WALTER MAREVANHEMA
Versus
ABERFOYLE FARMING (PRIVATE) LIMITED
and
INARD PROPERTIES
and
ZVIMBA RURAL DISTRICT COUNCIL
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 06 September 2022 & 01 March 2023

Adv. T.L Mapuranga, for the Plaintiff.
Mr. Nyathi, for the 1st Defendant.

INTRODUCTION

NDLOVU J. At the close of the case for Plaintiff, the 1st Defendant launched an application for absolution from the instance. The application is opposed by the Plaintiff.

BACKGROUND

The Plaintiff issued Summons against the 1st Defendant and others seeking a declaration that 4 Agreements of Sale he entered into with the 1st Defendant in respect of 4 pieces of land situate in the District of Salisbury on 21 April 2016 are valid, legally binding, and enforceable. The 1st Defendant resisted the claim and to that end filed a Plea and a Counter-claim. It later withdrew the counterclaim at the commencement of the trial.

At the joint Pre-Trial Conference between the Plaintiff and the 1st Defendant, the following 4 issues were referred to trial.

1. Whether there were valid Agreements of Sale entered into between Plaintiff and the 1st Defendant.

2. If the Agreements of Sale were valid whether the Plaintiff has discharged his obligations in terms of such agreements.

3. Whether Plaintiff misappropriated the 1st Defendant's funds and fuel and if so, the quantum of the loss.

4. Whether Plaintiff failed to act in the best interests of the 1st Defendant in the exercise of his functions as Director and if so, the quantum of the loss suffered by the 1st Defendant as a result of Plaintiff's conduct.

Clearly issue number 3 has since fallen by the wayside with the withdrawal of the counter-claim.

PLAINTIFF'S EVIDENCE

The Plaintiff, led the following evidence. He is friends with James Taziwana Chivaviro (Chavaviro) who is a Director of Aberfoyle Farming Company (Private) Limited, (the company). Between 2012 and 2014 he was mentored by Chivaviro on how to run a business and he helped in the running of the company called. The company owns a development called Kintyre Estate A. He was appointed a nominee Director in 2014 and resigned in 2019. He mainly ran the company on the directions of Chivaviro as the other two Directors were "sleeping" Directors (namely Patience Chivaviro and Mavunanhamo Chivaviro) and Chivaviro was also based in South Africa. The company was run solely by Chivaviro. He, in some instances, would sign agreements without the involvement of the other Directors. Plaintiff was not privy to the shareholders, he believed Chivaviro was the major shareholder. Plaintiff was not remunerated for the services he rendered to the company. Therefore, he was remunerated by land valued at US$10 per square metre and got 5 hectares as per Agreements of Sale tendered as Exhibits A to D. The land at the time of his resignation in 2019 though not subdivided, was worth between US$12 and US$15 per square meter. When asked whether Board Resolution was necessary, he said it was not required.

Cross-Examination.

Under cross-examination, the Plaintiff told the Court that although he signed Exhibits A to D with Aberfoyle Farming (Private) Limited, the land was in fact owned by Aberfoyle Farming ***Company*** (Private) Limited. Aberfoyle Farming (Private) Limited and not Aberfoyle Farming ***Company*** (Private) Limited is cited as the 1st Defendant in this matter. At the time the Agreements of Sale were entered into and signed the land in question was not subdivided and the subdivision permit in relation to the land in question had expired in 2015 and had not been

extended. The Agreements of Sale between him and Aberfoyle Farming (Private) limited makes no reference to Chivaviro having been authorised and make no reference to a Board Resolution yet other contracts signed by the parties mention Board Resolutions having been made. He was a Director and not an outsider so far as matters involving the company were concerned. Contrary to the suggestion in his letter on page 18 of Plaintiff's Bundle of Documents, he did not pay any purchase price for the four pieces of land. Plaintiff went on to say that it is possible that Chivaviro was not authorised and exceeded his mandate when he signed the agreements and conducted the affairs of 1st Defendant.

THE LAW

To succeed in an application of this nature, a Defendant must show that Plaintiff has failed on a balance of probabilities to prove a *prima facie* case, against Defendant. This is a kind of application that should be reluctantly granted and only in clearly deserving cases because of the impact it has on a Plaintiff's case. Where in doubt, a judicial officer should err on the side of caution and refuse to grant the application.

