REPORTABLE (51)

UNITED HARVEST (PRIVATE) LIMITED
v
(1) THAKOR RANCHOD KEWADA (In his capacity as the executor testamentary of the estate late John Vigo Naested) (2) THE MASTER OF THE HIGH COURT N.O.

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA, & MUSAKWA JA
HARARE: 13 FEBRUARY 2023 & 15 JUNE 2023

T. Magwaliba, for the appellant

T. Mpofu, for the first respondent

MAVANGIRA JA:

[1] This is an appeal against the whole judgment of the High Court of Zimbabwe handed down on 13 September 2022. The court *a quo* was seized with an application, by the first respondent, for the eviction of the appellant from the immovable property known as Lot 18 Gardiner East of Gardiner situated in the district of Goromonzi held under Deed of transfer 6791/2018 (hereinafter referred to as "the premises"). Also, before the court *a quo* was a counter application by the appellant for the return of the part of the purchase price that it had already paid. The court *a quo* granted both applications.

[2] The appellant is United Harvest (Private) Limited, a registered company incorporated in terms of the laws of Zimbabwe. The first respondent is Thakor Ranchod Kewada, cited in his capacity as the executor testamentary of the estate late John Vigo Naested. The late John Vigo Naested (hereafter referred to as "the deceased") is the registered owner of the premises. The second respondent is the Master of the High Court cited in his capacity as the authority responsible for the administration of estates in Zimbabwe.

[3] On 12 August 2020, the deceased entered into an agreement of sale with the appellant in terms of which the appellant purchased the premises. The purchase price of the premises was US$ 400 000.00. In terms of the agreement, the purchase price was payable by instalments during the period 12 August 2020 to 31 March 2021. It was also a term of the contract that the appellant would take occupation of the property on 1 August 2020. The appellant proceeded to take occupation of the premises. It, however, failed to pay the purchase price in accordance with the agreement.

[4] After its failure to pay the purchase price, the appellant, on 21 December 2020, wrote a letter to the deceased proposing a restructuring of the payment terms. Despite the resultant restructuring of the payment terms as requested by it, the appellant still failed to pay the sum due in accordance with its own proposed figures. The parties engaged in further discussions and on 15 March, 2021, the appellant proposed to pay the sum of US$ 15 000.00 per month. On 16 March, 2021, the deceased accepted the proposal made. Once again, the appellant failed to make payments in accordance with its proposal, resulting in the full balance of the purchase price becoming due and payable. On

19 January, 2022 the first respondent wrote to the appellant putting it on terms to pay the purchase price. The appellant did not pay. As a result, on 28 February 2022, the first respondent cancelled the agreement of sale.

[5] The appellant was furnished with a notice to vacate the premises. It ignored the notice. It was the first respondent's averment before the court *a quo*, that having cancelled the agreement, he was entitled to an order of ejectment and that the sum already paid would be repaid in the normal course of winding up the estate.

[6] In response to the application for ejectment, the appellant accepted that it had agreed to buy the premises but the payment would be in instalments. It argued that upon taking occupation of the property in terms of the agreement, it effected changes to the premises to the value of US$ 11 000. However, the appellant did not agree that it was a term of the agreement that the full balance of the purchase price would become due and payable upon its failure to pay any instalment. It was, therefore, the appellant's belief that what became due was the balance of the instalment payable during that particular month of default.

[7] It was the appellant's further argument that the demand for the balance was premature and erroneous because the deceased died on 8 May 2021, a month after the initial agreement had been novated. In that regard, the appellant contended that the first respondent could only demand the balance of the outstanding instalments and not the full purchase price. The appellant's point of departure was that the initial agreement of 12 August 2020 was superseded by the agreement of 16 March 2021. The appellant averred that the first

respondent could not have legally cancelled the agreement of 12 August 2020 because that agreement was superseded by the agreement of 16 March 2021. Lastly, it was argued that the agreement of 16 March, having not been cancelled and being extant and in force, the appellant was entitled to remain in occupation of the property.

