1. SIMBARASHE ANTONIO
versus
ASHANTI GOLDFIELDS ZIMBABWE LIMITED
and
THE REGISTRAR OF DEEDS

2. KINGSTONE MUJATI
versus
ASHANTI GOLDFIELDS ZIMBABWE LIMITED
T/A FREDA REBECCA MINE
and
THE REGISTRAR OF DEEDS

3. ASHANTI GOLDFIELDS ZIMBABWE LIMITED
versus
KWADZANAYI BONDE

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 16, 17 and 23 June, 20 July and 18 November 2009

TRIAL CAUSE.

G.C. Manyurureni for S Antonio and K Bonde
T Nyamasoka for S Antonio
T Magwaliba for Ashanti Goldfields t/a Freda Rebecca Mine.

MAKARAU JP: With the consent of all the parties, I consolidated the hearings of the above three matters as they involve the same dispute between Ashanti Goldfields Zimbabwe Limited and three of its former workers. Again with the consent of the parties, I agreed that the three former workers give their combined evidence first even though the third worker is a defendant under HC3793/08. For convenience, I shall refer to the three former employees as the plaintiffs and to Ashanti Goldfields Zimbabwe Limited as the defendant.

The dispute between the parties revolve around two agreements that were concluded between the defendant and its former workers in respect of certain properties that the workers were occupying during the subsistence of their employment with the defendant. On 1 December 2003, an agreement headed "memorandum of agreement between Ashanti goldfields management and Employees" was signed by the defendant's General Manager and Finance Director on one hand and by three employees who were members of the Workers Committee, representing the defendant's employees. In the agreement, the defendant agreed to

dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low density to its employees who were sitting tenants. An agreed price list was attached to the agreement. On various dates thereafter, but commencing around 9 December 2003, the defendant and its employees entered into several lease agreements in respect of the housing units that the employees were occupying. Deductions were thereafter effected against the salaries of the employees. The employees contend that such were in fulfillment of the agreement of sale concluded on 1 December 2003. The defendant on the other hand contends that these were rentals deducted in fulfillment of the lease agreements concluded by each of the employees in respect of the housing unit they were occupying. Failing to reach agreement on whether the employees had purchased the housing units or were renting same from the defendant, a number of suits were filed in this court, including the above three.

In the first suit, the plaintiff issued summons on 20 August 2007, seeking an order declaring binding the sale agreement between the parties and compelling the defendant to transfer certain immovable property, described in the summons, to the plaintiff. The suit was defended. In a separate suit, the defendant counter-claimed for an order evicting the plaintiff from the property.

In the second matter, the plaintiff filed a court application seeking an order compelling the defendant to transfer to him certain immovable property described in the papers. In the application, the plaintiff averred that he had purchased the immovable property from the defendant in terms of the agreement of sale of 1 December 2003 and that he had paid the full purchase price through deduction effected against his salary.

The application was opposed and in the opposing affidavit, the defendant denied the agreement of sale and averred that the second plaintiff was occupying the property in terms of a lease agreement which he had breached.

At the hearing of the application, the matter was referred to trial with the papers filed of record standing as pleadings.

In the third matter, the defendant sued for the eviction of the plaintiff from certain immovable property described in the summons. In the declaration filed with the summons, the defendant alleged that the third plaintiff was a tenant in respect of the property and that by terminating his employment with the defendant, he had breached the lease. In defending the suit, the third plaintiff averred that he was not occupying the property in terms of a lease

agreement but had purchased same from the defendant in terms of the agreement of sale of 1 December 2003.

Thus the issues arising from the above three matters are similar and call for an interpretation of the two agreements that the parties concluded in respect of the properties in dispute.

In support of their cases, the three employees gave evidence. Again for convenience I shall refer to them as first to third plaintiffs.

The first to testify was Simbarashe Antonio. He resides in Bindura and was employed by the defendant up to June 2007.

During the subsistence of his employment with the defendant, he occupied many roles. He was a trained electrical technician and would act as a consultant electrical technician on a need to need basis. On a daily basis, he was employed in the Finance department where he was the Financial Assistant Accountant, responsible for banking, investments, debtors and gold sales. He also represented the lower levels of the employees on the board of the defendant and was thus a board member. Due to his position on the board, he was appointed into a committee that spearheaded and shepherded the alleged disposal of the housing units by the defendant to its employees. His testimony was as follows.

In or about 1998, the defendant, then under different shareholding and management, expressed a desire to dispose of its housing units to its employees. This was driven by reports that the ore reserves at the mine would be depleted in five years and the disposal of the housing units was viewed as a way of recouping some of its investments and at the same time as a way of keeping essential skills until the mine closed.

