LUKE ADAM MUNYAWARARA
versus
SAM RINDAI BHANDE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 21, 22, 23 & 28 March 2018

Trial

P. Kufakwaro, for the plaintiff
M. Mavhunga, for the defendant

MUNANGATI-MANONGWA J: The plaintiff and defendant herein are brothers. The plaintiff instituted summons in 2016 claiming US$14 731-00 (fourteen thousand seven hundred and thirty one dollars) arising from outstanding dividends which were due and payable from October 2012, interest and costs. The defendant denies liability on the basis that the claim has prescribed and in any case no dividend is payable to the plaintiff as none was declared by the board of directors.

The parties agreed that the following issues stand for determination:

1. Whether or not the plaintiff's claim has prescribed, if not
2. Is the plaintiff entitled to a dividend in terms of the shareholders agreement? If so, how much is he entitled to?

The facts of this matter are as follows: plaintiff and defendant were shareholders in a company known as Central African Forge Company (Pvt) Ltd (hereinafter referred to as "CAFCO") through an investment vehicle known as Sam Bee Engineering (Pvt) Ltd since 1997. The plaintiff held 9.9% of the shares. On 15 September 2012 the brothers entered into a shareholder's agreement wherein the plaintiff sold his shareholding to the defendant for the sum of US$94 403-00. Attached to and as part of the agreement is a payment scheme which detailed how the purchase price was to be paid, payment of the deposit, annuity and interest.

It is common cause that the defendant paid the full purchase price for the purchase of shares together with interest thereof. It is the issue of the amount allegedly owed as dividends which the brothers cannot agree on.

In deciding on whether the claim had prescribed the court had to hear evidence. This was necessitated by the fact that the plaintiff alleged that on 24 February 2016 the defendant paid him US$5000.00 towards the claim for dividends, consequently, that amounted to interruption of prescription. In contention, the defendant submitted that the amount was a loan to plaintiff and was never intended to go towards the payment of dividends.

It was the plaintiff's evidence that in terms of clause 2.4.5 of the sale of shares agreement the parties agreed as follows:

> "That the parties agreed that LAM (Luke Adam Munyawarara) will be entitled to receive all dividends due to him in CAFCO prior to full payment of the deposit"

He gave evidence that the dividends were constituted as follows: US$13 417.00 being dividends due as at 30 September 2012 and US$6 314.00 earnings due from May 2012 to 30 September 2012 making a total of US$19 731.00.

After making various demands for payment of his dividends, the defendant made a payment of US$5000.00 on 24 February 2016. This was a belated payment given clause 2.4.5 which provided for payment of dividends before full payment of the deposit for the payment of shares. Full payment of the deposit for the shares was only made on 31 May 2015 although the larger sum of the deposit being US$18 000.00 had been paid in 2012.

Both parties referred to a document duly accepted as exh 1 which has the heading **LAM/SRB Account 2016**. This document has workings under the following headings: "Standard Settlement Plan" and "Structural Settlement Plan" with the latter having 2 options of a settlement plan. The Standard Settlement plan refers to US$19731.00 as payable to the plaintiff together with interest of 20% over a period of 3 years. The "Structural Settlement Plan" refers to option 1 involving loaning US$20 000.00 to the plaintiff at 5% interest per annum for 9 months from July 2016. However the opening balance thereon is indicated as US$19731.00. Option 2 refers to a loan of US$15000.00 to plaintiff in June 2016 at 5% interest per annum calculated over 9 months from July 2016. Once again the opening balance is reflected as US$19731.00. The plaintiff gave evidence that he prepared this document as a proposal to the defendant on how the defendant could pay the outstanding dividend. By getting a loan he could take charge of generating income so as to pay his dividend and in the long run the defendant would also benefit from interest until he got back his US$20 000.00. He stated that the defendant did not respond nor agree to the proposal. The plaintiff vehemently denied that the US$5000.00 that the defendant ultimately paid was a loan.

The defendant maintained that the US$5000.00 he paid was a loan. The plaintiff had initially asked for a loan of US$20 000.00 under the proposed scheme wherein he had promised that parties will generate a lot of money. He gave the plaintiff US$5000.00 to try the scheme and this he did without reading the proposal. When he ultimately read the document he realised that he had been made to pay a dividend through the back door. The defendant made it clear that he refused to pay a dividend as same was not declared by the board and also the company was under heavy penalties from ZIMRA. The defendant could not give the terms of the alleged loan agreement, content to say, as a brother he looked forward to receiving the money back.

