INDIUM INVESTMENTS (PRIVATE) LIMITED
versus
KINGSHAVEN (PRIVATE) LIMITED
and
DANIEL KUZOZVIRAVA SHUMBA
and
LINDA SHUMBA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 25, 26 and 27 January 2010 & 22 May 2013

Civil Trial

Advocate L Uriri, for the plaintiff
A Moyo, for the defendants

INTRODUCTION

HUNGWE J: Shumba owned a residential of property in South Africa. It was under mortgage. He failed to service his mortgage bond. The bank foreclosed on the mortgage bond. He was desperate to avoid the sale of his property by auction. He approached Jayesh Shah for a loan in order to save his property from imminent auction. They concluded an agreement in South Africa in terms of which Jayesh Shah remitted money to Shumba's legal practitioners in South Africa. The property was not auctioned on the due date. Instead the legal practitioners passed a mortgage bond over the property in favour of Shah. A further two agreements were concluded in Zimbabwe in terms of which Shumba sold all his shares in a company which formed an immovable property at 108 West Road, Harare. The second agreement was the lease agreement in terms of which the first defendant leased the same property from Shah. This lease agreement included a buy-back option exercisable within the stipulated period. Shah sues Shumba for eviction from the property as new owner alleging breach. Shumba raises the defence that the "agreements" are mere shams or simulations and the whole transaction amounts to a

pactum commissorium which at law is unenforceable. The issue for determination is whether the agreements upon which plaintiff's claims are based are a sham or simulations. The resolution of the rest of the issues will depend on the determination of this issue. The onus to prove that the agreements upon which the cause of action was founded lay on the defendants. They had a duty to begin. In *Comninos & Frangs* v *Couvaras & Ors* 1940 OPD 54 at 62-63, VAN DEN HEEVER J held that "the presumption of legality would prevail unless the informer succeeds in putting before the Court material sufficient to rebut the presumption."

The parties identified several issues for trial. At trial they relied on bundles of documents which were discovered during pleadings. These are mainly the South African agreements annexures "A", "B" and the Zimbabwean agreements annexures "C" and "D" to defendants' plea, the correspondence between the parties and the letter by plaintiff's legal practitioner to defendants.

The following facts were not in dispute and were common cause. Prior to 18 December 2007 and before the filing of C.R. 14 which is exh 14 on p 28 of the plaintiff's bundle, the control of all decisions and actions of the plaintiff rested with the second and the defendants i.e Dr. and Mrs. Shumba. In turn plaintiff owned the immovable property known as 108 West Road, Strathaven, Harare, a hospitality business consisting of several self-contained lodges. On 18 December 2007 and after the filing of C. R. 14 exh 14, control of the plaintiff rested with Jayesh Shah and Shaleetha Mahabeer who became the beneficial shareholders of the plaintiff. Jayesh Shah claims that this change of directorship in plaintiff followed upon a sale of shares agreement annexure "C" to defendants' plea. How this came about is a matter of contention between the parties. The defendants contend that annexures "C" amounts to *pactum commissorium*. Plaintiff disputes this contention. I proceed to consider the evidence led by the parties in support of their respective contentions.

THE EVIDENCE

The evidence for the defendants was adduced from Daniel Kuzozvirava Shumba. It was to the following effect. Between 1998 and 1999 he and his wife purchased the property known as 108 West Road, Strathaven, Harare, through the plaintiff. This property was used to carry on

an hospitality business through another company called Kingshaven (Private) Limited. In South Africa the couple owned a residential property known as 17 Portman Road, Bryanston, Sandton through a close corporation known as ERF 825 Bryanston CC. This property was at the material time mortgaged in favour of ABSA bank in South Africa. Over time the couple failed to service the mortgage resulting in foreclosure proceedings. By December 2007 the property was up for sale by public auction. To avert the imminent sale of this property due on 12 December 2007, Shumba approach Shah of financial assistance. After the extensive negotiations Shah agreed to lend Shumba US$550 000,00 required to avert the sale. Shumba and Shah travelled to South Africa on 8 December 2007 and executed a loan agreement with the assistance of Van Huyssteen Incorporated Attorneys. Loan agreement is exh 1 of the defendants' bundle of documents. It reflects the following:

1. Jayesh Shah agreed to lend and advance to Shumba and ERF 825 Bryanston CC the sum of US$550,000 to avert the imminent sale of the house by ABSA.

