

**SAMMY'S GROUP (PRIVATE) LIMITED  
T/A KINGS AUCTION CENTRE**

versus

**JOHN BOURCHER MEYBURGH (NO)**

and

**NUGLO INVESTMENTS (PRIVATE) LIMITED**

and

**C.W ELECTRICAL (PRIVATE) LIMITED**

and

**REGISTRAR OF COMPANIES, N.O**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 21 MARCH 2013 AND 16 MAY 2013

Mrs *H Moyo* for the plaintiff  
Mr *Mazibuko* for the 1<sup>st</sup>-3<sup>rd</sup> Defendants

Exception

**MAKONESE J:** The parties in this matter appeared before the Honourable Ndou, J on the 4<sup>th</sup> September 2012 for a Pre-trial Conference under case No. HC 2104/10. It was agreed that the matters under case No. 2104/10 and HC 2734/10 be consolidated and heard together.

In case No. HC 2104/10, the parties were Nuglo Investments (Pvt) Ltd being the Applicant and the Respondent is Irene King, t/a Kings Auction Centre. This matter which had commenced as a Court Application was referred to trial on the 20<sup>th</sup> of June 2011 after both parties agreed that the matter could not be resolved on the papers. The parties proceeded to file their pleadings up to Pre-Trial stage when the matter was then consolidated with case No. HC 2734/10. On the other hand the parties under case No. HC 2734/10 were Sammy's Group (Pvt) Ltd t/a as Kings Auction as the Plaintiff, and John Bourcher Meyburgh (NO), Nuglo Investments (Pvt) Ltd, CW Electrical (Pvt) Ltd and Registrar of Deeds were 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.

It is noted that at the time the two matters were consolidated, both parties overlooked the fact that pleadings under case No. HC 2734/10 were not complete in that, there was no Pre-Trial memorandum of issues, and further the parties had both not filed their Synopsis of Evidence. This meant that for the purpose of trial, the issues for determination were not set out in that particular matter.

I resolved, with the consent of both Mrs *H. Moyo* and Mr *N. Mazibuko* for the Plaintiff and Defendants respectively that we hear submissions first on the Exception and Special Plea filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under case No. 2734/10 before hearing evidence on the merits in the consolidated cases.

This judgment therefore deals with the Exception and Special Plea.

### **Plaintiff's Claims**

The Plaintiff in this matter, Sammy's Group (Pvt) Ltd, t/a Kings Auction is a registered company carrying on the business of auctioneers at stand 1396

Bulawayo. The Plaintiff alleges in its declaration that it entered into a lease agreement with 2<sup>nd</sup> Defendant (Nuglo Investments) Pvt Ltd in terms of which the 2<sup>nd</sup> Defendant let to the Plaintiff certain premises known as stand 1396, Bulawayo Township, held by the 2<sup>nd</sup> Defendant under Deed of Transfer number 1686/53, also known as Kings Auction Centre. The Plaintiff further alleges that sometime on or about 30<sup>th</sup> June 2006, the 2<sup>nd</sup> Defendant, represented by one of its directors and shareholder, the late Graham Leonard Elston (DR 810/08) in his lifetime, entered into a verbal agreement with the Plaintiff, represented by one of its directors, Irene King, in terms of which the 2<sup>nd</sup> Defendant granted the Plaintiff, as a sitting tenant, a right of first refusal in respect of the immovable property known as stand 1396 Bulawayo Township, held by the 2<sup>nd</sup> Defendant under Deed of Transfer number 1686/53 should the property be put up for sale. The Plaintiff contended further, that as consideration for the right of first refusal it was agreed that the Plaintiff would at its own cost undertake all necessary repairs and maintenance of the immovable property in 2<sup>nd</sup> Defendant's stead, and pay instalments towards the eventual purchase of the property. The Plaintiff further averred that following the conclusion of the right of first refusal agreement the parties got to a point where they negotiated and agreed a purchase price of ZW\$5 billion (five billion Zimbabwe dollars). Before the parties finalised the sale transaction, the Plaintiff avers that the representative of 2<sup>nd</sup> Defendant, the late Graham Leonard Elston, suffered a tragedy in that his wife Elana Elston, who was the other director and shareholder of the 2<sup>nd</sup> Defendant died on the 8<sup>th</sup> October 2006. The Plaintiff avers that this further delayed the finalisation of the sale transaction between the 2<sup>nd</sup> Defendant and the Plaintiff in terms of the right of

