

REPORTABLE (94)

BUCHWA IRON ORE MINING COMPANY (PVT) LTD
v
(1) SHERIFF OF THE HIGH COURT GWERU N.O (2) OPTIMAX
MINING RESOURCES (PVT) LTD

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAVANGIRA JA & CHIWESHE JA
BULAWAYO: 22 NOVEMBER 2023**

T Magwaliba with *A Mutima*, for the appellant

B Chipadza with *T Madondo*, for the second respondent

No appearance for the first respondent

GWAUNZA DCJ:

[1] This is an appeal against the whole judgment of the High Court Bulawayo, (court *a quo*), handed down on 13 October 2022. The court *a quo* dismissed the appellant's application for the setting aside of the sale by auction, of a stockpile of iron ore fines, on the basis of *actio rei vindicatio*. At the close of submissions, this Court issued an order in these terms;

‘The appeal be and is hereby dismissed with costs’

The court also indicated that full reasons for the order would follow in due course. These are the said reasons.

BACKGROUND FACTS

[2] The appellant is a company duly registered in terms of the laws of Zimbabwe. It is also

a subsidiary of *Zimbabwe Iron and Steel Company (Pvt) Ltd (ZISCO)* which has a 100% shareholding in it. The first respondent is the Sheriff of the High Court at Gweru. The second respondent is a company duly registered in terms of the laws of Zimbabwe.

[3] According to the appellant, in 2009, it engaged the *Minerals Marketing Corporation of Zimbabwe (MMCZ)* to float a tender to sell five million tonnes of iron ore fines (the property) stockpiled at the plant located within its premises. The tender was ultimately awarded to a company known as *NJZ Resources (HK) Limited*, a foreign company, in 2010. After the awarding of the tender, a Memorandum of Agreement “the Memorandum” was entered into among the following parties, in 2013:

- (i) Ministry of Industry and Commerce (“the Ministry”) which was said to be the title holder of the iron ore stock;
- (ii) *NJZ Resources (HK) Limited* as the purchaser;
- (iii) *NJZ Resources Africa (Pvt) Ltd* as the producer and subsidiary of *NJZ Resources (HK) Limited*;
- (iv) Minerals Marketing Corporation of Zimbabwe (“MMCZ”) as the selling agent.¹

[4] Thereafter the company, *NJZ Resources Africa (Pvt) Ltd*, was appointed to facilitate the execution of the agreement between the appellant and *NJZ Resources (HK)Ltd*. *NJZ Resources Africa (Pvt) Ltd* subsequently paid into the appellant’s bank account the sum of USD250 000.00 as a bid bond which became part of the payment for the 5 million tonnes of iron ore fines. The money paid to the appellant was obtained from a bank loan facilitated by *Mr Absolom Sibanda* on behalf of *NJZ*

¹ However, a perusal of the memorandum in question (Annexure ‘AM2’) makes no reference to the Ministry of Trade and Commerce, and in addition cites different parties as the purchaser and producer of the object of the sale.

Resources Africa (Pvt) Ltd. The memorandum was however cancelled as *NJZ Resources (HK) Ltd* failed to satisfy some of the conditions of the agreement.

- [5] In 2016 *Sibanda*, as the judgment creditor, successfully registered an arbitration award against *NJZ Resources Africa*, the judgment debtor, for USD250 000,00. This was under case number HC 12423/15. The facts giving rise to the registration of the arbitration award were that the judgment creditor instituted proceedings against the judgment debtor claiming *inter alia*, repayment of the amount, interest and bank charges on the loan that the judgment creditor obtained for the judgment creditor's benefit. In execution of these instructions the first respondent attached the iron ore fines stockpile (the property) and sold it to the second respondent. The sale in execution of the property that was attached, was advertised in the local newspaper.
- [6] The sale thereafter took place *in situ* on 26 November 2016, and the proceeds were remitted to the judgment creditor's legal practitioner in satisfaction of the debt. During the process of execution, the first respondent did not receive any interpleader claims relating to the sale, nor was such sale stayed through any other legal challenge.
- [7] On 26 February 2021, some four years or so later, the appellant addressed a letter to the first respondent indicating an interest in the property that was attached and sold in execution to the second respondent. The appellant averred that it was the owner of such property and that it was not a party in case number HC 12423/15. It contended that the property was sold in error on the basis of a mistaken belief that it belonged to the judgment debtor. Against this background the appellant, on 10 September 2021, then launched an application in the court *a quo*, seeking the

setting aside of the Sheriff's sale on the basis of *actio rei vindicatio*.

