GORDON SAVANHU
versus
UNTU MICRO FINANCE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 23 & 28 September 2016

Stated Case

S Hashiti with *G Sithole*, for the plaintiff
M Muchandiona, for defendant

TSANGA J: This is a special case by consent brought in terms of Order 29 r199 (1) of the High Court Rules 1971, in which the agreed facts are stated as follows:

1. The plaintiff was employed by the defendant company in April 2011 as an Executive Director responsible for credit. The contract of employment was for a fixed term of three years and it was terminable by either party upon giving the other party three months' notice.
2. On the 30th of September 2011, the plaintiff tendered his resignation from Defendant's employ after receiving an offer of employment from MBCA Bank.
3. After consulting with the company's board of directors, Clive Msipha, the then General Manager of the defendant (who is now the Chief Executive Officer of the company) held a meeting with the plaintiff and proposed some improvements to the plaintiff's remuneration package. The Plaintiff accepted the new remuneration package proposed by the Defendant and continued in the Defendant's employment.
4. The Plaintiff's new remuneration package was communicated to him by letter dated 4th October 2011. The last paragraph of the letter read as follows: ***"An immediate allocation of 2000 shares in Defendant valued as (sic) US 40000.00. The normal good leaver and bad leaver covenants will apply".***
5. By letter dated 1st January 2012, the Chairperson of the defendant company's Remuneration Committee, Bartholomew Mswaka, wrote to plaintiff explaining the mechanism by which the **share options** available to plaintiff could be exercised.

6. The plaintiff did not pay the monetary value of the 2,000 shares which were offered to him by letter dated 4th October 2011.
7. By letter dated 30th September 2013, Plaintiff was given notice of termination of his contract of employment effective from 31st December 2013.
8. By letter of 5th November 2013, the Plaintiff was provided with a computation of his terminal benefits.
9. The plaintiff queried the computation by letter dated 4th December 2013.
10. Defendant's Chief Executive Officer responded to plaintiff's queries by letter 16 December 21013.
11. On the 3rd of September 2015 the plaintiff instituted the present actions and his Summons and Declaration were served on Defendant on 14th September 2015.

Upon having agreed to proceed by way of a stated case, both parties agreed in their submissions that the question for determination by this court, is that which was captured as the sole issue for trial, which is as follows:

> "Whether or not the plaintiff and defendant entered into an agreement in terms of which the plaintiff was allocated US$ 40 000.00 worth of shares at no financial cost".

Plaintiff's submissions on agreed stated of facts

The plaintiff's submissions emphasise that shares were immediately allocated to him on the 4th of October 2011. His argument is that as they stood immediately allocated and due to him, the rules of contract ought to be given their ordinary grammatical meaning unless they lead to an absurdity. The case of *Metro International (Pvt) Ltd* v *Old Mutual Property Investment Corporation & Anor*[1] is cited in support of this contention. His position is that there was a material difference between shares allocated to him on the 4th of October 2011, which he unequivocally accepted as part of this remuneration package, and, the share options which he was entitled to exercise under the employee share ownership scheme as provided in his contract of employment contract. It was these shares which formed the subject matter of the letter of 1st January 2012. He also argues that the absence of a share certificate for the 2, 000 shares is not material. His standpoint is that his claim is contractual in nature as an offer was made which he accepted. (*Reid Bros (SA) Ltd* v *Fischer Bearings Co Ltd).*[2] He says the letter of 1st January 2012, advising him that he had been allocated 2, 000 share options at

[1] SC 83-06
[2] 1943 AD 232 at 241.

$20.00 per share was with reference to shares which fell in the category of share ownership scheme. He says he did not exercise his rights in terms of this scheme.

As such, the thrust of his query regarding his terminal benefits related to the omission of the 2, 000 shares which prompted the response that they were never offered to him for no value. He says that the suggestion by Defendant that the letter of 1st of January 2012 concerned itself with shares allocated on the 4th of October does not hold water as the October shares were allocated as part of common corporate practice in commerce to reward persons in his position in order to retain their services. He also says that the shares he was allocated in October 2011, were simply shares and not share options. Share options would entail that he exercise his discretion to accept any such offer, whereas the ones allocated to him were at defendant's sole discretion. Thus, in essence, his point is that as of 4th October he acquired equity in defendant as he immediately became a shareholder of the 2 000 shares valued at 40 000.00.

He argues that the fact that no share certificates were issued to him for the 2,000 equity shares is neither here nor there as it was defendant's responsibility and not his to ensure that the certificate was issued within the confines of the law. He further posits that whilst in terms of s 104 of the Companies Act the share certificate would serve as *prima facie* evidence of title, it is not conclusive evidence that the bearer of the share certificate is in fact the owner of such shares.