first refusal. Whilst the late Graham Elston was still mourning his wife's death, he suffered yet another mishap in that he was burnt in a fire and was hospitalised for several months. He subsequently died on 3<sup>rd</sup> July 2008 before the conclusion of the sale transaction pursuant to the right of first refusal. After the death of Elana Elston and Graham Leonard Elston who were the two directors and shareholders of the 2<sup>nd</sup> Defendant. The Plaintiff continued in occupation of the immovable property at stand 1396, Bulawayo, Township as tenants.

The Plaintiff contends in the declaration that on or about 15<sup>th</sup> and 21<sup>st</sup> April 2010, 1<sup>st</sup> Defendant, in his capacity as the Executor of the estates of Elana Elston and Graham Leonard Elston entered into a written agreement of sale of shares in terms of which all the issued shares in 2<sup>nd</sup> Defendant were sold to the 3<sup>rd</sup> Defendant. The sale of shares agreement had the effect of disposing of the immovable property known as stand 1396, Bulawayo Township, held by 2<sup>nd</sup> Defendant under Deed of Transfer number 1686/53, to the 3<sup>rd</sup> Defendant, in breach of the right of first refusal granted by the 2<sup>nd</sup> Defendant to the Plaintiff, so the Plaintiff argued. The Plaintiff alleged that by purchasing all the issued shares in the 2<sup>nd</sup> Defendant the 3<sup>rd</sup> Defendant effectively acquired ownership of the immovable property as the said property was the sole major asset of the 2<sup>nd</sup> Defendant. The Plaintiff contended that as the sale of shares agreement was in violation of the right of first refusal granted by the 2<sup>nd</sup> Defendant to the Plaintiff, it was invalid and of no force and effect whatsoever and should be so declared and cancelled. It is the Plaintiff's assertion that the sale of shares agreement, which had the effect of disposing of the sole asset of the 2<sup>nd</sup> Defendant or disposing of the entire undertaking of the 2<sup>nd</sup> Defendant, was entered into

without compliance with the provisions of section 183 of the Companies Act [Chapter 24:03] and the sale was therefore invalid and of no force and effect. The Plaintiff avers, therefore, that the agreement between the 2<sup>nd</sup> Defendant and the Plaintiff in terms of which Plaintiff was granted the right of first refusal is binding on both parties and prays for a declaratory order that Plaintiff has a right of first refusal upon the disposal of the immovable property known as stand 1396, Bulawayo Township. The Plaintiff also seeks a declaratory order that the agreement of sale of shares of Nuglo Investments (Pvt) Ltd entered into by the 1<sup>st</sup> Defendant and 3<sup>rd</sup> Defendant on the 1<sup>st</sup> and 21<sup>st</sup> April 2010, is in breach of the Plaintiff's right of first refusal and therefore invalid and must be cancelled. The Plaintiff prays for an order directing the 2<sup>nd</sup> Defendant to sell the immovable property in question to the Plaintiff in terms of the right of first refusal.

#### The basis of the Exception

The first and second Defendant filed an Exception and Special Plea in response to the Plaintiff's claims. The Defendants submit that the Plaintiff's claim is bad at law and discloses no cause of action and is also contradictory, vague and embarrassing. They argue that the Plaintiff in its declaration as amplified by the Further Particulars admits that what was sold to the 3<sup>rd</sup> Defendant by 1<sup>st</sup> Defendant were shares in the 2<sup>nd</sup> Defendant. It follows, so the Defendants argue, that since the property is owned by the 2<sup>nd</sup> Defendant and has been so owned since 1953 upon the death of Graham Leonard Elston and Elana Elston, the property remained in the name of the 2<sup>nd</sup> Defendant and could not fall into either estates. The Defendants argue that effectively what could only be sold was in

fact, the shares in the 2<sup>nd</sup> Defendant. In not so many words what the Defendants are asserting is the principle that shares are an incorporeal movable asset and do not amount to the equivalent of the immovable property owned by the company being sold or disposed of.

