

SOUTH AFRICA / JUDGMENT

Shabala v Iliev and Another (147/85) [1987] ZASCA 19 (26 March 1987)

[1987] ZASCA 19**COURT**

Supreme Court of Appeal

BEFORE

Joubert, Hoexter, Grosskopf, Vivier, Steyn

CASE / FILE NUMBER

147/85

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**ANOTHONY JOHN SHALALA Appellant and JOSEPHINE ILIEV 1st Respondent and****SHALALA BROTHERS (PTY) 2nd Respondent LTD.****Case No: 147/85 mp****IN THE SUPREME COURT OF SOUTH AFRICA****(APPELLATE DIVISION)****ANTHONY JOHN SHALALA Appellant****(Second Respondent in the Court a quo)****and****JOSEPHINE ILIEV First Respondent****(Applicant in the Court a quo)****SHALALA BROTHERS (PTY) LIMITED Second Respondent (First Respondent****in the Court a quo)****CORAM:**JOUBERT, HOEXTER, GROSSKOPF, VIVIER, JJA et STEYN,
AJAHEARD: 5 March 1987 DELIVERED: 26
March 1987

JUDGMENT

HOEXTER, JA

2.

HOEXTER, JA,

In this appeal the second respondent ("the company") is a private company known as Shalala Brothers (Pty) Ltd which was incorporated in December 1954 with a registered share capital of ninety El shares. The real parties in the appeal are Mr Anthony John Shalala, who is the appellant, and his sister Mrs Josephine Iliev (born Shalala). Mrs Iliev is the first respondent in the appeal. In the Court below Mrs Iliev was the applicant, and in this judgment reference to her will be made as "the applicant". The appeal concerns the propriety or otherwise of an order for rectification of the company's share register granted in favour of the applicant in the Court below.

The salient facts may be stated quite shortly. The appellant and the applicant live in Klerksdorp where each carries on his or her own business. At the time of the company's formation in 1954 the appellant was a bachelor

3.

and the applicant was married to one Michael Shalala. Their marriage was dissolved in March 1955. The applicant was then known as "Josephine Shalala" and for business purposes she signed her name thus. In 1970 the applicant married her present husband, one Iliev. In the same year the appellant married one Hind Shalala. During 1975 Hind Shalala instituted an action for divorce against the appellant, and their marriage was dissolved in 1977. Thereafter the appellant married a Miss Nel.

When the company was formed thirty shares in it were issued to each of three initial shareholders, being respectively the appellant, the applicant, and their brother Mr Daniel John Shalala ("Daniel"). Each shareholder was issued with an original share certificate dated 14 March 1955. Certificate Number 1 (in respect of shares nos 1 - 30) was issued to Daniel; certificate Number 2 (in respect of shares nos 31 - 60) was issued to the appellant; and certificate Number 3 (in respect of shares nos 61 - 90) was issued to

the 4. the applicant. In October 1959 Daniel transferred his thirty shares (nos 1 - 30) to the appellant, and pursuant thereto a certificate Number 4 was issued to the appellant. Until the end of January 1974 the sole shareholders in the company were the appellant (sixty shares) and the applicant (thirty shares); and the share register of the company reflected their respective shareholdings accordingly.

At all material times one Grobler, who practises as an accountant at Klerksdorp, acted as the auditor respectively to the appellant, the applicant and the company. In addition Grobler's firm performed secretarial duties for the company. At all material times the appellant was the controller of the company. According to the minute book of the company a meeting was held on 5 February 1974 which was attended by the appellant and the applicant. In what follows I shall refer to the meeting thus reflected in the minute book as "the 5 Feb meeting". The minutes of the 5 Feb 5. 5 Feb meeting are signed by the appellant as "chairman" and they record that the following business was transacted thereat -

"SHARE : It was decided that J Shalala CAPITAL would receive R2 000,00 for her 30 shares and that they would be transferred as follows:-

A J Shalala to receive 29

shares

Hind Shalala to receive 1

share

DIRECTORS : J Shalala resigned as Direc=

tor of the Company. She is to be replaced by Hind Shalala. Sylvia Shalala was also appointed as a Director of the Company."

