BOTHWELL MNYONI
versus
WAVERLY TRADING AND INVESTMENTS COMPANY LIMITED
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 30 JANUARY AND 8 FEBRUARY 2018

Civil Trial

Plaintiff in person
S Collier for the 1st defendant

MATHONSI J: The plaintiff may be 68 years old, fairly advanced in age and having worked for the first defendant company from the humble beginnings of a floor level employee to a manager, a journey that took him 31 years, but his claim in this matter is what ZHOU J may have had in mind in *Southmark Trading (Pvt) Ltd and Others* v *Karoi Properties (Pvt) Ltd and Others* HH 52/13 (unreported). The learned judge stated:

> "The biblical aphorism": 'Whatever a man sows, that he will reap' has lost its meaning in our society. This matter presents a sordid picture of a culture of wanting to reap where persons did not sow."

He went on:

> "The fourth respondent was aware that he could not just wake up to find himself as the holder of all the shares in a company for free. He would know too that the indigenous legislation does not operate in the manner that he sought to portray to justify his claim to a 100% shareholding in the first respondent."

This get rich fast syndrome which appears to be propelled by a new tendancy of primitive accumulation among our people most of whom are averse to paying for anything but would rather just acquire wealth for free is hard to understand.

The plaintiff sued out a summons against the defendants seeking an order directing transfer of stand number 1560 Nketa Township of Lot 400 Emganwini, Bulawayo (the house)

from the name of the first defendant to his name. In the alternative he sought an order directing the first defendant to pay to himself the sum of $16000-00 as the replacement value of the said property. He also claimed costs of suit on the scale of legal practitioner and client.

In his declaration the plaintiff, who filed all his pleadings through the agency Dube-Banda, Nzarayapenga and Partners legal practitioners of Bulawayo only to feature at the trial as a self-actor, made the averments that during the 31 year tenure of his employment by the first defendant, initially as a barman at Waverly Hotel and later as a manager, particularly in February 1991, the first defendant purchased the house from one Kenneth Shito. It is common cause that after purchase the house was transferred into the name of the first defendant. The plaintiff further averred that it was agreed between himself and the first defendant that upon his retirement the house would be transferred to his name by the first defendant, clearly for no consideration whatsoever.

When the plaintiff was retired in 2011, the condition precedent for the transfer of the house was satisfied, but despite demand the first defendant refused or neglected to effect transfer. He therefore craved the grant of an order aforesaid.

The first defendant entered appearance to defend and filed a plea and counter claim. In its plea it denied that the house was purchased for the plaintiff maintaining that it was its own investment and that the plaintiff was accommodated at the house as a condition of his employment. Upon the termination of the plaintiff's employment by retirement the right of occupation also ceased. The first defendant made a vindicatory claim in re-convention for the eviction of the plaintiff from the house and for holding over damages. The latter claim was withdrawn at the trial on what Mr *Collier* for the first defendant described as compassionate grounds and that the prospects of recovery of those damages from the plaintiff were completely non-existent.

The issues for trial as settled at the pretrial conference are:

1. Whether the parties entered into an agreement in terms of which the first defendant was to transfer ownership of the house to the plaintiff upon his retirement from employment.
2. Whether Leonardus George Nicolaas Scheijde had any authority to enter into an agreement binding on the first defendant with the plaintiff in 1991.
3. Whether the plaintiff was employed as a manager or as assistant manager.

4. Whether the first defendant is entitled to evict the plaintiff from the house.
5. Whether the first defendant is entitled to holding over damages from the date of retirement to the date of eviction.

I must say that at the trial the parties appeared to abandon issue three and rightly so in my view because it is completely superfluous in the resolution of the dispute between them. The evidence led did not address that issue at all. As I have already said, Mr *Collier* for the first defendant abandoned the claim for holding over damages originally made in the counter claim, thereby throwing out through the window issue five as well. I have therefore been called upon to decide issues 1, 2 and 4 which is what this judgment is confined to.

In his evidence, the plaintiff stated that sometime in 1991 he was holding a management position at first defendant company when he approached Leonardus Scheijde requesting a company loan to enable him to purchase a house for himself and his family. He preferred to call L. Scheijde "the chairman" of the first defendant. L. Scheidje sent him out to look for a suitable house to buy which he did leading him to the house now the subject of this litigation which was being sold by Kenneth Shito for $34000-00 (Zimbabwe currency.).