It seems to me, that the correct legal position is that since the immovable property remains in the name of the 2<sup>nd</sup> Defendant, it follows that the immovable property has not been disposed of and the Plaintiff's claim is therefore bad in law and discloses no cause of action. The definition of "share" in the Companies Act makes it quite clear that a share is not immovable property. "Share" is defined in the Companies Act as follows:-

*"means as share in the share capital of a company and includes stock, except where a distinction between stock and shares is expressed or implied."*

In both papers under case No. HC 2734/10 and HC 2104/10, the Plaintiff alleges that it entered into a lease agreement with the 2<sup>nd</sup> Defendant which subsequently granted it the right of first refusal. Herein lies the problem.

The lease agreement referred to was in fact between the Plaintiff and Auction Centre (Pvt) Ltd. At no stage did the Plaintiff deal with the late Graham Leonard Elston in his capacity as representing the 2<sup>nd</sup> Defendant. Indeed, from the papers, it is clear that Plaintiff was not even aware of the existence of the 2<sup>nd</sup> Defendant until after the death of Mr Elston. It follows therefore, that if at all Mr Elston gave a right of first refusal, he did so either in his personal capacity or as an officer of Auction Centre (Pvt) Ltd, in which case such right was of no force and effect as neither Mr Elston nor Auction Centre had the mandate to grant a right

over the property which they did not own. The fact that Mr Elston may have thought that he owned the property in his personal capacity or through Auction Centre (Pvt) Ltd does not assist the Plaintiff as the court must look at the facts and the circumstances surrounding the transaction. See *Felistano Khumalo v Lizzie Mandeya and Bulawayo City Council* 2008 (2) ZLR 203 (S) where MALABA JA held that even when the parties purported to be selling each other immovable property when in fact they were selling each other rights in the property the court had to look beyond that as agreeing with the parties could accord no legal effect at all to a nullity.

The Defendants further contend that the Plaintiff's claim for the right of first refusal is vague and embarrassing and contradictory more particularly in that it is unclear when such right was accorded to the Plaintiff. In any event, as a company can only act through the medium of a Resolution made in terms of the Companies Act, the alleged right of first refusal cannot therefore be sustainable in the absence of such resolution or irrefutable proof that the Late Mr Elston was acting on behalf of and on the authority of the 2<sup>nd</sup> Defendant and not in his personal capacity. There is no dispute that when Mr Elston signed the lease agreement he signed it on behalf of Auction Centre (Pvt) Ltd. The reason for this could be that he thought (mistakenly though) that he could enter into the lease agreement in his personal capacity or on behalf of Auction Centre (Pvt) Ltd. As it turned out the property belonged to the 2<sup>nd</sup> Defendant, which was not a party to the lease agreement.

The Defendants aver that they are embarrassed in that, whilst alleging a right of first refusal, the Plaintiff in the same breath suggested that an agreement

was subsequently concluded with Mr Elston. The Defendants say they are embarrassed because on the one hand the Plaintiff alleges it has a right of first refusal, which it was never given an opportunity to exercise, whilst in the same breath it alleges that as a result of the right of first refusal, an agreement of sale was concluded. The Plaintiff argues that the purported agreement of sale was never finalised adding confusion to the whole case.

I am of the firm view that that Plaintiff's submission in paragraph 14 of its declaration is vague and embarrassing and bad in law as it is not correct to say the sale of shares in the company amounted to the sale of the immovable property. The confusion of the Plaintiff alleging a right of first refusal and the existence of contract was compounded not only by its admission that a final agreement was not reached but by the fact that the alleged terms of either the right of first refusal or the agreement are vague and unclear. The averments by the Plaintiff do not therefore disclose or establish a cause of action. See the case of: *Nestoros v Inncor Africa Ltd* 2007(2) ZLR 267.

