

TATENDA GWINJI
versus
ZIMPLANTS MHONDORO NGEZI CHEGUTU ZVIMBA COMMUNITY SHARE
OWNERSHIP TRUST
and
ZIMBABWE PLATINUM MINES (PVT) LTD
and
MINISTER OF INDUSTRY, COMMERCE AND ENTERPRISE DEVELOPMENT
and
SIBUSISIWE REVAI CHINDOVE
and
GODFREY HAVATITYE SIGOBODHLA

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 28 March 2023 & 17 January 2024

CIVIL ACTION

T R Mugabe, for the plaintiff
Z T Zvobgo, for the 2nd and 4th defendants

MANZUNZU J

INTRODUCTION

On 21st November 2022, the plaintiff instituted the present summons action in terms of section 14 of the High Court Act [Chapter 07:06], in which he seeks the following declaratory and consequential relief:

- a) An order declaring that the 1st Defendant (the Trust) is entitled to subscribe to, and the 2nd Defendant (Zimbabwe Platinum) is obliged to allot to the Trust, ordinary shares in the share capital of Zimbabwe Platinum constituting 10% (ten per centum) of the issued share capital of the Zimbabwe Platinum in terms of clause 3.2 of the ZIMPLATS MHONDORO-NGEZI CHEGUTU ZVIMBA COMMUNITY SHARE OWNERSHIP TRUST MA1315/2011 dated 2nd December 2011;
- b) An order declaring that Zimbabwe Platinum's failure and/or neglect to comply with clause 3.2 of the Trust Deed to be *ultra vires* section 13 of the Constitution of Zimbabwe, 2013 and Regional and International Instruments to which the Republic of Zimbabwe is a State Party in respect of the Plaintiff's right to national development; consequently,
- c) An order that, within fourteen (14) days of this order, Zimbabwe Platinum execute with the Trust, a subscription agreement relating to the community shares in terms of clause 3.3 of the ZIMPLATS MHONDORO-NGEZI CHEGUTU ZVIMBA

COMMUNITY SHARE OWNERSHIP TRUST MA1315/2011 dated 2nd December 2011; and

- d) Costs of suit on the legal practitioner and client scale.

BACKGROUND FACTS

The background facts are common cause. Zimbabwe Platinum is a private limited company duly incorporated under the laws of Zimbabwe. It is involved in platinum mining in the Mhondoro – Ngezi area. Under the indigenization laws, it was a requirement that Zimbabwe Platinum submit an indigenization implementation plan. It did so by expressing its intention to allot 10% of its issued shares to the local community in which it carries out its platinum mining activities. To that end, on 13 October 2011, a memorandum of understanding (“*the MOU*”) was signed between the Government of Zimbabwe and Zimbabwe Platinum. The MOU recorded that a community share ownership trust (“*the Trust*”) would be set up for the benefit of the various communities affected by Zimbabwe Platinum’s mining activities.

It was further recorded that Zimbabwe Platinum would dispose 10% of its issued share capital to the Trust for fair value, on terms and conditions to be agreed upon. The MOU further acknowledged that the disposal of the shares was subject to, *inter alia*, the execution of definitive agreements relating to the disposal of the shares to the Trust, including a share sale agreement between Zimbabwe Platinum and the Trust.

On 11th December 2011, a Trust Deed was registered in the Deeds Registry which effectively gave birth to the Trust, being the 1st Defendant.
The plaintiff’s cause of action is premised on clauses 3.2 and 3.3 of the Trust Deed.

It is the plaintiff’s contention that despite Zimbabwe Platinum making profits and declaring dividends, it has refused and or neglected to allot to the Trust, ordinary shares in its share capital constituting 10% (ten per centum) of the issued share capital. Plaintiff attributed the delay and/or failure to give birth to the subscription agreement to Zimbabwe Platinum.

The plaintiff instituted this action in his personal capacity as a resident and beneficiary of the Trust and in the public interest on behalf of other residents and communities who are beneficiaries of the Trust.

The 4th and 5th defendants have been cited in their official capacity as Founding Trustees of the Trust.

The 2nd and 4th defendants have raised an exception to the summons and declaration in that they do not disclose a cause of action. They also have raised special pleas, that of prescription, lack of *locus standi* of the plaintiff; and that the court has no jurisdiction to deal with the action which is not commercial dispute.

THE EXCEPTION

Mr Zvobgo who moved the exception for the 2nd and 4th defendants was detailed in his approach but to the point. He started by examining the nature of the relief sought by the plaintiff and concluded that it was one where the cause of action rests on the interpretation of clauses 3.2 and 3.3 of the Deed of Trust. In fact, the plaintiff admits his claim is founded on the two clauses.

