

RIVER RANCH LIMITED
versus
DELTA CORPORATION LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 9-11 June and 26 January 2010

Adv. R.M. Fitches, for the plaintiff
Adv. J.C. Andersen SC, for the defendant

PATEL J: The plaintiff in this matter seeks an order requiring the defendant to vacate Stands 322 and 324 in Beitbridge Township and pay holding over damages from the 1st of April 2006 to the date of vacation. The defendant avers that it is the lawful purchaser of both houses in terms of written agreements of sale and counterclaims for the transfer of the stands. The plaintiff disputes the validity of the agreements of sale and pleads, in any event, that the defendant's claim in reconvention has prescribed.

At the trial of this case, the first witness (Peter Lewis Bailey) was called by the defendant. At the conclusion of this witness's testimony, it was agreed by both counsel that there were no material disputes of fact and that no further evidence would be adduced by either party.

Background Facts

In February 1998 Peter Bailey was appointed as the plaintiff's liquidator. Subsequently, in October 1999, a Deed of Compromise (the Deed) was concluded with the creditors and Buby Minerals (Pvt) Ltd. and thereafter sanctioned by this Court in Case No. HC 15191/99 [Exhibit 1]. Under the Deed, Buby Minerals was to take transfer of all claims of the creditors against the plaintiff. By virtue of the Court order, Bailey was appointed as agent of the parties, firstly, to effect the transfer of claims in terms of the Deed and, secondly, in order to receive, administer and make

payments of all amounts payable to the creditors in terms of the Deed. The Court order operated to set aside the winding up of the plaintiff.

Bailey testified that he was approached by Buby Minerals to sell the two houses in Beitbridge to the defendant. Bailey then authorised both sales which took place in September 2002. At that time, one of the houses was occupied by a third party who had been given notice to vacate by the plaintiff, while the other house was already occupied by the defendant as lessee. Thereafter, the defendant paid the purchase price in cash and this was immediately transferred to Buby Minerals. The money was to be used to continue the running of plaintiff's mines and thereby generate more income for the benefit of all the creditors. Bailey's evidence was that the agreements of sale [Exhibits 2A and 2B] were entirely open and above board. Moreover, there was no indication at the time that the parties did not intend the sale of the houses or that the sales should be cancelled and the money paid by the defendant be refunded. On the contrary, after the purchase price was paid, the plaintiff gave vacant possession of both stands to the defendant who then duly took occupation of the houses.

Authority to Sell

According to Bailey, clause 2.3 of the Deed, as read with clauses 4.1.1.3 and 4.2.1, empowered him to authorise Buby Minerals to effect the sales *in casu*. Moreover, the disposal of the houses did not require any resolution of the plaintiff's board of directors whilst the Deed was in place.

By virtue of clause 2.3 of the Deed, for so long as any amount payable to the preferred or concurrent creditors remained unpaid, Buby Minerals was prohibited from alienating any of the plaintiff's assets "*without the prior written consent of the Liquidator having first been obtained*". In terms of clause 4.2.1, "*the Liquidator shall exercise sole and absolute discretion in relation to the interpretation and implementation of this Deed and in the event of a dispute arising thereon, his decision shall be final and binding on all the parties hereto*". In my view, although Article 2.3 is negatively couched in the form of a prohibition against

alienation, when read in conjunction with clause 4.2.1, its necessary implication is that the liquidator was empowered to authorise the disposal of the plaintiff's assets if and when he deemed it appropriate to do so in the execution or furtherance of his general mandate.

In the agreements of sale concluded in September 2002 [Exhibits 2A & 2B] the plaintiff, as the seller, was represented by Adele Farquhar as "*being duly authorised thereto*". At that time, Adele Farquhar was the Managing Director of Buby Minerals. As appears from certain correspondence between March 1998 and March 2006, Adele and Michael Farquhar and/or Buby Minerals were assumed to be the majority shareholders in the plaintiff [Exhibits 5, 6 & 7], while the Farquhars also evidently became directors of the plaintiff [Exhibits 4A, 4B & 4C].

Article 78 of the plaintiff's Articles of Association [Exhibit 9] provides for the appointment of Board directors. It empowers the existing directors to fill casual vacancies or appoint additional directors. Every such appointment is "*subject to confirmation by the members at the next ordinary meeting*". In the instant case, a former director (one Cowper) gave notification, by letter dated the 30th of August 2002, of his resignation as director of the plaintiff with immediate effect and his replacement in that capacity by Adele Farquhar. However, no evidence was placed before the Court as to whether the existing directors had concurred in this appointment or whether it was subsequently ratified at the next ordinary meeting of members.

