

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APP/149/2020

BETWEEN:



AMRITANADA BANERJEE

APPELLANT

AND

NARENDRA VALAND

1ST RESPONDENT

VORTEX ELECTRICAL COMPANY LIMITED

2ND RESPONDENT

CORAM: CHISHIMBA, SIAVWAPA AND SHARPE-PHIRI, JJA

On 21st April and 28th July 2022

FOR THE APPELLANT : MR. F.S. KACHAMBA OF EBM CHAMBERS

FOR THE RESPONDENT: NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA JA delivered the Judgment of the Court

Cases referred to:

1. *Panorama Alarm System and Security Services Limited v Dar Farms Transport Limited* 2012 Z.R Vol 2
2. *Jonny's Trading Company Limited and Yewendweossen Mengitsu Appeal* 163 of 2018
3. *Balashundram v Bible Society of Zambia Appeal* 124 of 2013

Legislation referred to:

1. *Companies Act No of 3 2017*

1.0 **INTRODUCTION**

1.1 This is an appeal against Honourable Mr Justice E.L Musona's judgment dated 26th May 2020 by which he dismissed all the Appellant's claims except one for commission arrears from the 2nd Respondent.

2.0 **BACKGROUND**

2.2 The Appellant has 38% shareholding in and, was Managing Director of the 2nd Respondent until 25th October 2018 when he relinquished his position as Managing Director.

2.3 The 1st Respondent expressed interest in purchasing the Appellant's shares in the 2nd Respondent and to this end the parties engaged advocates to prepare a Share Purchase Agreement.

2.4 To determine the price of the Appellant's shares, the Appellant and the 1st Respondent engaged a professional advisory firm to assess the fair market value of common equity of the 2nd Respondent.

2.5 After the assessment was done, the 1st Respondent opted to do a due diligence on the value of the shares before he could sign the Share Purchase Agreement.

2.6 Subsequently, the 1st Respondent refused to sign the Share Purchase Agreement citing the pending due diligence report as the reason. This aggrieved the Appellant who commenced an action in the Court below.

3.0 **CASE IN THE COURT BELOW**

3.1 The Appellant took out a writ of summons accompanied by a statement of claim against the Respondents claiming the following reliefs:

- i. Against the 1st Respondent, an Order for specific performance of the Share Purchase Agreement;
- ii. Against the 2nd Respondent, an Order for the payment of the sum of K702,000.00, being the balance due in respect of the accumulated commission;
- iii. Against the 2nd Respondent an Order for payment of K45,000.00 per month for the period that the Agreement remained incomplete;
- iv. Interest on the said amount at the current ruling bank rate from the date of issue of this writ until judgment or sooner payment;
- v. Against the 2nd Respondent for an Order that it ceases to operate the newly opened bank accounts of the 2nd Respondent in abrogation of the signing mandate that has always existed until such a time when the Appellant would have been paid off on the share sale;

- vi. An Order that the Respondents render an account of the newly opened 2nd Respondent bank accounts at Indo Zambia Bank and Atlas Mara and the First National Bank accounts;
- vii. Such other or further relief as the Court may deem fit to award to the Appellant;
- viii. Costs for and incidental to these proceedings

3.2 The Appellant alleged that he had a verbal agreement with the 1st Respondent, for the latter to pay him ZMW4,900,000.00 as consideration for his shares in the 2nd Respondent.

4.0 **FINDINGS BY THE TRIAL JUDGE**

- 4.1 The learned trial judge opted to determine the matter by considering the reliefs sought.
- 4.2 In relation to the order for specific performance, the learned trial Judge noted that the agreement was never signed by the parties and remained in draft form.
- 4.3 In relation to the claim for commission, the learned trial Judge found that the 2nd Respondent had admitted that it owed the Appellant commission with only the amount being in dispute. The learned Judge then referred the claim to the Deputy Registrar for assessment.