At that stage L. Scheidje told the plaintiff that he was not going to advance a house loan to him because he would fail to repay it. Instead he would purchase the house in the name of the company and allow the plaintiff and his family to live in it. If the plaintiff served the company loyally and passionately and also worked hard right up to the time of his age of retirement, the house would be transferred to him upon retirement. It was therefore the plaintiff's evidence that the agreement to transfer the house to him was subject to a suspensive condition – hardwork, loyal and passionate service up to retirement. The plaintiff did not state the yardstick which was to be used to gauge that and who was assigned the responsibility of marking him. That agreement was reached in the presence of the other directors A. T Chirongo and E Scheijde.

He stated that after the house was purchased he immediately moved into it with his family and invited L. Scheidje to come and view the house which invitation he declined stating that it was unnecessary given that, for all intents and purposes, the house belonged to the plaintiff. It is for that reason that none of the company representatives have ever visited or inspected the house. He has remained in occupation of the house up to now. During that period he paid all the rates, water and electricity charges which bills were never changed into the first

defendant's name but remained in the name of the seller Kenneth Shito. He however acknowledged that when it was purchased, the house was transferred into the name of the first defendant which holds title by Deed of Transfer number 412/1991.

The plaintiff went on to say that he was thoroughly surprised when, towards his date of retirement, Estelle Lorraine Scheijde a director of the first defendant and wife of L. Scheijde informed him by phone when she was at the airport on her way to France where she is now based to vacate the house stating that the house was not his. L Scheijde had unfortunately died in 2004. His state of surprise stemmed from the fact that he had stuck to his side of the bargain by rendering loyal and passionate service from the time of the agreement in 1991 to retirement and expected transfer of the house to his name not eviction. As far as he is concerned by doing so the first defendant was breaching the terms of the agreement.

He refused to vacate and holding the first defendant to the agreement, he brought this action before this court aforesaid. Under cross examination the plaintiff admitted that at the material time the first defendant employed 55 workers. He also admitted that the favour of having a house bought for them as happened to him was not extended to any of the other 54 workers although there were others who had been employed for periods much longer than him. He conceded that other than paying the rates, water and electricity bills, mainly relating to his own consumption, he did not pay anything for the house. Asked why he was singled out for special treatment the plaintiff could only say he was speaking for himself and not the other workers. He stated that his bosses were spending lengthy periods of time out of the country on holiday and they wanted him to be of fixed abode as he had to look after the hotel and business funds on his own, an explanation not helpful at all to his cause.

Asked why the house could not be bought in his name from the start if indeed it was his, the plaintiff stated that this was because of the conditions of hardwork, loyalty and passionate service up to retirement which had to be fulfilled first. As to how the court would know if the conditions were satisfied the plaintiff was ambivalent, only stating that he had received a letter of appreciation from the employer upon retirement. Except that the only letters placed before the court as written to him by the employer on 12 and 26 September 2011 are far from recording such appreciation. If anything they speak to an acrimonious disengagement. Indeed even the

letters written by the plaintiff's own workers union (Zimbabwe Federation of Trade Unions) at the time confirm that the relationship between the parties had broken down.

For an example, I will refer to the first defendant's letter of 12 September 2011 to the plaintiff which reads:

> "NOTICE OF TERMINATION OF EMPLOYMENT AND USE OF COMPANY HOUSE.
> This letter serves to give you three (3) months notice to leave your employment with the Waverly Hotel on the grounds of your age. Your final day of employment will be Saturday 31 December 2011. This letter also serves to advise you that you are to immediately vacate the Nketa House as per the notice given to you on 18 November 2010. Because of the manner in which you have handled your retirement after receiving verbal notice in March this year, we have no other option but to ask you to leave the company house. You will sign a copy of this letter and retain one for your records.
> Yours truly
> AC Scheijde
> Director."

In another letter dated 26 September 2011 the employer complained about the plaintiff's un-co-operativeness and concluded by saying:

"We thank you for your service and wish you the best in your future endeavours."

This is hardly any record of appreciation of loyal and passionate service or any form of hardwork. I am therefore unable to find any evidence, even assuming that a valid agreement was concluded on terms alleged by the plaintiff, suggesting that the suspensive condition was fulfilled.