Initially, the defendant wanted to hand over all the housing units to a Building Society for it to oversee the disposal. The defendant failed to raise the deposit require by building societies for such an exercise and the matter returned to the board for further discussion. Negotiations were opened between the workers and management and the witness was tasked to speed up the process. The board empowered him to ensure that management did not slacken on the process. As part of the process, a committee was set up called the Housing Committee. It comprised the General Manager, the Finance Director and a Mr Musarira as representing management and thus the defendant and the witness and two others as representing the workers.

In 2002, the board met in Ghana and the issue came up for discussion. It was followed up at a subsequent board meeting held in Johannesburg where it was resolved that the matter should now be concluded. The sticking point that was disclosed to the board was the inability of the workers to pay in cash for the properties. The committee was tasked to come up with a financing method that was acceptable to both sides.

Consultations between the two sides continued up to late 2003. A legal practitioner was retained to draft a document that would capture and protect the interest of both parties. The board had indicated that it required evidence at its meeting of 1 December to show that the issue had been put to rest. The housing committee in its wisdom, decided to come up with the memorandum of agreement on 1 December 2003 in which it is recorded that the defendant had agreed to dispose of its housing units to its employees.

During negotiations, the committee had agreed that each housing unit be valued and three evaluations were carried out in respect of each unit and a value was assigned to each unit. The sitting tenant in respect of each unit was also identified and all this was agreed upon by members of the committee in a schedule they attached to the agreement.

The witness understood the document to be the agreement of sale between the defendant and its workers. The document was taken to the board and was accepted by the board as having put the matter to rest. The board also understood it to be an agreement of sale.

The employees were informed that the board had now agreed to sell the properties. Since the employees had no money with which to finance the purchases, they decided to sell their shares in the defendant. A sum of $5 million was raised from the exercise and this was distributed to the workers. The witness then paid for his particular unit in full.

Another method of paying for the properties was agreed upon. The defendant had on a previous occasion disposed of motor vehicles through a finance –lease arrangement. This would entail periodic payments deducted from the employees' salary and the document for so doing was a lease agreement. The witness entered into a lease agreement with the defendant in respect of his unit which is the document he used to effect payment of the purchase price to the defendant.

An accounting system was created for this particular exercise. The employees' pay slips would reflect a rent to buy deduction. After each deduction, the balance due in respect of the property being purchased would be reflected on the pay slip.

All appeared to be going well until 2006 when the defendant was sold Mwana Africa. The workers went on strike. They were apprehensive as to their welfare and in particular, as to whether the new owners of the mine would honour the agreements that had been concluded with the previous owners. They were assured that nothing would change and they returned to work. Later the employees heard that the new board of directors was not going to honour the agreements of sale. Employees pressing with the issue were victimized and subsequently dismissed or retrenched.

The witness was suspended from employment in April 2007. On 27 June, he resigned.

The witness was quite eloquent. His narrative was easy to follow and he gave his evidence well. Under cross- examination, he was effusive, and would give explanations not called for. He however, admitted that in terms of the lease agreement, he had to remain in the employment of the defendant for 5 years before he could purchase the property and that he left employment before that period had lapsed.

The witness was cross-examined at great length in connection with a memo that was addressed to all the workers on 2 December 2003 by the Chairman of the Workers' Committee giving them up to February 2004 to decide whether or not they wanted to buy the house allocated to them. It was suggested to him that this memo indicated that there had been no agreement of sale on 1 December 2003 as he had testified. The witness remained firm in his belief that on 1 December 2003, the defendant had bound itself to sell the housing units to its employees.

While he was rather verbose and lengthy in his testimony, especially when answering questions under cross-examination, I gained the impression that he was truthful and honest. There were no improbabilities in his testimony. He remained consistent in his narration of events leading to the execution of the two agreements. His understanding of the two agreements, though not strictly legal at times, was reasonable.

Next to testify in the matter was Kingstone Fungai Mujati. He also resides in Bindura and was employed by the defendant from 1997 to

He is one of the signatories to the agreement of 1 December 2003. He represented the workers when he signed the document. His understanding of the document was that the defendant was agreeing to dispose of its properties to its employees who were sitting tenants in respect of those properties. The prices of the properties were attached to the agreement. His

own property was listed on the attachment as number 1287 and the agreed price was the sum of $2 140 000-00.

In his testimony, the witness testified that he paid in full the purchase price in respect of the property that was allocated to him. The purchase price was deducted from his salary on a monthly basis. In 2005, he then made a lump sum payment to clear the balance that was due. He identified the pay slips from which the various deductions had been made. After he had made the final payment, the defendant wrote to the local authority and to the Zimbabwe Electricity Supply Authority advising the two that the defendant was no longer responsible for rates and electricity charges respectively, for the property. All utility bills were now coming in his name.

