STONCOR MINING SUPPLIERS [PVT] LTD
versus
INDUCON INVESTMENTS [PVT] LTD
and
CRISTIANO SANTINI
and
FRANCO D'ANGOLO

MAFUSIRE J
HARARE, 21 October 2024 & 7 November 2024

Date of judgment: 17 March 2025

Civil trial

T. Zhuwarara with *B. Matanga*, for the plaintiff in convention, and the second and third defendants in reconvention.
T. Magwaliba, for the first defendant in convention

MAFUSIRE J

a INTRODUCTION

[1] This was a civil trial. There was a claim in convention by the plaintiff against the first defendant, and a counter-claim, known as a claim in reconvention, by the first defendant against the plaintiff, jointly with the second and third defendants.

[2] In convention, the plaintiff seeks the eviction of the first defendant, and all those claiming rights of occupation through it, from certain three [3] granite mining claims at a place called Uzumba in Mashonaland East Province of Zimbabwe. The official registered names of those claims are Rusumba 7, Registration No 28321 BM; Rusumba 8, Registration No 28322 BM; and Rusumba 9, Registration No 28323 BM [hereafter referred to as "***the mining claims***".]

[3] In reconvention, the first defendant seeks certain declaratory orders and consequential relief against the plaintiff and the first and second defendants.

[4] Distilled, the declaratory orders sought by the first defendant are to the effect that the plaintiff sold to the first defendant the shareholding in the plaintiff and the mining equipment for distinct sums of money of which the first defendant had duly paid for forty percent [40%] for the shareholding, and hundred percent [100%] for the equipment; that the first defendant is entitled to retain occupation of the mining claims; that the first defendant is tendering to the plaintiff, payment for the remaining sixty percent [60%] of the shareholding, to bring the first defendant's shareholding in the plaintiff to one hundred percent [100%]; and that thereafter the plaintiff and the second and third defendants should transfer to the first defendant the entire shareholding in the plaintiff.

b BACKGROUND

[5] Both the plaintiff and the first defendant are registered companies in Zimbabwe. The plaintiff is the registered owner of the mining claims. The first defendant, its directors, employees, assignees and others claiming rights of occupation through it are in occupation of the mining claims, at least at all material times.

[6] The second and third defendants are the sole or major shareholders and co-directors of the plaintiff.

[7] Initially the first defendant's claim in reconvention was against the plaintiff only. However, following an order of joinder following the first defendant's application which the plaintiff did not oppose, the second and third defendants were duly joined as parties to the first defendant's claim in reconvention.

c THE PLAINTIFF'S CLAIM

[8] Summarized, the plaintiff's claim in convention for the eviction from the mining claims of the first defendant and all those claiming rights of occupation through it is based on the following allegations:

- that the plaintiff is the uncontested owner of the mining claims;

- that in terms of a 2017 agreement between the parties the plaintiff granted the first defendant the rights to mine granite at the mining claims and to use the mining equipment in return for certain amounts for rent or royalties with payment modalities being expressly agreed upon;

- that in industrial parlance, the agreement aforesaid is what is called a tribute agreement and that it was extended from time to time in three [3] yearly phases;

- that at the same time as the tribute agreement aforesaid was entered into, the parties began extended negotiations and considered the possibility of the second and defendants selling their collective shareholding in the plaintiff, beginning with forty [40%] of the shareholding, and the remaining sixty percent [60%] after a period of five [5] years];

- that after considering several payment modalities for the first defendant's financial obligations under the agreements, it was finally agreed that the plaintiff would buy the granite blocks mined by the first defendant from the mining claims at discounted prices, with such discounts constituting the royalties in terms of the tribute agreement, and the purchase price in terms of the sale of shares agreement, if eventually executed;

- that despite prolonged discussions over a lengthy period of time, no agreement for the sale of the second and third defendants' shares in the plaintiff was ever concluded;

- that eventually the plaintiff duly gave the first defendant three [3] months' notice terminating the tribute agreement and to vacate the mining claims;

- that notwithstanding the notice aforesaid, the first defendant and all those claiming occupation through it, have failed and or refused to vacate the mining claims;

d THE FIRST DEFENDANT'S DEFENCE AND CLAIM IN RECONVENTION

[9] Also summarized, the first defendant's defence to the plaintiff's claim in convention and its own claim in reconvention, not quite elegantly pleaded, are that following an oral agreement between the parties, the second and third defendants sold to the first defendant their entire shareholding in the plaintiff on the following terms:

- that the plaintiff would sell forty percent [40%] of its shares of which one hundred percent [100%] would translate to the plaintiff's major assets, namely the miming claims;

- that in terms of a separate tribute agreement, the first defendant would take immediate occupation of the mining claims, begin working on them immediately and take over the plaintiff's mining workforce, all of which the first defendant did;

- that several payment modalities for the first defendant's obligations were considered until it was finally agreed that in payment for the forty percent [40%] shareholding aforesaid, the defendant would, over a period of three [3] years, sell granite blocks to the plaintiff at discounted prices, the discounts being construed as the installments at US$2 777-77 per month;

- that the agreed purchase price for the mining equipment, comprising machinery and vehicles, was US$180 000-00 which would be payable over a period of two [2] years of the date of the first defendant's finishing off the payment for the forty percent [40%] shareholding aforesaid;

- that after five [5] years the first defendant would have the option to buy the remaining sixty percent [60%] of the plaintiff's shareholding;

- that the first defendant has duly paid for both the mining equipment and the forty percent [40%] shareholding and that its occupation of the mining claims is legitimate;

- that despite demand, the plaintiff and the second and third defendants have failed and or refused to transfer the forty percent [40%] shareholding to the first defendant, hence its claim in reconvention

e THE ISSUES

[10] The plaintiff alleges that no agreement was ever concluded between the parties in regards to the sale of the second and third defendants' shareholding in the plaintiff. On the other hand, the first defendant contends that an agreement on that aspect, together with that relating to the sale of the equipment, was indeed concluded.

[11] The issues for trial were agreed as follows:

- whether or not the parties concluded any agreement for the sale of the forty percent [40%] shareholding in the plaintiff;

- whether or not the first defendant purchased and paid for the plant and equipment in the sum of $180 000-00, or at all;

- whether or not the first defendant has a right to remain in occupation of the mining claims and to acquire the remaining sixty percent [60%] shareholding in the plaintiff, and

- whether or not the plaintiff is entitled to evict the first defendant from the mining claims and all those claiming rights of occupation through it.

f THE PLAINTIFF'S WITNESSES

[12] The plaintiff called two witnesses, namely defendants 2 and 3. Their evidence was that the tribute agreement of 2017 was the only and sole agreement between the parties. The witnesses, who corroborated each other in all material respects, testified that from February 2017 there were extensive discussions and correspondence between the parties directly, and sometimes through their representatives, but that no agreement was ever reached on the sale of shares and equipment. They denied that the first defendant has any shareholding or equity of any sort in the plaintiff.

[13] The witnesses also testified that it had been the express contemplation of the parties that if ever an agreement on the sale of shares would eventually be reached, it would be reduced to writing by the parties' legal representatives but that this was never done because no such agreement was ever reached.

[14] The witnesses further testified that the royalty payments by the first defendant were towards the rental of the equipment and not for its purchase, let alone for the shares. They said no money was ever paid for the purchase price for the equipment or the shares, even after the plaintiff's legal practitioners in South Africa had written to the first defendant providing it with the bank account into which the money could be deposited.

g THE FIRST DEFENDANT'S WITNESSES

[15] The first defendant called only one witness, one Sean He Xuan ["***Mr Xuan***"]. He was a director of the first defendant at all material times until the end of 2017.

[16] Mr Xuan testified that an agreement was reached between the parties as attested to by the emails on record, particularly the one in January 2017 appearing on p 25 of the record. However, he conceded that a written agreement was to be drafted, but claimed that this did not detract from the fact that an enforceable agreement had been reached between the parties.

[17] Mr Xuan maintained that the first defendant had duly paid in full for both the 40% equity in the plaintiff and for its equipment by way of granite blocks sold to the plaintiff at the agreed discounted prices. He denied that the invoices relied upon by the plaintiff were for rental for the equipment and claimed that they were for both the purchase for the 40% shareholding and the equipment.

[18] Of the tribute agreement's existence and relevance, Mr Xuan alleged that it was just a mere formality to allow the first defendant to mine the mining claims which were still under the plaintiff's ownership, but otherwise that the real agreement was for the sale of shares and the equipment.

h FINDINGS

i/ *Whether or not the parties concluded an agreement for the sale of the forty percent [40%] shareholding in the plaintiff*

[19] A valid agreement of sale comes into existence when there has been a meeting of the minds of the seller and of the purchaser on the purchase of the thing to be sold and the purchase price for been it. This is quite elementary.