On 5 February 1974 the appellant signed a Securities Transfer Form ("the share transfer form") as the transferee of 30 shares in the company from "Josephine Shalala" as the transferor. The number of the relative share certificate is therein stated as "2", and the distinctive numbers of the shares as "31 - 60". In the portion of the share transfer

6. transfer form in which the transferor's signature has to be affixed there occurs a signature "J Shalala" above the date "5.2.74". In what follows reference will be made to this signature as "the disputed signature". The share transfer form states that the sum paid for the shares to be transferred is R2 000 and indicates the names of the transferees as "Anthony John Shalala - 29 shares, and Hind Shalala 1 share."

Concerning the share certificates issued by the company and also its share register, the appellant on 7 February 1974 deposed to an affidavit ("the false affidavit" which was thereafter pasted onto the inside of a hard-cover leaf of a reconstructed share register of the company. The relevant portion of the false affidavit is in the following terms -

"I hereby declare under oath that the Share Register, Transfer No 1, and the following Share Certificates, in the above company, were lost by me:-

CERT. No.

7.

CERT NO. HOLDER THEREOF DATE OF ISSUE DISTINCTIVE NUMBERS

1 D J SHALALA 21.12.54 1 - 30

2 J SHALALA 21.12.54 31 - 60

3 A J SHALALA 21.12.54 61 - 90 4 A J SHALALA 6.10.59 1 - 30 "

On the strength of the false affidavit a new share register was compiled and fresh share certificates in the company were issued; and pursuant to the minutes of the 5 Feb meeting thirty shares in the company held by the applicant were transferred to the transferees in the proportion (29 shares to the appellant and 1 share to Hind Shalala) therein indicated. On 26 February 1975 the appellant signed a Securities Transfer Form as the transferee of one share in the company from Hind Shalala as the transferor; and in the space provided for the signature of the transferor the name "Hind Shalala" appears in signature form. To this signature I shall refer as "the forged signature". When the matter came before the Court below, and according to the reconstructed share register, the

registered 8. registered shareholders in the company were the appellant (sixty shares) and his present wife, the former Miss Nel (thirty shares).

It will be noticed that the false affidavit erroneously states both the numbers of the original share certificates issued to the appellant and the applicant respectively, and the distinctive numbers of the shares respectively allotted to each of them. However that may be, the statements made in the false affidavit are incorrect in a more fundamental respect. In truth the share certificates in question had not been lost by the appellant or by anybody else; and on 7 February 1974 all three certificates were in fact in possession of the applicant.

In March 1982 the applicant initiated motion proceedings in the Transvaal Provincial Division against the company (which was cited nominally as the first respondent) and the appellant as the second respondent. In terms of

sec 115

9.

sec 115 of the Companies Act, No 61 of 1973, the applicant alleged that her name had been removed from the company's register without sufficient cause; and she applied for rectification thereof. The appellant resisted the application.

The applicant's case, in a nutshell, was the following. During 1954 she and her two brothers (Daniel and the appellant) agreed that each would contribute E2 000 (R4 000) towards the purchase of a rural property ("the farm") in the Klerksdorp district. To this end the applicant paid R4 000 to Daniel from whom, in due course, she received her original share certificate for 30 shares in the company. On 3 November 1963 the applicant lent the appellant R800, which loan has since remained unpaid. At the time of the transaction and "as proof of the loan" the appellant

gave the applicant a cheque for R800 and as security for repayment

the

10.

the appellant handed over to the applicant the appellant's two share certificates in respect of the remaining sixty shares in the company. Thereafter, so said the applicant, the appellant knew full well that his share certificates were in the applicant's possession. The applicant denied that she had ever been a party to the transfer of her thirty shares to the appellant; and she denied that the appellant had paid her R2 000, or any other amount, in respect thereof. In regard to the identity of the disputed signature on the share transfer form the applicant adopted an ambivalent attitude. She contended, in the main, that the disputed signature was not hers. In the alternative she adopted the stance that if the disputed signature were in truth her signature it had been procured by some fraudulent means. She was adamant that she had never had the slightest intention of disposing of her thirty shares in the company. The applicant went on to say that on

12 October

11.

