

BELLEPAISE ESTATE (PVT) LTD
versus
MAI-KAI-REAL ESTATE DEVELOPMENT TRUST
and
BERNARD MAHARA MUTANGA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 22 & 30 June, 2016

Opposed application

T Mpofu, for the applicant
R Chingwena, for the 1st & 2nd respondents

MANGOTA J: On 5 January 2006, the applicant and the first respondent signed two agreements. The first related to the sale of the applicant's 10 000 shares to the first respondent. The second was an investment agreement the conditions of which the first respondent undertook to implement.

Pursuant to the conclusion of the agreements, the second respondent who represented the first respondent in the signing of the agreements took the title deed of the applicant's only property. The property was described as number 4039/92 for Lot 9 Block S Hatfield Estate [“the property”]. It measured 140, 3805 hectares in extent.

The second respondent, it was alleged, took the title deed under the pretext that he wanted to process certificates of title. The applicant applied to have the title deed returned to it. It advanced three or fourth reasons for the return of the same. The advanced reasons tended to show that none of the two agreements which the parties signed on 5 January, 2006 ripened into a contract. The contracts, it said, were null and void *ab initio*. It, accordingly, insisted that the invalidity of the contracts eroded the basis upon which the second respondent retained the title deed. Hence this application for the return of the same.

The first and second respondents opposed the application. The third respondent did not. It was the court's view that the third respondent chose to abide by its decision whatever or however it came out to be.

The first and second respondents raised two preliminary matters. The first was that the applicant's right to seek cancellation of the agreement was prescribed. The second was that

the resolution which the applicant attached to the application as Annexure A.1 did not have any legal force or effect. They stated that the directors of the applicant were one Tsitsi Mutanga and the second respondent. They said the authors of the annexure were not qualified to clothes the deponent of the founding affidavit with authority to represent the applicant. They insisted that the deponent of the affidavit, one Anthony N. Purkis, did not have *locus standi* to represent the applicant. They took issue with the citation of the second respondent. They said he should not have been cited in his personal capacity. They said he should have been cited in his representative capacity. They averred that the citation was, therefore, irregular.

On the merits, they argued that the contracts which the parties signed on 5 January, 2006 were valid and were, accordingly, enforceable. They stated that they paid the purchase price for the shares and were in the process of giving effect to the investment agreement as per their undertaking of 5 January, 2006. They insisted that there was no legal basis for the return of the title deed to the applicant.

The issue of prescription which the respondents raised depended on the validity or otherwise of the agreements which the parties signed on 5 January, 2006. That position obtains as nothing arises from nothing. Reference is made in this regard to s 16 (1) of the Prescription Act [*Chapter 8:11*]. The section reads:

“Subject to subsections (2) and (3) prescription shall commence to run as soon as a debt is due” [emphasis added]

The question which begs the answer is whether a debt was due *in casu*. The first observation which is made is that the parties did not appear to have been *ad idem* on the currency which they employed for the sale and purchase of the shares. The applicant stated that it sold the shares to the first respondent in United States dollars. The respondents’ position was that these were sold to them in Zimbabwe dollars. There was, therefore, no meeting of the parties’ minds on that aspect of the first contract which the applicant attached to the application as Annexure A.

The respondents appeared to have taken a correct view of the matter. They argued that the shares could not have been offered to them in foreign currency before the introduction into the country of the multiple currency regime. However, their view was rendered null and void on the basis that the investment agreement which they concluded with the applicant on the same day that Annexure A was signed by the parties was denominated in United States dollars.

The investment agreement which the applicant attached to the application as Annexure B showed that it was signed on 5 January, 2006 which is the date that Annexure A was signed. It also showed that the property to which the title deed related had to be revalued at the equivalent of USD, 2.200 000 the proceeds of which would create a loan account in the applicant. The first respondent, according to the annexure, undertook to pay for the loan account as follows:

- (a) initial deposit of \$USD700 000 upon registration of the certificates of registered title- and
- (b) balance of \$USD1 ,500, 000 over a period of 6 months.