2. The amount was to be paid to Van Huyssteen, legal practitioners, who would in turn arrange to pay off the debt due to ABSA and retain the title deeds.

3. The loan amount was to be repaid to Shah within 11 months from the date of the advance would be US$687 500 but would escalate to US$733 334 if paid within 12 months.

4. To facilitate the repayment of this loan, the agreement provided that the South African property would be sold through Pam Golding Estate Agents. The proceeds would be used to pay Shah through his nominated Swiss account. Should there be any residue, it would be paid to Shumba.

5. Clauses 6.3.1 and 6.3.2 appointed Shah as the lawful agent to do all such things and sign all papers as may be necessary to give effect to the seven the transfer of the property to the prospective buyer.

Shumba told the court that two payments were made in respect of the South African property, viz; R3 200 000 on 9 January 2008 and R686 190. 26 on 25 June 2008. Defendant's legal practitioner wrote at p 43 of the defendants' bundle:

> "Dear Dr Shumba,
>
> Re: PTN 2 of 825 Bryanston
>
> We confirm will receive the following amounts into a trust account by direct deposit from Jayesh Shah:
>
> 1. R3 200 000 on 9 January 2008;
> 2. R686 190,26 on 25 June 2008.
>
> Yours sincerely,
>
> VAN HUYSSTEEN INCORPORATED
>
> ATTORNEYS"

There is correspondence between van Huyssteen, Shumba and Shah regarding payments by Shah to van Huyssteen on behalf of Shumba's indebtedness to ABSA over the South African property. This correspondence shows that the payments were meant to resolve Shumba's indebtedness to ABSA. One such correspondence relied upon by the defendants is an electronic mail exchanged between Cheryl Aldridge and Shah. On 4 September Cheryl Aldridge wrote:

> "We advise that the bond in your favour in respect of the above property was registered in the Pretoria Deeds Office today, 4 September 2008."

He replied an hour later:

> "1. Note that you'll have finally managed to get the bond the registered.
>
> 2. Please inform the final amount paid in settlement of Dr. Daniel Shumba's indebtedness to ABSA so that we can update our records.

3. Please note that your firm will sell the property (in terms of the Agreement) if repayment is not done by Mr. Shumba.

4. As and when I do receive any repayments from Mr. Shumba I shall inform you by e-mail."

Throughout this correspondence the subject matter is portion 2 of ERF 825 BRYANSTON. According to Shumba after the execution of the loan agreement, he had expected, upon their turned to Zimbabwe that Jayesh Shah would release immediately the loan amount in order to avert the imminent sale of his property in South Africa. Instead Jayesh Shah demanded additional security over and above that which had been secured in terms of the South African loan agreement. Shumba says the requirement of additional security was raised after 10 December 2007 when he asked Shah to release the loan in terms of the South African agreement. It was agreed that Shumba offers 108 West Road as additional security and have a bond registered over it as security. Shah's legal practitioner, Mr *Mafusire* of Scanlen and Holderness pointed out that since the loan was in foreign currency it was not legally feaseable to get such a bond sounding in foreign currency in Zimbabwe as the disbursement outside had not been approved by the relevant exchange control authorities. *Mafusire* then suggested that Shumba transfers all the shares in the company holding the property at 108 West Road into Shah's name. In order to facilitate Shumba's continued occupation, a lease agreement would then be drawn to that effect. That lease agreement would have a buy back option which ensured that upon a proper discharge of the South African loan Agreement, Shumba is able to buy back his shares in the plaintiff. This explains why the figures in the Sale of Shares Agreement mimick the South African Agreement. There is no variation in terms of the actual figures. Interest was factored in as a buy back premium. Share transfer suited both parties as it would not cost either party much to revert to the position previously obtaining. This, according to Shumba explains how Annexures "C" and "D" came about.

This position appears to find support in the letter dated 10 December 2008 written to Shumba's legal practitioners by Shah's legal practitioner, Mr *Mafusire* in which he states:

> "The unambiguous position is that our client lent your clients a considerable sum of money in foreign currency primarily two of eight immine and loss of fuel client's property in South Africa which was under auction by their creditor. The terms of the lending were that your clients would sell the property and repay our clients' monies. As security for the loan, you'll clients transfer aid to oh client effective ownership of the Zimbabwean Company, Indium Investments (Pvt) Ltd, that owns the immovable property situate West Road, together with fixtures, fittings thereat. You'll clients use the back the property and had an option to buy it back."