[8] The appellant contended that it was the owner of the property on the basis that in the Memorandum in point, the appellant was described as the 'previous owner' of the iron ore stockpile. The appellant contended that this was because it had temporarily passed ownership thereof to the Ministry of Industry and Commerce ('the Ministry') for the sole purpose of selling the products to international customers. The appellant submitted that it engaged the MMCZ to sell the iron ore fines on its behalf because it was under sanctions and could not access the international market. The appellant also submitted that since the agreement failed to go through, ownership of the iron ore fines stockpiled at the plant reverted to it by operation of the law.

[9] The second respondent opposed the application on the basis that the appellant was not the owner of the property and had no *locus* at law to institute proceedings to recover it. It submitted that the owner of the property was the Ministry, (through MMCZ) which transferred the property to the judgment debtor. The property was then sold in execution to the second respondent. It was also the second respondent's submission that the appellant failed to prove ownership of the property, nor did it prove that such property did not belong to the judgment debtor. The appellant, averred the second respondent, also failed to demonstrate that the property was undervalued.

[10] On the date of hearing, the second respondent raised a number of preliminary objections.

These were that;

- (a) the application was not properly before the court as it did not comply with the rules of court,
- (ii) the application was filed out of time and therefore had prescribed,
- (iii) there were material disputes of facts which could not be resolved on the papers, and

(iv) there was non-joinder of interested parties.

The second respondent however abandoned the preliminary point that the application was not properly before the court and no further reference to it was made.

[11] Concerning prescription, the court *a quo* held that there was no evidence that the appellant became aware of the identity of the debtor before 12 April 2021. It also held that there was no evidence that the appellant became aware of the facts from which the cause of action arose, before February 2021. The court further held that there was no evidence from which the appellant could be deemed to have had knowledge of the identity of the second respondent and of the facts from which the cause of action arose before the dates contended by the appellant. There was also no evidence that the complete set of facts necessary for the appellant to institute the application were known to it before February 2021. The court therefore found that the second respondent had not discharged the *onus* of showing that the matter had prescribed. Accordingly, the preliminary point on prescription was dismissed.

[12] With regard to the second point *in limine*, on material disputes of facts, the court *a quo* held that a dispute of fact arises where the court is left in a state of reasonable doubt as to which course to take in resolving a matter. Further, that the documentary evidence before it was clear and unambiguous. Taking a robust and commonsense approach, the court came to the conclusion that there were no material disputes of fact in respect of the ownership of the property.

[13] On the appellant's alleged lack of *locus standi* in the matter, the court *a quo* held that the issue of whether the appellant was the owner of the disputed property turned on the merits

of the matter. It further held that the issue of ownership could not be decided as a preliminary point for the simple reason that it was the anchor of the appellant's case. It was the court's position that it was unthinkable that the appellant could be said not to have *locus standi* in a matter where it claimed ownership of the property attached and sold by the Sheriff. The court subsequently held that whether the claim succeeded or not was not the issue. The issue, rather, was that the appellant had a direct and substantial interest in the matter. The preliminary point was therefore found to have no merit and was dismissed.