[8] The appellant then filed what it called a court application in terms of s 9 (2) of the Contractual Penalties Act [*Chapter 8:04*] for the return of the purchase price. This was a counter application in response to the first respondent's application for eviction. In the counter application, the appellant submitted that he was claiming a refund of the purchase price in terms of the agreement of sale dated 12 August 2020 and the subsequent novated agreement dated 16 March 2021. The appellant was claiming the part purchase price of US$ 200 955.51 and an additional US$ 11 000.00 being the value of the improvements that were allegedly made on the property.

[9] The first respondent opposed the counter application and raised preliminary points in relation to it. The first respondent submitted that the procedure adopted by the appellant does not exist in the High Court rules and that the application was fatally defective. It was the first respondent's view that the appellant had contradicted itself with regards to the averments that it made in the main application. The first respondent was of the view that the appellant could not approbate and reprobate. His last point was that the counter application was an abuse of court process as the first respondent had already, in the main application, tendered the payment of the purchase price. On the merits, the first respondent

made averments similar to the ones he had made in the main application and prayed that the application be dismissed with costs on a higher scale.

[10] In disposing of the matter the court *a quo* made a finding that there was no variation of contract. The court *a quo* further held that the agreement of 12 August 2020 was the one that was varied with regard to payment only. The court *a quo* further held that the first respondent could not be faulted for cancelling the agreement and that the cancellation was also in line with s 8 (1) and (2) of the Contractual Penalties Act [*Chapter 8:04*]. Concerning the counter application, the court *a quo* held that it ought not to have been filed as the first respondent had already agreed to refund to the appellant the purchase price that it had already paid. In its disposition, the court *a quo* granted both the first respondent's application for the cancellation of the agreement as well as the ejectment of the appellant, and the appellant's application for the refund of the part purchase price paid.

[11] Surprisingly, despite having been granted the order that it sought in its counter application, the appellant has filed this appeal on the following grounds;

i. The court *a quo* erred on a point of law and fact by confirming the cancellation of the written agreement of sale between the appellant and the late John Vigo Naested dated 12 August 2020 and ordering the appellant's eviction when the said written agreement of sale had been novated by an agreement between the said parties dated 16 March 2020. (sic)

ii. Furthermore and alternatively, the court *a quo* erred in confirming the cancellation of the agreement of sale dated 12 August 2020 executed between the late John Vigo

Naested and the appellant when the cancellation of the said agreement by the first respondent was invalid, in that, the first respondent's notice of cancellation dated 19 January 2022 unlawfully called the appellant to pay the full balance of the purchase price in the absence of an acceleration clause.

iii. Further, alternatively, the court *a quo* erred in ordering the appellant to pay the costs of the counterclaim for refund of the purchase price paid when the appellant had been successful in the counterclaim.

Notably, after filing the appeal, the appellant filed a notice to amend the grounds of appeal by adding an additional two grounds which are as follows:

iv. The High Court grossly erred in granting the relief set out in para 1 of its order dated 13 September 2022 cancelling an agreement of sale which relief had not been sought by the 1st respondent.

v. In the event that the High Court was correct in finding that the agreement between the parties dated 12 August 2020 was amended and not novated, the High Court was grossly wrong in finding that the notice of cancellation was valid and therefore that the said agreement could be validly cancelled by the court.

PROCEEDINGS BEFORE THIS COURT

[12] At the commencement of the hearing, the first respondent raised three points *in limine*. Mr *Mpofu*, for the first respondent, submitted that the appeal stands dismissed by operation of law because of the appellant's acquiescence in the judgment of the High Court. He submitted that by its actions, the appellant has perempted its right of appeal. He argued that

there were two causes of action in the court *a quo* being the cause, brought by the first respondent seeking the eviction of the appellant and the cause brought by the appellant seeking a refund of the purchase price. Mr *Mpofu* argued that the refund could only be claimed in the event that the cancellation was held to have been extant. He further argued that the claim for refund was granted by consent and that it can therefore not be challenged in this Court.