12 October 1981 she made an inquiry concerning the farm of the accountant Grobler whereupon the latter informed her that her shares had been acquired by the appellant. It is common cause that on 26 November 1981 attorneys acting on behalf of the applicant addressed separate letters to (1) the company (2) Grobler's firm and (3) the appellant, each letter demanding rectification of the company's share register by the restoration therein of the name of the applicant as the registered shareholder of thirty shares.

The answering affidavits filed by the appellant in opposition to the applicant's notice of motion raised certain disputes of fact. On 20 October 1982 VAN DIJKHORST, J ordered that oral evidence be heard. The issues which were referred to the trial Court for its determination were formulated thus -

"2.1 die kwessie van onus;

2.2 die reg om te begin; 2.3 die egtheid van die applikante se handtekening op Aanhangsel

"H" (the disputed signature of the person

named

12.

named as transferor in the share transfer form), alternatiewelik of dit op 'n bedrieglike wyse verkry is;

2.4 of die uitreiking van die duplikaat Aandeesertifikaat op 'n bedrieglike wyse verkry is al dan nie;

en gevolglik of die applikante geregtig is op die regshulp soos aangevra."

In due course the matter came before

KIRK-COHEN, J. The hearing lasted ten days and involved the testimony of several witnesses. Having heard argument the trial Court ruled that the applicant had the right to begin and that she bore the onus of proving her case on a balance of probability. In regard to the authenticity or otherwise of the disputed signature the trial Court concluded that on a balance of probability it was the

signature of the applicant; but that it had been "obtained" by the appellant "in a fraudulent manner". The trial Court

likewise concluded that the duplicate share register had been procured in a fraudulent fashion. In the result the trial Court ruled that the applicant was entitled to claim

rectification

13.

rectification of the company's share register. In regard to costs KIRK-COHEN, J decided that these should be borne by the appellant for two reasons. First, the application had been resisted not by the company but by the appellant. The second reason was considered by the learned Judge to be the more cogent one, and he stated it in the following words:

"The proceedings before me were lengthened inordinately by the numerous falsehoods told by the second respondent. It took considerable time for them to be fully exposed and I take a very serious view of this aspect of the case as will more fully appear from paragraph 3 of my order hereunder. As a mark of censure I am of the view that, on this ground alone, the second respondent ought to be ordered to pay the costs which will include those reserved by my brother VAN DIJKHORST and all of the costs involved in the ten day hearing before me including those incurred in the argument on the right to begin."

In the result KIRK-COHEN, J made the following orders in the Court below:

"1. That

14.

"1. That the share register of the first

respondent be rectified to record that:

1.1 the original allotment of the applicant's 30 shares was made on the 14th day of March 1955 in terms of certificate No. 3 with distinctive numbers 61 to 90; 1.2 that the applicant has never transferred the said shares to anyone else;

2. That the second respondent be ordered to

pay the costs of these proceedings which will include those reserved on 20 October 1982 and those consequent upon the hearing of verbal evidence before me.

3. I request the Registrar to forward a copy of this judgment to the Attorney-General of the Transvaal for his consideration of the conduct of the second respondent as set out therein."

With leave of the Court a quo the appellant appeals against the first and second orders abovementioned.