The case of ***Efrolou (Private) Limited Vs Muringani HH122/13***, is instructive. ***Mafusire J*** stated on pages 6 to 8 of the cyclostyled judgment;

> "*The test for absolution from the instance at the close of the plaintiff's case was laid down in the case of Gascoyne -v- Paul Hunter 1917 TPD 170 in which BEADLE CJ accepted as the locus classicus on the point. This was in the case of Supreme Services Station (1969) (Pvt) Ltd -v- Fox and Goodridge (Pvt) Ltd 1971 (1) RLR*
>
> *In Gascoyne's case the test was formulated as follows;*
>
> *"At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is: is there evidence upon which a reasonable man might find for the plaintiff? … The question, therefore, is, at the close of the case for the Plaintiff, was there a prima facie case against the defendant …: in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against (the defendant)?…"*

GROUNDS OF THE APPLICATION

The issues relied upon by the 1st Defendant in its application are;

1. 1st Defendant's name
2. Lack of authority.
3. Violation of the Companies Act.
4. Statutory illegality.

1st DEFENDANT'S NAME

Aberfoyle Farming (Private) Limited is cited as the 1st Defendant in this matter. It is the company that Plaintiff contracted with over the 4 pieces of land in question. It was represented by one Chivaviro. Plaintiff testified that he was employed by Aberfoyle Farming Company (Private) Limited. The land in question belong or belonged to Aberfoyle Farming Company (Private) Limited. 1st Defendant has argued that the company (Aberfoyle Farming (Private) Limited) does not exist and therefore the Agreements of Sale and the Summons in this matter and by extension these proceedings are invalid, null, and void.

This point need not detain us longer than is necessary. Whether or not the 1st Defendant as cited exists or never existed are questions of fact. It is common cause that Exhibits A – D were entered into between Aberfoyle Farming (Private) Limited and Plaintiff. How that was done by Chivaviro in respect of land he supposedly was aware belonged to a different entity in which he was its Director is a question of fact only that only he can explain. In the pleadings, 1st Defendant's name as cited was expressly not put in issue and therefore is taken to be formally admitted. No application to amend the pleading or withdraw the formal admission by the 1st Defendant has been made. A court must be cautious and move with chameleonic speed when it is sought that it decide a question of fact without hearing all the evidence. *Efrolou (Pvt) Ltd -v- Muringani* (*supra*) and the authorities cited therein.

This point fails the test, is without merit, and is therefore duly dismissed.

LACK OF AUTHORITY

In as much as the Plaintiff told the Court that he was not privy to the Shareholders and is not aware of a resolution of the sale, he equally told the court that in his view Board approval was not required because previously Chivaviro had signed on behalf of the company without the consent of the other Directors or Board approval a transaction relating to 24 (twenty-four) lots. He went on to say that the other 2 Directors were Directors on paper, as it were (brother and wife to Chivaviro) in that they were never directly involved in the company's affairs or day-to-day running. The system was such that Plaintiff would act in Chivaviro's stead whenever Chivaviro was out of the country. He told the court that Chivaviro was the ultimate authority in the company, his word was "law", and his decisions were binding on everyone. He made all the decisions on behalf of the company without resorting to or seeking ratification

from the Board or Shareholders. The company was James Taziwana Chivaviro's alter ego. Chivaviro told him that he owns the 1st Defendant and he brought his wife and brother into it.

Whether or not Chivaviro had the authority to contract with Plaintiff is a question of fact. Where facts are not common cause and the contrasting version is not before the Court, it will be remiss of the Court to decide the fact in issue before hearing the other versions.

The issue raised is without merit and is dismissed.

VIOLATION OF THE COMPANIES ACT [CHAPTER 24:03]

This issue is without merit because it ignores a lot of the evidence given by Plaintiff and the natural gaps in the evidence in this matter that can only be testified on by the 1st Defendant.

It is so argued by the 1st Defendant that the 4 Agreements Of Sale violated ***Sections 176(2), 183(1)(b),*** and ***186 of the Companies Act [Chapter 24:03]*** then in operation.

The provisions in question read as follows;

Section 176

"(1) It shall not be lawful for a company to pay a director remuneration, whether as director or otherwise, free of any taxation in respect of income, or otherwise calculated by reference to or varying with the amount of such taxation or with the rate of taxation on incomes, except under a contract which was in force on the 1st January, 1952, and provides expressly, and not by reference to the articles, for payment of remuneration as aforesaid.

