DIPAK PATEL

And

RAYMOND LOUW

Versus

HAVELOCK COURT (PVT) LTD

And

KANTORA (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 8 & 9 SEPTEMBER 2009, 5, 6 & 7 OCTOBER 2009, 23 & 24 JUNE 2011 & 15 MARCH & 31 MAY 2012

V.Majoko for plaintiffs
E. Jori for defendants

Civil Trial

KAMOCHA J: The plaintiffs' claim in this matter was for:

"(1) An order that clause 2 of both agreements between the parties be declared to refer to the accrual and compounding of interest and that as a result the *in duplum* rule should apply and that: in consequence:-

(2) The purchase price tendered by the plaintiffs for the properties be declared to be the correct purchase price and; in consequence:

(3) The defendants be ordered to effect transfer of the respective properties to the plaintiffs upon payment of the purchase price and transfer fees to the defendants' conveyancers within 14 days of the date of judgment failing which the Deputy Sheriff of this honourable court be and is hereby authorized to sign all documents necessary to effect transfer on behalf of the defendants.

(4) ALTERNTIVELY

(a) An order declaring that the defendants prematurely cancelled the agreement of sale before the expiration of the 3 months period within which the plaintiffs were required to pay the purchase price and consequently plaintiffs be and are hereby granted 3 months from the date of judgment within which to make the necessary payments and the defendants be ordered to transfer the respective properties to the plaintiffs within 14 days of the date of such payment.
(b) Costs of suit."

In a joint pre-trial conference minute the parties agreed that the issues that they wanted the court to determine were as follows:-

"(1) Was the calculation of the option price subject to the *in duplum* rule?

(2) Did plaintiffs tender the correct option price within a period of three months from the date that the option was exercised?

(3) Have the options lapsed?

(4) Were the defendants obliged to give three (3) months notice of cancellation?"

The issues in this matter essentially hinge on the interpretation of the two buy back agreements the plaintiffs signed on 16 June 1999. The agreements are in respect of two companies namely Havelock Court (Private) Limited which owned a property known as sub-division A of stand 589 Bulawayo Township and Kantora (Private) Limited which owned stand 662 Bulawayo Township. The companies were the sellers whilst the two plaintiffs were the purchasers.

The two agreements were worded in identical terms. The companies had agreed to grant the purchasers certain option rights in respect of the properties. Each agreement provided that the parties agreed as follows:-

"(1) That the purchasers sign this agreement jointly and the right granted to them in terms of this agreement shall only be exercised by them jointly. Neither purchaser shall be entitled to cede or assign his rights in respect of this agreement without the written consent of the company.

(2) That for a period of ten (10) years from the date of signature of this agreement, the purchasers shall have the right to purchase the immovable property for the sum of ($6 000 000,00 in respect of sub division A of stand 589 Bulawayo Township) and $9 000 000,00 in respect of stand 662 Bulawayo Township)

increased by 43.5% per centum per annum compounded monthly from the date hereof to the date on which the option is exercised, provided, however, that should the company have erected further immovable improvement on the property subsequent to the date of this agreement the purchase price shall be increased by the value thereof as at the date of the exercise of the option. Should the parties be unable to agree on the value thereof the amount shall be determined by a member of the Estate Agent Council appointed by the president of that council and the determination so made shall be binding on the parties.

(3) Should the purchasers exercise their option to purchase the costs of transfer to them shall be paid by them and they shall be obliged to deposit such costs of transfer together with the purchase price with the company's conveyancers within a period of one month from the date on which they have exercised their option. Should they fail to do so, interest on the purchase price shall accrue on the rate of 43.5% per centum (sic) per annum from the date of exercise of the option to the date of transfer, provided, however, that if the full purchase price is not paid or guaranteed to the satisfaction of the conveyancers within a period of three months from the date of the exercise of the option, the company shall have the right to cancel the sale and all option rights will cease.

(4) That the company shall have the right to sell the immovable property to any associate company subject to the condition that such associate company will acknowledge that it is bound by the terms and conditions of this agreement.

(5) That in consideration of the purchaser's maintaining and paying all expenses in respect of property as hereinafter set out, the sellers grant to the purchasers for a period of five years the right to beneficial occupation of the property which right shall include the right to lease out the property provided, however, that the purchasers shall at all times be responsible for the action of their tenants and shall ensure that their tenants comply with the provisions of this agreement. The purchaser shall not make any structural alterations to the property without the written consent of the company. Such written consent shall set out the provisions if any of the terms of which the purchasers are to be compensated for any improvements effected during the five year period and if no provision is made no compensation shall be payable in respect thereof.