The essential parts of the applicant's case have already been noticed. In brief the appellant's version came to the following. The appellant denied that he had borrowed R800 from the applicant but he admitted that she had gained

possession

15.

possession of his share certificates. His explanation was that such share certificates and the company's original share register had been handed over by him to the appellant for safekeeping by her. On 5 February 1974 he bought the applicant's thirty shares for R2 000, whereafter the applicant told him that she had lost the documents earlier entrusted to her. The appellant telephoned Grobler to inform him of the loss of the share certificates and later the appellant and the applicant proceeded to Grobler's office where in the presence of the appellant (but not Grobler) the applicant signed the transfer form. Thereafter the applicant was paid R2 000 in cash and the appellant made the false affidavit. The appellant maintained, however, that before he signed it he showed the false affidavit to the applicant and she agreed with its contents. The appellant further testified that he had signed the minutes of the 5 Feb meeting in Grobler's office after they had been considered by the applicant; and that the applicant had likewise approved the minutes, of the

meeting

16.

meeting held on 7 February 1974.

The crisp issue in the case was therefore whether the applicant had, with deliberate intention, sold her thirty shares in the company to the appellant, or whether she was the unsuspecting dupe of a fraudulent scheme engineered by the appellant. As the evidence in the Court below unfolded, however, the scope of the inquiry was considerably enlarged and several secondary factual disputes were explored. In the result there was, at the end of the evidence, much material by reference to which the respective credibilities of the applicant and the appellant could be tested. A few examples will suffice. One of the secondary issues was . whether in 1954 the applicant had had the financial means to make a contribution towards the purchase of the farm. The appellant contended that the applicant had not then had any money of her own and that in fact she had contributed nothing towards the purchase of the farm. Another subsidiary issue

was

17.

was whether or not a partnership had ever subsisted between the applicant and the appellant and, in connection therewith, whether or not the appellant had been guilty of fraudulent conduct in making income-tax returns to the Receiver of Revenue; regarding which the appellant in the course of his evidence blew hot and cold in a most bewildering fashion, A further collateral matter investigated involved the appellant's assertion (firmly repudiated by the applicant) that the appellant had sold to the applicant for R14 000 the business known as the Skyline Tearoom. The appellant's claims was easily demonstrated to be false because his witness Grobler told the Court below that there was no entry whatsoever in the financial statements either of the appellant or of the applicant reflecting such a Liability. Indeed, the evidence of Grobler established that at the relevant time it was the appellant who owed the applicant a large sum of money. It is convenient, however, to pause here in order to consider

briefly 18. briefly the tenor of the appellant's evidence affecting the manner in which, according to him, it was sought to reduce the applicant's debt of R14 000. Such evidence not only affords some insight into the appellant's business unorthodoxy but further provides an illustration of the blatant inconsistency which characterised much of his testimony in the Court below.

The applicant and the appellant were both clients of Volkskas Beperk at the same branch of the bank in Klerksdorp While relations between brother and sister were still cordial it regularly happened that the appellant on his visits to the bank took with him the takings from the applicant's business for depositing to her account. It is common cause that in so doing the appellant from time to time deposited part of the applicant's takings to the credit not of her account but to the credit of his own; and that during the period 1967-1974 the appellant in this fashion diverted a very substantial amount of the applicant's money to his own account. The applicant's .

19.

applicant's evidence was that this was a systematic defalcation of which she became aware for the first time in 1974. On the other hand the appellant's explanation was that such siphoning-off was the method adopted by him, at the instance of the applicant herself, in order to reduce the debt of R14 000 owed to him by the applicant in respect of the purchase price of the Skyline Tearoom. Dealing with this part of the case the learned Judge thus summarised the effect of the appellant's evidence:

"This system was that, on the original deposit slip, kept by the bank he (the appellant) placed his own name and on the copy remaining in the deposit book, he inserted the name 'Skyline Store' in capital letters, writing the latter through carbon paper in order to induce the belief that it was a true copy of the original. Where 'Skyline Store' was written in capital letters he took the money but, where it was in ordinary handwriting script, this would be a genuine deposit. This system he and the applicant operated until

1974. This subterfuge was adopted to impress the applicant's present husband that she was a rich woman (despite the fact that the system commenced in 1967 and she

married

20.

married Iliev in 1970). According to the second respondent (the appellant.) this system continued until Iliev came to know of the matter; this caused trouble and the second respondent went to Volkskas Beperk who accepted his explanation. He admitted that the amounts

of R1 986,91 and R2 586,62 were

transferred from his account to the applicant's account as a result of her complaint to the bank in regard to the alleged falsification of the bank deposit slips. He also admitted that he had paid her the sums of R2 000 and R3 000 in addition as a repayment of the alleged falsifications but added that he did so as the applicant's husband had forced her to demand repayment 'but she has already given me back some of the money'. Later in evidence he denied having paid these latter two sums. In answer to a question in cross-examination he said:

'If I said I paid R2 000 and R3 000 I was mistaken.'