[13] Mr *Mpofu* contended that the substance of the issues before the court is a challenge to an order by consent. He further submitted that the appellant's prayer is for an order that is adverse to the order that was granted by consent and the appellant has no right to do so. The final point in *limine* was that the order of the court *a quo* has been executed and the appellant has been evicted from the premises that constitute the subject of these proceedings. He, therefore, argued that the business of the court may no longer be employed in this matter as it has become moot.

[14] In response to the points *in limine*, Mr *Magwaliba* argued that there was no acquiescence to the judgment of the High Court. He argued that what was sought was an order for ejectment of the appellant and that what is disputed about the order of the High Court is the order adverse to the appellant in respect of costs. He argued that peremption occurs where a litigant who intends to appeal or has appealed, takes action which is not consistent with pursuing its appeal. He further contended that a party is only deprived of the right to appeal upon proof of waiver of that right. He, therefore, submitted that no conduct had been taken by the appellant showing a lack of desire or intention to persist with its appeal.

[15] Counsel argued that an order by consent must clearly say so and that nowhere in the *ex tempore* judgment is it stated to be an "order by consent." He contended that none of the five grounds of appeal, challenge the grant of the refund. He argued that the granting of the relief is a necessary consequence of the success of the main application.

[16] As to mootness, Mr *Magwaliba* argued that mootness occurs where events outside the record occur which render the matter or proceedings unnecessary. He further argued that eviction in accordance with a court order does not result in mootness. He submitted that the mootness alleged is predicated on an application for execution pending appeal, which was later sought and granted *a quo*.

ISSUES FOR DETERMINATION

[17] The issues at hand must be dealt with in sequence. They are interrelated. These are: whether the appellant had acquiesced in the judgment of the High Court and whether the matter is now moot. In order for a matter to be adjudged to be moot, there ought to have been a valid appeal before this Court. For this reason, I will firstly deal with the issue of whether or not the appellant had acquiesced in the judgment of the High Court.

WHETHER OR NOT THE APPELLANT HAD ACQUIESCED IN THE JUDGMENT OF THE HIGH COURT.

[18] It was argued by counsel for the first respondent that a party who has acquiesced in the judgment loses the right to challenge the judgment. His submission was that if a party has acquiesced in a judgment, that party openly loses the right to challenge the judgment. On

the contrary, it was the appellant's position that no acquiescence to the judgment of the court *a quo* took place. He argued that a party can only be deprived of his right of appeal upon proof of waiver of the right to appeal.

[19] According to the *Collins dictionary*, to acquiesce is "to assent tacitly; submit or comply silently or without protest; agree; consent; accede; concur; capitulate." Thus, the acceptance of something without protest is acquiescence. In terms of the common law doctrine of peremption, a party who acquiesces in a judgment cannot subsequently seek to challenge the judgment to which he has so acquiesced. The case of *Dhliwayo v Warman Zimbabwe (Private) Limited* HB – 12 -22 is pertinent in this regard. DUBE-BANDA J stated therein:

> "According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions or to both approbate and reprobate, or to blow hot and cold. It may even be said that a party will not be allowed to have her cake and eat it too. …"

Note ought to be taken of the fact that peremption is one aspect of a broader policy that there must be finality in litigation, in the interest of the parties and for the proper administration of justice. At common law, peremption, which is not to be confused with pre-emption, though not a common objection in, entails that a party must make up his mind and cannot equivocate by acquiescing in a judgment and later deciding to appeal against the same.

[20] The following statement in *Clarke v Bethal Co-operative Society* 1911 TPD 1152 at 1158 is apt:

> "The authorities are all agreed on one point, namely, that there must be either an express or an implied agreement between the parties not to pursue an appeal. If there is no express agreement, the appellant must have so conducted himself that his acts, when fairly construed, necessarily lead the court to the conclusion that he has impliedly agreed with the other side not to prosecute his appeal. That is the law as it is laid down in the Code (7.52.5), and by Voet (49.1.2)."

