

FAITH MUSARURWA
versus
ELEANOR MUSARURWA
and
MUNYARADZI MUSARURWA
and
SIBANGI MUSARURWA
and
MUSARURWA TRADING (PVT) LIMITED
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
BHUNU J
16 APRIL AND 28 APRIL 2004

Opposed Urgent Application

Mr *Sinyoro*, for the applicant
Mr *Samkange*, for the 1st to 4th respondents

BHUNU J: The late Mark Tavengwa Musarurwa and her wife Eleanor Musarurwa built up a business empire with shops dotted throughout the whole country starting way back in 1958.

They started as sole traders but as the business empire grew and spread its tentacles to the various corners of the country they formed the 4th respondent Musarurwa Trading (Private) Limited to run their business empire. The company was incorporated in 1985.

Upon the incorporation of the company they brought in their three sons Shandirayi, Grant and Davidson the applicant's late husband as co-directors. The full board of directors comprised:

1. Mark Tavengwa Musarurwa
2. Eleanor Musarurwa
3. Grant Zivanayi Musarurwa
4. Davidson Tafirenyika, and
5. Shandirai Onward Musarurwa

It is common cause that the 4th respondent company is the registered owner of the shop in dispute being Musarurwa Trading Supermarket, shops 5 and 6 St Johans Way Southerton Shopping Centre.

It is also common cause that during his life time the late Davidson was assigned to run and manage the Southerton supermarket as General Manager. The proceeds of the shop were and are still being banked with Standard Chartered Bank, Southerton Branch under the account of Musarurwa Trading (Pvt) Limited. The signatories to the account were the late Mark Musarurwa, Eleanor Musarurwa and the late Davidson. Eleanor is the only remaining signatory to the account.

The applicant got married to the late Davidson Musarurwa under customary law sometime in 1996. The marriage was later solemnized in terms of the Marriage Act [*Chapter 5:11*] on the 31st October 2003.

At the time the civil marriage was solemnised Davidson was already sick and he died about four months later on the 20th February 2004.

Upon the demise of her husband the applicant was dully appointed by the 5th respondent, the Master of the High Court as curator *bonis* to her late husband's deceased estate.

She now claims that prior to and after the death of her husband she was in peaceful and undisturbed possession of the Southerton Supermarket. She alleges that she has since been unlawfully dispossessed of the property by the 1st to 4th respondents whereupon her claim is for the restoration of peaceful and undisturbed possession of the property pending the distribution of her late husband's estate.

Her claim is based on a memorandum dated 19th March 2004 addressed to all members of staff by the 1st respondent. It reads:

"Subject change of management

Please be advised that the Southerton Branch of Musarurwa Trading Stores (Pvt) Limited is under new management with effect from 12 March 2004. Day to day and operational management now rests with Sibangi Musarurwa and Munyaradzi Musarurwa. These changes have been necessitated by the passing away of D.T. Musarurwa in February 2004.

We thank Faith Musarurwa (the applicant) for filling in for her husband during his illness. However she will no longer have any role in the running of the Southerton Branch. Any employee who involves in any business transactions with Mrs F. Musarurwa risks dismissal. Any employee who prejudices the business by engaging in transactions with Mrs F. Musarurwa will be prosecuted to the full extend of the law."

On the facts before me it is clear that the applicant has confused possession with management. I am satisfied that Davidson during his life time was wearing two hats. One as shareholder, in Musarurwa Trading (Private) Limited and the other as general manager of the Southerton Supermarket.

It appears to me that the right to manage the Southerton Supermarket was a personal right exclusive to the late Davidson Musarurwa. That right being a personal right was not transferable upon his death. This was particularly so because the assignment of management duties appears to have had an element of *dilectus persona* it being clear that the businesses falling under Musarurwa Trading (Pvt) Limited are a family concern to which the applicant is a stranger.

I believe it is trite and a matter of common sense that shares in a company fall under the possession and management of the holding company. That being the case whatever possession the applicant might have had was as a proxy of the company. Her possession was at the pleasure of the 4th respondent. She being a mere proxy cannot have any possession against the will of her principal. This is because she did not possess the property in her own right but for and on behalf of the company.

The mere fact that the company may have at one time or another assigned management duties to the late Davidson and through him the applicant does not mean that the company was relinquishing its rights to possession. In fact the company was exercising its right to possession through Davidson and his wife the applicant. This is put beyond question by the fact that they were both required to bank the proceeds from the shop in the company's bank account to which the 1st respondent is a signatory whereas the applicant is not.

Upon the demise of Davidson the remaining directors were entitled in terms of the Articles of association to reorganise the management of its businesses including the Southerton Supermarket.

Clause 2A of the Articles of Association gives the directors wide powers to allot and vary share rights. It provides that:

"Share Capital and Variation of Rights

2A the shares shall subject to the provisions of the Act, be at the disposal of the Directors and they may allot or otherwise dispose of them to such persons at such times and generally on such terms and conditions as they shall think proper and with full power to give to any person the call on any shares, either at par or at a premium, and for such time and for such consideration or gratuitously as the Directors shall think fit."

Thus notwithstanding any internal arrangements the directors were at large to exercise their rights under clause 2A of the articles of association.

In its opposing papers 4th respondent claimed the return of a Mazda B2500 pick-up truck registration number 681-243 F. that application is not properly before me and as such cannot succeed.

The applicant having failed to establish peaceful and undisturbed possession her claim cannot succeed as well.

In the result it is ordered:

1. that the applicant's application be and is hereby dismissed with costs.
2. That the 4th respondent's counter claim for the return of the Mazda pick-up truck be and is hereby dismissed with costs.

Sinyoro Muunganirwa and Company, the applicant's legal practitioners
Byron Venturas and partners, the 1st - 4th respondents legal practitioners.