[20] In *Warren Park Trust v Pahwaringira & Ors* HH 39/09, at p 4 of the cyclostyled judgment, BHUNU J, as he then was, simplified the law on agreements of sale as follows:

> "It is trite and a matter of elementary law that the essential elements of a valid contract of sale comprise: **1**. Agreement [*consensus ad idem*] as to:- [a] the thing sold, the [*merx*] and [b] the price of the thing sold, [*pretium*]. In other words a contract of sale comprises three essential elements, that is to say:- [i] an agreement between the parties to buy and sell, [ii] an agreement on the thing or commodity sold known as the *merx* and [iii] an agreement on the price known as a *pretium*."

[21] Demonstrably, the first defendant's case is limping. It cannot point to any particular date when, or any particular document which evidences a meeting of the minds of the parties. It has desperately tried to string together disparate correspondence or discussions over a period of time to construe an agreement and proof of payment for the sale of both the plaintiff's equipment and the shareholding of defendants 1 and 2 in the plaintiff. However,

it is quite apparent that there was never any such meeting of the minds. All that the correspondence proves is that the parties did energetically engage each other over an extended period of time in relation to the subject matters in contention but that no final agreement was ever entered into.

[22] The *coup de grace* in the evidence against the first defendant is the acknowledgement by all the witnesses, supported by some of the correspondence, that it was the intention of the parties that once an agreement was finally reached on the contentious subjects, their legal practitioners would reduce it to writing. This was never done.

[23] The e-mail on 19 January 2017 from one Suzanne Naransamy, on behalf first defendant to Mr Xuan, reads in part:

> "With reference to our telephone conversation of yesterday, please find below imperative items that were discussed and agreed upon.
>
> A final agreement will be drafted by a legal entity taking into consideration the items mentioned below.
>
> 1. Stoncor Mining is the registered permit/claim holder of Rusumba, we will cede you 40% of the company; price to be agreed upon.
>
> 2. Inducon Investments has access to use all the equipment, value to be agreed on.
>
> 3. Graniti Tecnicia will purchase all production first choice … …, Graniti Tecnicia will have first preference on the commercial choice blocks. Inducon Investments can start quarrying immediately.
>
> 4. Prices as agreed in Zimbabwe [FOT quarry]
> BIG SIZES
> $450
> $400
> $350
> Small sizes to be agreed
>
> 5. Inducon Investments have the first option to buy the balance of 60% after a period of 5 years." [*underlining for emphasis*]

[24] Not only does the first defendant take the e-mail above completely out of context in that, among other things, it was actually penned at the start of what were to be protracted negotiations, and that there is subsequent correspondence whose construction is literally at

war with the first defendant's interpretation, but also this email, by itself, is evidence that the parties had not agreed on one of the essential elements of a sale agreement, namely the price [*pretium*].

[25] Contrary to any suggestion that there was an agreement between the parties on the contentious subjects and that the e-mail on 19 January 2017 above could be taken as part of the corpus of the evidence to that effect, there was also an email on p 30 of the record from the first defendant's legal practitioners showing that as late as 26 November 2018, the parties were still far from agreeing on the purchase prices for both the claims and the equipment. They wrote in part:

> "3. Our client needs to understand how much cubics will be for the **claims** and how much will be for **the equipment**. It is key at this point for your client to recall that the pickup vehicle had problems and client had to fix the problems at its costs yet your client ended up taking the vehicle."

[26] It must sound like scratching the bottom of the barrel for the first defendant to pivot its defence and counter-claim on such insubstantial and nebulous factual compendia. The arrangement between the parties from which a contact or contracts would be drawn up was quite complex. The average businessman or businesswoman does not leave it so loose. It is one that common sense dictates that it be reduced to writing.

ii/ *Whether or not the first defendant has a right to remain in occupation of the mining claims and to acquire the remaining sixty percent [60%] shareholding in the plaintiff*

[27] Given my findings and conclusion on the first issue above, it follows that the first defendant's plea and counter claim should fail in their entirety.