[21] In *President of the Republic of South Africa v Public Protector* 2018 (2) SA 100 (GP) at 146 G-H, the Court held that the President's acceptance of and acquiescence to the remedial action amounted to a peremption of his right to review the remedial action. It held:

> "The legal principles pertaining to peremption are well established. In ***Dabner v South African Railways and Harbours*** **1920 AD 583 at 59**4, Inne's J stated:
>
> > 'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'"

[22] What emerges from the above case law is that once a party has accepted the order that has been made in its favor it loses its right to appeal. This principle was enunciated in *Cohen v Cohen* 1980 ZLR 286 (S) wherein it was held at page 287 that;

> "It is an established principle of our law that a person who has acquiesced a judgment cannot thereafter appeal against it, and once the appeal is perempted, that is the end of the matter."

[23] Acquiescence, therefore, as already noted above, happens when there is the existence of a court order and a party accepts its correctness and complies with it. *In casu*, the appellant's conduct created the impression that it acquiesced in the order of the High Court. This view is created by the fact that the order that was sought in the main application was an order for the eviction of the appellant from the premises. Despite purportedly opposing the application, the appellant made a counter application for the return of the purchase price already paid pursuant to the order in the main application being granted.

[24] There can be no doubt in the circumstances that the existence of the order made in the main application led to it being acquiesced to by the appellant. The appellant obtained the order that it sought in the counter application, which order was in sync with the order sought and finally obtained in the main application.

[25] The appellant's conduct of filing an appeal against that order can rightly be viewed as a classic display of *mala fides* by the appellant. It is clear that having obtained the order in terms of its counter application, it now seeks, in this appeal, an order for the reversal of that order or rather the "erasure" of that counter application from the roll. It is settled in this jurisdiction that a party is not allowed to approbate and reprobate. Mathonsi JA in *Mashoko (in her capacity as the executrix dative in the estate of the late Albert Machengete Mashoko and Trustee of the Mashoko – Kusisa Family Trust) & Ors v Mashoko (duly assisted by her guardian Barbara Maonde-Chikosi) & Ors* SC 114/22 at p 10 held that:

> "In other words, our law does not allow a party to have his or her cake and eat it at the same time."

The above position was expressed emphatically in *S v Marutsi 1990 (2) ZLR 370* at p 374 B that:

> "It is trite that a litigant cannot be allowed to approbate and reprobate a step in the proceedings. He can only do one or the other, not both."

[26] From a reading of the record, and as alluded to earlier, the appellant filed a counter application for the return of the part purchase price that it had paid. That application was in direct response to the first respondent's application for the confirmation of the cancellation of the agreement and the subsequent eviction of the appellant. A closer look at the relief sought by the appellant shows that it had accepted the cancellation of the agreement and was willing to have its purchase price returned to it, which monies the first respondent had already promised to return. Such conduct of accepting the relief that was sought by the other party is tantamount to acquiescing in the order that was sought, and finally obtained. The order sought by the appellant in the court *a quo* was granted. It is thus surprising that it filed this appeal against such an order, because it is incompetent, at law, to do so. The appellant cannot succeed in adopting a position contrary to the one it elected in the court *a quo*. See *Alliance Insurance v Imperial Plastics (Private) Limited & Anor* SC 30/17 at p 7.

[27] Having considered the principles above and the circumstances of the case, I am of the view that the appellant did acquiesce in the judgment of the court *a quo.* The point in *limine* has merit. The present appeal therefore properly stands dismissed on this point only.

DISPOSITION

[28] The point in *limine* raised by Mr *Mpofu* is meritorious. The appellant has indeed acquiesced in the judgment of the court *a quo*.

The point *in limine* raised having thus been upheld, the appeal therefore stands dismissed by operation of law.

[29] In the result, it is accordingly ordered as follows:

The appeal be and is hereby removed from the roll with costs.

CHIWESHE JA: I agree

MUSAKWA JA: I agree

Muhlekiwa Legal Practice, appellant's legal practitioners

Scanlen and Holderness, respondent's legal practitioners