To complete the picture it might be mentioned that no sooner had the appellant's explanation of a code based on the use of capital letters been effectively demolished in cross-examination than the appellant proffered an alternative (but equally unacceptable) code involving alleged distortions of his signature on the deposit-slips involved. It is hardly

surprising

21.

surprising that in regard to the entire scheme for the channelling of the applicant's money into his own bank account the Court below came to the conclusion that the evidence of the appellant was a tissue of lies; that he had in fact misappropriated these monies; and that, when his theft was discovered, the appellant repaid to the applicant the amounts deposited to by her.

It is unnecessary to examine the testimony of the applicant and the appellant in regard to the other collateral disputes of fact. All the evidence in the case was carefully dissected by the learned Judge in the course of a full and thorough judgment. It suffices, I consider, to notice the impressions gained by the learned Judge of these two witnesses and recorded in the judgment of the Court a quo; and to say that such impressions are fully borne out by a reading of the record of the evidence.

The

22.

The learned Judge described the applicant as a garrulous and impulsive witness with a tendency towards the theatrical who could be devious and, at times, evasive. The learned Judge nevertheless gained the distinct impression that she was not a dishonest witness. He remarked that although the applicant was not a person of great intellect -

"the impression she made upon me was that

she was telling the truth. That she had no great love any longer for her brother, was patent and, in making my assessment of her, I never lost sight of this fact."

The appellant struck the Court a quo as being a man of intelligence. The learned Judge pointed out that on many and material points in the case the version given in his evidence by the appellant (who was represented by senior counsel in the Court below) had not been put to the applicant in cross-examination; and that the appellant was often evasive to the point of becoming incoherent. The learned Judge described the appellant as "a thoroughly untrustworthy witness" and further observed of him:

"He

23.

"He lied on a number of occasions and, when his lies were exposed, attempted to evade the issue by telling further lies and enmeshing

himself in a web of falsehoods

Despite his glib manner of answering I am of the view that the second respondent was demonstrated to be a dishonest person

His explanations of the reason why he made the false affidavit on 7 February 1974 are contradictory and unconvincing. His evidence in regard to the events of 5 February 1974 is unimpressive and unconvincing and simply does not bear the ring of truth. I make the same observation in regard to the alleged concurrence of the applicant in the minutes of the two meetings of the first respondent."

Putting the evidence of the appellant in the scales against that of the applicant the learned Judge was impelled to the following

conclusion:

"I do not believe him on any major issue except where his testimony is supported by other acceptable evidence. When weighing up his evidence against that of the applicant there is no comparison."

At this juncture it is convenient to refer briefly to (1) the authenticity or otherwise of the disputed signature

24.

signature on the share transfer form; and (2) the authorship of the forged signature on the Securities Transfer form dated 26 February 1975 purporting to authorise the transfer of one share in the company from Hind Shalala to the appellant. In the Court below a typewritten report ("the Horley report") prepared by a handwriting expert was handed in by consent "as evidence of the contents thereof". The . Horley report expressed the opinion that the disputed signature, was "probably" the signature of the applicant; but that the forged signature was not the signature of Hind Shalala.