[28] Incidentally, the first defendant's claim for a series of declaratory orders is manifestly ill-conceived. A party that moves for a declaratory order does so in terms of s 14 of the High Court Act [*Chapter 7:06*]. In a declaratory order, properly sought, the court declares what the law says or what the legal position is on the given facts, either as agreed or as settled. The court does not declare facts. It declares the law, after making findings of facts.

[29] In its prayer for the claim in reconvention, the first defendant moves the court to declare, among other things:

- that in 2017, the plaintiff entered into an agreement of sale in terms of which it sold all its shares and mining equipment to it for the stated sums of money;
- that it duly paid a certain amount of money in kind as purchase price;
- that it is entitled to retain occupation of the mining claims and to mine the granite from them.

[30] These declaratory orders sought by the first defendant are manifestly improper. The court is being moved to declare facts, not law. Courts cannot alter the contracts entered into between the parties or read into them what the parties did not agree on. In *Magodora & Ors v Care International Zimbabwe* 2014 [1] ZLR 397 [S], the Supreme Court, *per* PATEL JA, stated, at p 403C – D:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy……. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms.''

[31] The first defendant has no right to remain in occupation of the mining claims or to demand the sale to it of 60% of the shareholding in the plaintiff.

iii/ *Whether or not the plaintiff is entitled to evict the first defendant from the mining claims*

[32] The plaintiff's claim is for a remedy called *rei vindicatio*. In *Chenga v Chikadaya & Ors* SC 7-13, at p 7 of the cyclostyled judgment, the Supreme Court, *per* OMERJEE AJA, defined this remedy as follows:

> "The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are two essential elements of the remedy that require to be proved. These are firstly, proof of ownership and secondly, possession of the property by another person. Once the two requirements are met, the onus shifts to the respondent to justify his occupation."

[33] It is common cause that the plaintiff is the owner of the mining claims. One of the incidents of ownership of a thing is the owner's entitlement to the exclusive possession of that thing. The law presumes possession of the thing as being an inherent nature of ownership. Flowing from this, no other person may withhold possession from the owner unless they are vested with some right enforceable against the owner: see **SILBERBERG AND SCHOEMAN**'S *The Law of Property*, 5th ed., at p 243. Otherwise an owner deprived of possession against his will can vindicate his property wherever found, and from whomsoever is holding it: see *Chetty v Naidoo* 1974 [3] SA 13 [A], at p 20B.

[34] Given the court's finding above, the plaintiff is entitled to evict from the mining claims the defendant all those claiming rights of occupation through it.

i COSTS

[35] Both parties have claimed costs on the higher scale of attorney and client. But costs on a higher scale cannot be used by parties to punish each other just because of their soured relationship and the litigation that has ensued. They should be sought on a justified cause, such as errant behaviour or an abuse of the court process. In any case, the general rule is that costs follow the cause and they are in the discretion of the court. In the present case, no exceptional circumstances warrant the award of costs on the higher scale. Costs on the ordinary scale shall follow the cause.

j DISPOSITION

[36] The plaintiff has made its case on a balance of probabilities. There was no agreement finally concluded between the parties on the issues in contention. The defendant's reliance on a series of correspondence as evidence of the agreement is misplaced. The time that such correspondence was being crafted was the period of ongoing negotiations. The correspondence cannot be treated as confirmation of any final agreement. In any event, the parties agreed to have the final agreement reduced to writing. This was never done.

[37] The plaintiff wants the first defendant and all those claiming occupation through it to vacate the mining claims within five [5] days of the order for eviction. Although none of the parties addressed the court on this aspect, given the protracted period of the dispute, from 2017 to now, a period in excess of eight [8] years, a period of five [5] days seems exceedingly too short and therefore unreasonable. It offends against one's sense of justice. A period of twenty-one [21] days for the first defendant to close down and wind up its operations seems more plausible.

[38] In the premises, the following orders are hereby made:

i/ Within twenty-one [21] business days hereof, the first defendant, its directors, employees and all those claiming rights of occupation though it, shall vacate the plaintiff's mining claims situate in Uzumba, Mashonaland East Province, being Rusumba 7, 8 and 9.

ii/ The first defendant's claim in reconvention is hereby dismissed in its entirety.

iii/ The first defendant shall pay the costs of suit.

17 March 2025

Gill, Godlonton & Gerrans, legal practitioners for plaintiff, and for second and third defendants
Dube, Manikai & Hwacha, legal practitioners for first defendant