[14] In relation to the point *in limine* on non-joinder, the second respondent argued that the non-joinder of the Ministry of Industry & Commerce, *NJZ Resources Africa*, *NJZ Resources Ltd* and MMCZ was fatal to the application. The appellant on the other hand contended that the non-joinder of these parties was inconsequential to the relief sought in the application. The court held that the test for joinder was whether or not a party had a "direct and substantial interest" in the subject matter in dispute, that is, a legal interest that may be prejudicially affected by the judgment of the court. The court held further, that while the parties mentioned did have an interest in the subject matter of the litigation, it was still able to determine the issues or questions in dispute in so far as they affected the rights and interests of the persons who are parties to the application. Accordingly, the point was held to be without merit and dismissed.

[15] On the merits, the court *a quo* found that the appellant was not the owner of the property as no evidence had been shown of the averred temporary passing of its ownership, to the Ministry. In the court's view the reasons, whatever they were, for passing ownership of the property to the Ministry, were of no moment. The court also held that in any case, the applicant ceased to be the owner of the property when it passed ownership to the

Ministry. Further, that even if the memorandum was cancelled, the ownership of the property would not have reverted to the appellant, because it was not the last owner before the memorandum was signed. The court *a quo* also held that it would be contrary to the notions of justice and fairness to rescind and set aside the sale when the appellant had not shown by acceptable evidence that it was the owner of the property in question. Further, that in the circumstances of the particular case, it would be unfair to set aside the sale when the second respondent acquired the property for value.

[16] On the issue of sanctions busting, the court held that this was not borne out by any of the evidence on record, a circumstance that reduced it to no more than an *ipse dixit* of the appellant. For that reason the court determined that it would not consider whether the issue of sanctions avoidance, if proved, would justify the claim by the appellant to ownership of the property.

The court in the result, dismissed the application.

[17] Aggrieved by the decision of the court *a quo*, the appellant noted this appeal on the following grounds:

1. The court *a quo* erred and misdirected itself in dismissing an application wherein the requirements for *action rei vindicatio* were all satisfied in general and conjunctively.
2. More specifically and by making a finding that the Appellant did not prove that it was the owner of the iron ore in dispute, the court *a quo* erred and misdirected itself.
3. Having accepted that the memorandum of agreement involving the Mineral Marketing Corporation was cancelled, the court *a quo* ought to have made a finding that the *status quo ante* was restored.

4. The court *a quo* erred and misdirected itself in finding that the Appellant sought an order of rescission of a default judgment when in fact and at law it sought the *rei vindicatio* of its property in terms of common law.
5. The court *a quo* erred and misdirected itself in making a finding that there was never a temporary passing of transfer of rights from the applicant to a third party despite the evidence presented by the appellant *a quo*.
6. The court *a quo* committed a gross misdirection and irrationality which must be interfered with when it erred on the facts in that the appellant was never the owner of iron ore in dispute.
7. The appellant in the result seeks the following relief ;
 - i) that the appeal be allowed with costs
 - ii) that the judgment of the court *a quo* be set aside and in its place and stead be substituted with the following:
 1. The application be and is hereby granted on the following terms:

That the sale in execution of iron ore fines stockpiles at Mukwakwe Plant Site 338 Mberengwa in Midlands Province done by the first respondent in execution of court under case number HC 12423-15 be and is hereby set aside.
 2. The second respondent pays the costs of suit on a higher scale.

PROCEEDINGS BEFORE THIS COURT

[18] Before this Court, both the appellant and the second respondent expressed the view that the sole issue for determination, which would entitle the appellant to the relief that it craved, was whether or not it was the owner of the property in dispute.

[19] APPELLANT'S SUBMISSIONS

In support of its contention that indeed it was the owner of the property, the appellant contends that sufficient evidence to prove such ownership and entitle it to a claim based on *actio rei vindicatio*, had been placed before the court *a quo* and

that the court therefore erred by finding otherwise. The evidence alluded to, the appellant averred, included;

