REPORTABLE (50)

ZIMRE PROPERTY INVESTMENTS LIMITED
v
(1) SAINTCOR (PRIVATE) LIMITED t/a V. TRACK (2) JOHN SHUMBA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA *et* GOWORA JA
HARARE, MAY 22, 2015 & DECEMBER 1, 2016

T Mpofu, for the appellant
F Mahere, for the respondents

GARWE JA:

[1] In a judgment handed down in January 2014, the court *a quo* upheld the plea of prescription raised by the respondents and consequently dismissed the claim against the respondents with costs. Against that order, the appellant now appeals to this court.

BACKGOUND

[2] In October 2012, the appellant, as plaintiff, issued summons against both respondents before the High Court, Harare, claiming payment of the sum of $30 094-98 being arrear rentals in respect of the respondents' tenancy of premises known as Shop 5, Zimre Centre, Corner Kwame Nkrumah Avenue and Leopold Takawira Street, Harare. The second respondent had bound himself as surety and co-principal debtor in respect of the first respondent's indebtedness.

[3] In their plea, the respondents, as defendants, raised the defence of prescription. More specifically they averred that, in instituting proceedings on 19 October 2012, more than three years after the debt became due, the claim had become time-barred. The plea was not set down for hearing. Instead the defendants pleaded over to the merits in the same plea.

[4] In its replication, the appellant denied that the claim had prescribed. It averred that the first defendant had, on 22 October 2009, acknowledged the debt and had undertaken to pay the outstanding amount in full by 10 November 2009. There was no rejoinder by the respondents.

[5] In a joint pre-trial conference minute, the parties agreed that the issues requiring determination at trial were (a) whether the plaintiff's claim had prescribed (b) whether the first respondent had breached the lease agreement by failing to pay rental and other costs (c) whether the respondents were liable to pay the sum of US$30,094,98 together with interest and costs of suit (d) whether there had been mutual termination of the agreement between the parties and whether the appellant had unlawfully and unilaterally ejected the respondents from its premises, and (e) whether such conduct had resulted in the respondents suffering damages "in respect of the first respondent's assets and business" and, if so, the quantum thereof.

PROCEEDINGS BEFORE THE COURT A QUO

[6] At the hearing of the matter, the respondents, through their lawyer, sought the leave of the court to deal with the issue of prescription first and lead evidence on it. Despite opposition from the appellant, the court *a quo* decided that the issue of prescription be determined first and thereafter, depending on the outcome, the court would again hear evidence on the remaining issues.

[7] In its judgment, the court *a quo* was of the view that the issue that fell for determination was the authenticity of the letter purportedly written by one Annet Mbedzi on behalf of Saintcor Holdings in October 2009. In this regard it made a number of observations. The letter was not written on any letterhead, unlike in previous correspondence. It reflected the appellant's postal address. The letter was also written on behalf of Saintcor Holdings, a company both parties were agreed does not exist and was not a party to the lease agreement. The letter was addressed to a Mr Muringani but the name had been cancelled in black ink and in its place the name Muringi inserted. Nowhere in the letter is it suggested that Saintcor Holdings was acknowledging indebtedness on behalf of Saintcor (Pvt) Ltd. On a consideration of all these features, the court *a quo* concluded that the letter had not been written on behalf of the first respondent. Consequently the court upheld the plea of prescription and dismissed the plaintiffs claim with costs, hence this appeal.

GROUNDS OF APEPAL

[8] In its grounds of appeal, the appellant has attacked the decision of the court *a quo* on the basis that it:-

(a) erred in fact and at law in holding that the appellant's claim had prescribed;

(b) misdirected itself by holding that the letter that was received by the appellant on 22 October 2012 was not authentic;

(c) misdirected itself by making a finding that the author of the letter that was received by the appellant on 22 October 2009 did not have authority to author the same.

[9] It is apparent from the above grounds that it is the conclusion reached by the court *a quo* that the letter in question had not been written on behalf of the respondent that the appellant is challenging.

PRELIMINARY ISSUES RAISED BY THE RESPONDENTS

[10] In their heads of argument, the respondents raised two points *in limine.* The first was that the judgment of the court *a quo* reflects three different dates as the dates when the judgment was handed down. The date of the judgment reflected in the notice of appeal is at variance with the date appearing *ex facie* the judgment itself and consequently there has been no compliance with r 29 of the Rules of this Court. Secondly, the relief sought is defective as it seeks to substitute the decision of the court *a quo* with one referring the matter back to the court *a quo* itself.

[11] In his response, Mr *Mpofu* drew the attention of the court to a letter from the Registrar of the High Court which states that the *ex-tempore* judgment was handed down on 10 February 2015, which is the date appearing in the notice of appeal. On the prayer, he conceded that the wording was inelegant but argued that the relief sought was clear. He submitted that the inelegance does not invalidate the appeal as ultimately the court will make an order it deems appropriate in the circumstances.

[12] After hearing argument on the two preliminary issues, this court was of the view that the issues be rolled over for determination together with the issues that arise on the merits.

