REPORTABLE ZLR (8)

Judgment No. SC 13/07
Civil Appeal No. 149/06

NGATIBATANEYI (PRIVATE) LIMITED v (1) TOBIAS VENGANAYI MOYO (2) THE REGISTRAR OF DEEDS N.O.

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, MARCH 5 & MAY 29, 2007

U Sakhe, for the appellant

C. Kwaramba, for the first respondent

No appearance for the second respondent

MALABA JA: This is an appeal from an order of the High Court dated 29 May 2006 granted with costs directing the appellant company to have all necessary documents signed on its behalf to effect transfer of stand 579 Bluff Hill Township 11 of Lot 1 of Lot 8A Bluff Hill into the first respondent's name, failing which the Deputy Sheriff be authorized and directed to sign all such documents and do all such things as are necessary to effect transfer of the said property to the first respondent.

The appellant is a limited liability company incorporated on 7 April 1989 in terms of the laws of Zimbabwe. It has two shareholders who are its directors. These are Florence Hlatywayo and Judith Paradzai, who is currently ordinarily resident in the United States of America where she is pursuing her studies. Florence Hlatywayo has been the active director of the company. She is also its Secretary.

The appellant owns stand 579 Bluff Hill Township 11 of Lot 1 of lot 8A Bluff Hill which is a vacant piece of land ("the stand"). The stand is the only asset of the appellant as it does not seem to have carried on any business since incorporation.

On 8 March 2005, and apparently without the consent of the other shareholder, Florence Hlatywayo signed a mandate instructing Foresthill Real Estate ("the Estate agent") to sell the stand on behalf of the appellant. On 20 April 2005 whilst purporting to be representing the appellant she signed an agreement of sale in terms of which the appellant purported to sell the stand to the first respondent for $125 million payable upon transfer by means of a loan obtained from Intermarket Building Society ("the Building Society") against a first mortgage bond on the property.

The agreement of sale indicated that the seller of the stand was the appellant, represented by F. Hlatywayo in her capacity as secretary. Words to the effect that she was "being duly authorized hereto by resolution of an extraordinary board meeting of Directors of the said company held at Harare on 8th March 2005" followed.

The first respondent successfully applied to the building society for the loan. Before transfer could take place, Florence Hlatywayo wrote to the estate agent on 15 September canceling the agreement of sale on the ground that, when she purported to enter into the agreement on behalf of the appellant, she had not obtained the consent of the co-shareholder who had since refused to grant the consent to have the stand sold.

The first respondent rejected the repudiation of the contract by the appellant. On 11 November 2005 he made an application to the High Court for an order directing the appellant to transfer the stand into his name against tender of the purchase price and transfer fees. He indicated in the founding affidavit that Florence Hlatywayo had, as a director of the appellant and its secretary represented to him that she had the authority to sell the stand on behalf of the company. He made specific reference to the words in the agreement of sale to the effect that she had been "duly authorized hereto by resolution of an extraordinary board meeting of Directors of the said company held at

Harare on 8th March 2005". He said that he had acted on the representation of authority to sell by the director of the company. The appellant was therefore estopped from denying that Florence Hlatywayo had authority to sell the stand on its behalf.

He relied on s 12(a) of the Companies Act [*Cap. 24:03*] ("the Act") which provides that:

> "**12 Presumption of regularity**
>
> Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth –
>
> (a) that the company's internal regulations have been duly complied with."

The appellant opposed the application. It relied on the affidavits of the two shareholders. Florence Hlatywayo averred in the opposing affidavit that, at the time she signed the agreement of sale, she had not been authorized by the company in a general meeting by a resolution to sale the stand. She said no general meeting of shareholders had taken place. No meeting of the board of directors took place on 8 March 2005. She said she did not know where the person who drafted the agreement of sale got the idea that she had been authorized by a resolution of a meeting of the board of directors to sell the stand.

Judith Paradzai, in the supporting affidavit, denied ever attending a general meeting of shareholders where approval of the proposed sale was granted to Florence Hlatywayo by a resolution to sell the stand to the first respondent. She averred that she did not want the stand sold.

The appellant relied on s 183 of the Act which provides that:

> "**183 Prohibition of allotment of shares to directors save on same terms as to all members, and restriction on sale of undertakings by directors**

> (1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting –
>
> (a) …
>
> (b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.
>
> (2) No resolution of the company shall be effective as approving … of a disposal in terms of paragraph (b) of subsection (1) unless it authorizes, in terms, the specific transaction proposed by the directors."