It was on the basis of such sums of money as were stated in the foregoing paragraphs that the applicant insisted that both agreements-Annexure A and B-were denominated in United States, and not Zimbabwe, dollars.

The applicant did not state that the parties obtained the approval of the Exchange Control Authority when they drew and signed the contracts in foreign currency as it alleged. The parties' contracts were, on that score alone, illegal and, therefore, null and void *ab initio*. The words of Lewis ACJ (as he then was) drive the point home in a clear and succinct manner on the point in issue. He remarked in *York Estates Ltd v Wareham*, 1950 (1) SA 125 at 126 as follows:

“As a general rule, a contract or an agreement which is expressly prohibited by statute is illegal, null and void even when no declaration of nullity has been added by statute”. (emphasis added).

Going by the proposition that the parties' contracts were void for vagueness on the currency which the parties used in the purchase and sale of shares and that the same were void on the basis of illegality, prescription which the respondents pleaded could not hold. No debt was due to either party on the mentioned basis.

The second preliminary matter which the respondents raised was that the deponent to the applicant's founding affidavit did not have the authority to represent the applicant. They insisted that the second respondent, and not him, did have *locus standi* to represent the applicant.

Whether the deponent to the applicant's affidavit or the second respondent did have *locus standi* in this application would depend on the meaning and import of the two agreements. A critical examination of Annexures A and B would, in the court's view, resolve the matter which pertains to the respondents' second *in limine* matter in a conclusive manner.

Annexure A showed that the parties agreed between them that the applicant would sell to the first respondent who would purchase:

- (a) 10 000 ordinary shares – and
- (b) 100% of the applicant's loan account.

Reference is made in this regard to para (d) of the preamble of the annexure.

Clause 1 which recorded what the parties agreed between themselves reads:

“1. PURCHASE PRICE:

1.1 payment of shares

The purchase price payable for 10 000 shares shall be \$10 000 at \$1.00 each payable on the date of signature of this agreement by the last part

1.2

Clause 2 of the Annexure is not a stand alone matter. It makes reference to delivery and transfer of shares which are mentioned in clause 1.1. It reads:

“2. DELIVERY, TRANSFER OF SHARES:

2.1 On payment by the investor of the share price mentioned in clause 1. 1 above, the company shall instruct Bellapaise Estate (Private) Limited to release to the investor:

2.2.1 Share transfer forms duly signed by the company for the transfer of the sale of shares together with the relevant share certificates.

2.2.2 A signed or certified copy of a resolution by the Directors of the company approving the transfer of the sale shares to the investor”.
(emphasis added)

It was evident that validity of Annexure A was predicated upon the first respondent's payment of the purchase price for the shares. That payment should have been made on 5 January, 2006 and not later than the stated date. It should have been paid on the date of the signature of the first contract by the parties.

The respondents claimed that they paid for the shares. They, however, produced no evidence of payment for the shares. The respondents' submission which was to the effect that either payment was made or was waived could not hold. If they paid for the shares, as they claimed, they would have produced a receipt, or a copy of the bank transfer or an invoice or an acknowledgment of receipt from a person who received payment as proof of what they claimed to have done.

Payment for the shares sold to the first respondent was a *sine quo non* term of the parties' first contract. All other obligations of the parties flowed from the first respondent's fulfilment of that term. Its claim which was to the effect that the applicant might have waived the issue which related to payment for the shares was, in the court's view, raised for argument's sake. It did not produce any proof of the said waiver.

The applicant stated, and correctly so, that the contract was invalid on the basis that the first respondent did not pay for the shares which it allegedly purchased from the applicant. That statement of the applicant shifted the *onus* onto the first respondent to rebut the applicant's claim. The first respondent failed to rebut the *onus*. The court, therefore, remained satisfied that no contract came into existence as between the parties.