- a) the fact that the property in question was situated at Mukwakwe Plant site 338, which belonged to the appellant;
- b) that the MMCZ as the authority responsible for the selling of minerals in the country, was aware of this fact, as demonstrated by its email (annexure 'AM4') to the effect that all applications for export license for the iron ore fines would be first referred to the appellant for approval;
- c) that the Preamble to annexure 'AM2' in the record of proceedings referred to the appellant as the 'previous owner' of the property, only because it had 'temporarily' passed ownership of the property to the Ministry for the sole purpose of selling its products to 'the international customers.' This was because the appellant was under sanctions and could not access such markets;
- d) that accordingly, the arrangement by which the property was 'temporarily' transferred to the Ministry amounted to a simulated agreement which did not equate to an intention by the parties to permanently divest it of ownership thereof;
- e) that paragraph A of annexure 'AM2' made it 'clear' that the iron ore fines were being purchased from the appellant;
- f) that by operation of the law, when the agreement of sale failed to sail through, it was the appellant which paid back the purchase price, a circumstance that meant that ownership of the iron ore fines reverted to the appellant.

[20] The appellant further cited case law² as authority for the proposition that where simulated agreements become the subject of a legal dispute, the court looks at the nature of the transaction to ascertain the true intention of the parties. It contended that *in casu* the property was only temporarily (and not permanently) transferred to the Ministry to

² CSARS v NWK (2010) ZASCA 168; Erf 3183/1 *Lady Smith (Pvt) Ltd v CIR* 1996 (3) SA 942 (A) at 953A

facilitate the sale thereof by the latter, without the yoke of sanctions under which the appellant laboured. Implicitly therefore the appellant's argument was that, notwithstanding the temporary transfer of ownership to the Ministry, the two parties intended for the appellant to remain the true owner of the property.

[21] **SECOND RESPONDENT'S SUBMISSIONS**

The second respondent disputes the averred ownership of the property by the appellant, any entitlement to such property by the appellant on the basis of *actio rei vindicatio*, as well as the latter's submission that it had placed before the court *a quo*, evidence proving such ownership. To the contrary, contends the second respondent, the appellant had admitted in its founding papers and during pleadings, that at the time the sale was concluded, it had transferred ownership thereto to the Ministry. If that was the case, the second respondent argues, the Ministry was therefore within its rights as an owner, to sell the property in question. Citing a number of authorities³, the second respondent further contends that the appellant's case should accordingly 'stand or fall' on the basis of its founding papers.

[22] The second respondent further pointed to the fact that the appellant cited non-existent portions of Annexure AM2, in support of its averments that it had placed before the court *a quo* sufficient evidence to prove its ownership of the property. The second respondent submitted in particular, that the entities that the appellant listed as parties to annexure 'AM2', were clearly not those reflected in the annexure. Further to that and contrary to what the appellant submitted, nowhere in annexure 'AM2' was mention made of the appellant being the 'previous owner' of the property. Accordingly, contends the

³ Among others, *Zimbabwe Posts (Pvt Ltd) v Communication and Allied Services Union* 2016 (1) ZLR 10 (S); Herbstein and Van Winsen's *The Civil Practice of Superior Courts in South Africa* 3rd ed, at pg 8;

second respondent, in the absence of any documentary or other proof of ownership of the property by the appellant, the court *a quo* could not be faulted for finding that the appellant had failed to place before the court any evidence that it owned the property in question.

ISSUE FOR DETERMINATION

[23] As the parties correctly agreed, only one issue presents itself for determination and this is:-

Whether or not the court *a quo* erred in finding that the appellant was not the owner of the property.

APPLICATION OF THE LAW TO THE FACTS

[24] The appellant in its first ground of appeal submits that the court *a quo* erred and misdirected itself in dismissing an application wherein the requirements for '*actio rei vindicatio*' (*sic*) had been met 'in general and conjunctively'.