- 4.4 As regards the claim for payment of K45,000.00 monthly, the learned trial Judge found that the Appellant had failed to prove that there was an agreement with the 1st Respondent to pay him the claimed amount and dismissed the claim.
- 4.5 Having held that the Share Purchase Agreement never existed, the learned trial Judge found that the claim for a cessation of the operation of the new bank accounts had no leg to stand on.
- 4.6 On the claim to render an account, the learned trial Judge found that the Appellant's other claims were independent of the accounts upon which an order to render an account was sought, and that being the case, he dismissed the claim.
- 4.7 Lastly, the learned trial Judge awarded interest on the commission arrears found due, at short term bank deposit rate from the date of the writ to the date of judgment and thereafter, at the current bank of Zambia lending rate.

5.0 **THE APPEAL**

5.1 The Appellant, dissatisfied with the outcome, launched an appeal containing the following grounds;

1. That the learned trial Judge erred in Law and fact when he declined to award specific performance on the basis that there was no valid contract in existence

when the evidence on record clearly demonstrated that the contract had been implemented and put into effect by the 1st Respondent who to date still has full control of the management of the Company affairs and Company accounts.

2. That the learned trial Judge in determining the questions of specific performance and evaluating the existence of the contract between the Appellant and the 1st Respondent, failed to take into account the equitable principles which deem “that as done which ought to be done” when there has been substantial performance of a contract by the party. The Appellant performed his part of the Contract and the Respondents, by their actions, accepted and benefited from that performance by the Appellant and are bound by the tacit terms of the contract albeit unsigned.
3. The learned trial Judge erred in Law and fact when he declined to award monthly payment of ZMW45,000.00 despite evidence on record demonstrating that this had been promised to the Appellant by the 1st Respondent and undertakings to this effect had been made by the Respondents.

4. The learned trial Judge erred in law and fact when he declined to order the Respondents to cease operating Bank accounts which had been illegally and wrongly opened and to which the Appellant is not a signatory and therefore unable to keep track of the financial situation of the 2nd Respondent Company.

5. The learned trial Judge erred in law and fact when he failed to order the equitable remedy of an account of the newly opened 2nd Respondent's Bank accounts when the evidence on record clearly demonstrated that the said accounts were opened in breach of the agreed signing mandate and were exclusively operated by the 1st Respondent which situation severely prejudices the Appellant.

6.0 **APPELLANT'S ARGUMENTS**

- 6.1 In support of ground one, the Appellant argues that even though the draft agreement has not been signed by both parties, they performed what was required of them for the sale to be completed.

- 6.2 Our attention is drawn to page 117 of the record of appeal to show that there was an agreement signed by both parties.

- 6.3 Further, the Appellant has drawn our attention to a letter appearing at page 126 of the record of appeal, dated 29th May 2019 as confirmation that the 1st Respondent agreed to pay for the shares on condition that the final figure would be adjusted.
- 6.4 The Appellant has drawn inspiration from the case of Panorama Alarm System and Security Services Limited v Dar Farms Transport Limited¹ in which the Supreme Court held that there was a contract between the parties, and it was immaterial that the same was not signed by them.
- 6.5 In ground two, the Appellant argues that following his stepping down as Managing Director of the Company, the 1st Respondent has been siphoning money from its accounts as evidenced by pages 160 – 164 of the record.
- 6.6 He further asserts that since his stepping down as managing Director, he is never called to the shareholders' meetings and he does not receive his dividends.
- 6.7 It is his held view that relinquishing his position and the 1st Respondent taking over control of the 2nd Respondent, amounted to performance of the Share Purchase Agreement by the parties. This view is purportedly anchored on our Judgment in the case of Jonny's Trading Company Limited and Yewendweossen Mengitsu².

