REPORTABLE ZLR (66)

Judgment No. SC 69/07
Civil Appeal No. 362/06

DORBROCK HOLDINGS (PVT) LIMITED
v
(1) TURNER & SONS (PVT) LIMITED (2) ANTHONY TURNER

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, OCTOBER 1, 2007 & SEPTEMBER 11, 2008

A P de Bourbon SC, for the appellant

Miss J Wood, for the respondents

CHEDA JA: The appellant launched a court application at the High Court seeking an order in the following terms –

"IT IS ORDERED:

1. That the respondents jointly as well as severally, the one paying the other to be absolved, shall forthwith undertake all that is necessary and required, including making all payments and completion and signing all documents required, in order to procure transfer without delay by the first respondent to applicant of the first respondent's entire shareholding in Zambezi Paddle Steamer (Pvt) Ltd.

2. That immediately upon registration of the aforesaid transfer in the share register of Zambezi Paddle Steamer (Pvt) Ltd the applicant shall pay the first respondent the balance of the purchase price for the said shares such balance being the sum of $138 000 000.00.

3. That the respondents jointly and severally the one paying the other to be absolved shall pay the costs of this application on the scale of legal practitioner's and own scale."

The application was opposed by the respondents.

The first respondent also launched a counter application seeking an Order for the provisional liquidation of the appellant in terms of the Companies Act [*Cap 24:03*].

The two applications were eventually consolidated by consent and heard together.

After hearing argument on the two matters the High Court made the following order -

> "1. The application in case HC 5186/2005 be and is hereby dismissed with costs.
>
> 2. In case No. 5264/2005
>
> 2.1. The first respondent's company Zambezi Paddle Steamers (Pvt) Ltd is provisionally wound up pending the granting of an order in terms of para. 2.3. or the discharge of this order.
> 2.2. …
> 2.3. …
> 2.4. …
> 2.5. …"

This appeal is against the above judgment and orders of the High Court.

At the hearing of the appeal the respondent raised a point *in limine* as follows:

> "It is submitted that the appeal in case No. 362/06 is not properly before this Honourable Court as the order granted was interlocutory in that it does not have a final and definitive effect and it may be set aside by the Judge who granted it see *Hunt v Hunt* 2000(1) 165(HC); *South Cape Corporation (Pvt) Ltd v Engineering*

Management Services (Pvt) Ltd 1977(3) 534(AD) 549 *et seq.* that being so, leave to appeal was required in terms of s 43 of the High Court Act.

It was not obtained."

A lot of information was placed before the Judge in the court *a quo* in the form of documentary exhibits and many issues were raised in that court as well as in the Heads of Argument on appeal.

However, the main issues for consideration by this court which can resolve or settle the matter are as follows:

"1. Whether the appeal against the Provisional Order for liquidation is properly before this Court.

2. Whether the payment arrangements entered into by the parties constituted a legally binding contract which is enforceable through a court of law."

I now proceed to deal with the point *in limine* raised by the respondents.

Section 43 of the High Court Act [*Cap 7:06*] provides as follows:

"43. **Right of appeal from High Court in civil cases**

(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its appellate jurisdiction…

(2) No appeal shall lie –
(a) …
(b) …
(c) (i) …
(ii) …

(d) From an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases –
(i) …
(ii) …"

Mr *de Bourbon* submitted that it was wrong to say a provisional liquidation order is not appealable as it was interlocutory. He said s 241 of the Companies Act [*Cap* 24:03] gives a right of appeal.

While he is correct in relation to an order for liquidation proper, I do not agree that he is correct in relation to an interlocutory order. The order given by the court a quo was not a final order for liquidation but a provisional one. Its correctness is still open to be tested on the return date. (See *Hunt v Hunt* 2004 (1) ZLR 165(H)).

I also do not consider it correct to say that the property of a company under provisional liquidation can be sold before the Provisional Order is confirmed.

In *Van Leggelo v Transvaal Celocrete (Pty) Ltd & Anor*, 1953 (2) SA. 287T it was held that an order by a magistrate granting leave to execute pending an appeal was interlocutory and consequently not appealable in terms of s 83 of the Magistrates Court Act 32 of 1944, in that it did not have the effect of a final judgment. (my underlining)

The above decision also received support from Corbett JA (as he then was) in the case of *South Cape Corporation v Engineering Management Services*, 1977(3) SA 534.

I do not believe that any good purpose is achieved by getting this appeal court to make a determination on a matter which can possibly be altered by the court that granted the order on the return day.

The Court that makes a Provisional Order obviously leaves room for itself to reconsider the merits of the matter on the return day, so it does not appear proper that an appeal court should interfere by pronouncing a final order on such a matter.

I therefore find that the point *in limine* raised by the respondent is well-founded.

Accordingly, the appeal against the provisional liquidation order should be struck off the roll with costs.

In view of the above finding I do not intend to deal with the other issues raised concerning this matter because to do so would amount to dealing with the merits of a matter that is not properly before this Court.

I now turn to deal with the legality of the agreement of sale.

Once more, the determination of the legality of the agreement entered into by the parties resolves the matter once and for all, without going into the detailed submissions on the merits of the matter.

Both parties agree that the agreement was that payment for the shares would be made to Tony Turner's daughter in the United Kingdom.

Section 11 of the Exchange Control Regulations 1996, S.I. 109 of 1996 provides as follows:

"Payments outside Zimbabwe

11 (1) Subject to subsection (2), unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall –

(a) make any payment outside Zimbabwe; or

(b) incur any obligation to make payment outside Zimbabwe.

(2) Subsection (1) shall not apply to –

(a) any act done by an individual with free funds which were available to him at the time of the act concerned; or

(b) any lawful transaction with money in a foreign currency account.

(3) Subject to subsection (4) unless authorized by an exchange authority, no foreign resident carrying on any trade, business or other gainful occupation or activity in Zimbabwe shall –

(a) make any payment outside Zimbabwe; or

(b) incur any obligation to make payment outside Zimbabwe;

in respect of that trade, business, occupation or activity.

(4) Subsection (3) shall not apply to any lawful transaction with money in a foreign currency account."

The following paragraph from the appellant's Heads of Argument gives a very clear background of the position of the parties and the role each played in the sale agreement.

I quote from p 8 para 6 of the Heads –

"6. The parties met in Harare in the period between 28 June and 14 July 2004. Representing their respective companies, an agreement was concluded in terms of which Turner and Sons would sell its shareholding in ZPS to Dobrock Holdings for $250 million.

At a meeting, see para 12, p 38, as read with para 13, p 68, Peter Dobson told Tony Turner that he would procure payment where and whenever Tony Turner wanted. Tony Turner claimed he urgently needed pounds in the United Kingdom, and that payment was to be made to his daughter in that country."

In my view, the above shows, firstly that the shares were being purchased by or on behalf of a company, and that Tony Turner was to make the payment again on behalf of the company.

Both companies are based in Zimbabwe but payment was to be made outside Zimbabwe in the United Kingdom.

The source of funds was not disclosed and there was no suggestion at all that there were free funds available to pay for the shares.

For that reason, I have no basis to fault the court *a quo's* finding that the agreement was illegal and is un-enforceable by the Court.

Having come to that conclusion, I see no reason to deal with the other issues raised on appeal as they will not change the above conclusion.

The appeal cannot succeed.

I therefore make the following order –

1. The appeal in case No. SC 36/06 is dismissed with costs.
2. The point *in limine* in case No. SC 361/06 is upheld and the appeal in that case is struck off the roll with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Byron Venturas, respondents' legal practitioners