[25] The requirements for an *actio rei vindicatio* were set out in *Chenga v Chikadaya & Ors* SC 7/13 at pg 7 as follows:-

The *actio rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are two essential elements of the remedy that require to be proved. These are firstly, ***proof of ownership and secondly, possession of the property by another person***. Once the two requirements are met, the *onus* shifts to the respondent to justify his occupation." (*emphasis is mine*)

[26] The appellant, on the basis of this authority, bore the *onus* of putting before the court *a quo*, concrete and verifiable evidence proving that it was indeed the owner of the property in dispute. The court finds, on the evidence before it, that the appellant failed to discharge this *onus*. This is because the totality of the evidence it adduced in its bid to persuade the court that it was the true owner of the property, was characterized by a

spectacular lack of any form of proof or independent substantiation.

[27] Firstly, the appellant before both the court *a quo* and this Court, expressly admitted that at the time of the auction sale in question, it had ‘temporarily’ transferred ownership of the property, to the Ministry, *albeit* only for strategic reasons. It stated as follows in its founding affidavit:-

“Paragraph A of the preamble of Annexure AM2 is clear that ownership of the iron ore fines were (*sic*) transferred from the Applicant to the Ministry of Industry and Commerce during the export negotiations.” And later on;

‘In terms of annexure AM2 the applicant was described as the previous owner of the iron ore stockpile. The Applicant was described as such **because it had temporarily passed ownership of the iron ore fines to the Ministry of Industry and Commerce** for sole purpose of selling its products to the international customers.’ (*my emphasis*)

[28] Annexure AM2, is a document pertinent to the transactions leading to the sale of the property by auction. As the second respondent correctly submitted, that annexure contained no such averments. However, the court finds that the appellant’s reliance on the contents of a document not before the court, does not detract from the fact that it made the admissions in question. The court *a quo*, in the absence of an explanation as to why the Ministry as an owner, *albeit* a temporary one as the appellant averred, could not properly sell the property, cannot be blamed for finding that the appellant had failed to prove its ownership of the property.

One may however wonder why the appellant, having been alerted to the fact that it was mistakenly relying on a document that was clearly not the one that it meant to rely on, did not take steps to correct that damning error by attaching the correct document. This was particularly so, since it meant to rely heavily on the document;

It is pertinent to note in this respect that the real Annexure AM2 on record cites MMCZ as the ‘selling agent’ who, in terms of paragraph 2 thereof, agreed to sell the same property at issue *in casu*, ‘on behalf of the producer.’ A certain Vusani Grey Diamond Sibanda, is cited as ‘the producer’.

[29] Rather than regard its admissions on having been ‘temporarily’ divested of ownership of the property, as negating its claim to such ownership, the appellant quite paradoxically, in the court’s view, sought to persuade the court to accept them as proof that it owned the property. It also does not escape notice that the alleged ‘temporary’ transfer of the property to the Ministry was not borne out by any other evidence. Nor were the terms of such transfer disclosed. In this respect, all that the appellant stated in its heads of argument was;

‘The appellant claimed ownership of the property **based on an express allegation of an intricate sanctions bursting (*sic*) mechanism.** (*my emphasis*)

Tellingly the appellant therefore did not contend that its claim to ownership was based on any concrete proof in the form of evidence like a written agreement or even a supporting affidavit.

[30] Secondly, the appellant sought to rely on other documents outside of annexure ‘AM2’, that contained averments not directly speaking to its alleged ownership of the property, but which the appellant nevertheless implored the court to interpret as doing so. The appellant, as an example, cited Annexure AM4, an email from MMCZ, and stated as follows in its founding affidavit;

‘In Annexure AM4, MMCZ indicated that all applications for export licence for the iron ore fines will be first referred to the Applicant for approval. This was because MMCZ as the authority responsible for the selling of minerals in the country, was aware that iron ore fines stockpiles situate at Mukwakwe Plant site 338 belongs to the Applicant’

A look at the Annexure AM4 does not show that the MMCZ made a direct assertion that the property belonged to the Appellant. Nor did MMCZ depose to an affidavit making the same assertion. The appellant, it seems was calling upon the court to draw from the MMCZ email, the inference that the appellant was the owner of the iron ore stockpiles in question, and further to that, elevate such inference to the status of evidence that it owned the property in dispute. Clearly, the court could not do so.