(2) Any provision contained in a company's articles or in any contract other than such a contract as aforesaid, or in any resolution of a company or a company's directors, for payment to a director of remuneration as aforesaid shall have effects if it provided for payment, as a gross sum subject to taxation, of the net sum for which it actually provides."

The Agreements do not purport to be tax-free payments. In any case, the land has not yet been transferred to Plaintiff. Tax is paid from an earning and not a promise.

Section 183(1)(b)

> "(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting –
>
> > (b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company."

Plaintiff told the court that during his tenure at the 1st Defendant, no meeting of Shareholders ever took place. In any case, he did not know who the Shareholders were. The shareholders can and should testify on this fact, if necessary. However, even if the 1st Defendant is assumed to be correct on the factual aspects of this issue, at law the agreements

did not require approval of the shareholders because the total land sold to Plaintiff did not constitute the greater part of the company's assets. He was sold 5 hectares from about 105 hectares of land the 1st Defendant held.

Section 186

"Subject to this section, it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature and full extent of his interest as a meeting of the directors of the company."

According to Plaintiff during his tenure, there was never a meeting of the Board of Directors convened in the 5 years he was there. In fact, under cross-examination, it was put to him that the 3 other Directors could have met and could decide in his absence and their decision being that of the majority would be binding on him and he accepted that. It defied logic to say Plaintiff did not declare the nature and full extent of his interest in the contract with 1st Defendant at a meeting that never took place, or that could have taken place in his absence and without his knowledge.

This issue is dismissed as well.

STATUTORY ILLEGALITY

One of the issues referred to trials is:

"Whether there were valid agreements of sale entered into between the Plaintiff and the 1st Defendant"

It admits to no argument that for an agreement to be valid, it must perforce be in compliance with the laws of the land. The issue referred to trial and mentioned above, is what the Plaintiff has come to court through these proceedings seeking the Court to pronounce itself on. This point is clear in the Plaintiff's summons and declaration. Generally, an issue referred to trial is a distillation of the claim by the Plaintiff or the plea by the Defendant or a synthesis of the two.

To argue, as the Plaintiff has done that this matter was neither pleaded nor contested is at best being evasive and at worst misunderstanding one's claim. The agreements which are the subject matter in this litigation were signed before the land in question was subdivided and after the sub-division permit had lapsed or expired. Plaintiff does not deny this.

Section 39 of the *Regional, Town and Country Planning Act [Chapter 29;12]* reads as follows in the relevant parts:

*"**39. No subdivision or consolidation without permit***

(1) Subject to subsection (2), no person shall….

(a) subdivide any property; or

(b) enter into any agreement …

(*i) for the change of ownership of any portion of a property; or…"*

The use of the words ***"no person shall …"*** is evidence of the peremptory nature of the provisions. Its disobedience calls for its visitation with nullity. *Messenger of the Magistrate Court, Durban –v- Pillay 1952 (3) SA 678 (A).*

The general rule is that an agreement that is expressly prohibited by statute is illegal and is therefore null and void even without a badge of nullity having been added by the statute. *York Estate Ltd -v- Wareham 1949 SR 197.*

The Supreme Court cleared any doubt that might have lingered in some people's minds when in *X-Trend-A-Home (Pvt) Ltd -v- Hoselaw (Pvt) Ltd 2000 (2) ZLR 348 (S*) it stated;

> *"It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."*

The law is therefore clear, not only from the statutory angle but also from the interpretation that has been given to the statutory provision in question by the Supreme Court. The question of the 4 (four) agreements between the parties concerned in this matter being null and void is therefore settled. They were not valid and of no legal force. No rights or obligations could flow from them regardless of the joint intention of the parties on 21 April 2016.

With that finding having been made, the matter however does not end there. I now turn to consider the ultimate question to be asked and answered in this application.

This application is made at the close of the Plaintiff's case. The question is, is there evidence upon which a reasonable man might find for the Plaintiff in this matter? In any considered view, it is clear that there is no such evidence in this matter. No court may endorse illegality. The Supreme Court spoke on that subject and the High Court is duly bound. The Plaintiff has therefore failed to establish a *prima facie* case against the 1st Defendant.

DISPOSITION

The application for absolution from the instance by the 1st Defendant at the close of the Plaintiff's case is successful and it is ordered as follows;

(1) The application for absolution from the instance by the 1st Defendant is granted.

(2) The Plaintiff shall pay the 1st Defendant's costs of suit.

Farai And Farai Attorneys, Plaintiff's legal practitioners.

Kantor & Immerman, 1st Defendant's legal practitioners.