The testimony of this witness was largely similar to that of the first witness. He however testified that while others signed a finance-lease agreement in respect of their properties, he did not.

The witness gave his evidence well. He was cross-examined on why he did not sign a lease agreement and I found his responses forthright and probable. It is my finding that he was truthful.

Kwadzanai Bonde also gave evidence. He also resides in Bindura and was employed by the defendant as an accounts clerk. He joined the defendant in 1995 and left employment in November 2007. His evidence was similar in material respects to the evidence of the first and second witnesses. Unlike the second witness, he signed a lease agreement in respect of the property. The lease agreement was explained to him by members of the housing Committee as a document that would assist him to finance the purchase of the property.

He concluded his evidence by maintaining that he had purchased the house he was occupying and the defendant had no right to evict him therefrom.

The witness gave his evidence well. He was not shaken in cross- examination. I shall rely on his evidence.

The plaintiffs also called the evidence of one Emmanuel Gambara. He resides in Bindura and was once an employee of the defendant. During the course of his employment with the defendant, he was elected as a representative of the workers. He was one of the signatories to the agreement of 1 December 2003 and was a member of the Housing committee set up by the defendant's board. His understanding of this document and the subsequent lease

agreement was similar to that of the other witnesses. He did not personally sign the lease agreement as the defendant's Finance Director was of the view that the workers' representatives should be the last one to participate in the purchase of the properties.

After the testimony of this witness, the plaintiffs closed their cases.

The defendant called the evidence of one Agasi Wala. He is its Human Resources Manager. He was employed by the defendant in 1996. He initially was a welfare officer and rose through the ranks to his current position. The matter relating to the alleged disposal of the properties to staff were matters that fell under the purview of the Human Resources department where he worked as his department coordinated all the meetings with staff.

He confirmed that the three plaintiffs were all once employed by the defendant. He also confirmed that there were negotiations at Works Council level between the management and the employees of the defendant in 2002 regarding the disposal of the properties that the defendant had allocated to its workers. These were protracted until December 2003 when the memorandum of agreement was signed. It was his understanding that the memorandum of agreement between the parties signified that with effect from 1 December 2003, sitting tenants in company houses were to be offered their units to purchase. To him, this was a statement that these properties would be disposed of to the workers at a later date. There was going to be a separate agreement of sale at a later date. After this agreement, the parties concluded a lease agreement.

Regarding the contention by the plaintiffs that the agreement of 1 December 2003 was an agreement of sale, the witness was of the view that it was not. He was of the further view that the price list attached to the agreement for each unit was meant to assist in assessing a rental for each.

He confirmed that on 5 December 2003, following the first agreement, a notice was put up on the notice board inviting all employees interested in participating in the scheme to make their choices known. He was of the view that if the first agreement was an agreement of sale, this notice to the workers would have been unnecessary and may not have come out in that form. The employees responded to that notice by filling in lease agreement forms.

The witness confirmed that deductions were effected against the salaries of the workers who had responded to the notice of 5 December 2003. These were only effected after the workers had signed the lease agreements. A worker who was not participating in the scheme

would be in mine accommodation and would pay subsidized rentals. All those against whose salary were deducted payments were to purchase their properties after 5 years. The amount they would have paid in advance would be taken into account in assessing the purchase price of the property after the five year period.

In respect of the second plaintiff, he was adamant that Kingstone Mujati signed a lease agreement that he removed form his file before he left employment. All employees participating in the scheme had signed the lease agreements.

Regarding the letters written to ZESA and to Bindura Municiaplity in connection with Kwadzanayi Bonde's property, he testified that the letters did not state that the employee had bought the property. It simply transferred responsibility for the payment of bills to the employee who had left employment with the defendant.

Under cross – examination, the witness testified that he did not attend the meeting at Works Council level where the issue of the disposal of houses was discussed. He kept track of what was being discussed there from feedbacks he got from the Housing Committee and from some of the records of the transactions that were kept by the defendant. He did not have any access to the minutes of the Board of the defendant.

The witness gave his evidence well. The bulk of his evidence was in corroboration of the plaintiffs' evidence as to how the two agreements came about. The difference between his testimony and that of the plaintiffs was in the interpretation that each side gave to each of the two agreements. While he obtained his information from the Housing Committee, he was of the view that the two documents should speak for themselves.