Edmond Mudzamba, the current Hotel manager gave evidence for the first defendant routinely disputing the existence of an agreement between the parties as alleged by the plaintiff. He maintained that the house was purchased by the first defendant as its own. The plaintiff was only accommodated there as part of his conditions of service and at no time did the parties agree that the house belonged to him. Mudzamba agreed that the plaintiff was responsible for paying the bills but only because he was the consumer of services and nothing more.

Referring to documentation in the first defendant's bundle of documents, exhibit 1, the witness demonstrated why L. Scheijde was not a director of the first defendant at the time he allegedly concluded the agreement with the plaintiff. He drew attention to the CR14 Form, the list of directors of the first defendant, as filed with the Registrar of Companies in Bulawayo on

23 January 1987 which shows that L Scheijde had resigned as a director on 12 January 1987 with the company being notified on 21 January 1987. The active directors were Tsongora Alick Chirongo, Estelle Lorraine Scheijde and Otherne Moira Deetlefs. The plaintiff was unable to dispute the veracity of that evidence only attempting to refer to letters allegedly signed by L. Scheijde at the material time which had not been discovered and could hardly be of any value as counter to official company documents on directorship.

Mudzamba also referred to a CR14 Form lodged with the Registrar on 11 October 1988 showing that the directors of the first defendant at the time were still the three I have referred to above. Another CR 14 Form lodged on 2 January 1997 shows that L. Scheijde was only re-appointed as a director of the company on 14 October 1996. I therefore have no reason to doubt that he was not a director in 1991. The question therefore is whether he could contract on behalf of the company under those circumstances.

In trying resolve the issue whether the parties entered into an agreement in terms of which the first defendant was required to transfer the house to the plaintiff the starting point is to mention that there is no record of such agreement anywhere. It is said by the plaintiff in his pleadings that "the agreement was oral" and that it "was made and sealed in February 1991" (see paragraph 2 of the plaintiff's further particulars). If the agreement was oral, one then wonders why at the trial the plaintiff swung round in his *viva voce* evidence and stated that the agreement was recorded in a black book which was kept by L. Scheijde at Waverly Hotel. He did not ask for and was not given a copy. Quite strange indeed for a party who was so articulate and conducted his own case in good English. He is presumed to have understood the need for him to keep his own copy.

More importantly we now have this unfortunate situation in which the plaintiff's evidence is at variance with his pleadings. It is either the agreement was oral as pleaded or it was in writing and captured in a black book as stated in his oral evidence. It cannot be both. It is trite that a party is bound by the pleadings that he or she has filed in court. Even if he was not, I am of the view that the plaintiff has failed to prove the existence of a written agreement. I therefore find that there was no agreement recorded in a black book as reference to it by the plaintiff appears to have been an after thought.

Could it be said that there was an oral agreement to transfer? Apart from the fact that the plaintiff was not a credible witness as he performed very badly and had a bad demeanour, everything seems tilted against him. No satisfactory explanation is given as to why the agreement was not reduced to writing and why he did not keep a copy or why, if indeed the house was bought for him, it was not transferred straight to his name. The story that he had to retire first after loyal service does not make sense at all.

Unfortunately the plaintiff has been unable to produce a single witness to vouch for him. It is not without reason that all the people that he mentions as having been involved are either dead or have left the jurisdiction of this court and yet standing on his own the plaintiff was a pathetic witness. L Scheijde died several years before the plaintiff retired. From 2004 right up to 2011 the plaintiff did not see the wisdom in pursuing the written agreement or having it recorded given that its architect had died. Alick Tsongora Chirongo is also deceased while Estelle Scheijde emigrated to France. These are the only names that the plaintiff conveniently mentions and yet they cannot help him.

It is usual for contractants to provide for uncertainty about a future event that may affect their obligations in a contract by qualifying an obligation by means of a condition. It tends to qualify a contractual obligation by making its performance dependant upon whether an uncertain future event happens or not. Writing on that subject the learned authors S. W. J Van der Merve, L. F Van Huyssteen, M. F. B Reineck and G F Lubbe, in their book *Contract General Principles*, 4th edition, Juta stated:

> "--- conditions may be classified as suspensive or resolutive: this is the most important classification of conditions, since the effect which a condition has on the obligation it qualifies is determined by the suspensive or resolutive nature of the condition. A suspensive condition suspends or postpones the full operation of the obligation which it qualifies until certainty is reached, in that the condition is fulfilled or in that it fails. A resolutive condition, on the other hand, does not postpone the operation of the obligation: the obligation operates in full, but may come to an end if certainty is reached, in that the condition is fulfilled or in that it fails."