The respondents attached to their opposing papers Annexures AA and BB. The first annexure were minutes of a meeting of Directors of the applicant. The meeting was purported to have been held on the day that the parties signed the contract which related to the sale of shares of the applicant to the first respondent (i.e 5 January, 2006). The second annexure was a copy of what the respondents said was the applicant's current Form No. CR 14.

The first annexure purported to show a resolution which was to the effect that the applicant's directors – Alison Mary Sharman and Sean Barry Sharman – resigned and that Tsitsi Mutanga and the second respondent were appointed as directors of the applicant. The second annexure's contents were to an equal effect albeit in a more elaborate manner than the former annexure.

The deponent to the applicant's affidavit contested the claims of the respondents in a strenuous manner. He averred that the directors of the applicant, Alison Mary Sharman and Sean Barry Sharman, did not ever resign from being the directors of the applicant. He stated that, if the respondents' claim was true, the respondents should have produced the directors' letters of resignation. He said Annexures AA and BB were a fraud which the second respondent authored in furtherance of his own ends. He insisted that, if the directors had resigned as the respondents claimed, Annexure AA should have been signed by the outgoing directors, the applicant's secretary or chairman. He stated that, in the absence of letters of resignation by the applicant's directors, the annexures should be disregarded as having had no force or effect.

Clause 2 of the first agreement, Annexure A, appeared to be *in sync* with the view which the deponent to the founding affidavit took of the matter. The clause pertained to the

issue of delivery and transfer of shares. The court repeats its contents hereunder for purposes of emphasis and clarity. It reads:

- “2. DELIVERY, TRANSFER OF SHARES
- 2.1. On payment by the investor of the share price mentioned in clause 1.1. above, the company shall instruct BELLAPAISE ESTATE (PRIVATE) LIMITED to release to the investor:
- 2.2.1 Share transfer forms duly signed by the company for the transfer of sale shares together with the relevant shares certificates.
- 2.2.2. A signed or certified copy of a resolution by the Directors of the Company approving the transfer of the sales shares to the investor” [emphasis added]

The finding which the court made was that the first respondent did not pay the purchase price for the shares. The applicant could not, under the circumstances, have instructed anyone to release to the first respondent share transfer forms. At any rate, the first respondent did not produce such forms. What it produced was a share certificate which it attached to its opposing papers. It marked it Annexure CC. The annexure is not a share transfer form. It was not signed by the applicant’s outgoing directors as it should have been. There was no signed and/or certified copy of a resolution by the outgoing directors of the applicant approving the transfer of the sales shares to the first respondent. Annexure CC, therefore, tells nothing of what should have been complied with in terms of clause 2 of the first agreement.

The parties were meticulous in the manner that they executed the agreements which formed the basis of the present application. They inserted clause 7 into the investment agreement, Annexure B. The clause allowed them to return to the *status quo ante* the agreements in the event of the first respondent not performing what it undertook to do at the time that the contracts were signed. The clause reads:

- “f. It is understood that the sale is dependent on the successful completion of the actions noted in 6 above. Should the sale not proceed for any reason the investor undertakes to return the shares so issued and will sign blank share transfer forms to this effect” [emphasis added]

In terms of clause 6 of the investment agreement, the first respondent undertook to clear the property of illegal settlers and any restrictions on the title deed. It did not live up to its word from the time that the parties signed the agreements to date. Its statement on the matter which related to the removal of the settlers who were illegally on the property was that

the issue was works which were in progress. It said the matter was of a delicate nature and was, accordingly, being handled delicately as, according to it, there was too much politics at play.

The court was in agreement with the view of the applicant which was to the effect that the respondents did not have the capacity to remove the illegal settlers by whatever means. What they did, in the court's view, was to hold themselves out as having had such capacity. The respondents produced nothing which showed that they made any effort to comply with clause 6 of Annexure B. They could easily have produced some court process which was aimed at showing that it was removing the settlers who illegally occupied the property.