Given the aforegoing evidence, the court is persuaded by the evidence of the plaintiff that the US$5000.00 paid was payment of dividends. The proposal which was referred to by both parties, which was handed to defendant consistently referred to the amount of US$19 731.00 which amount plaintiff always claimed as dividends due before the payment of the admitted US$5000.00. That the plaintiff deducted the amount of US$5000.00 when he issued summons points towards acceptance of the amount as reduction of the purported outstanding dividends. The loan *alibi* becomes untenable especially when the defendant could not enunciate the terms of the loan. He could not state when the loan was due and whether interest was to accrue on the loan. This coupled by the fact that defendant had not claimed the amount in a period of 2 years shows that the amount was never meant to be a loan. As a corollary, I find that the payment of US$5000.00 in 2016, when taken as part payment of the dividends due, becomes an acknowledgement of liability, which would act as interruption of the prescription period. Accordingly the special plea of prescription is dismissed. Thus the matter has to be decided on merits.

The plaintiff gave evidence that when he sold his shares to the defendant the defendant signed exh 4 (a) which was an acceptance to buy the shares, exh 4 (b) the shareholders agreement and Exh 4(c) the payment scheme, all documents being signed on 15 September 2012. The total payable was US$114 134-00 consisting of US$94 403-00 as equity and US$19 731-00 as annuity and earnings due. The equity was paid for in full together with interest thereof which was charged at 20% per annum.

He stated that the issue of dividends was governed by a resolution passed in 2002 which provided that the company would pay dividends on a 50:50 basis every financial year as between the company and the shareholders. In essence net profit (after tax) would be split between the company (for recapitalisation) and the shareholders.

As such, the shareholder's agreement between the parties had provided for the plaintiff's accrued dividends. The plaintiff referred to clause 2.4.5 in the shareholders agreement which entitled him to dividends even before full payment of the deposit. He stated that the payment scheme was clear on the issue of the accrued dividend which he indicated was emanating from the difference between

Cum-dividend Net Book Value of CAFCO at COD	US $1 623 090.00
Ex-Dividend Net Book value (EDNDB) of CAFCO at COD	US$ 1 487 566.00
	US$ 135 524.00

Thus 9.9% of US$135 524.00 brings about the US$13 417-00 he claims. The additional US$6 314-00 are the earnings due to him from May to September 2012 as provided in the payment scheme. The plaintiff denied that he sold the shares because the company was not doing well. Instead, he says, it was because the defendant wanted to run the company alone as he wanted to implement new strategies. The plaintiff admitted that he demanded the dividend after payment of the shares and he indeed put pressure on defendant as the amount was due. He claimed that as of the 28th February 2018 he is owed US$39 501-00 being the principal amount and interest at 20% per annum.

It was also the plaintiff's evidence that the value of the shares were arrived at together with the defendant and he denied that he imposed the values. On being asked why he had made a proposal to be loaned US$20 000-00 when he was owed US$19 000-00 he responded as follows: that the defendant insisted that he was not going to pay interest on the dividends hence he had to cut down his losses. As the economy had collapsed, he contemplated investing the US$20 000-00 to generate income and settle the outstanding amount ultimately returning the principal amount to defendant. The proposal on exh 1 was thus based on the judicial management model often used when resuscitating a company. He could have generated money to pay himself and when profits get realised the defendant would then get back some income on a cumulative basis. He stated that his proposal like many others before, was not considered by defendant, neither did defendant give him any feedback.

The plaintiff gave his evidence well. He was coherent and his evidence consistent. He projected the outlook of a seasoned businessman and he knew the figures he was dealing with very well. He withstood rigorous cross examination remaining consistent, and was quite honest, making admissions were necessary. He was an impressive witness.

The defendant gave evidence to the effect that the plaintiff was a 10% shareholder in CAFCO. He confirmed entering into the sale of shares agreement with plaintiff. He had duly

paid US$18000.00 as part deposit in 2012 and admitted that the remaining balance of the deposit being US$881.00 was only paid later in May 2015. Nonetheless, he paid the full purchase price of US$94 403.00 together with US$35 860.00 interest. It was his evidence that interest on the purchase price was not 20% *per* annum but the plaintiff used the word "amortized" to calculate the interest to US$35 860.00 although the amount could have been US$23 000.00. He however had paid the interest.

He admitted that indeed in 2002 the company had passed a resolution to the effect that dividends had to be paid on a 50:50 basis annually between the company and the shareholders. He however indicated that this was for accounting purposes only. Dividends were only payable after being declared by the board. The defendant challenged the figures on the payment scheme which showed a net profit of US$135 524.00 arguing that such figures emanated from plaintiff. Further ZIMRA was owed US$170 000.00 and since plaintiff was doing the financials he knew no such net profit existed. Further, he had no input in the agreement.

The defendant indicated that he was forced to sign the agreement by threats from plaintiff to sell his shares to the other partner, so, in order to protect his interests, he had to sign the agreement.