The plaintiff conceded that the performance of the obligation to transfer the house to him was subject to the suspensive conditions that he renders loyal and passionate service and also works hard until his retirement. Going by the plaintiff's case it was only upon the attainment of those conditions that transfer would be effected. The question is; has he proved the satisfaction

of those conditions? I think not. It was always going to be hard to do so in the absence of an agreed score card and in the absence of even a marker. L. Scheijde who, according to the plaintiff, was the architect of the agreement died in 2004, 7 years before the plaintiff retired and therefore could not help determine the fulfillment of the other conditions. The relationship between the plaintiff and the remaining directors got twisted in the end it could not be anywhere near satisfying loyalty or passionate service. Whichever way, the plaintiff could not award himself a pass mark as to be entitled to transfer.

What however brings the entire claim of the plaintiff to its knees is the capacity in which L. Scheijde is said to have contracted. It is common cause that the first defendant is an incorporation and therefore once incorporated it had the capacity of a natural person in terms of s 9 of the Companies Act [Chapter 24:03]. In terms of s 8 (1) of the Act contracts made by a private company may be verbally made on its behalf by a representative of the company but such a person must be "acting under its authority." It is trite that as a fictitious person a company can only act through resolutions made by its directors appointed in terms of s169.

In this case no resolution of the company to transfer the house to the plaintiff has been alleged or produced. As already stated the plaintiff has not shown in what capacity L Scheijde acted in purporting to enter into an agreement to alienate property belonging to the company. Neither has he produced any authority issued by the company empowering L. Scheijde to so act. More importantly evidence produced in this court shows that L. Scheijde was not a director and therefore could only bind the company when not specifically authorized by it to do so. To that extent therefore even if I were to find that indeed an agreement to transfer was reached between the plaintiff and L. Scheijde which I have not done, such agreement would still be invalid for want of authority. That therefore resolves issues 1 and 2 for trial.

Regarding the 4th issue of the first defendant's entitlement to evict the plaintiff I have stated that the first defendant holds title to the house by Deed of Transfer number 4121/1991. Such registration of title was done in accordance with the Deeds Registries Act and was not a mere matter of form, but one of substance. It conveyed real rights upon the first defendant in whose name the house is registered. See *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) at 105H – 106A. Our law protects the right of an owner to vindicate his or her property against the whole world. See *Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 438C.

The first defendant has a vindicatory right against whomsoever is in possession of its property, the house. The *actio rei vindicatio* is available to the owner whose property is in the possession of another without his or her authority or consent. It is premised on that an owner cannot be deprived of his or her property against his or her will and is only required to prove that he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor, in this case the plaintiff, to prove a right of retention. See *Zavazava and Another* v *Tendere and others* 2015 (2) ZLR 394 (H) at 398 F-G; *Jolly* v *Shannon and Another* 1998 (1) ZLR 79 (H) at 88A-B; *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20 A-C.

It is unfortunate that the onus having shifted squarely on to the plaintiff to prove a right of retention, he has dismally failed to discharge it. I accordingly find that the first defendant is entitled to evict the plaintiff from the house. It is shameful that from the time he was advised to vacate the house in November 2010, through all the correspondence written to him in 2011 right up to now the plaintiff has remained steadfast refusing to vacate the house on flimsy grounds. It is for that reason that I expressed indignation at what appears to be a growing habit in this country of people wanting to claim ownership of property they know pretty well they did not pay for. As to why life should be that easy one is unable to fathom.

In the result it is ordered that;

1. The plaintiff's claim be and is hereby dismissed.

2. The first defendant's claim in reconvention succeeds with the result that the first defendant is hereby restored possession and shall take delivery of stand 1560 Nketa Township of Lot 400A Umganin situate in the District of Bulawayo from the plaintiff who shall be evicted together with all those claiming occupation through him from the said house.

3. The plaintiff shall bear the costs of suit.

Webb, Low & Barry, 1st defendant's legal practitioners