That in consideration of the rights of occupation the purchaser shall:-

(a) Keep and maintain the property and all improvements thereon in good state of repair and shall repair and replace any damage caused to the property.
(b) Pay rates, taxes and charges levied in respect of the property;
(c) Insure the property with an Insurer approved by the company for its full value. Such Insurance policy shall be taken out in the name of the company. Should any claims be made in terms of such policy, the amounts so received by the company shall be used towards the restoration of the property. Should there be any shortfall they be paid by the purchaser.
(d) The rights of beneficial occupation granted to the purchasers shall cease in the event of the purchasers breaching the terms or conditions of this agreement and failing to rectify the same within thirty days after receipt of a written notice advising them of the breach.
(e) That the purchasers choose as their *domicilium executandi* the movable property.

(6) That five years after the effective date, and if the purchasers have not yet exercised their option to purchase the immovable property in terms of clause 2 of this agreement, the above right of beneficial occupation, including the right to lease out the property ceases. However, the purchasers continue to be responsible for all other sub-clauses stated in clauses 5.

This agreement constitutes the entire agreement between the parties no variation thereof shall be binding on it (sic) unless it is reduced to writing and signed by them."

The plaintiffs led *viva voce* evidence from three witnesses while the defendants led only one witness.

The first witness called by the plaintiffs was the first plaintiff Dipak Patel who resides at 44A Napier Avenue, Hillside, Bulawayo. He said the two defendant companies belonged to his family as the original shareholders were his mother Shanti Patel, his sister Pravina Govind and himself. The present shareholder is Allen Wack and Shepard.

Havelock Court (Pvt) Ltd – "Havelock" owned a block of flats with shops at the bottom while Kantora (Private) Limited – "Kantora" also owned a block of flats with shops underneath in the name of Romana and other block of flats known as Irma Court.

Sometime in 1998 he was approached by a friend of his called Mahomed Jassat who owned a company known as Young Blood Investment whose business was fabric importation. Jasset had problems with Allen Wack and Shepard which was a clearing agent for his company. Due to the crushing of the Zimbabwe dollar his company's indebtedness to Allen Wack &

Shepard had tripled and was still escalating. Jassat told him that Allen Wack and Shepard required co-lateral or suretyship towards the debt. In order to help Jassat out, Patel told him that he would give him two properties that were being held by the two defendant companies as surety.

His lawyers who were then Joel Pincus & Konson drew a Deed of Indemnity in February 1998 to be signed by Jassat so that he would be protected if anything went wrong.

In June 1999 he was again approached by Jassat with two sets of documents – one set form Havelock and the other one for Kantora. Jassat explained that he required more substantial surety than what head been extended to him.

One agreement was an agreement of sale which allowed Allen Wack & Shepard to acquire the shares. The second one was the buyback agreement which allowed Patel free access to the property for 5 years. That meant that he would enjoy the benefits such as collecting rentals from the property for that period. Above all it allowed him to buy back the property within 10 years.

Patel signed all the four documents on 15 June 1999 he, however, wanted the court to believe and accept that he had not agreed to sell the shares in Havelock and Kantora to Allen Wack & Shepard (Pvt) Ltd. He alleged that he had not discussed the matter with Allen Wack & Shepard at all. The documents were allegedly prepared by a law firm known as Wintertons in Harare without his instruction and mandate. He claimed not to have had any communication whatsoever with Allen Wack & Shepard and Wintertons the law firm. I pause to observe from the onset that this does not make sense and is not worth any serious consideration.

Patel continued and alleged that Kantora did not receive any payment for the sale and neither did he receive any payment on signature. No money was paid either to his mother or to his sister. He said he only signed the agreements because Jassat said he needed stronger collateral for Allen Wack & Shepard. He further alleged that the reason why he signed the agreements was because there was a buy back agreement which Jassat promised to fund when the time came for him to exercise the option to buy back.

He denied entering into an agreement with Raymond Louw to the effect that in the event of a buy back the property be transferred into their joint names. He alleged that Raymond never asked him for money from the proceeds of the rentals which he collected for a period of 5 years and he (Raymond) was never involved in the maintenance of the property.

