RICHARD BHURI
and
NYASHA MASAKA
and
PURPLE DOT INVESTMENTS (PVT) LTD
versus
TARISAI MAVETERA
and
CHIEF REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU & CHILIMBE JJ
HARARE, 16 November 2023 & 18 July 2024

CIVIL APPEAL

S Kachere, for the appellants
A Mutima with *T Mazonde*, for the 1st respondent

MANZUNZU J

This is an appeal against the whole judgment of the Magistrate's Court in which the court *a quo* granted an application in favour of the 1st respondent (Mavetera) for the rectification of the register in terms of section 162 of the Companies and Other Business Entities Act (the Act) [*Chapter 24:31]*.

BACKGROUND

Mavetera, through an application against the appellants (Bhuri, Masaka and Purple Dot), as respondents. sought an order to compel Purple Dot to rectify its registers to show Mavetera as a holder of 40 shares in Purple Dot representing 40% shareholding. The basis upon which the relief was sought is that, Matevere bought shares from one Loice Ruvimbo Takaona (Takaona) which shares she held in Purple Dot.

Bhuri and Masaka are directors in Purple Dot. It is common cause that Takaona signed an agreement of sale of shares with Mavetera. The defence by the appellants in the court *a quo* was that the agreement is a nullity because prior written consent was not given by all the shareholders as per the articles of association.

The court *a quo,* having considered the evidence before it, and the submissions by the parties, ruled that Mavetera proved his case on a balance of probabilities and issued the following order;

> "1. Applicant (sic) be and is hereby granted.
>
> 2. 1st Respondent is ordered to update the Register of the 3rd Respondent to include the Applicant as a member and Director of the Company.
>
> 3. 1st respondent is ordered to rectify the register of the 3rd respondent to show the applicant as a holder of 40 shares in the company representing 40% shareholding.
>
> 4. The 4th respondent shall, by notice of this order, rectify the registers in respect of the 3rd respondent in terms of this order.
>
> 5. The 1st and 2rd respondents shall pay costs of suit."

Aggrieved by the decision of the court *a quo,* the appellants lodged this appeal on three grounds.

GROUNDS OF APPEAL

The following grounds were raised in this appeal:

"1. The lower court misdirected itself on a point of law in validating the sale of shares agreement between Loice Ruvimbo Takaona and the 1st respondent, on ground that the 1st respondent was not to blame; when it was clear that this sale of shares agreement was a nullity in that no prior consent of all the shareholders was obtained as required by the provisions of the Articles of the Company.

2. The lower court grossly misdirected itself on a point of law and fact, in finding that no corrective measures were taken by the 1st to 3rd appellants to nullify the sale of shares agreement entered between the 1st respondent and Loice Ruvimbo Takaona, when enough evidence was produced to confirm that an extra - ordinary meeting was convened by the company to pass appropriate resolutions for the cancellation of the sale of shares agreement.

3.The lower court misdirected itself on a point of law in finding that there was nothing irregular in the joinder of the 1st and 2nd appellants in their personal capacities when the basis of suing them in their personal capacity was not pleaded or established by the 1st respondent."

In the event these grounds were to succeed, the appellants pray for the success of the appeal with costs and for the decision of the lower court to be set aside and substituted with the dismissal of the application with costs on a higher scale.

SUBMISSIONS BEFORE THIS COURT

At the hearing Mr *Kachere* for the appellants abandoned ground number 3 on mis-joinder of parties. He persisted with grounds 1 and 2.

The central issue before the lower court was whether or not the agreement for the sale of shares (the agreement) between Mavetera and Takaona was valid. The onus was on Matevere to prove on a balance of probabilities that the agreement was valid. The court ruled in his favour and this court has a duty to look at the lower court's findings and reasons in support, *visa-vis* the grounds of appeal challenging the findings.

Mr *Kachere* argued that the agreement was a nullity and for that reason the application for rectification ought to have failed. For this stance, he referred to the evidence which he said was placed before the lower court. Reference was made to the articles of association to support the argument that prior consent by the other shareholders was required. Counsel was at pain to demonstrate a clear provision which required prior written consent by the other shareholders before one could sale one's shares. He kept on wondering from one clause to the other. In particular, he referred the court to clauses 4 (a) and 4 (b). When he realised their inadequacy, he jumped to clause 3 (b) which too could not clothe him with the comfort he wanted. He ended up throwing the court to the generality of clauses 3 (b) to 3 (h). In the end, we were not persuaded with this erratic search for evidence to support his line of argument.

