

Judgment No. HB 83/2003  
Case No. HC 1487/00  
X-Ref - HC 3327/99 & 4075/99

**MAKO PROPERTIES PRIVATE LIMITED  
T/a MSUNA SAFARIS AND TRAVEL**

**APPLICANT**

**Versus**

**TRUST MERCHANT BANK PRIVATE LIMITED**

**1<sup>ST</sup> RESPONDENT**

**And**

**ZIMBABWE DEVELOPMENT CORPORATION**

**2<sup>ND</sup> RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 17 JULY 2003

*Majoko & G Nyoni* for applicant  
*J C Andersen* for 1<sup>st</sup> respondent  
*A B C Chinake* for 2<sup>nd</sup> respondent

Judgment

**CHIWESHE J:** The applicant seeks an order couched as follows:

1. “The agreement of sale between applicant and Zimbabwe Development Corporation was and remains a valid agreement and Zimbabwe Development Corporation's purported cancellation is held to be of no force and effect.
2. First respondent is ordered in terms of its agreement with applicant and in terms of its undertaking to Zimbabwe Development Corporation, to pay to Zimbabwe Development Corporation's legal practitioners, Kantor & Immerman, the sum of Z\$30 million, within seven (7) days of this order.
3. Subject to it having received payment or a satisfactory undertaking to pay, Zimbabwe Development Corporation is hereby enjoined and directed to do all such acts and sign all such necessary papers as may be required of it to enable shareholding in Last Hope Estate Dete Holdings (Private) Limited to be transferred to applicant.

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4. Zimbabwe Development Corporation pay the costs of this application jointly and severally with Trust Merchant Bank Limited.”

The background facts to this matter are as follows. In July 1999 the second respondent, the Zimbabwe Development Corporation (“the ZDC”) invited tenders for the purchase of its entire shareholding in a company called Last Hope Estate Dete Holdings (“the company”). The applicant submitted a bid for the advertised shares. The bid was successful. In terms of its bid, the applicant was obliged to pay the sum of \$30 million for the purchase of the ZDC’s interests and shareholding in the company. The applicant then approached the first respondent Trust Merchant Bank (“the bank”) to assist it in raising the purchase price. The bank then wrote to the ZDC advising it of the arrangement agreed to between it and the applicant. The bank stated that it would pay \$30 million to the ZDC for the purchase by the applicant of shares in the company and that this undertaking constituted an irrevocable guarantee open for a period of 30 days and renewable. On the strength of that undertaking by the bank the ZDC then proceeded to instruct its legal practitioners to draw an agreement of sale. The bank made an input into the final draft which was signed by the applicant and ZDC on 21 June 1999. The bank had by then extended the validity of its irrevocable guarantee to 25 June 1999 thus covering the applicant at the time the agreement was signed. The bank was furnished with a copy of the signed agreement. Thereafter the bank did not make payment as agreed thereby prompting the ZDC to write to the applicant demanding payment within 14 days failing which the agreement would be cancelled. In turn the applicant wrote to the bank calling upon it to pay the ZDC. At the same time the applicant also wrote to the ZDC advising it that it had no

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right to cancel the agreement as the applicant's performance had been irrevocably guaranteed by the bank, to whom the ZDC should look for payment.

Having failed to get the bank to honour its obligation the applicant approached this court under case number HC 3327/99 seeking an order compelling it to pay the ZDC the purchase price. While that application was still pending, the ZDC wrote to the applicant advising that the agreement had been cancelled and that the property would be re-tendered. The property was re-tendered with a reserve price of \$35 million. The initial advertisement had had no reserve price. The applicant's response was another application under case number HC 4075/99 in which it sought an order interdicting the ZDC from disposing of its shares in the company pending the outcome of its application under case number HC 3327/99. The interdict was granted under a provisional order.

When the application under case number HC 3327/99 came for hearing the presiding judge expressed the view that it would be preferable if the ZDC would indicate whether it would abide by the decision of the court in that application as common issues arose in both case number HC 3327/99 and case number HC 4075/99. The ZDC indicated it would not abide by the decision of the court. The applicant responded by applying for the consolidation of the two applications. Despite opposition by the ZDC and the bank the application for consolidation was granted under case number HC 1487/00. The bank appealed against that decision. The appeal was dismissed by the Supreme Court.

It is that consolidated application which is now before this court. The first issue that falls for determination is whether there was any relationship between the ZDC and the bank which would entitle the ZDC to demand payment from the said

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bank and oblige the bank to pay to the ZDC the purchase price of the shares. In my view the answer must be in the positive. The irrevocable guarantee given by the bank in favour of the ZDC of necessity created rights and obligations between and among the three parties. It amounted to a tripartite arrangement entered into for the purposes of satisfying a crucial term of the agreement between the ZDC and the applicant. It was on the strength of that irrevocable guarantee that the ZDC and the applicant concluded the agreement of sale. The ZDC was entitled on that basis to demand payment from the bank in the event that the applicant had not paid. It chose not to do so and purported to cancel the agreement.