The testimony of this witness was largely a reflection of his personal opinion. It was not based on personal experience as he was not part of the management team that negotiated the sale or disposal of the housing units. He did not sit on the Board where the issue was debated and resolved. He did not have access to the minutes of the Board where the issue was recorded. While he has been chosen to be the mouth piece of the defendant, he cannot testify as to the intention of the defendant when the two agreements were concluded. He cannot know what the defendant intended as he was not part of the defendant's representatives when such decisions were being made. I shall revert to this point in due course.

The defendant did not call any other witness and closed its case after the testimony of Agasi Wala.

In my view, the first issue that I have to determine in this matter is whether or not the agreement of 1 December constituted an agreement of sale between the defendant and its employees.

As indicated above, the agreement of 1 December 2003 was a terse document whose operative part read:

"Ashanti Goldfields agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached."

I am in agreement with *Mr Magwaliba* for the defendant that the above was an agreement by the defendant to dispose of its properties to its employees who were sitting tenants and that the agreement would be with effect from 1 December 2003 and that this agreement was not the agreement of sale itself.

In my view, the agreement of 1 December 2003 is no more than an agreement by the defendant to bind itself to sell its housing units, described in the schedule, to the employee named against each unit and at the price given as the market value of each unit on the date of the agreement. It was thus an agreement giving the employees an option to purchase the housing units on the terms and conditions stipulated in the agreement.

To the limited extent that the defendant bound itself to offer the housing units for sale to its employees on the terms stipulated in the agreement, an agreement came into being. It would be binding on the defendant but not on the employees. The true nature of that agreement was an option granted to the employees to purchase the housing units.

In my view, the agreement could also be viewed as an irrevocable offer by the defendant to sell its housing units on the terms and conditions stipulated in the agreement.

It is not in dispute between the parties that once the terms and conditions of the agreement of 1 December were met, a *vinculum juris* would be formed between the parties and a binding contract would come into being. Thus, the option granted the employees to purchase the housing units was also an offer by the defendant to each and every employee named in the schedule to purchase the unit allocated to him or her at the agreed price.

As offer has been described as a proposal by the offeree made with the intention that by its mere acceptance, a contract shall form. (See R. H. Christie: The Law of Contract in South Africa 3rd Ed page 29). In other words, 'the proposal, objectively construed, must be

intended to create binding legal relations and must have so appeared to the offeree'. 4 DT Zeffertt 'Payments "In Full Settlement"' (1972) 89 SALJ 35 at 38.

The next issue that falls for determination is whether the offer as contained in the agreement, was ever accepted by the above three plaintiffs.

It is trite that as a general rule a contract is not concluded until the offeree has not only decided in his mind to accept the offer, but has communicated his acceptance to the offeror.

In each case it is necessary to consider the terms of the offer to determine the mode of acceptance required. Where in my view the offer is silent as to how the offer is to be accepted, any conduct on the part of the offeree, by deed or by word is in my view that is consistent with acceptance of the offer and which conduct or word is brought to the attention of the offeree and is also understood by the offeree as an acceptance of the offer is sufficient to create the requisite *vinculum juris* between the parties.

In *casu*, it is not in dispute that the agreement of 1December 2003 was silent as to what the employees needed to do to accept the offer. In my view, after the agreement of 1 December 2003, if each and every employee named in the agreement had tendered the full purchase price of their respective unit to the defendant, a binding agreement of sale would have been created. The three plaintiffs contend that they accepted the offer to purchase their respective housing units by completing the lease agreements which they understood to be vehicles to finance the payment of the purchase price in installments.

Two issues arise from the execution of the lease agreements between the parties. Firstly, I have the testimony of the plaintiffs as to how the lease agreements came into being. This testimony in my view cannot be assailed at the instance of the defendant. It is common cause that at the time the lease agreements were executed, there was no dispute between the parties as to which employee was in occupation of which unit and what rental the employee had to pay. The parties had not been negotiating lease agreements at any level and there was thus no factual or legal dispute that required the parties to enter into lease agreements. In other words, there was no need for the lease agreements either on the part of management or on the part of the employees.

On the other hand, the parties had been negotiating the disposal of the housing units by management to the employees. The negotiations had spanned a period of over 5 years and days

before the lease agreements were executed, the defendant had finally bound itself to dispose of the houses to the employees in a written document. Thus, the dispute between the parties was in connection with the disposal of the housing units and thus, the understanding by the employees that the lease agreements were part of the process was in the circumstances more probable than the defendant contention that this was a new stand alone agreement.

Thus on a balance of probabilities, I would hold that that lease agreements were not separate from the exercise of the disposal of the houses to the plaintiffs.