APPELLANT'S SUBMISSIONS ON APPEAL

[13] In both his heads of argument and oral submissions, Mr *Mpofu* raised the following issues. First, that the judgment of the court *a quo* does not derive from the pleadings.

Second, the appellant's cause of action was predicated upon a valid cancellation of the lease agreement. Such cancellation was effected on 18 November 2009 and the cause of action would have accrued on that day. Therefore when the appellant issued summons on 22 October 2012, the debt had not prescribed. Third, that the appellant would have had no reason to cause the letter of 22 October 2012 to be generated. Once it had accepted that the letter had not been generated by the appellant, the court should have concluded that the letter had indeed been authored by the respondents. Fourth, that the second respondent knew how to contact Annet Mbedzi, the author of the letter in question. Annet Mbedzi had been involved in the goings-on at the premises of the first respondent, and yet both respondents had not found it proper to call him. Lastly, Mr *Mpofu* submitted that it was improper for the court to have heard evidence piecemeal. Once the plea of prescription had not been set down and the respondent had then proceeded to plead over to the merits, the court should have heard evidence on all the issues and an assessment of the credibility and integrity of the witnesses undertaken only after all the evidence had been led.

RESPONDENTS' SUBMISSIONS ON APPEAL

[14] In response, Ms *Mahere* made the following submissions. First, that what is being attacked by the appellant are findings of fact which cannot be interfered with on appeal in the absence of a finding of irrationality on the part of the trial court. Second, that the court *a quo* was correct in its findings that the letter received by the appellant on 22 October 2009 had not been written by or for the respondents. This is because the appellant had admitted that, by that date, the first respondent had been evicted from the premises, and consequently the first respondent would not have used that address in correspondence with the appellant. Third, that the appellant has not established a lawful basis for the suggestion that the judgment

does not derive from the pleadings as no leave of the court had been sought to advance argument on this ground, contrary to the Rules of this court. In any event, the respondents, in their plea, had placed prescription in issue. Lastly, that the debt did not become due on cancellation since rent was due monthly in advance and therefore the cause of action arose whenever such rental was not paid on due date. The appellant had, in any event, evicted the first respondent in August 2009 for non-payment of rent and the "debt" included outstanding rentals up to the date of such eviction.

ISSUES FOR DETERMINATION

[15] It is clear from the above that a number of issues arise before this court. These will be dealt with in turn.

WHETHER THE NOTICE OF APPEAL REFELECTS A WRONG DATE

[16] The judgment of the court *a quo*, cited as HH 25/15, reflects the date of hearing as 7 February 2014 and the date of handing down as 14 January 2015. The notice of appeal reflects the date of handing down as 10 February 2014. A letter written by the Registrar of the High Court dated 21 May 2015 to the Registrar of the Supreme Court states that the trial judge had confirmed that the *ex-tempore* judgment had in fact been handed down on 10 February 2014.

[17] In the circumstances, the date reflected in the notice of appeal is correct. It is my view, however, that the correction should more properly have been made on the judgment itself rather than through a letter.

WHETHER THE RELIEF SOUGHT IS PROPER

[18] In its prayer, the appellant seeks the following relief:

> "The appellant will pray that the appeal be allowed with costs and that the judgment of the High Court be set aside and substituted in place thereof by an order that:
>
> (1) The respondent's special plea of prescription be and is hereby dismissed with costs at an attorney and client scale; and
>
> (2) The matter be and is hereby referred back to trial on the merits in the High Court before a different judge."

[19] The main thrust of Ms *Mahere's* argument was that the relief is defective because the prayer seeks to refer the matter back to the same court. The High Court cannot make an order remitting a matter to itself.

[20] Mr *Mpofu* has accepted that there is some difficulty with the prayer, which he says is inelegant. He argued however that the relief sough is clear and since it is the court that must ultimately make an order it sees fit, the notice of appeal cannot be said to be invalid on that score alone.

[21] I agree with Ms *Mahere* that para (2) of the prayer is almost meaningless in its present form. However I also agree with Mr *Mpofu* that the relief prayed for is clear. In the event that the appeal succeeds, the appellant seeks an order that the matter be referred for trial on the merits. The suggestion in the prayer that the matter be referred for trial before the High Court is an obvious mistake, one which does not, in my considered opinion, invalidate the entire appeal.

[22] The prayer, in para (1) seeks dismissal of the special plea of prescription. It is clear that in para (2) the relief sought is that the matter be referred to trial on the merits, before a different judge. In the circumstances, I am unable to hold, as urged by Ms *Mahere,* that the relief is so fatally defective as to invalidate the whole appeal.

This preliminary point must also fail.

WHETHER THE COURT A QUO ERRED IN DEALING ONLY WITH THE ISSUE OF PRESCRIPTION

[23] As noted earlier in this judgment, the special plea was not set down for hearing but instead the respondent pleaded over. At the trial, the respondents requested the court to deal with the question of prescription first. Despite protestations by the appellant on the proposed course, the court *a quo* determined that a full trial on the issue of prescription be held and if the plea failed, the court would then hear evidence again and determine the remaining issues referred to it for trial.