To round off this outline of the main evidence adduced in the Court below mention should be made of two respects in which the evidence of the applicant conflicted with that of Grobler. The applicant testified that Grobler's communication to her on 12 October 1981 was the first intimation to her by anyone that her shares in the company had been transferred to the appellant. According to Grobler,

however,

25.

however, the appellant had already on 28 September 1978 inquired of him who the shareholders in the company were. To this inquiry, so testified Grobler, he responded by telling the applicant that it was none of her business. Grobler's testimony further lent some support to the appellant's story (firmly repudiated by the applicant) that on 5 February 1974 she had accompanied the appellant to the offices of Grobler. When testifying otherwise than in relation to the financial statements of the applicant, the appellant and the company, Grobler's memory was shown to be defective in significant respects. In regard to the events of 1974 the learned Judge described Grobler's powers of recollection as "appalling". In addition the learned Judge found that, affecting the two issues just mentioned, the evidence of Grobler was unimpressive and that it betrayed a bias in favour of the appellant.

The way has now been cleared for a consideration of the main findings recorded by the Court below in regard

to

26.

to the central issue of the alleged sale and transfer of the shares by the applicant to the appellant. The learned Judge properly approached the case by looking at the evidence before him in its totality; and he furthermore appreciated that should he reject the evidence of the appellant and Grobler on certain issues such rejection would not necessarily point to the truth of the applicant's version.

On the cardinal issue whether the appellant paid the applicant R2 000 for her thirty shares the Court below found as a fact that the appellant had paid the applicant nothing either on 5 February 1974 or shortly thereafter. Dealing with the appellant's contention that before he signed the false affidavit he had shown it to the applicant, and that the latter agreed with its contents, the learned Judge remarked in his judgment:

"This would be incredible if she was in possession of the shares at that stage. If, of course, she had lost them it is possible that she would have read the affidavit without demur, but why should he have bothered to show it to her, and why should she have agreed to

his

27. his making a false statement 'lost by me'?"

Appraising the probabilities the learned Judge pointed out that at the time of the false affidavit the appellant was successfully "manipulating his sister and her bank deposits", and then observed:

"If he knew that his sister would not surrender the shares or if he wished to circumvent her by having new shares registered then, on the probabilities, a dishonest man would set about acquiring the shares (which he regarded as his) by alleging they were lost. There exists no other acceptable inference why the second respondent should have deposed to a false affidavit. I find this to be the case in casu."

The Court below concluded that the false affidavit:

"was part of a scheme by him (the

appellant) to obtain shares from the applicant to which he considered she was not entitled as she was in his eyes a mere nominee."

Concerning the disputed signature on the share transfer form the learned Judge held, on the probabilities, that this was in fact the signature of the applicant; and that she affixed her signature to the document:

"not

28.

" not before but, on the probabilities,

on 5 February 1974."The Court below found as a fact that the appellant procured the signature of the applicant to the share transfer form

"by some false pretence" and "in a fraudulent manner". No finding was made as to the particular stratagem employed by the appellant in so obtaining the applicant's signature, and the learned Judge could do no more than to speculate on the probability that if the appellant wished to act dishonestly -

" he would place a document before her

requesting her to sign it in her business name and that she would have done so without reading it. She trusted her brother at that stage; he knew of this fact and, because of this trust, he was then busy misappropriating money from her bank deposits by falsifying the original deposit slips."

Dealing with the company's minute book the Court *a quo* found

in relation to the 5 Feb meeting -

" that the minutes are an unilateral

declaration by the second respondent; that no such meeting was held and that the applicant did not agree to sell or transfer her shares as set out therein."

Similarly

29. Similarly in regard to the minutes of the alleged meeting on 7 February 1974 the learned Judge accepted the applicant's version that these minutes had never been shown to her, and he described them as "an unilateral document merely prepared as a matter of form" to give effect to the appellant's plan to obtain the applicant's shares.

Elaborate heads of argument were filed on behalf of the appellant by the senior counsel who had appeared for him in the Court below. In this Court the appellant was represented by Mr Ettlinger who confined his argument to two main submissions set forth in his own (and commendably brief) addendum to the heads of argument. It should be pointed out at once that the appellant's original heads of argument disavowed any challenge of the validity of the distinctly unfavourable credibility findings against the appellant recorded in the judgment of the Court below. In the course of his argument Mr Ettlinger, wisely I think, did not try to persuade us that the learned Judge's assessment of the

appellant's

30.

appellant's demerits as a witness were open to criticism.