What emerges from the testimony of the parties regarding the lease agreements, if I were to accept the defendant's testimony, is that parties were not ad idem concerning the true nature of the agreement. The employees regarded the agreement as a vehicle to offset the purchase price of the housing units when on the other hand the defendant viewed the agreement as a stand alone lease agreement, creating fresh obligations for the parties.

In any event, I have above expressed my reservations about accepting the views of Agasi Wala as representing the intention of the defendant when it concluded the lease agreements with the first and third plaintiffs.

It is trite in my view that it is not every employee who can give evidence on behalf of a corporate body such as the defendant which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate governance structures of the defendant to have knowledge of the facts that they testify of. This knowledge can be derived from the employee's personal contact with the transactions in issue or from their position in the corporation that allows them access to the memories of the corporate body. Agasi Wala had neither. On his testimony alone, I therefore cannot find that it was the intention of the defendant to enter into separate lease agreements with the same employees that it had agreed to dispose of its housing units to. He has no personal knowledge of what the defendant's intention was. He is not so placed within the structures of the defendant to have known from accessing records as to what the intention of the defendant was.

The major defect of the defendant's defence is that no one appropriately placed in the corporate governance structures of the defendant came to testify on behalf of the defendant.

Thus, the lease agreement between the parties was not meant to be in replacement of the first agreement. It was not executed with the necessary *animus contrahendi* by the employees and is therefore not binding on all the parties.

The issue remains as to whether the plaintiffs accepted the option granted them by the defendant. In my view, they did.

It is common cause that the plaintiffs made various monthly payments to the defendant in reduction of the agreed purchase price of their respective units. This was sufficient communication of the acceptance of the offer. It is further not in dispute that the representatives of the defendant then accepted the deductions as part payment of the purchase price. The opinions of Agasi Wala as to what these payments constituted cannot be ascribed to the defendant for the reasons I have given above.

It is therefore my finding that the plaintiffs did conclude binding agreements of sale with the defendant in respect of each of their units. The offer to purchase was made on 1 December 2003. The acceptance was by each employee when he or she communicated their intention to the management of the day that they were going to participate in the scheme and made arrangements to pay off the purchase price. The offer from the defendant did not stipulate how acceptance was to be communicated and any conduct consistent with being bound by the defendant's terms, communicated to the defendant's representatives, was sufficient.

In concluding as I do, I am aware of the Supreme Court judgment in Ashanti *Goldfields Zimbabwe Limited v Clements Kovi* SC7/09 in which it was held that the agreement of 1 December 2003 between defendant before me and a similarly placed employee to the plaintiffs before me was not an agreement of sale. I agree. In particular, I agree with the finding by the Supreme Court that in the agreement of 1 December 2003, the defendant agreed to offer the housing units to its employees. It thus granted them an option to purchase. The clear evidence led before me shows that each of the three employees took up the offer made to them and exercised the option by commencing to make periodic payments to the defendant. More importantly in my view, such periodic payments in the matter before me were accepted by the defendant's management of the day as a reduction in the purchase price of the housing units involved.

I am bound by all decisions of the Supreme Court on points of law. Where however, the facts that were placed before the Supreme Court are different from the facts before me, I believe I am at liberty to interpret those facts in light of the law handed down by the Supreme Court. The doctrine of *stare decisis* applies to points of law and not to factual disputes.

In the result, I make the following orders:

1. In HC4428/07 and 5665/07:

   1.1. The defendant is hereby ordered to transfer ownership in the property commonly known as Stand number 293 Tumazos Avenue Bindura within 10 days of this order failing which the Deputy Sheriff is hereby empowered to sign all necessary documents and transfer the property to the plaintiff.

   1.2. the defendant's counterclaim is dismissed

   1.3. The defendant shall bear the plaintiff's costs of suit.

2. In HC 2125/07:

   2.1.1 The defendant is hereby ordered to effect transfer of the property commonly known as number 1287 Chiwaridzo Township Bindura to the plaintiff within 10 days of this order failing which the Deputy Sheriff is hereby empowered to sign all such necessary documents and take all necessary steps to transfer the property to the plaintiff.

   2.1.2 The defendant shall bear the plaintiff's costs.

3. In HC3793/08

3.1 the plaintiff's claim, (Ashanti Goldfields Zimbabwe Limited' claim) is dismissed

3.2 The plaintiff is to bear the defendant's costs.

Atherstone & Cook, legal practitioners for Simbarashe Antonio.
Manyurureni & Company, legal practitioners for Kingstone Mujati and Kwadzanai Bonde.
Magwaliba & Kwirira, legal practitioners for Ashanti Goldfields Zimbabwe Limited.