In June 2004 he approached his lawyers who were Joel Pincus & Konson wanting to exercise his option. He was advised by his lawyers that the *in duplum* rule would apply. Each

property was then valued at 15 million Zimbabwe dollars giving a total of 30 million Zimbabwe dollars for both properties. The exercising of the option was allegedly funded by Jassat who had to sale one of his own properties in order to do so. Patel alleged that he did not have to liaise with Raymond Louw in exercising the option.

After exercising his option he was supposed to pay within 3 months from the date of the exercise of the option. According to him the parties had, however, not agreed on the amount to be paid when exercising the option.

On 4 October his lawyers informed him that Wintertons had written to say his option to buy back had expired because he had not paid within the period of 3 months stipulated in clause 3 of the buyback agreement. The letter was dated 4 October 2004 and reads thus:-

"Dear Sir,

Re: Havelock Court (Private) Limited and Allen Wack and Shepard

In this matter we give you formal notice in terms of clause 3 of the two agreements that payment of the full purchase price has not been paid or guaranteed to our satisfaction as conveyancers within the period of three months from the date of the exercise of the option. The agreements of sale have been cancelled and all option rights have ceased.

Yours faithfully

Wintertons"

Patel told the court that he believed that in terms of the agreements he had signed he would have 3 months to pay from the date the parties agreed on a figure to be paid and not from the time he exercised his option. According to his reckoning the 3 months period would start to run from 23 September 2004 when the respondents wrote back with their figures in respect of both agreements. He said that should have been the date the 3 months period should have started to run instead of 30 June 2004.

Patel and Louw instructed their lawyers to write to the directors of Allen Wack & Shepard advising them that they intended to exercise their option to purchase the properties in terms of clause 2 and 6 of the agreements. Their legal practitioners did as instructed and wrote the first letter on 17 June, 2004 in respect of Kantora (Pvt) Ltd and 18 June 2004 in respect of Havelock Court (Pvt) Ltd. The price for Kantora was calculated at 9 million dollars plus an equal amount of interest of 9 million dollars giving total price of 18 million dollars. Havelock Court

was to fetch a total price of 12 million dollars. Hence, the total of 30 million dollars was offered for both properties.

Wintertons, however, responded on 30 June, 2004 pointing out that the calculation of the applicants were wrong and put the prices at $50 818 136,60 for Havelock Court (Pvt) Ltd and $76 228 104,90 for Kantora (Pvt) Ltd. The respondents fixed 30 June 2004 as the date applicants exercised their option while the applicants put it at 23 September 2004. It is, however, not clear why the latter date was being suggested.

In conclusion, Patel said he wanted to emphasize that there was no sale of the properties at all. What appears like a sale was purely done for security reasons. That, of course, is clearly false and must be rejected.

Patel faired very badly under cross examination. He prevaricated, contradicted himself and was clearly being untruthful. For instance he wanted the court to believe that he was not sure of what he was doing when he sold both properties and shares in them yet he signed the agreements in respect of both properties and the shares in respect of them. He did not end there, but even issued share certificates.

While admitting that he and Raymond Louw had, through their legal practitioners in a letter dated 18 June 2004, clearly stated that they were exercising their option to purchase the property in terms of clause 2 and 6 of the said agreement, he wanted the court to believe that the 3 months within which to exercise the option would only begin to run from the date the parties agree on the buyback price. It was until he was further quizzed that he admitted that the agreements do not say that.

Patel also was at pains to explain to the court that Raymond Louw was not involved in the buyback agreements. His story was, however, only meant to mislead the court because clause 1 of the said agreement clearly states that he and Raymond signed the agreement jointly and the right granted to them in terms of the agreement would only be exercised jointly.

He also, under cross examination maintained that the agreements for sale were not genuine agreements. They were just being used as sureties. Yet, later in cross examination he admitted that he had sold the properties and was trying to enforce the buyback agreements as reflected in his declaration. He also admitted that he had validly sold the shares as well. He finally admitted that it was not possible to buy back what he would not have validly sold.

He was further pinned down under cross examination and finally admitted that in terms of clause 3 of the buyback agreement if he failed to pay within a month of the buyback option interest would accrue at the rate of 43.5%. He also admitted in terms of that clause if he failed

to pay within 3 months the company had the right to cancel the agreement and the three months were to be reckoned from the date he exercised his option which was 30 June 2004. So his suggestion earlier on that the 3 months period would start after the parties had agreed on the amounts to be paid was false. Quite clearly, the reckoning started on the date he exercised his option.