The evidence by Dr. Shumba was well given just as that by Jayesh Shah. Both men are reputable business people. The clearly knew what they were about regarding these transactions. Each gave evidence on behalf of the companies. I need to assess the credibility of both witnesses in order to determine where the probability of the matter lies. Shumba says the Zimbabwean agreements were simulations. Shah says the South African Agreements are shams meant to facilitate the repatriation of payments by Shumba out of South Africa to his Swiss accounts. Shah denies that he loaned Shumba money. His evidence requires closer scrutiny.

Shah told that the court that he had previously lent and advanced and money to Shumba prior to 2007. He had stopped his money lending business because it was difficult to conduct without a licence. The restrictions regarding allowable interest rendered this business unwieldy. He was now into property development. He was reluctant to lend Shumba money. He instead agreed to buy shares in a company that owned immovable property. He entered into a lease agreement with a buy back clause which was exercisable within 11 months upon the fulfillment of certain terms and conditions regarding a premium over the initial purchase price. Shah told the court that Shumba wanted US$750 000 for his shares in Indium Investments (Pvt) Ltd. He offered US$500 000 and they settled at US$550 000. This was however never put to Shumba during cross-examination. It may well have shed light on why the agreements reflect the same figures. Shah did not satisfactorily explain why the terms of the South African loan agreement effectively mimicked and were reproduced in the Zimbabwean agreements. Shumba told the court the reason why these figures are the same. The Zimbabwean agreements were not what they purport to be as no sale of shares was ever intended by both parties but, as Shah insisted on additional security, the transfer of shares was agreed upon by both parties. There is no evidence

to suggest that a fair valuation of the shares was ever undertaken. This may suggest that the explanation given by Shumba, is, in all probability true.

According to Shah, the South African lawyers advised that exchange control authorities would never approve a loan agreement where interest was 25%. The subsequent agreement was drawn without the title reference being "Loan Agreement" but to all intents and purposes it was drafted so as to reflect indebtedness by Shumba to Shah. This camouflage, according to Shah was designed to facilitate the exercise of a buy back option, contained in the Zimbabwe agreement, in favour of Shumba. In other words, this agreement did not reflect the true intention of the parties. There was no loan to Shumba. However, subsequent advice revealed that in this form it could not be used as an instrument to facilitate the buy back option. It is clear to me that the South African loan agreement was first in time to the Zimbabwean agreements. The Zimbabwean agreements repeat the figures that appear in the South African loan agreement. The figures in the South African agreements arise from the outstanding debt. There is no evidence that those found in the sale of shares were a result of the bargaining which Shah claims. In any event he did not plead his case that way. His plea supports Shumba's claims as does his legal practitioner's letter.

Although Shah vehemently denied that the bond in his favour was passed with his knowledge and consent, the evidence which I have referred to above suggests otherwise. Besides acknowledging the existence of the bond in his favour, Shah goes further to explain what processes would follow should Shumba not perform his side of the bargain: the sale of the property should follow. He was appointed agent to appoint the conveyancers of the property in favour of whoever would have bought the house. Yet by February 2008 he was already in court seeking Shumba's eviction before he had fully performed his obligations in terms of the loan agreement. If Shah was seeking Shumba's eviction in February 2008, the question that one must ask is, when had he paid for the shares in Indium Investments? One might immediately say that what was claimed in the February summons against the defendants was eviction on the basis of failure to pay rent only as opposed to eviction on the basis that the defendants had failed to exercise their buy-back option and that the lease had expired. But then why does the same lease not provided for renewal, if indeed it was a genuine lease agreement? Clearly, this lease

agreement was not what it said it was. Shah's version of the events does not accord with the facts established by the evidence. His version is less persuasive than that given by Shumba.