- 6.8 In support of ground three, our attention was again drawn to page 117 of the record where there is exhibited a purported agreement between him and the 1st Respondent dated 24th January 2019 stating that he would receive K45,000 monthly until 100% of the purchase price is paid.
- 6.9 In ground four, the Appellant argues that to open bank accounts for the 2nd Respondent, the 1st Respondent needed a resolution by the 2nd Respondent at a meeting to which he would be a party as director and shareholder.
- 6.10 In ground five, the Appellant argues that he is entitled, as a shareholder and director, to receive an account of the financial transactions of the 2nd Respondent, which he claims the Respondents have not availed him.
- 6.11 The Appellant prays that his appeal succeeds with costs.

7.0 **RESPONDENTS' ARGUMENTS**

- 7.1 In response to grounds one and two, the Respondents have argued that the learned trial Judge was on firm ground in deciding as he did, because it was not in dispute that the Share Purchase Agreement was not signed.

- 7.2 The Respondents have also referred us to page 213 of the record of appeal to argue that the sale was subject to an agreement on the purchase price.
- 7.3 In relation to pages 117 and 126, relied upon by the Appellant as proof of an agreement for the sale of shares, the Respondents have argued that these did not amount to an agreement because the Appellant still sent the letter appearing at pages 215 to 216 giving the 1st Respondent up to 5th April 2019, to sign the Share Purchase Agreement failing which it would mean his offer to sell the shares had been turned down.
- 7.4 It is argued that there is no conduct which suggests that the parties performed the contract as the Appellant's resignation as Managing Director was not a pre-condition for the purchase of the shares. The Panorama case, supra, is therefore, not only distinguishable but also not binding being a High Court decision.
- 7.5 In response to ground three, the argument is that the payment of K45,000.00 was dependent on the Share Sale Agreement. It is also reiterated that such a payment would offend against Section 183 of the Companies Act.

- 7.6 Of the email at page 117 of the record of appeal, it is argued that the same is not an agreement, but an instruction to counsel to amend the draft agreement.
- 7.7 In response to grounds four and five, the Respondents' position is that since the Appellant ceased to be a director of the 2nd Respondent, he was neither entitled to be on the panel of signatories nor privy to the daily financial operations of the 2nd Respondent.
- 7.8 The additional argument is that the Appellant, as shareholder, is only entitled to see the financial affairs of the company at the annual general meeting where the accounts of the company are laid bare.
- 7.9 The Respondents have prayed that the appeal be dismissed.

8.0 **OUR ANALYSIS AND DECISION**

- 8.1 After carefully considering the Judgment of the Court below, the grounds of appeal and the competing arguments advanced, we have formed the view that the main question to be resolved is whether there exists an enforceable Share Purchase Agreement between the Appellant and the 1st Respondent.

- 8.2 Our view is premised on the Appellant's insistence that he was entitled to specific performance of the contract notwithstanding that the same has not been signed by the parties.
- 8.3 In the case of Balashundram v Bible Society of Zambia³ the Supreme Court, in determining whether specific performance should have been ordered, discussed tentative agreements which are not binding and provisional agreements which may be binding.
- 8.4 It was stated that a tentative agreement is subject to another agreement while a provisional one is capable of being carried into execution and by necessary implication, specific performance can be ordered.
- 8.5 What is not in dispute in this case is the fact that the parties had verbally agreed on the share purchase sometime in 2018. Following upon that agreement, on 24th December 2018, the Appellant communicated to the 1st Respondent to the effect that he was awaiting a response from the 1st Respondent's lawyer in relation to the share sale.
- 8.6 However, on 28th December, 2018, as shown at page 117 of the record, the Appellant communicated to the 1st Respondent via an email that the draft agreement should be amended and

the contract formalized. The exhibited copy of the contract is signed by both parties. However, in that email, there is nothing said about the share purchase price.