In any event, the agreements of sale *in casu* were entered into by Adele Farquhar on the 5th of September 2002, after her ostensible appointment as a director of the plaintiff. In this regard, according to Article 101 of the Articles of Association, "*all acts doneby any person acting as a Director shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of the Directors or persons acting as aforesaid, or that they or any of them are disqualified, be as valid as if every person had been duly appointed or was qualified*".

Under the law of agency, it is trite that the agent's actions operate to create a contractual or other legal tie between the principal and the third party. The agent's authority to act may arise either by dint of actual authority, whether express or implied, or by way of ostensible or apparent authority or authority by estoppel. According to Christie: *Business Law in Zimbabwe* (1985) at pp. 342-343:

“In the language of the law of agency apparent and ostensible authority are synonymous and ostensible authority is sometimes said to be created by the principal holding out the agent as having authority, although sometimes a distinction seems to be drawn between apparent authority (flowing from the capacity in which the agent is employed) and holding out (by particular words or actions)

Ostensible authority may arise otherwise than from the capacity in which the agent is employed, as exemplified by: from a course of dealing; from the third party's knowledge that the agent had authority to pay certain debts and presumption that he had authority to pay others; where the presumption of continuity was applied and the third party was entitled to assume that an agent to whom (unknown to the third party) the principal had transferred his business was still the principal's agent.

What is not clear is whether apparent authority, ostensible authority and authority by holding out are all synonymous with authority by estoppel, which requires not only a representation by the principal but that the third party has acted on it to his prejudice. No doubt in ninety-nine cases out of a hundred the third party will have no difficulty in establishing prejudice, but it is suggested that it is not necessary for him to do so, as the situation contains all the elements of quasi-mutual assent, for which proof of prejudice is unnecessary.”

As regards the principal's right to vindicate property disposed of without his authority, the learned author states as follows, at p. 354:

“A principal whose agent has without authority disposed of property entrusted to his care may recover that property from third parties unless estopped from doing so, as by having given the agent ostensible authority to deal with the property.”

Applying these general principles of agency to the facts of this case, it seems to me that Adele Farquhar was duly authorised to represent the plaintiff as the seller of the two houses in September 2002. Farquhar's

authority to do so derives, firstly, from the sales having been authorised by Bailey in terms of clause 2.3 as read with clause 4.2.1 of the Deed and, secondly, from her ostensible appointment and subsequent acts as a director of the plaintiff under Article 78 as read with Article 101 of the plaintiff's Articles of Association. In my view, the cumulative effect of these provisions coupled with the conduct of the parties before and after the disputed sales affords the requisite authority to sell the houses in question. It is to be noted in this regard that the first intimation of the sales being challenged was only provided in a letter from the plaintiff's lawyers addressed to the defendant on the 7th of September 2004 [Exhibit 8], over two years after the houses had been sold. In the intervening period, the plaintiff did not question the propriety of the sales and in fact gave vacant possession of the houses to the defendant. The latter, on its part, paid the agreed purchase price in full and took occupation of the houses. If the sales were to be reversed at this juncture, the defendant would be significantly prejudiced in terms of its monetary outlay for the stands in 2002.

In the premises, I am satisfied that Farquhar did possess the requisite ostensible authority to represent the plaintiff in the agreements of sale and that they were therefore validly concluded. The plaintiff is accordingly bound by the agreements and thereby estopped from recovering the stands in question. It follows that the plaintiff's claim for the eviction of the defendant cannot be sustained and it is accordingly dismissed with costs. It also follows that the defendant is entitled to enforce the binding agreements of sale and therefore succeeds in its counterclaim for the transfer of the two stands, subject to the determination of the plaintiff's special plea of prescription of the counterclaim.

Prescription of Counterclaim

In terms of common clause 2 of both agreements of sale "*transfer of the property into the name of the Purchaser shall be effected as*

soon as possible after the purchase price has been paid, and within fourteen (14) days of the Seller's Legal practitioners requiring the Purchaser to do so." While this clause is somewhat vague and not categorically clear as to when transfer is to be effected, it accords in essence with the established common law position, viz. that the seller is obliged to transfer the immovable property sold upon payment of the purchaser price and, conversely, that the purchaser is entitled to demand specific performance, i.e. transfer, as soon as the purchase price is paid. See *Lamprecht v Lyttleton Township (Pty) Ltd* 1948 (4) SA 526 (T) at 530; *Chiwawa v Mutzuris* HH 7-2009, at p. 5.

Section 14 of the Prescription Act [*Chapter 8:11*] provides for the extinction of debts by prescription, while section 15 specifies the relevant periods of prescription in respect of different debts. In terms of section 16 of the Act:

"(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.

(2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

Section 2 of the Act defines the word "debt" as follows:

"without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise".