The court *a quo* proceeded on the basis that it was common cause that there was no resolution passed by the appellant at a general meeting authorizing the sale of the stand to the first respondent on the terms stipulated in the agreement, as required by s 183 of the Act. The arguments before the court *a quo* centred on the question whether s 12(a) of the Act, which embodies the common law principles of estoppel enunciated in the case of *Royal British Bank v Turquand* 1856) 119 E.R. 886 (generally known as the Turquand Rule), governed the determination whether the transaction had legal effect and was enforceable. The contention advanced on behalf of the first respondent was that s 12(a) was applicable to the determination of the validity and enforceability of the transaction. It was argued that s 183 was a part of the internal regulations of the company. It was contended on behalf of the appellant that s 183 was not part of the internal regulations of the company. Its requirements override those in s 12(a) where the transaction involved the sale of the whole or a greater part of the assets of a company. The argument was that s 183 governed the determination of the issue whether the purported sale of the stand to the first respondent by one of the appellant's directors was valid. As it was common cause that no resolution was passed by the company in a general meeting approving the disposal of the stand in terms of the purported agreement, the transaction was of no legal effect as it was concluded in contravention of s 183 of the Act.

The learned Judge accepted the argument that s 183 was part of the internal regulations of the company. He held that s 12(a) was intended to protect the

rights of third parties dealing with companies. He also found as a fact that Florence Hlatywayo, in her capacity as a director and secretary of the company had made the representation to the first respondent through the statement recorded in the agreement of sale to the effect that she had been authorized by a meeting of a board of directors on 8 March 2005 to dispose of the stand on behalf of the appellant. The first respondent was on the basis of s 12(a) of the Act, entitled to assume that the company had granted her the authority to sell the stand. He determined that the transaction was valid and enforceable.

The first question to be decided on appeal is whether the learned Judge was correct in holding that s 183 is part of the internal regulations of the company subservient to s 12(a) of the Act. The learned Judge misdirected himself on this point. If s 183 formed part of the internal regulations of the company giving rise to the inference under s 12(a) of the Act by anyone dealing with the company, that its requirements had been complied with, there would have been no need for the legislature to open its provisions with the words, "notwithstanding anything in the articles…". The words can only mean that, notwithstanding the authority given to directors of a company by articles of association which ordinarily contain the internal regulations of a company the directors would have no power to dispose of the whole or greater part of the assets of the company without first complying with the mandatory requirements of s 183. In other words, the disposal of the whole or the greater parts of the assets of a company is not a function falling within the authority customarily given to directors under internal regulations. That authority can only be obtained from a general meeting of the company in the form of a resolution approving in its terms the specific transaction.

The intention behind s 183 was to protect the assets of a company from disposal by directors without the knowledge and consent of the shareholders. Section 183 takes the disposal by directors without the knowledge and consent of the shareholders. Section 183 places the disposal of the whole or greater part of the assets of the company outside the ambit of the application of the Turquand rule embodied in s 12 of the Act. I accept the submission by Mr *Sakhe* for the appellant that a construction which renders s 183 part of the internal regulations of a company and therefore

subservient to s 12(a) of the Act would defeat the object of the legislature in enacting s 183 and promote illegal transactions in cases where the express authority of shareholders at a general meeting required to have been given to directors in the specific form prescribed in s 183 had not been obtained. The effect of upholding the application of s 12(a) in the circumstances would be to render enforceable that which s 183 has in the public interest declared illegal or invalid.

In this case it was common cause that no general meeting of the shareholders was held at which a resolution authorizing Florence Hlatywayo to dispose of the stand to the first respondent in the terms of the agreement of sale was passed. The other shareholder was in the United States of America at the time the transaction was entered into between Florence Hlatywayo purportedly representing the appellant and the first respondent. As the subject matter of the transaction was the disposal of the whole asset of the appellant in the form of the stand it was obligatory for Florence Hlatywayo to obtain the approval of the other shareholder. There was no approval by the other shareholder of the transaction before it was entered into by Florence Hlatywayo nor was there a ratification of it after it had been entered into. Even if it were accepted by the learned Judge that Florence Hlatywayo represented in the statement recorded in the agreement of sale that she had been authorized by a board of directors at a meeting of 8 March 2005 to sell the property on behalf of the appellant, that decision would not constitute valid authority for the purposes of s 183. There was no suggestion that Judith Paradzai was present at that meeting.

It is clear to me that the agreement entered into by Florence Hlatywayo on behalf of the appellant with the first respondent was in contravention of s 183 of the Act. It had no legal effect. Section 12(a) of the Act could not save the transaction. See *Farren v The Sun Service SA Photo Trip Management (Pty) Ltd* [2003] ALL SA 406 (C).

The appeal succeeds with costs. The judgment of the court *a quo* is set aside and in its place substituted the following order -

"It is ordered that the application be dismissed with costs."

SANDURA JA: I agree.

CHEDA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, first respondent's legal practitioners