There is another reason why the court prefers Shumba's version over that given by Shah. In his pleadings, Shah contended that he entered into a loan agreement with Shumba. It is clear from plaintiff's own pleadings that the purpose of the loan agreement was to procure the cancellation of the mortgage bond in favour of ABSA. In terms of the loan agreement, the South African property would be sold by Pam Golding Properties on the open market and the proceeds would be used to repay the loan which, it was anticipated, would all be done within 11 months, or at the latest, 12 months. In terms of the loan agreement failure to pay the full advance within 12 months would entitle Jayesh Shah or any agent appointed by him to sell the immovable property at any price he considered appropriate and any amounts due to him would be remitted to his overseas account. In court Shah categorically denied that he had loaned Shumba any money. Instead he claimed that his legal practitioner drafted the pleadings without following his instructions on this point. He stuck to the new version which is that he had purchased the shares in Indium Investments (Pvt) Ltd outright. He insisted that the loan agreement was executed specifically to assist Shumba in exercising his buy back option in Zimbabwe in terms of the sale of shares agreement. Tellingly, the plaintiff had departed from his pleaded case. Although not much can be deduced from such prevarication, it is instructive that it is coming from the only witness for the plaintiff. In this regard I am constrained to draw an adverse inference regarding his credibility. In doing so I do not lose sight of the fact that both he and Shumba have reasons enough to mislead the court regarding these transactions. Both of them knew that in executing an agreement abroad for the benefit of a Zimbabwean resident exchange control approval would be required as such a transaction amounted to externalizing foreign currency without approval. The transaction fell foul of section 5 of the Exchange Control Regulations, 1996 in Statutory Instrument 109/96. I am satisfied that the defendants have discharged the onus on them to prove that annexures "C" and "D", the Zimbabwean agreements are shams or simulated transactions.

In my view of the facts, the defendants have adduced sufficient evidence to rebut the presumption of legality of the transactions described above. Generally, one of the most common forms of tax avoidance is where the parties to a contract attempt to disguise its true nature in

order to qualify for a tax benefit that would not be available if the true contract between them were revealed. The courts require no statutory powers to ignore pretence of this kind and the law will always give effect to the real transaction between the parties. The classic exposition of the law in this regard is the judgment of INNES C.J. in the 1910 Appellate division case of *Zandberg* v *Van Zyl* [1910] AD 302, where he said that —

> "Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose) the parties to a transaction endeavour to conceal its true character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. . . But the words of the rule indicate its limitations. The court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same subject might have been attained in another way will not necessarily make the arrangement other than what it purports to be."

In determining whether the transaction is "disguised" or "simulated", a crucial and often decisive question is whether the parties to the contract in question intended to give effect to it "according to its tenor" in other words in accordance with its apparent terms, or whether there was some secret understanding between them that they would not do so. In such an event the court will strip off its ostensible form and give effect to what the transaction really is. (*Michau* v *Maize Board, (2003) ZASCA 79*). The fundamental issue, therefore, is whether the parties actually intended that the agreements that they had entered into should have effect. In this matter, I find that there was another, unexpressed, intention and that the legal substance of the agreements was other than what was reflected in the agreements. The common law principle encapsulated in the maxim *plus valet quod agitur quam quod simulate concipitur* means "what is actually done is more important than that which seems to be done." This has been understood to allow courts to champion the legal substance of the transaction over the form in which it is presented if the nature of such a transaction is in dispute. For example, in the context of tax planning, parties to a transaction may simulate a transaction to resemble, in form, a lease, when the transaction actually achieves a sale. The tax consequences of sales and leases differ and if such a transaction is brought before the court application of the principle will ensure that parties

are taxed according to the legal consequences of the sale the transaction effects in substance, instead of the lease consequences that the transaction purports to have in its form. The question arises: how do the courts determine the legal substance transaction? The courts will consider if the parties truly intended to give effect to the agreement in accordance with its terms. If they did, then substance follows the form and the agreement will stand. If they did not, then substance contradicts form and the agreement will be disregarded.

In *Commissioner for the South African Revenue Service* v *NWK* [2010] ZASCA 168, the South African Supreme Court of Appeal (the "**SCA**") considered a pair of loans by First National Bank ("**FNB**") to NWK, the second of which the Commissioner of the South African Revenue Service (the "**Commissioner**") alleged had been simulated in order to create a tax advantage for NWK (an increased deduction on the interest paid to FNB, in terms of section 11(a) of the Income Tax Act, 1962).

FNB had advanced a loan of R50 million to NWK. FNB then purported – through a complex set of agreements between itself, NWK and another entity – to advance a further loan of R96 million to NWK (the "**Second Loan**"). However, there were several aspects of the Second Loan that raised the suspicions of the Commissioner, who disallowed the deductions and sought to impose additional tax and interest as a punitive measure. NWK successfully appealed the Commissioner's assessment in the Tax Court before the matter came before the SCA.