- 8.7 In a subsequent letter dated 29th May 2019, appearing at page 126 of the record of appeal, the Appellant's advocates, state that the parties had agreed that the purchase price would be adjusted upwards or downwards upon conclusion of a due diligence undertaking at the instance of the 1st Respondent.
- 8.8 The record shows that there was no resolution to the dispute on the purchase price as shown in the correspondence appearing at page 277 of the record of appeal.
- 8.9 Given the above background, it is clear to us that since the share purchase price was dependent upon the due diligence report, the K4,900,000.00 the Appellant was demanding was an interim amount. To that effect, there is no enforceable Share Purchase Agreement between the Parties.
- 8.10 We are fortified in our view by the fact that in the intended Share Purchase Agreement produced by the Appellant, appearing at page 172 of the record of appeal, clause 2.1 provides that completion of the sale was subject to and conditional upon some conditions being satisfied.

- 8.11 Further, condition No 4, appearing at page 192 of the record, states that the buyer could conduct, to his satisfaction, due diligence on the share sales, the company, and its assets.
- 8.12 It is therefore, our considered view that the Appellant is not entitled to specific performance as there is no valid enforceable contract in place. The grounds based on this argument must therefore, fail.
- 8.13 In ground two, the argument is that the agreement was partly performed when the Appellant relinquished his position as Managing Director.
- 8.14 We have perused the record, particularly the draft Share Purchase Agreement and find that there is no term calling for the resignation of the Appellant. There is no evidence to support the Appellant's position in this regard and this ground must equally fail.
- 8.15 The argument in ground three is that the Appellant is entitled to the payment of K45, 000.00 by the 2nd Respondent pending the signing of the Share Purchase Agreement.
- 8.16 This ground is opposed on two legal points; firstly, that there exists no resolution to that effect and secondly that such a

payment would be contrary to Section 183 of the Companies Act No 10 of 2017.

- 8.17 Whereas Section 183 of the Companies Act restricts financial assistance in the acquisition of shares, the evidence on record shows that the payment of K45, 000.00 was not related to the purchase price for the shares as that amount was not agreed upon by the parties. The ground and the argument are therefore, misdirection on the part of the Respondent.
- 8.18 The issue that remains to be resolved then, is whether this payment is affected by the absence of a resolution.
- 8.19 The Appellant has fervently argued that he is entitled to this payment in his capacity as a director of the 2nd Respondent. This can also be seen in the letter at page 132 of the record of appeal.
- 8.20 Section 58 of the Companies Act provides that the fixing of the remuneration of a director is business to be transacted at an Annual General Meeting.
- 8.21 The record of appeal bears no testimony of a resolution, at an Annual General Meeting, to pay the Appellant the amount claimed. To this end, the 2nd Respondent has no liability to pay

the Appellant the claimed amount rendering the claim unmeritorious.

- 8.22 In ground four, the Appellant's argument is that the 2nd Respondent's accounts with Atlas Mara and Indo Zambia Bank were illegally opened as he was not consulted as a shareholder and Director in the 2nd Respondent.
- 8.23 The PACRA printout appearing at pages 51 and 52 of the record of appeal clearly shows that not only is the Appellant a shareholder but he is also a director in the 2nd Respondent contrary to the Respondents' assertions to the contrary.
- 8.24 However, while it is not disputed that the Appellant is a director in the 2nd Respondent, he has not pointed to any provision of the Articles of Association of the 2nd Respondent requiring the consent of all the directors to open an account. It has therefore, not been proved on a balance of probability that the accounts opened without the consent of the Appellant are illegal. This ground equally fails.
- 8.25 In ground five, the appellant faults the learned Judge in the Court below for refusing to order the rendering of an account in relation to the newly opened account.

8.26 We however, note that in the letter appearing at page 122 of the record of appeal, dated the 8th May, 2019, addressed to the Appellant's advocates, particularly at page 124 line 40, the 1st Respondent invites the Appellant to inspect the company's accounting records.

8.27 The Appellant cannot therefore, cry foul that he is ignorant of the 2nd Respondent's financial situation as the said ignorance is by his own choice.

9. **CONCLUSION**

9.1 With all the grounds being unsuccessful, we dismiss the appeal with costs to the Respondents to be taxed in default of agreement.



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F. M. CHISHIMBA
COURT OF APPEAL JUDGE



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M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE