with the appellant at about the same time. She too received a sum of US$26 410.45 in full and final settlement of her claim for damages in *lieu* of reinstatement pursuant to the same deed of settlement in which the respondent was awarded a separate amount for the same reason. An analysis of the affidavit of Sharon Fazilahmed makes interesting reading. She says, under oath, and contrary to what the respondent had deposed to under oath, that of the 100 shares in the company, sixty were owned by Guy W. Edmunds, twenty five by Nicola Wilkinson and fifteen by the respondent. She says it was only when Nicola Wilkinson was retrenched in 2014 and relinquished her shareholding that her twenty five shares were then reallocated to the respondent. There lies the problem. That is not what the respondent had averred in her founding affidavit.

[22] In the same affidavit, Sharain Fazilahmed explains why company returns showing the involvement of the respondent were compiled and signed by Guy Edmunds. She states that the company records were not up to date. At that stage however, Nicola Wilkinson, who had been one of the directors, had left the company and it was not possible to get her signature. There was need to update the returns all the way back to 2006. It was for that reason that papers were prepared on the instructions of Guy Edmunds which reflected the directors and shareholders as Guy Edmunds and Firoza Moosa, the respondent. The share certificates in the names of Guy Edmunds and Firoza Moosa and the company returns were then signed by Guy Edmunds and copies were then sent to the appellant's secretaries whilst copies were retained by the company.

[23] The affidavit by Sharain Fazilahmed makes it clear that the company returns and share certificates were doctored because the company records were not up to date and it was impossible to get Nicola Wilkinson to sign them.

[24] There are further disputes as to the facts. Whilst both parties accept that a deed of settlement was signed by the parties, there is divergence on what issue between them was settled. Was it all issues related to the two ladies' involvement with the company, as the appellant argues, or was it only in respect of their unlawful dismissal as employees of the appellant, as the respondent now argues? A resolution of this dispute was necessary. If the settlement related to all issues, then the respondent would have been taken as having compromised all actions she may have been entitled to.

[25] The appellant denies that the removal of the respondent was improper. It says she was not a shareholder. The respondent says she was and should have been called to the shareholders' meeting at which her directorship was revoked.

[26] There can be no doubt that the above issues were not capable of resolution in the absence of oral evidence. Indeed counsel for both parties conceded in oral submissions that the facts in dispute were not capable of resolution on the papers.

DISPUTES OF FACT – THE LAW

[27] The approach to be taken where there are disputes of fact on the papers has been highlighted in several cases, both in this country and in South Africa. The headnote in the case of *Masukusa* v *National Foods Ltd & Another* 1983 (1) ZLR 232 (H) reads as follows:

> "Proceedings should not be initiated by notice of motion when there is likely to be a conflict in the evidence or where the claim is illiquid, as in a claim for damages. Nevertheless, even if notice of motion proceedings are wrongly used, the courts will take a robust view of conflicts of fact, where they think they can solve the issue despite apparent conflicts in evidence. They will also seek to save further wasting of costs by referring the matter for oral evidence, or ordering the application to stand as a summons or ordering the papers to stand as pleadings. They will not, however, allow oral evidence to prove facts which the affidavits themselves should have presented, nor will they automatically and *mero motu* allow a matter to go to evidence where counsel advocates the procedure as a fall-back position in the event that an application is granted. Where the facts are in dispute, the court has a discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate when an applicant should, when launching his application, have realised that a serious dispute of fact was inevitable."

The above case is authority for the proposition that an application can be dismissed where an applicant should have realised that a serious dispute of fact was inevitable.

[28] In the *locus classicus* of *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S), this Court stated as follows:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over - fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact."

[29] As already noted, there were serious disputes of fact requiring resolution through the leading of oral evidence. The decision by the High Court to determine these issues on the papers, including even the question of the credibility of Guy Edmunds, was irregular and

posed potential prejudice to the appellant. Indeed there were not only disputes of fact between the parties but serious inconsistencies in the respondent's case before the court *a quo*. The court *a quo* may well have been entitled, in light of those inconsistencies, to dismiss the application for a *declaratur* altogether.

DISPOSITION

[30] There were inconsistencies in the respondent's case (as applicant) in the case *a quo*. There were also disputes of fact that were incapable of resolution on the papers. In these circumstances, the High Court should have referred the matter to trial so that these issues could be resolved after the hearing of *viva voce* evidence.

[31] On the question of costs, I see no reason for departing from the usual practice of the court. The costs incurred by the parties in the court *a quo* are to be paid by the respondent. So too will the costs of this appeal.

[32] In the result, it is ordered as follows:

1. The appeal succeeds with costs.
2. The decision of the court *a quo* is set aside and in its place the following is substituted:

"(a) In view of the several disputes of fact in this matter, the matter is referred to trial.
(b) The application is to stand as the summons and the notice of opposition as the appearance to defend. The matter is thereafter to proceed in terms of the Rules of this court.
(c) The applicant is to pay the costs of this application."

GUVAVA JA **:** I agree

MATHONSI JA **:** I agree

Atherstone & Cook, appellant's legal practitioners

Caleb Mucheche & Partners, respondent's legal practitioners