NWK submitted the agreements themselves as proof of its genuine intention to borrow the larger amount from FNB. It argued that the fact that the parties had performed in terms of each agreement constituted prima facie proof of the true nature of the transaction. However, the SCA disagreed and emphasized that, where simulation is alleged, substance always trumps form and that "a real intention, definitely ascertainable, which differs from the allegedly simulated transaction" is required. Most importantly, the test to determine simulation considers not just whether the parties intend to give effect to a contract as written or agreed, but the commercial sense of the overall transaction, its "real substance and purpose". In other words, the test is one of fact in each case, and not a general rule.

In this instance, the SCA could discern no commercial sense in the overall web of transactions effecting the loan of R96 million, other than to secure a tax advantage for NWK.

Thus, while arranging one's affairs in a tax efficient manner is permissible, structuring a transaction to disguise its true nature, especially for the sole purpose of avoiding a rule of law, is not. On the facts the SCA held that NWK had done the latter and ordered it to pay the additional tax sought by the Commissioner. (See also *Upper Class Enterprises (Private) Limited* v *Oceaner t/a Enigma Promotions and Others 2002 (1) ZLR 98)*.

In my view the true nature of the Zimbabwean agreements was that they are additional securities to the South African loan agreement despite the fact that they in effect apparently passed ownership and control to Shah. The buy back option as well as the fact that the loan had been secured by a mortgage bond gave Shumba the belief these agreements will be respected by the parties as pledge to the underlying loan agreement. I therefore find for the defendant in respect of the first issue.

As to whether annexure "C" amounts to a *pactum commissorium*, it follows from my reasoning above that once the interpretation given by the defendant is upheld, the court must find in his favour on this point as well. I do so for the following reasons. A *pactum commissorium* has been defined as "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full ownership in the thing will invariably pass to the creditor in payment of the debt." See *Chimutanda Motor Spares (Pvt) Ltd* v *Musare & Another* 1994 (1) RLR 310, at 314, and *Van Rensberg* v *Wieblen* 1916 OPD 247 at 252.

The reasons for the prohibition in the case of pledge simplicitier are:

(a) the weak financial position of the borrower;
(b) the often misplaced optimism of the borrower about his prospects to repay the loan;
(c) which lead to the borrower being oppressed by the creditor demanding security out of all proportion to the amount of the debt in order to obtain a windfall. (G. F. Lubbe. Mortgage and Pledge, in The Law of South Africa (ed Joubert) Vol 17 p. 285 at 327).

In the present case clearly, Shumba who faced a ruinous foreclosure proceedings in a foreign jurisdiction, was in the weakest position when negotiating the terms of the South African loan with his benefactor, Shah. On the other hand, Shah was aware of Shumba's weak

position. He intended to secure a windfall by all manner legally possible. His legal practitioner advised a web of agreements to ensure he remained within the realms of the law. A loan here, a "purchase of shares" there and a lease with a buy-back option to crown it all, was all it took to secure apparent control of the debtor's immovable property in Zimbabwe without any reference to its true value. Clearly, whatever the parties decided to call it, the agreement to take over control of the plaintiff company from Shumba without paying for it amounted, in my view, to a *pactum commissorium.* It is the substance, not the form, to which the court looks when deciding the true nature of an agreement. Consequently, therefore, the second issue, whether annexure "C" amounts to a *pactum commissorium* is determined in defendants favour. I have already found that the payment in South Africa by Shah was intended as a loan, as pleaded by plaintiff, therefore there is no evidence to suggest that the same payment doubled as payment for shares in Indium Investments (Private) Limited. That issue is resolved in favour of the defendants as well. The transactions were clearly in *fraudum legis*. The law in this regard is clear. Where the contract which is in *fraudum legis* is performed, the court cannot come to either party's assistance.

In light of the above, I need not decide on the validity of the South African agreements as the order sought does not depend on their validity or otherwise. Plaintiff based its claim on the Zimbabwean agreements. Its pleadings in regard to these prevaricated. I did not therefore find in its favour in that regard. But this is not to say that plaintiff has no recourse at law for the loan advanced to defendants' benefit. One can conceive of an unjust enrichment claim if the facts at its command so suggest. But on the evidence before me I am unable to give judgment in plaintiff's favour. I therefore dismiss with costs its claim as set out in the consolidated matters.

Muringi Kamdefwere, plaintiff's legal practitioners
Kantor & Immerman, defendants' legal practitioners