The defendant's Submissions

The defendant on the other hand denies that it issued plaintiff 2 000 shares at no financial cost. It zeroes in on the word allocate and points out that it means to set apart or to assign. Its contention therefore is that it immediately set apart shares for the plaintiff upon writing to him in the letter dated 4 October 2011. It states that the plaintiff had two options regarding the 2,000 shares it allocated to him: he could either subscribe for the shares by paying for their value or simply choose to benefit from a rise in their value with no capital outlay. It says that it is this latter option which the plaintiff agreed to and which was the essence of what was captured to him in the letter dated January 1, 2012, which basically allowed him to participate in the growth of the company without any capital outlay. The shares allocated in this regard were from the Ownership Trust. In advancing the argument that shares were not allocated at no financial cost, the defendant argues that if the situation had been otherwise, then plaintiff would have been entered into the company's member's book. It insists that the nature of the shares allocated were share options.

It is an agreed fact that at the termination of the plaintiff's contract he had queried by way of a letter dated 4 December 2013 the fact that the actual issue of shares of 2, 000 at $40 000.00 had not been addressed. The defendant therefore placed great reliance on the detailed reply that had been given the plaintiff on the 16th of December 2013 in reply to his query. The defendant notes that the issue of the shares only resurfaced in January 2015 by way of a counter claim after plaintiff had been sued for an unpaid loan of $6 224.53 in the Magistrates Court.

The defendant also draws attention to s71 of the Companies Act which deals with the need to keep a register on allotments and returns, to emphasise that the plaintiff was never issued with a share certificate and could not have derived ownership of shares in Defendant. It also points to s104 of the same Act regarding a share certificate being prima facie evidence of title and challenges the interpretation accorded by the plaintiff's counsel to the case of *Walker* v *Industrial Equity*[3] that a person can be the owner of shares without holding a share certificate.

Furthermore, it is contended that at no time between 2011 and 2015 had the plaintiff asserted rights of a shareholder in the defendant and that the reason was because he knew that he was not a shareholder.

The defendant further highlights that the value of the shares is not static and that the claim for monetary value of the shares would in any event be determined on the date of judgment. The demand for the issuance of a share certificate is regarded as problematic because the plaintiff did not pay value for them. The defendant denies failing to discharge all obligations in relation to plaintiff. It says at the very worst the parties never reached consensus regarding the 2,000 shares and that as such no valid agreement existed. Furthermore, it is argued that the plaintiff, being a banker, is highly conversant with the formalities and processes involved in the acquisition of shares and that he cannot now pretend to be ignorant.

In response to the above submissions, counsel for the plaintiff insist that the nature of the offer made is to be found only within the four corners of the letter of 4 October 2011. They maintain that to point to explanations that are outside this letter would go against the extrinsic evidence rule. The cases of *Johnston* v *Leal;*[4] *Nyika Investments* v *Zimasco Holdings & Anor* [5]; *Union Government* v *Vianini Ferro Concrete pipes (Pty) Ltd*[6] and N*hudu*

[3] *Walker v Industrial Equity Ltd 1995 (1) ZLR 87*
[4] *Johnston v Leal 1980 (3) SA 927 at 943B*
[5] *Nyika Investments v Zimasco Holdings & Anor* SC 49- 05.

v *Chiota & Anor* [7] are all drawn on for the assertion that where a contract has been integrated into a single and complete written document, a party is prevented from referring to extrinsic evidence to redefine the terms of that contract. Caution is drawn in going against such an established rule. In particular, the letter of 16 December 2013 which Defendant relies on as having articulated the position of the shares in response to the plaintiff's enquiry is deemed to be such an attempt to introduce extrinsic evidence.

Analysis and disposition

What is significant in my view from the agreed facts is that the share allocation was made and is contained in a total remuneration package to the plaintiff which was meant to counter the offer he had received from MBCA. It would make little sense to read the allocation of shares outside the offer as a whole. As such what the plaintiff accepted was the total package as outlined to him in the letter of 4 October 2011 which reads as follows:

> "Following our discussion yesterday, I would like to **confirm** the following amendments to your remuneration package. (My emphasis)
>
> - A salary increase to US $5 000.00 per month effective 1 November 2011;
> - A car loan of US$15 000.00 an increase of US$5 000.00 from the current loan benefits;
> - A mortgage loan of US$15 000 payable after 3 years
> - A school fees assistance package of 80 000 rands per annum, deductible from the annual bonus. This will attract a zero interest cost
> - An immediate allocation of 2,000 shares in Defendant valued as US $ 40 000. The normal good leaver and bad leaver covenants will apply."