Clause 3.2 reads;

“Subject to clause 3.3 below, the Founding Trustees shall, in the name of the Trust, subscribe for, and Zimplats shall allot to the Trust, ordinary shares in the share capital of Zimplats constituting 10% (ten percent) of the issued share capital of Zimplats (“the Community Shares”)”

Clause 3.3 reads;

“The Trust’s subscription for, and Zimplats’ allotment of, the Community Shares in terms of clause 3.2 above shall be subject, as a condition precedent, to the execution by the Founding Trustees and Zimplats of a subscription agreement relating to the Community Shares (“the Subscription Agreement”).”

Mr Zvobgo’s simple argument was that these two clauses relied upon by the plaintiff to derive his cause of action, create a precondition, which must be fulfilled first before one can derive any right from them. What is this pre condition? It was submitted, it is the execution of a subscription agreement.

Both the MOU and the Trust Deed provide that the allotment of shares will be subject to the execution of the subscription agreement. Logically, it was argued that, the plaintiff cannot seek a *declaratur* that the Trust has a right to subscribe for Zimbabwe Platinum’s shares, because that right is subject to a precondition that parties must first enter into a subscription agreement.

Mr Zvobgo further argued that the obligation of Zimbabwe Platinum to allot any shares to the Trust is not actuated until the condition precedent has been met. For this assumption he relied on the case of *University of Zimbabwe v University of Zimbabwe Staff Associations SC8/04*, where SANDURA JA, as he then was, made the following remarks regarding a suspensive condition:

“A suspensive condition, also known as a condition precedent, suspends the operation of all or some of the obligations arising out of an agreement until the occurrence of a future uncertain event. See The Law of Contract in South Africa 4 ed by R H Christie at p 159. Once that event occurs, the agreement becomes operational and binding on the parties.”

In *Treasure Consultancy (Private) Limited v Masvingo City Council & Another HH246/12* the court had occasion to comment on the non-fulfilment of the condition precedent, and stated, “I do take the point advanced by Advocate Mpofo that: ‘In the absence of the fulfilment of the

conditions precedent, which position is common cause, the Applicant had no contract to enforce’.

The second point taken by Mr Zvobgo in advancing that there was no cause of action, is on the requirements of section 14 of the High Court Act. The section provides that: “*The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.*”

The argument on whether the plaintiff has a right remained intertwined with the absence of a right because of the non-fulfilment of a condition precedent.

The last point to this exception was that it was improper for the plaintiff to ask the court to compel the parties to enter into an agreement. This is because the Court cannot order parties to reach *consensus ad idem*. It is trite law that an agreement to agree is not enforceable. *In Premier, Free State and Ors v Freedom Free Estate (Pvt) Ltd 2000 (3) SA 413 (SCA)*, the court held that:

“An agreement that parties will negotiate to conclude another agreement is not enforceable because the absolute discretion is vested in the parties to agree or disagree.” See also *Hativagone & Another v CAG Farms & Others SC42/15*.

The 2nd and 4th defendants sought for the dismissal of plaintiff’s claim, they said it was incurable.

Mr Mugabe for the plaintiff was put on a hill start. He was brief. He agreed that as a general rule, an agreement to agree was unenforceable. He created a duty for himself to assist the court, as to what are the exceptions and whether this case falls within the exception. He fought, but in my view, a losing battle.

In an effort to demonstrate the exceptions to the general rule, Mr Mugabe referred to the case of *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993 (1) SA 768 (A)*. From a reading of this case, I did not see the assistance sought from it neither did Mr Mugabe demonstrate with any clarity the principles laid therein. This is because the case deals with the issue of whether certain clauses of the agreement were void or not.

I do not think the absence of time lines in clause 3.2 and 3.3 of the Deed of Trust amounts to an exception as argued by Mr Mugabe.

Mr Mugabe insisted that the court could still order the parties to enter into a subscription agreement without necessarily dictating the terms. I disagree for the simple reason that the court cannot force parties to enter into an agreement.

Reference to the plaintiff’s written heads cannot salvage the plaintiff either. The heads defines what a cause of action is and further persist the cause of action is founded on the breach of clause 3.3. Such a dry statement cannot persuade any one.

Given the non-fulfilment of the condition precedent, it logically follows that the Plaintiff cannot seek to enforce any rights emanating from clause 3.2 or 3.3 of the Trust Deed. The

plaintiff has not established any valid cause of action. The exception ought to be upheld. It disposes of the plaintiff's claim. In that event, it is pointless to deal with the special plea.

DISPOSITION.

1. The exception to the summons and declaration by the 2nd and 4th defendants is upheld with costs.
2. The plaintiff's claim be and is hereby dismissed.

Tafadzwa Ralf Mugabe, plaintiff's legal practitioners
Zvobgo Attorneys, 2nd and 4th defendants' legal practitioners.