When his legal practitioner re-examined him he gave irreconcilable answers. For instance he contradicted himself by saying the company was not entitled to cancel the agreement when in cross examination he had said the company was entitled to do so in terms of clause 3 since he had failed to pay within 3 months.

Patel was so unreliable that he was not worth to be believed as he told deliberate untruths.

His witness Mahomed Jassat was an equally bad witness who prevaricated and was also untruthful like Patel. He openly confessed that all the sale agreements that were drawn up and signed by the parties in respect of the sale of the properties and shares were just meant to cheat and mislead. He went on to allege that he in fact had no input whatsoever in the preparation of the agreements. All he was interested in was to convince Patel to sign them because of the situation in which he was. He did not want to go into liquidation. He claimed that Patel was an innocent person who must get his properties back. Jassat said he would provide the money in full to buy back the properties.

Under cross examination Jassat was reluctant to answer questions and when he did, he was evasive and the court had to tell him to answer questions asked. He was not worth to be believed. He admitted in cross examination that he had not told the mother and sister of Dipak Patel that their shares in the properties were being sold and neither did he tell Allen Wack & Shepard that he had no authority from them to dispose of their shares. While admitting that the sale of his properties stands numbers 1799, 5122, 12277A, 662 and stands 3231, 1249, 1936 and 7287 was a valid sale he wanted this court to believe that sales relating to Havelock and Kantora were a sham. That suggestion is clearly false and must be rejected.

The third witness was Raymond Paul Louw the second plaintiff. He runs a small company called F and C S Accounting (Pvt) Ltd. He wanted to distance himself from what took place between Dipak Patel and Allen Wack & Shepard in relation to the sales of Havelock Court (Pvt) Ltd and Kantora (Pvt) Ltd and the disposal of the shareholding therein.

It was his evidence that he was just a mere director and company secretary who had no shareholding in the companies. Although he signed the agreements he himself would derive no benefit at all. He would gain nothing out of both transactions.

He agreed that he should not have signed the agreements at all. He said in fact the documents were false as they told a lie about themselves. He even suggested that he had signed the documents in error.

It was clear that he was trying to approbate and reprobate. On 17 and 18 June 2004 he and Dipak Patel instructed their then legal practitioners to write to the directors of Allen Wack & Shepard telling them that they wanted to exercise their option to purchase the properties in terms of clause 2 and 6 of the said agreements.

Although Louw was also unreliable and not worth to be believed he at least made concessions where they were needed. He conceded under cross examination that the agreements were valid and binding on the parties. He also conceded that Allen Wack & Shepard accepted the exercise of the options by himself and Patel. Therefore, the obligation to pay within a month arose upon their exercise of the option. He had no choice but to concede that due to the fact that the purchase price was not paid within 3 months Allen Wack & Shepard had the right to cancel the agreement. He said as far as he was concerned the *in duplum* rule did not apply in this matter. Which was the correct position.

The defendants adduced *viva voce* evidence from one witness Christopher Darangwa who was a director of both Havelock Court (Pvt) Ltd and Kantora (Pvt) Ltd.

He was also the managing director of Allen Wack & Shepard. One of their services was to provide credit facilities to their customers one of whom was Young Blood Investments. The first condition for establishing a letter of credit was that the customer had to supply them with Title Deeds as security. Young Blood Investments gave them ten Title Deeds for ten properties. They then established letters of credit to the value of those properties. They then bonded those properties to secure their interests in the properties.

When the Zimbabwe dollar started to slide they demanded that Jassat of Young Blood Investment pays them for the value of the letter of credit. They held several meetings with Jasset in Harare culminating in an agreement that in order to reduce the interest burden on Young Blood Investments they were to convert the securities they were holding to an outright transfer of those properties from their owners to Allen Wack & Shepard.

Jassat indicated that he had discussed with all the property owners who had agreed to transfer their properties to Allen Wack & Shepard. As a result of that they then prepared a

debt restructuring agreement for the ten properties that they were holding so that Young Blood Investments debts would be reduced by the values of the properties.

The debt, at that stage, stood at $96 732 232,60 Zimbabwe dollars. Jassat and the owners of the properties valued their ten properties and gave them to the witness. The value of the securities was $48 700 000,00 giving a shortfall of $47 938 034,96.