The defendant indicated that whilst he paid the US$5000.00 it was never for a dividend. The parties had discussed and argued about the dividend and he had maintained that there were no dividends payable. He confirmed that it was after refusing to pay, that plaintiff came with proposals of investments and he was convinced they would make money hence the payment of US$5000.00. Only to realise he had been taken for a ride. Under cross-examination the defendant indicated that he never had an opportunity to read the sale of shares agreement as he signed the documents at Newlands Shopping Centre. Further that, sometimes net profit is just a figure in the books yet there will be no money. Thus net profit was only on paper.

The defendant was not an impressive witness. Neither was his case probable given the documentary evidence before the court. It is inconceivable that the defendant says he was forced to sign the agreement because the plaintiff threatened to sell the shares to his partner. In truth the defendant elected to buy the shares and this is borne by exh 4 (a) the acceptance that he signed. He wanted to consolidate his shareholding as the major shareholder. Equally he could not have paid interest of US$35 000.00 if only US$23 000.00 was due. This points to the fact that he was aware of the terms of the agreement. The defendant cannot profess ignorance of the contents of the agreement of sale as he complied with them to the letter except on the issue of dividends. Neither can the defendant raise issue on the figures about the status of the

company alleging that the figures were made by the plaintiff. He could have refused to sign if the figures were not a true and correct reflection of the status of the company. The figures reflected a net profit, and, the payment scheme as read with clause 2.4.5 points to the fact that defendant agreed to payment of the dividend. In fact the clause required payment of the dividend before even the full payment of the deposit.

Whilst Mr *Mavhunga* for the defendant is correct in his submissions that dividends are due from a company not a shareholder, the defendant elected to pay. He is the major shareholder and he wanted to protect his interests hence he elected to shoulder that responsibility.

In fact, clause II of the payment scheme is instructive on this aspect. It reads as follows:

"The vending party (seller/plaintiff Mr Munyawarara) shall without delay return the duly signed share transfer documents to the purchasing party (the defendant Mr Bhande) after

(a) The full deposit amount due,

(b) The total dividend amount due up to the cut-off date by 15 September 2012

(c) The total after tax profits amount due up to the cut-of date by 15 September 2012."

It is clear from clause II (b) and (c) that the parties agreed on the amounts being claimed by the plaintiff. If there was no dividend due there would not have been any reference to "total dividend amount due". Also the plaintiff is within his rights to claim the US$6 314-00 which is the after tax profits up to 15 September 2012. Of note is that the defendant did not produce any financial statements to prove the fact that there was no net profit which translated to dividends to shareholders. Merely saying there was no money and the ZIMRA penalties were heavy does not constitute an adequate defence to the claim. Having confirmed the 2002 resolution on dividends, coupled with evidence of figures pointing towards a profit read together with clauses 2.4.5 and clause II of the Payment Scheme the inescapable conclusion is that:

'(a) the parties agreed on payment of dividends and

(b) the defendant personally agreed to pay the same."

The payment of US$5000-00 was towards reduction of the defendant's obligation to plaintiff. The defendant understood the terms of the agreement and substantially complied. His denial of the payment of dividends is an attempt to escape liability.

This is an appropriate case where the caveat subscriptor rule would apply. This rule is aptly explained by RH Christie in *Business Law in Zimbabwe* at p 67:

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as the caveat subscriptor rule is therefore that a party to a contract is bound by his signature whether or not he has read and understood the contract …"

In *casu* the defendant signed the agreement of the sale of shares together with the attendant annexures. That he did not read the contents thereof (which allegation is doubtful) is neither here nor there, he remains bound to perform his obligations as per agreement. Accordingly I find that the defendant having signed the documents exh 4 (a) 4 (b) and 4 (c) he is duly bound thereto by his signature, with the obligation to render performance as stated therein. In exh 4 (a) acceptance of buying the shares, he clearly undertook to "adhere to all terms and conditions" pertaining to the agreement of sale. The defendant has no defence, he entered into the agreement clearly conscious of the desire to protect his shareholding and agreed to the terms of the sale hence he is bound by his signature. The court does not believe that defendant understood all other terms except the one on payment of dividends. Further his defence seems to lie on the fact that there were tax obligations on the company hence he could not pay and that the profit was simply on paper. Without proof to the contrary the court finds that the plaintiff has proved his case on a balance of probabilities.

However the evidence by the plaintiff that as at 28 February 2018 he is owed US$39 000-00 is disregarded. What plaintiff has proved is that he is owed the amount claimed in the summons together with interest at the rate of 20% per annum calculated from 1 October 2012 to date of payment. Whatever the amount adds to is not within this court's purview, the court having been called upon to decide on the claim for US$14 731.00. Having been successful the plaintiff is entitled to his costs.

Accordingly the following order is made;

IT IS ORDERED THAT

1. The defendant shall pay plaintiff the sum of US$14 731-00.
2. Defendant to pay interest on the amount at 20% per annum calculated from 1 October 2012 to date of full and final payment.
3. Defendant to pay costs of suit.

Chiminya and Associates, plaintiff's legal practitioners
Mavhunga & Associates, defendant's legal practitioners