ETERNITY STAR INVESTMENTS (PVT) LTD
and
RONALD AJARA
versus
MAHATI DAVID MAUNGANIDZE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 14 November 2013 & 4 December 2013

Opposed Matter

B. Maruva, for the applicant
Ms *F. Chinhaire,* for the 1st & 2nd respondents

NDEWERE J: The respondent's counsel applied for upliftment of the automatic bar and for condonation for late filing of Heads of Argument on behalf of the second respondent. She said the second respondent was initially represented by another law firm which renounced agency on 7 November, 2013. The second respondent himself deposed to an affidavit to the effect that he had encountered difficulties with his previous lawyers who were not working on the case while at the same time unwilling to give him his file until 7 November, 2013 when they eventually did so. The applicant opposed the application but in the interests of justice, the court decided to give the second respondent the benefit of the doubt since he had retrieved his file and engaged new lawyers who had filed the Heads of Argument, albeit out of time. The bar was accordingly uplifted and condonation granted and the second respondent's Heads of Argument were accepted as part of the record and the hearing of the main application proceeded as scheduled.

The facts are that on 30 November, 2011 the applicant and the first respondent entered into a sale of business assets agreement wherein the applicant sold several business assets to first respondent for US$350 000-00 to be paid as follows:-

US$20 000 by 29 November, 2011

US$50 00 by 31 December, 2011

US$27 000 by 31 January, 2012

The balance was to be paid in 11 monthly instalments of $23 000-00 beginning on 28 February, 2012.

The first respondent paid the initial $20 000 and the goods were delivered to him as listed on Annexure B. However, the applicant retained ownership of the assets until final payment. As of now the assets are in the first respondent's possession in terms of the agreement of 30 November, 2011.

On 18 June, 2012 the first respondent ceded his rights and obligations in the agreement of sale to the second respondent contrary to clause 13 of his agreement with the applicant.

Clause 13 reads as follows:-

> "Neither the seller nor the purchaser shall be entitled to cede or assign their rights and obligations hereunder to any third party without the prior written consent of the other party". (the underlining is my own).

On 1 March, 2013, the applicant filed a court application challenging the cession between the first and the second respondent on the basis of clause 13 of its agreement of sale with the first respondent. However, the applicant attached a wrong agreement as Annexure C. It attached an agreement with Soda Engineering, a company that is not a party to these proceedings but with a similarly worded agreement with the applicant. The respondents' legal practitioners did not raise this issue in its papers, it only raised it during argument. In this regard, legal practitioners are reminded to cross check all the documents they file with the court before such filing to avoid such errors. The agreement with the first respondent was a fundamental supporting document to the applicant's application and the applicant risked losing his case because his legal practitioners attached the wrong supporting document. Fortunately for the applicant the first respondent did not raise objections to this neither did he dispute the agreement. In fact, the first respondent attached the correct agreement as a supporting document to his response. Consequently, there was no prejudice caused by attaching the wrong agreement as a supporting document and the court, has, through the first respondent's admission of the existence of the agreement and its attachment as Annexure E, been availed of the correct supporting document for purposes of dealing with the application before it.

On 12 April, 2013, the first respondent filed a notice of opposition and opposing papers while the second respondent had filed his opposing papers on 22 March, 2013. In his opposing affidavit, the second respondent concedes that the cession is in breach of the

agreement of sale between the applicant and the first respondent. Paragraph 6.1 of his opposing affidavit states as follows:-

> "…when I entered into the agreement of cession with the first respondent he did not adequately explain to myself the material terms and conditions of the agreement between him and the applicant. If the real truth had been disclosed to myself I would not have entered into the agreement".

In para 6.2 he goes further and says:-

> "…it is peremptorily clear that the cession agreement between first respondent and myself flies in the face of Clause 13 of the purported agreement of sale between applicant and first respondent ….".

The above paragraphs show that there is no real opposition from the second respondent; all he is saying is if the court declares the cession invalid it must do the same to the agreement between the applicant and the first respondent because of the applicant's agreement with Soda Engineering.

The court refused to be drawn to discuss the Soda Engineering agreement when Soda Engineering was not a party to the proceedings. The court said the respondents were at liberty to apply for joinder of Soda Engineering as a party if they wanted to rely on its agreement. The court therefore ruled that it was clear that the Soda Engineering agreement was attached in error instead of the agreement with the first respondent and after pointing out the error, the respondents should desist from involving the court in the debate over the Soda Engineering agreement when that company was not a party to the proceedings before the court. Consequently all reference to Soda Engineering had to be struck out because Soda Engineering was not party to the proceedings between the applicant and the respondents.

Clause 13 of the agreement between the applicant and the first respondent required written consent before any cession could be done. The respondent's counsel argued that written consent was obtained and she referred the court to page 54 of the record where there is a letter from Gula-Ndebele and Partners to Nhemwa and Associates. Gula-Ndebele were representing the first respondent while Nhemwa & Associates were representing the applicant. She referred to the first paragraph of that letter wherein it is written:

> "We are instructed the said cession Agreement was drafted by yourselves and executed with the full knowledge and blessing of your above named client".

She said this was proof that the applicant was agreeable to the cession. But there is no such proof. The above statement does not even tell us who instructed Nhemwa & Associates to draft the cession agreement if indeed they drafted it. It is trite that lawyers act on

instructions and in the absence of proof of who instructed the drafting of the agreement, the first respondent's assertion cannot succeed.

The second paragraph of the same letter says:-

> "In the premises, we request confirmation that your client approves of the cession agreement concluded between our client and the said Mahati David Maunganidze on 18 June 2012. Further we request that you file and serve a Notice of Withdrawal in case No. HC 6348/12".

The first part of the above statement clearly shows that the first respondent's counsel at that time was anxious and he wanted the applicant's approval confirmed in writing because he had realised the implications of not having such written approval in terms of clause 13. The respondents' counsel conceded that no such written approval was ever given. She however said the fact that case No. HC 6348/12 was eventually withdrawn is proof of such consent. That cannot be. The withdrawal of Case No. HC 6348/12 was a 'further' issue, in addition to the requested confirmation of approval as indicated by the construction of the next sentence which starts with 'Further, …'.

In view of the provisions of Clause 13, verbal negotiations, discussions, undertakings and promises by the applicant were not enough even if they had been made (which was denied by the applicant). In terms of Clause 13, that consent to a cession to a third party had to be in writing. In the absence of proof of the applicant's written consent to the cession agreement between the first and the second respondent, the application must succeed and the cession agreement between the first and second respondent is hereby declared null and void. This means the agreement between the applicant and the first respondent of 30 November 2011 remains valid.

The respondents should pay the costs of suit on the ordinary scale.

Mugwadi & Associates, applicant's legal practitioners
Chitewe Law Practice, 1st and 2nd respondents' legal practitioners