The first contention advanced on the appellant's behalf was that both (a) the nature of the lay-out of the share transfer form and

- (b) the short period of time available to the appellant in which "to concoct a pretence" militated against the conclusion of the Court below that the appellant had procured the signature of the applicant to the document in question by some or other false pretence. As to (b) it is enough to say that the sufficiency of the time available to the appellant on 5 February 1974 to obtain the applicant's signature was not a matter investigated at all in the evidence. Nor in my opinion, is the argument based on factor (a) a particularly cogent one. The portrait of the appellant which emerges from the evidence in this case is one of a plausible and resourceful rogue who in February 1974 was exploiting the misplaced trust which his sister had reposed in him. I am not persuaded that it would have unduly taxed his ingenuity to

gull the applicant into signing the share transfer form by cloaking and misrepresenting the true nature of the document in question.

Mr Ettlinger's second contention comes to the following. Recognising the transparent falsity of the appellant's story that he in fact paid the applicant R2 000 as the consideration for her shares, counsel seeks to persuade us that upon a proper analysis of the evidence we should conclude that originally the applicant paid nothing for the shares. That conclusion, so the argument proceeds, permits as a natural and plausible inference that the applicant might have been quite content to transfer her shares to the appellant for no consideration. There are, I consider, a number of insuperable difficulties in the way of this argument. It is necessary here to mention only three. The first is that no good reason exists for disbelieving the evidence of the applicant that the shares were issued to her in 1955 in return for a capital contribution of R4 000 made by her towards the

purchase

32.

purchase of the farm. The second difficulty is that it was never suggested to the applicant in cross-examination that she had donated the shares to the appellant. There was, of course, hardly room for such a suggestion. The cornerstone of the appellant's case in the Court below was that the applicant had offered the shares for sale to the appellant because she was short of money, and that the appellant had bought the shares from her. The third difficulty is that the argument overlooks the reason which prompted the appellant to pretend that he had bought the shares. He so falsely pretended because he knew only too well that the applicant would never consider parting with her shares for nothing.

This is an appeal purely on fact. No misdirection on fact in the judgment of the Court a quo has been shown. So far from being convinced that the conclusion at which the learned Judge arrived at the end of a very careful

judgment

was wrong it seems to me that it was entirely correct.

follows

33. follows that the appeal must fail.

Two further matters require brief attention. Despite the fact that no leave to cross-appeal was sought by or granted to the applicant there was nevertheless filed on her behalf a cross-appeal against "portion of the judgment of the Court below." It relates to a subordinate finding of fact. It is common cause that the cross-appeal is irregular and that it should be struck off with costs. The appeal record lodged with the registrar of this Court runs to 33 volumes. Of the record so lodged 16 volumes were wholly unnecessary for the hearing of the appeal and a further 3 volumes to some extent contained unnecessary matter. The superfluous portions of the appeal record are set forth in a schedule appended to a letter dated 24 July 1986 from the appellant's Johannesburg attorney to his Bloemfontein correspondent, a copy of which letter was served upon the registrar. The fact that the appeal record was thus unnecessarily burdened requires a special order in regard to

34.

the matter of the costs of the appeal.

The following orders are made:-

- (1) The appeal is dismissed with costs including the costs of two counsel. Such costs will, however, not include, either as between party and party or as between attorney and client, any perusal fee in respect of the superfluous portions of the record. (2) As between attorney and client the appellant's attorneys will not be entitled to charge any perusal fee in respect of the superfluous portions of the record. (3) The cross-appeal is struck off with costs.

G G HOEXTER, JA

JOUBERT, JA)

GROSSKOPF, JA)

Concur VIVIER, JA)

STEYN, AJA)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZASCA/1987/19.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/shabala-v-iliev-and-others-unknown-topic-asca-1987>

Prepared on 12 October 2026 · Esheria