[31] Thirdly and more importantly, the appellant did not join the MMCZ, or the Ministry, to the proceedings. Neither did it join the other players to the transaction that it listed and (wrongly) referred to as parties to Annexure AM2. These entities, according to the appellant's founding and other documents, played different roles in the process leading to the sale of the property to the second respondent, and beyond. The appellant's evidence was that MMCZ and/or the Ministry, were party to what it termed a 'simulated' agreement aimed at 'sanctions busting', in terms of which it allegedly 'temporarily transferred' ownership of the property, to the Ministry. The appellant also cited the contents of an email by MMCZ and sought to persuade the court to accept its own interpretation of the import of the email. MMCZ, had it been cited as a party to the proceedings, would surely have been best placed to interpret the email that it had itself authored. It was also the appellant's evidence that *NJZ Resources Africa (Pvt) Ltd* subsequently paid into the appellant's bank account the sum of USD250 000.00 as a 'bid bond' which became part of the payment for the 5 million tonnes of iron ore fines. The appellant further submitted that it later paid this amount back, a circumstance it considered as having restored ownership of the property back to it. *NJZ Resources Africa (Pvt) Ltd* not having been cited in these proceedings, the appellants' assertions in this respect remained unsubstantiated.

[32] All or some of the entities mentioned above could have filed affidavits offering substantiation of the various assertions of the appellant in support of its claim to being the owner of the disputed property. The appellant, however, did not see fit to join any one of them to the proceedings, having taken the view that such joinder was neither material nor pertinent to the relief that it was seeking. So strong was the appellant's conviction in this respect that it vehemently opposed, on the basis of a number of case authorities, the point *in limine* raised by the second respondent that such non-joinder was fatal to the application before the court *a quo*.

[33] The appellant thus seemed to have lost sight of the fact that in any civil matter brought before the court, the imperative to adduce evidence to prove its case on a balance of probabilities is paramount. As the court *a quo* correctly stated, one cannot prove a case on the basis of one's mere say so, or *ipse dixit*.

[34] The upshot of the foregoing is that the applicant *a quo* failed to adduce sufficient evidence, properly substantiated, to prove a case for the relief that it sought. The law is clear on the consequences attaching to the adduction of insufficient or poor evidence before the court. In the recent case of *Dube v Murehwa SC 68/21 at p10*, the court aptly commented as follows on the impact of failure to adduce adequate evidence to one's claims;

'The law is clear that bald and unsubstantiated allegations do not establish a litigant's purported or announced position. See *Akhtar v Minister of Public Commission SC 173/97*. The court *a quo*'s decision cannot therefore be faulted because the evidence placed before it established on a balance of probabilities that the first respondent had rights emanating from the lease agreement with the second respondent whilst the appellant only made bare allegations which were not sufficient to prove the existence of any material disputes of facts (*my emphasis*).

In a similar vein, in *VanHoogstraten v Nelomwe SC 4/20* it was stated as follows at

pages 6 – 7:

‘The quality of the appellant’s evidence was so poor that the trial court cannot be faulted for rejecting it and embracing that of the respondents. The appellant has himself to thank for that outcome having done nothing to endear himself in the eyes of the court’

[35] When these *dicta* are applied to the circumstances of the case at hand, no doubt is left as to the correctness of the finding by the court *a quo* that the appellant failed to prove, on the basis of *actio rei vindicatio*, that it was the owner of the disputed property and therefore, entitled to the relief that it sought.

The appeal therefore lacked merit and could not be upheld. Costs followed the cause.

DISPOSITION

[36] The appellant failed to prove the case that it brought before the court, primarily due to the lack of sufficient and credible evidence to support its claim to ownership of the disputed property. Hence the court’s order to the following effect;

“The appeal be and is hereby dismissed with costs”

MAVANGIRA JA : **I agree**

CHIWESHE JA : **I agree**

Jiti Law Chambers, appellant’s legal practitioners

B Chipadza Law Chambers, second respondents’ legal practitioners