It is abundantly clear from this definition that in a contract for the sale of land the purchaser's right to sue for transfer or demand specific performance by the seller is a "debt" which may be sued for or claimed by reason of an obligation arising from contract. See *Desai N.O. v Desai & Others* 1996 (1) SA 141 (A) – apropos the equivalent definition in the South African Prescription Act (No. 68 of 1969).

As a rule, unless prescription is delayed or interrupted as envisaged in sections 17, 18 and 19 of the Act, and provided that the creditor is aware of the identity of the debtor and of the facts from which the debt arises, prescription commences to run as soon as the debt is due. In the present context, the seller's obligation to transfer and the purchaser's reciprocal right to claim transfer or specific performance arise from the date when performance is due, viz. as soon as the purchase price is paid. As of that moment, the debt becomes due and extinctive prescription begins to run against the purchaser. See *Lamprecht's case, supra*, at 530-531; see also *Norman's Law of Purchase and Sale* (4th ed.) p. 466.

Section 17 of the Act provides for instances where the running of prescription is delayed. In terms of section 17(2):

“A debt which arises from a contract and which would, but for this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.”

Reciprocity of debts as envisaged in this provision requires some close and immediate correlation between the debts concerned. See *Minister of Public Works and Land Affairs v Group Five Building Ltd* 1996 (4) SA 280 (A) at 288. Where the sale of immovable property is involved, the purchaser's obligation to pay the purchase price is ordinarily reciprocated by the seller's obligations to give occupation and effect transfer. See *Pasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (WLD) at 466. The parties' obligations are reciprocal because they arise from what is essentially a bilateral or synallagmatic contract. See Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 467-468.

In the instant case, the plaintiff seeks to vindicate the two stands in dispute. Its claim is not founded on an obligation in contract or delict. It is essentially a proprietary claim and the defendant's potential right to claim ownership after 30 years of open, adverse and uninterrupted possession, by virtue of section 4 of the Act, does not constitute a reciprocal contractual right. It follows that the plaintiff's claim for eviction is not a

reciprocal debt arising from the same contract and that the prescriptive period of 30 years applicable to that claim does not operate in terms of section 17(2) to delay the running of prescription as against the defendant's right to claim transfer of the stands.

Section 18 of the Act deals with the interruption of prescription by acknowledgement of liability, as follows:

“(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

(2) If the running of prescription is interrupted in terms of subsection (1), prescription shall commence to run afresh –

(a) from the date on which the interruption takes place; or

(b) if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.”

In paragraph 1 of its further particulars (filed on the 3rd of June 2008), the plaintiff avers that it “*became aware of the illegality of the sales towards the end of 2004*”. Furthermore, the correspondence between the defendant, its lawyers and the conveyancing lawyers shows that until 2004 they were mutually pursuing the question of transfer. This is confirmed in the letter of the 7th of September 2004 which I have already referred to [Exhibit 8], from the plaintiff's current lawyers to the defendant, in which they indicate their request to the conveyancing lawyers “*to desist from proceeding with the request of transfer until such time that our clients' application has been determined by the High Court*”.

All of this, in my view, demonstrates a tacit admission by the plaintiff, for a period of approximately two years, of its obligation to transfer the stands to the defendant pursuant to the agreements of sale concluded in September 2002. In short, the plaintiff tacitly acknowledged its liability to effect transfer to the plaintiff until September 2004, as contemplated in section 18 of the Act, and prescription only began to run as against the plaintiff thereafter. The defendant filed its counterclaim on the 5th of June 2006, well within the 3 year prescriptive period, and its claim for transfer has therefore not prescribed in terms of sections 14 and 15 of the Act.

Apart from the foregoing, I think that there is an entirely different basis on which the plaintiff's plea of prescription cannot be sustained. I have already found that the agreements of sale *in casu* were validly concluded and that they are binding on the plaintiff. The judgment herein in itself constitutes a fresh cause of action which the defendant will become entitled to enforce within the prescriptive period of 30 years specified for judgment debts. It would therefore be quite absurd and pointless at this juncture to decline the defendant's counterclaim for transfer founded on the agreements of sale, simply to await the institution of a further claim for transfer predicated on this judgment.

For the above reasons, the plaintiff's special plea of prescription must fail and it is hereby dismissed.

Order

In the result, judgment is entered in favour of the defendant as against the plaintiff, as follows:

- (i) The plaintiff be and is hereby ordered to transfer the two properties known as Stand 322 Beitbridge Township and Stand 324 Beitbridge Township into the name of the defendant.
- (ii) The plaintiff shall pay the costs of suit.

Costa & Madzonga, plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendant's legal practitioners