[24] The decision by the court *a quo* to split the trial into possibly two was one based on its discretion. I have not found any authority, nor has any been pointed out to me, which suggests that such an approach is wrong. However, my view of the matter is that the approach is undesirable and somewhat irregular. Once a matter is referred to trial on identified issues, it is desirable that all the issues be dealt with at the same time. Witnesses should be called once to give evidence on all issues. The approach adopted by the court in this instance may have the undesirable effect that a witness will be called to give evidence twice in the case and before the same court. This may complicate the determination of issues of credibility and probabilities as the court would have to consider the evidence given by a witness on two different occasions in the same matter.

SUBMISSION BY THE APPELLANT THAT JUDGMENT DOES NOT DERIVE FROM PLEADINGS

[25] Mr *Mpofu,* for the appellant, argued that the judgment of the court *a quo* does not derive from the pleadings. In particular, he drew attention to the allegation in the declaration that the respondents had acknowledged their indebtedness, which acknowledgment the respondents accepted in their plea but which they alleged had

been actuated by duress and undue influence. How, in these circumstances, the court found that there had been no acknowledgment and that the acknowledgment relied upon was fraudulent baffles the mind.

[26] In response, Ms *Mahere* has taken two points. First, that this argument does not flow from any of the grounds of appeal and secondly that, in any event, the judgment does in fact derive from the pleadings.

[27] I agree with Ms *Mahere* in both respects. There are three grounds in appellant's notice of appeal and none of them deal with the submission. Rule 32 (2) of the Rules of this court is clear in this regard. An appellant shall not be heard in support of any ground of appeal nor set out when the appeal was entered, unless leave of the court is first sought and granted. Further in terms of subrule 3, an applicant may apply to amend the grounds of appeal either before or at the hearing of the appeal. This was not done in the present matter. Therefore the appellant cannot be allowed to raise this argument for the first time in heads filed before this court.

[28] I further agree with Ms *Mahere* that, in any event, the judgment does in fact derive from the pleadings. It was the respondents who pleaded prescription. In its replication, the appellant denied that its claim had prescribed and attached thereto a copy of a letter received on 22 October 2009 which the appellant alleged emanated from the respondents. The issue therefore whether the letter of 22 October 2009 had interrupted prescription became a live one. This argument therefore has no merit.

[29] It is also apparent that the appellant may have failed to appreciate that there were several acknowledgments made by the respondents and that there never was a

suggestion that the letter ostensibly written on behalf of the first respondent on 22 October 2009 was obtained as a result of duress and undue influence.

WHETHER DEBT BECAME DUE ON CANCELLATION OF THE AGREEMENT

[30] It was Mr *Mpofu's* submission that the appellant's cause of action in the court *a quo* was predicated upon a valid cancellation of the lease agreement. Put differently, he sought to argue that the debt which was sought to be recovered would have become due upon cancellation of the lease agreement.

[31] In my view, this contention also lacks merit. It was common cause that rental payments were due and payable monthly in advance. Indeed, following the failure by the first respondent to pay rentals on due date, the appellant caused the eviction of the first respondent in August 2009. In the circumstances, I agree with the respondents that the debt became due each time the first respondent failed to pay rent on due date and that the debt would include all rentals owing up until eviction in August 2009.

WHETHER THE COURT A QUO ERRED IN MAKING FINDINGS OF FACT

[32] The appellant has attacked various findings made by the court *a quo* on the facts, and in particular the finding that the letter received by the appellant on 22 October 2009 was not authentic and that the author of the letter did not have authority to write the same.

[33] The court *a quo* made the following findings of fact. First, that the letter was written for and on behalf of an entity called Saintcor Holdings and not Saintcor Pvt Ltd. Second, the name of the addressee had been incorrectly spelt. Third, the letter was not written on the first respondent's letter head. Fourth, the appellant's address

reflected in the letter was incorrect. Fifth, the letter of acknowledgment had been written in October 2009 and yet purported to use the same address from which the first respondent had been evicted. Sixth, the company that the author, Annet Mbedzi, purported to represent in the capacity of financial director does not in fact exist and the company does not, in any event, purport to act on behalf of the first respondent.

[34] On the basis of the above observations the court reached the conclusion that the letter had not been written on behalf of the first respondent and that the letter did not specify which debt was being acknowledged.

[35] The above conclusion cannot be said to be irrational. Nor can it be said that it is not supported by the evidence.

[36] The position is now settled that an appellate court will not interfere with the findings of fact made by a trial court unless the court comes to the conclusion that the findings are so irrational that no reasonable tribunal, faced with the same facts, would have arrived at such a conclusion. Where there has been no such misdirection, the appeal court will not interfere. This position was aptly captured by this court in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (s). At 670, Korsah JA remarked:

> "The general rule of law as regards irrationality is that an appellate court will not interfere with a decision of a 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 that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion……"

DISPOSITION

[37] In my view, this appeal lacks merit and must therefore fail.

[38] The appeal is accordingly dismissed with costs.

ZIYAMBI JA: I agree

GOWORA JA: I agree

Mhishi Legal Practice, appellant's legal practitioners

Muringi Kamdefwere, respondent's legal practitioners