However, despite such failure, the fact of the matter remains that it is not disputed that prior consent was a requirement for the validity of the agreement. This position is common to the parties and cannot otherwise, for the first time, be raised and argued in this court as was raised by Mr *Mutima*.

The case of *Muparutsa* v *Muparutsa* & Ors HH 688/16 relied upon by Mr *Kachere* supports the undisputed fact that rectification is preceded by title to be on the register. It is this title which the lower court ruled in favour of Mavetera, which has become subject of this appeal.

Mr *Kachere* said the lower court misdirected itself by the failure to decide on the legality of the agreement or otherwise. We do not think so, because the mere fact that the court granted the application means it found that the agreement was valid. It is the reasons behind this finding which is either right or wrong. If it is found to be right, then the court's decision will be confirmed and if it is wrong, it vitiates the decision.

Mr *Kachere* argued that the finding was wrong and he referred us to the judgment. We will come back to his analysis later.

Mr *Mutima* defended the judgment of the lower court. He started with reference to the evidence of Takaona which he said was uncontroverted and as such should be taken as the truth. In this regard he relied on *Fawcett Security Operations* **v** *Director of Customs and Exercise* 1993 (2) ZLR 121 (SC).

Mr *Mutima* also referred the court to the consent by the shareholders who include 1st and 2nd appellants. He argued such consent was not withdrawn though signed after the signing of the agreement. Although Mr *Kachere* said these were not the only shareholders but such were not before the court neither were their evidence placed before the court a quo.

Mr *Mutima* further argued that the agreement between Takaona and Mavetera was voidable and was ratified by the written consent of the directors. This, together with the unchallenged averments by Takaona, justified the lower court to make a finding that the agreement was valid, he further reasoned.

While in the written heads the respondent raised the application of the Tanquard rule, it was never pursued with.

THE LAW

It is trite that an appellate court will not interfere with the decision of the trial court based purely on a finding of fact, unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his/her mind to the question to be decided could have arrived at such a conclusion. See *PF ZAPU* v *Minister of Justice and Parliamentary Affairs*, 1985 (1) ZLR 305 (S).

The test is not whether the appellate court could have come to a different conclusion, but rather whether there was a misdirection on the part of the trial court. In *Barros & Anor* v *Chimphonda* 1999(1) ZLR 58(S) GUBBAY CJ at 62G-63A said:

> " It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court."

In other words, it is not permissible for this court to interfere with the discretionary power vested in the court a quo to grant the application as it did, unless it is shown that it had committed such an irregularity or misdirection, or exercised its discretion so unreasonably or improperly, as to vitiate its decision.

ANALYSIS

What was the lower court's reasons for saying the agreement was valid? Mr *Kachere* was selective in his attack of the judgment. He picked the portion which said even if the agreement was a nullity it cannot be blamed on the applicant. One needs to read the judgment as a whole to extract what were the influencing factors to the conclusion.

A close reading of the judgment will show that it is the uncontroverted evidence of Takaona, the consent document and the events which took place after the agreement was signed which led to the conclusion that the agreement was valid.

It is apparent from the judgment that the court accepted the evidence of Takaona as the truth in that, she sold her shares after the approval of the other shareholders and even thereafter introduced Mavetera to the 1st and 2nd appellants who were also signatories to the consent document. Thereafter, Mavetera had attended some of the board meetings before he was segregated.

We find no merit in the first ground in attacking the discretion of the court in its findings.

The second ground of appeal is a non-event. The mere fact that the appellants say they took action, that on its own is no proof that the agreement was a nullity. There is contrary evidence by Takaona. She introduced Mavetera to the 1st and 2nd appellants in two meetings and the appellants did not protest. Masaka was even appointed to the position of managing director which position Takaona held before she left. Why would they replace her if they still considered her part of the establishment? Mavetera attended some of the board meetings. Appellants signed a consent document. The conduct of the appellants constitute ratification of the agreement. For them to say at the eleventh hour that the agreement was a nullity, it can only be classified as an afterthought.

We find no fault with the factual findings of the court a quo. We see no point to disturb the lower court's decision. The appeal has no merit and must fail.

The costs asked for by the respondent on a higher scale has no justification.

DISPOSITION

The appeal be and is hereby dismissed with costs.

CHILIMBE J ……..agrees

Kachere Legal Practitioners, appellants' legal practitioners
Jiti Law Chambers, 1st respondent's legal practitioners