Since the parties had agreed on the debt restructuring agreement they agreed to have a draft which the witness would take to their lawyers. The witness took the draft to his lawyers to whom he explained the nature of the agreement reached by the parties. The legal practitioners then came up with two agreements. One being for the sale of all the ten properties that Allen Wack & Shepard had. The other was for the possible buy pack of three properties as suggested by Jassat. The lawyers gave the agreements to the witness in the form of a template as they, at that stage did not know the owners of the 10 properties.

Having received the templates for both the debt restructuring agreement and the buyback agreements the witness and one Adam Lemon flew from Harare to Bulawayo. They met Jassat and his secretary and completed ten sale agreements and three buy back agreements for Havelock Court (Pvt) Ltd, Kantora (Pvt) Ltd and Fay's Ranching. Jassat provided the details of the sellers of each of the ten properties and the possible buyers of each of the three properties to be bought back. The agreements were then handed over to Jassat for signatures by the sellers and buyers. After they had been signed Jasset forwarded them to Harare for signature of the witness.

Five years after the conclusion of the agreements the option to buy back by Fay's Ranching was successfully exercised in terms of the formula that had been agreed on in the buyback agreement. The witness emphasized that the parties were free to exercise the options to buy back provided it was done in terms of the formula agreed upon.

Mr Darangwa testified that he absolutely intended to be bound by the agreements of sale of shares in both Havelock Court (Pvt) Ltd and Kantora (Pvt) Ltd and expected the other party to be equally bound. Clause 4 of the agreements was timeously implemented in full. Accordingly, shares in the two companies were transferred to Allen Wack & Shepard. Raymond Louw attended to the transfer of the shares and share certificates which were produced in court as exhibits 16 and 17. Old directors resigned and new ones were appointed in terms of clause 4 i.e. Dipak Patel and Raymond Louw resigned and Christopher Darangwa and Adam Lemon were appointed new directors.

When talking about the buyback agreements the witness said Dipak Patel and Raymond Louw were entitled to exercise the option to buy back in terms of clause 2 thereof. Interest would then become due from the date the option was exercised.

The witness said they even had envisaged developing the properties if necessary. In which case in the event of the property being sold back a formula which would take into account the developments would have to be found.

In the event that the plaintiffs exercised the option to buy back the capital sum would depend on the formula used and the amount arrived at would be lodged with the conveyancers. The time frame for the payment of the amount was 3 months from the date the option was exercised. Meaning that the capital sum, the interest and transfer fees would be paid within 3 months of the date the option was exercised. If payment was not tendered in full within the 3 months, the whole agreement would lapse.

The plaintiffs duly exercised their options to buy back the two properties by letters dated 17 and 18 June 2004 respectively. The amounts were however not correctly calculated but that was rectified by using the correct agreed formula.

The plaintiffs were unable to tender payment in terms of the agreement formula. Consequently the plaintiffs were formally advised by letter dated 4 October, 2004 that in terms of clause 3 of the two agreements that payment of the full purchase price had not been paid or guaranteed to the satisfaction of the conveyancers within the period of three months from the date of the exercise of the option. In the result the agreements of sale had been cancelled and all option rights had ceased.

The witness said the agreement could not have been a sham as the indebtedness of Young Blood Investment was reduced by an amount of $48 million Zimbabwe dollars.

All the other properties *i.e.* 8 of the 10 properties without buy back agreements were sold to the benefit of Allen Wack & Shepard. A certain group of people who were closely related to Patel and owned Fay's Ranching properly successfully exercised their buy back option.

The witness expressed surprise and dismay at the suggestion by Jassat that the agreement was a sham when he had been saying he had entered into the agreement with confidence that he would meet his obligations as he had enough stocks in the warehouse to sell and was doing so well that he had won an award of businessman of the year.

There can be no doubt that Jassat was just being deliberately untruthful like Dipak Patel and Raymond Louw when he suggested that the agreement was a sham.

The evidence of Christopher Darangwa reads well. It was given clearly and in a straight forward manner. He was cross examined at some length but was not shaken in anyway. His story remained clear. He is worth to be believed. This court prefers his well given evidence to that of the plaintiffs and their witnesses who were all not worth to be believed as they were deliberately untruthful.

In the result I would have no hesitation in dismissing both the main and alternative claims of the plaintiffs with costs.

Messrs Majoko & Majoko, plaintiffs' legal practitioners
Messrs Wintertons Legal Practitioners, defendants' legal practitioners