The Plaintiff sought to argue that 2<sup>nd</sup> Defendant filed the exception to the Plaintiff's summons and declaration outside the time limits stipulated in the rules in that the papers were filed five and half months after the Plaintiff's Further Particulars were served on the 2<sup>nd</sup> Defendant. Order 18 Rule 119 provides as follows:

*"The Defendant shall file his plea, exception or special plea within ten days of the service of the Plaintiff's declaration:  
Provided that where the Plaintiff has served his declaration with the summons as provided for in rule 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance is calculated in terms of rule 17."*

It is beyond argument that the rules do not provide for an automatic bar against a defendant who files an exception outside the prescribed time limits. In any event the Plaintiff did confirm that 1<sup>st</sup> Defendant's Notice of Exception was timeously filed. The 1<sup>st</sup> Defendant also pleaded over the merits and the same matters raised in 1<sup>st</sup> Defendant's exception relate to the same issues which fall for determination in the exception.

I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's exception and Special Plea are properly before the court and that there is no prejudice to be suffered by the Plaintiff because the basis of the exception and Special Plea have always been known to them.

**Whether the Defendants have established that plaintiff's claims are excepiable.**

I am satisfied that the Plaintiff's claims are vague and embarrassing and do not disclose a cause of action for these reasons:

- (1) There is no evidence that the Plaintiff and second Defendant entered into a lease agreement in respect of stand 1396 Bulawayo Township.
- (2) There is no evidence to support the assertion that at the time Auction Centre (Pvt) Ltd entered into a lease agreement with the Plaintiff, Mr Elston was mandated to represented 2<sup>nd</sup> Defendant.
- (3) There is no legal basis for asserting that the sale of shares in 2<sup>nd</sup> Defendant amounted to the sale of the immovable property in dispute.

- (4) The Plaintiff did not lay any solid and firm legal basis for the so-called right of first refusal either against 2<sup>nd</sup> Defendant or Mr Elston.
- (5) The Plaintiff's claims are contradictory in that on the one hand they claim that an agreement of sale was concluded and a price was agreed for the property and in the very same breath they aver that at the time of Mr Elston's death the transaction had not been finalised.
- (6) The defects in the Plaintiff's claims as particularized in the Declaration cannot be cured by an amendment.

Mrs *H. Moyo* for the Plaintiff argued that even if an exception is upheld, this does not mean that automatically the Plaintiff's claim should be dismissed. She contended that as a matter of practice the Plaintiff should be given leave to amend the offending pleadings within a specified time. Mrs *H Moyo* referred me to the cases of: *Adler v Elliot* 1988 (2) ZLR 283 and *Auridiam Zimbabwe (Pvt) Ltd vs Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359.

In the case of *Adler v Elliot (spura)* and at page 292, GUBBAY JA (as he then was stated as follows:-

"A claim should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action." (emphasis is mine)

Mr *Mazibuko* on behalf of the Defendants argued that it is not desirable in this case to order the Plaintiff to amend their claim as it is incurably bad at law. I tend to agree with Mr *Mazibuko* that the general practice of affording the Plaintiff the opportunity to amend their claims should not apply in this case. The Plaintiff's claims are not only vague and embarrassing and contradictory. The

claims are bad at law and are so incurably bad that it would in my view be undesirable to grant Plaintiff the leave to amend its declaration within a stipulated period. Herbstein and Van Winsen, in Civil Practice of the High Courts of South Africa 5<sup>th</sup> Edition (Vol 1) at page 630 summarise the position as follows:-

*“The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost – effective manner. Thus pleadings whose contents are so vague and it is impossible to determine the nature of the claim or the defence and pleadings which are bad in law in that their contents do not support a discernible and legally recognised cause of action or defence are struck out.”*

In the result I would accordingly make the following order:

- (1) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ exception and Special Plea be and are hereby upheld.
- (2) The Plaintiff’s claims are dismissed with costs.

*Messrs Cheda and partners, plaintiff’s legal practitioners*  
*Calderwood, Bryce and partners, defendants’ legal practitioners*