

NEW CORNER EMPORIUM (PVT) LTD
versus
AVERY SPORTS BAR
and
A MUZEYA

HIGH COURT OF ZIMBABWE
TAKUVA & WAMAMBO JJ
HARARE 9 May & 30 July 2024

Civil Appeal

A. Mugiya, for the appellant
C. Chipore, for the respondent

WAMAMBO J: This matter is a civil appeal against the whole judgment of the Magistrate sitting at Harare. Before the trial Magistrate, the plaintiff was the appellant herein. The respondents herein were the defendants.

The plaintiffs sought to evict the defendants from Patric House, Nelson Mandela/Fifth Street Harare. Defendants were given three months on 10 October 2022 to leave the premises.

In the Magistrate's judgment he refers to the issues for trial as follows:

1. "Eviction of the defendants by plaintiff.
2. Whether or not there was a valid resolution or mandate by the plaintiff to renovate the buildings and institute the proceedings.
3. Whether or not first defendant was a juristic person capable of being sued.
4. Whether the matter is *lis pendens*.
5. Costs and scale thereof."

The trial Magistrate for reasons given dismissed the claim for eviction and ancillary relief and ordered that each party shall bear its own costs. Dissatisfied with this outcome the appellant noted an appeal with this court. This is the appeal before us.

The grounds of appeal as raised read as follows:

1. "The court *a quo* erred in finding as a matter of fact that the company resolution was invalid because every Director had made their own resolution contrary to the evidence led which showed that the meeting culminating in the resolution was attended, and passed by 3 Directors.
2. The court *a quo* erred in concluding that there was no evidence of the company resolution because it was not produced as an exhibit, when the company resolution was before the court having been properly discovered and produced.

3. The court a *quo* erred in casting an onus on the plaintiff to prove that second defendant had been appointed as a Director fraudulently when this was not an issue for trial.
4. The court a *quo* misdirected itself as a matter of fact in concluding that the company resolution was invalid because there were squabbles on the Board of Directors when it was not an issue for trial and all evidence pointed out that at the time of the Board Meeting the other Directors were not aware of the existence of the second defendant as a Director.
5. The learned Magistrate misdirected herself in holding *lis pendens* in circumstances where the cause of action was different from the other cases.
6. The court a *quo* further misdirected itself on relying on provisions of a repealed Act of Parliament, the Companies Act.”

I will delve into the grounds of appeal presently.

Ground One

I will start off with the Magistrate’s finding on this ground. It was the Magistrate’s findings that:

The plaintiff did not file closing submissions, although defendants did. A bundle of exhibits was filed but no exhibit was tendered. The resolution was defective as each Director filed his own resolution. The Magistrate referred to the cases of *Madzivire & Ors v Zvorwadza & Ors*, *Salomon v Salomon & Co Ltd* (1897) AC 22 (HL), *Dahaw (Private) Limited and Another v Willdale Limited & 5 Others* (235 of 2022) (2022) ZWHHC 235 (6 April 2022).

The trial court pronounced itself further as follows:

“Because the aspect of the resolution not being described as valid now that defendant has shown papers that he is a director dating back 2005 the court cannot conclude that the plaintiff witnesses acted on behalf of New Corner Emporium (Pvt) Ltd. Currently there are now directorship squabbles and the defendant availed official documents from the Registrar of Companies. The original resolution made on the conference call and was never tendered as an exhibit (S/c). Two directors came to speak about it.”

This portion of the Magistrate’s judgment speaks to a number of the grounds of appeal other than ground one. It also speaks to grounds 2, 3 and 4. This entails that if the Magistrate’s findings are correct then those 4 grounds of appeal fall by the wayside. I will start off by discussing whether or not a resolution was produced in the course of the trial. The Magistrate was of the firm view that it was not tendered as an exhibit.

Appellant on the other hand is of the firm view that it was tendered as an exhibit. Respondent avers that the resolution was never tendered as an exhibit as per the trial Magistrate’s finding. To resolve this impasse, I will refer to the record of proceedings. One would expect the plaintiffs’ witnesses to produce the resolution. Agamennon Patrickios was the first witness for the plaintiff. He was referred to a number of documents but did not produce any. The second witness Dennis Patrikios also testified. He also did not produce any resolution.

That means that the Magistrate was correct in holding that the resolution was never produced during the trial, thus ground two is dismissed as it is not borne by the record. There being no resolution produced the Magistrate was correct in his findings. His findings are mainly based on the fact that the respondent (herein) who was the defendant in the trial had proved that he was a Director yet the testimony does not relate to him being a signatory to the resolution passed.

The Magistrate found second defendant (respondent herein) to be a director as he produced documentation to that effect.

The second respondent herein who was second defendant in the trial *a quo* also testified. He produced exhibits which are marked D1, D2 and D3 which in effect reflect that he has a 40% shareholding in the appellant company. The finding that second respondent herein was a Director was proven by the second respondent himself through tendering of exhibits. There is no reverse onus cast on the appellants herein to prove that second respondent had been appointed fraudulently.

The issue of fraud was never proven in the circumstances. That the learned Magistrate may have mentioned it does not change the complexion of the matter so the same applies to reference to the Companies Act which was not decisive of the matter. In the circumstances I find grounds 1, 2, 3, 4 and 6 as unmeritorious and I dismiss them.

Ground 5 appears different in that it is not woven of the same cloth as the other grounds. Ground 5 speaks to the issue of *lis pendens*. The Magistrate discussed the issue raised and referred to case law. The court found that cases 698/23, 809/22 and 812/22 are identical. I note here that the plea of *lis pendens* is in any case is not an absolute bar to the court to deal with the latter case.

I am buttressed in this view by what CHITAPI J said in *James Ginio v Memash Holdings & 8 Ors* HH 478/21 at page 4 as follows:

“The learned Judge went further to note that the plea of *lis alibe pendens* was not an absolute bar to the court’s discretion to deal with the latter case despite the *lis* being pending in an earlier pending suit. The learned Judge quoted from p 606 of *Herbestein and Van Winsen* text as follows;

“A plea of *lis pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject matter. The court reserves a discretion in the matter even if all the essential of the plea are present and may in spite of that fact consider whether it is more just and equitable or convenient that it (the action against which the special plea is advanced) should be allowed to proceed. It often happens that

the court will decide that the lis which was first commenced should be the one to proceed but that is not an immutable rule.”

In this matter the trial Magistrate clearly was of the view that the matter should proceed. He had a discretion to decide whether it was just and equitable or convenient to proceed with the matter. To that end I find ground 6 equally unmeritorious.

Having found all the raised grounds of appeal unmeritorious the appeal stands to be dismissed. Respondents asked for no costs in their heads of argument or oral submissions. No costs will be ordered against the appellants in the circumstances. An order that each party should bear its own costs is thus just in the circumstances.

It is ordered as follows;

The appeal be and is hereby dismissed with each party bearing its own costs.

WAMAMBO J:

TAKUVA J:**Agrees**

Mugiya Law Chambers, appellant’s legal practitioners
Charamba and Partners, respondent’s legal practitioners