The applicant stated, correctly so, that the issue of the removal of illegal settlers on the property fell into the realms of the civil courts of this country. The respondents could not and did not advance any reason as to why they did not pursue the route of the courts from January 2006 to date alongside whatever effort they were making, if they were, to resolve the same through the political arena.

The respondents' reliance on clauses 4 and 5 of the applicant's Annexure A was misplaced. The clauses were, on a strict interpretation of the annexure, predicated upon the first respondent's compliance with clauses 1 and 2 of the same. The parties' intention was that the first respondent would only enjoy the benefits which appeared in clauses 4 and 5 upon its performance of clauses 1 and 2. Its argument as based on clauses 4 and 5 was, therefore, without any foundation.

On a proper analysis of the present application, clause 9 of the applicant's Annexure A was not applicable to the applicant's case. The applicant showed that the agreements which the parties signed on 5 January, 2006 were null and void from the date of their signature. A number of reasons which it advanced in this regard appeared in some portions of this judgment. There was, therefore, no breach to talk about under the observed circumstances. It, in addition, could not be faulted when it asserted that the respondents' non-compliance with clause 6 of the investment agreement entitled the parties to return to the status *quo ante* the agreements. Its claim for the return of the title deed did have justification, in the view which the court holds of the matter. The above analysed matters provided clear and succinct answers to the respondents' second *in limine* matter. The directors and shareholders of the applicant, the court was satisfied, properly clothed the deponent to the founding affidavit with the authority to represent the applicant in this application. The agreements which the parties

purported to have concluded between them on 5 January 2006 were not valid for the reasons which the court made mention of.

All the annexures which the respondents attached to their opposing papers were, in the court's view, devoid of meaning. They were more confusing than they showed anything to anyone. The applicant described them as having been a fraud. The court could not state the same in so many words although, on a proper analysis of the annexures, their contents tended to gravitate in the stated direction.

The respondents raised a further preliminary matter. They did so in their heads of argument. They stated in para 14 of the Heads as follows:

“Applicant has sued the wrong parties. A trust is not a legal persona, but a legal institution *sui generis*. Therefore it must be sued in the name of the trustee or trustees.”

They referred the court to the learned work of Herbestein and Van Winsen's *The Civil practice of Superior Courts in South Africa* 5th Volume, p 182 which they said supported the view which they held on that aspect of the application. What they stated in the foregoing paragraph was in direct contradiction to what they stated in para 3 of their opposing affidavit. The paragraph reads:

“Ad para 3

The citation of myself in any personal capacity is irregular. There is also no basis for citing me in my representative capacity since the first respondent is a *legal persona* which does not have to act only through me in terms of the law.”

One was left to wonder as to what the respondents meant to convey by the two statements which contradicted themselves in some material aspect. They stated that a trust was not a legal person. They stated, in the same breadth, that a trust was a legal person.

The correct position of the matter is that a trust is not a legal person. It is a legal institution which, as they correctly stated, is *sui generis*. The respondents developed their argument further. They stated that “the trustees should be cited in their representative, and not their personal, capacity. They submitted that, on the basis of the foregoing, the first and the second respondents were, therefore, not before the court. They, accordingly, moved the court to dismiss the application as it related to the two respondents.

The court had the occasion to read the learned work of Herbestein and Van Winsen to which the respondents made reference. It noted that the argument as cited reflected the correct position of the law for the superior courts of South Africa. It, however, made observations which were to a contrary view in so far as the courts of this jurisdiction were or are concerned. The case of *Musemwa & 8 Others v Estate Late Misheck Tapomwa & 3*

Others HH 136/16 as read with order 2 A, r 8 D of the rules of this court rendered the agreement of the respondents, on that aspect of the application, to have been of no force or effect. The court was satisfied that, on the basis of the cited case as read with order 2 A, the respondents were properly before it.

The applicant proved its case on a balance of probabilities. The application, accordingly, succeeds with costs.

Matipano & Associates, applicant's legal practitioners
T.H. Chitapi & Associates, 1st & 2nd respondent's legal practitioners