In my view, this was the totality of the package that was made to the plaintiff and which he accepted in order to remain at Untu. The facts are clear in paragraph 3 that: **"The Plaintiff accepted the new remuneration package proposed by the Defendant and continued in the Defendant's employment".** They are also clear that the remuneration package was offered after consulting with the company's board of directors. Even if one takes the defendant's position on the meaning of the word "allocate" being to set aside, the setting aside of the shares in question was materially for the sole purpose of retaining the plaintiff. This had nothing to do with the Employee Share Ownership Scheme. The package accepted as a whole clearly included 2,000 shares valued at $40 000.00. The only conditions where the good leaver bad leaver conditions. These conditions, often contained in shareholder agreements, generally imply that an employee is a good leaver in instances of death, incapacitation through physical or mental causes, or were an employee is made redundant, or

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[6] *Union Government v Vianini Ferro Concrete pipes (Pty) Ltd 1941 Ad 43 at p 47*
[7] N*hudu v Chiota & Anor SC 28-08*

where he retires voluntarily after a prescribed time. [8] An employee is generally deemed to be a bad leaver in situations of dismissal for gross misconduct, voluntary departure before expiration of the agreed period or where the dismissal is not constructive.[9] The agreed statement of facts states that the termination was at the behest of the defendant who wrote the plaintiff a letter of termination. The letter of termination does not speak of any bad leaver conditions.

The fact that the defendants' remuneration package was accepted and that there is absolutely no doubt that the plaintiff turned down the MBCA Bank offer and remained with the defendant, the letter of 1st January 2012, which speaks to the allocation of share options is a totally different offer altogether. What is important is that the packaged offered in the letter of 4 October was accepted. It contained a definite allocation of 2,000 shares which the defendant put the value at the time as $40 000.00. The remuneration package did not talk of share options, which materially, are contingent upon the exercise of the option.

A share option accords the right but not an obligation to buy or sell shares at an agreed price within a certain period of time. The share option in this instance would expire after five years, if not exercised. If the option was exercised and the plaintiff were to leave within a five year period, the letter of 1st January 2012 was clear that company would have the right to buy back the shares. The calculation of the price to be paid in such an eventuality was also outlined. In other words the shares remained those of the defendant unless the option was exercised. This was an entirely different ball game altogether. It seems to be unconscionable for the defendant to now seek to argue that the share option as contained in the letter of 1st January 2012 referred to the shares that had been allocated in the letter of 4 October 2011. Once the plaintiff accepted the contents of the remuneration that was offered to him on 4 October 2011, then his acceptance sealed the offer as contained therein. If the intention was to merely accord him share options, then that should have been explicitly mentioned. This was not what the letter stated. It makes even less sense to argue that the full import of what he was offered is contained in a letter written to him in December 2013, some two years down in line.

The fact that the shares were not subsequently transferred by the defendant as is required by the company's Act speaks to the defendant's own breach of the applicable laws as opposed to that of the plaintiff. This cannot be used as an excuse against an offer which the

[8] See http//tubervilles.co.uk/blog/good leaver or bad leaver? When and why it matters. Accessed 26/9/2016
[9] Supra.

defendant know had been accepted by the plaintiff as part of the terms of his remaining in the defendant's employ.

The plaintiff's desired prayer is payment of $40 000.00 as the value of the shares when they were allocated to him. He submits however, that an order awarding him 2,000 worth of share certificates would be undesirable as it would force the parties into an untenable relationship. As regards the claim by the plaintiff for $40 000.00 as the value of those shares, I am in agreement with the defendant that the value of the shares is not static and that shares fluctuate in accordance with the performance of the company. The value of shares for unlisted companies of necessity takes into account a range of factors that have a bearing on the value of such shares. The performance of the company is clearly one such factor. Other factors include market conditions and the economic environment, past records and financial data of the company, as well as the value of shares of those engaged in similar operations.[10] As John Maney[11] explains in relations to the valuation of such stock in unlisted companies:

> "The book value of the stock of an unlisted corporation has no more relation to fair market value of the stock than the book values of listed stocks bear to their market value…..The only book value asset which is shown at its true value and fair market value is cash. Securities held by the corporation, on a certain date, may be worth more or less than the value carried on the books; accordingly, they should be valued as of the required date of appraisal".

To the extent that the plaintiff seeks value of the shares, in my view it should be the value that the shares would have had at the point of his departure as that was realistically the required date of their appraisal.

Accordingly, I find in relation to the question arising from the facts that were placed before me that:

1. The plaintiff and defendant entered into an agreement in terms of which the plaintiff was allocated 2, 000 worth of shares then valued at US$ 40 000.00 at no financial cost.
2. A financial expert agreed to by both parties shall be engaged at defendant's costs to ascertain the value of the shares as they stood at December 2013, this being the required time of appraisal.
3. As plaintiff has been successful and is entitled to his costs, defendant to pays costs of suit.

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[10] See John F Maney *Valuation of Common Stock*, 33 Taxes 1955 pp. 584-588
[11] See note 10 above.

G N Mlotshwa & Company, plaintiff's legal practitioners
Danziger and Partners, defendant's legal practitioners