It has been contended on behalf of both respondents that the agreement of sale between the applicant and the ZDC contravenes section 73 of the Companies Act, Chapter 24:03 thereby rendering the agreement void. Section 73 provides as follows;

- “73. Financial assistance by company for purchase of its own or its holding company’s shares –
- (1) It shall not be lawful for a company to give whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company unless –
    - (a) such assistance is given in accordance with a special resolution of the company; and
    - (b) immediately after such assistance is given, on a fair value of the company’s assets, excluding any asset resulting from the giving of the assistance, exceed its liabilities and it is able to pay its debts as they become due in the ordinary course of its business.
  2. If a company gives financial assistance in contravention of subsection (1) –
    - (a) any transaction resulting from such assistance and any transfer or allotment of shares arising therefrom may be set aside by the court at the suit of the company or its liquidator or any member

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- or creditor of the company or of any party to the transaction;  
and  
(b) whether ...”

Given the wording of this section and the facts of this matter, I am unable to agree with the respondents’ contention that the agreement of sale contravenes the provisions of that section. The facts clearly establish that the ZDC did not provide a loan to the applicant for the purchase of its shares in the company nor did it give the applicant any guarantee for that purpose. Neither did the ZDC give any other direct or indirect financial assistance to the applicant. The guarantee was given by the bank and it has not been alleged that the bank is an interested party either as a subsidiary or holding company of the ZDC or in any other capacity. I understand the parties to be in agreement with that approach.

The respondents have sought to argue that it is the company and not the ZDC that stands to be impoverished in the transaction, in that it will then be saddled with a \$30 million mortgage bond. That may well be true. The question is whether the provisions of section 73 are applicable to the company, a subsidiary of the ZDC. My view is that it is the ZDC that is involved in the transaction disposing of its shares and not the company. Therefore it is the conduct of the ZDC that should be examined *vis-à-vis* the provisions of section 73, and not the company. The company, though a subsidiary of the ZDC is not party to the transaction and for purposes of this transaction it is not covered by the provisions of section 73. The position would have been different if the ZDC was a subsidiary of the company and it sought to assist the applicant secure shares in it or in the holding company. I would hold therefore that section 73 is inapplicable to the present transaction in so far as the company is concerned.

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Assuming that section 73 applies *vis-à-vis* the company can it be argued that the company has been unduly encumbered by the mortgage bond? The property that stands to be mortgaged is Last Hope Estate which is a farm owned by the ZDC. This farm is not owned by the subsidiary company – it will be when transfer is effected. If transfer is effected the company will have gained an asset be it under a mortgage bond. Can it be said that the company will have been impoverished thereby? I should think not. It is normal business practice for a company to borrow or enter into mortgage arrangements in pursuit of its objects. My attention is drawn to the decision in *Gradwell Private Limited v Rostra Printers Limited and Another* 1959 (4) SA 419 AD in which the impoverishment test was applied. See also *SEDCO v Papersales Services and Others* 1998 (2) ZLR 584.

It has been argued by the applicant that it has not tendered to perform its obligations. In my view the applicant has done all that was required of him in terms of the agreement between it and the ZDC. It is the conduct of the respondents that has frustrated the consummation of the agreement. The agreement was signed within the guarantee period and the bank cannot be heard to say that it had been relieved from its obligations on the grounds that the validity of the guarantee had expired. It was incumbent on the bank to pay the ZDC and on the ZDC to demand such payment.

The applicant's prayer is for specific performance of the contract. The respondents argue that due to lapse of time it would not be appropriate to order specific performance. In that regard the discretion rests with the court as to when an order for specific performance may be appropriate. Other than alleging the lapse of time the respondents have not made out a substantiated case against an order for specific performance. They have not for example shown that it is impossible for them

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to effect specific performance nor given reasons giving rise to factors rendering specific performance impossible. In the case of the ZDC an interdict precluding them from disposing of the shares pending finalisation of this case is in force. Presumably the shares have not been disposed of and are therefore still available. In the case of the bank, a financial institution, it has not been argued that it no longer has the financial capability to meet its obligations in terms of the irrevocable guarantee given on behalf of the applicant. No undue hardships have been cited by the respondents as would arise if specific performance were to be ordered. The obligations arising from the agreement are of a precise nature and do not entail a contract for personal services. In any event the delay in bringing this matter to its conclusion must be blamed on the respondents for refusing to honour their obligations in terms of the agreement, opposing the application for consolidation and prosecuting an appeal against the resultant decision to consolidate.

I am satisfied that the applicant has set out a good case for the relief sought. I accordingly order as follows:-

1. The agreement of sale between applicant and Zimbabwe Development Corporation was and remains a valid agreement and Zimbabwe Development Corporation's purported cancellation is held to be of no force and effect.
2. First respondent is ordered in terms of its agreement with applicant and in terms of its undertaking to Zimbabwe Development Corporation, to pay to Zimbabwe Development Corporation's legal practitioners, Kantor & Immerman, the sum of Z\$30 million, within seven (7) days of this order.
3. Subject to it having received payment or a satisfactory undertaking to pay, Zimbabwe Development Corporation is hereby enjoined and directed to do all

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such acts and sign all such necessary papers as may be required of it to enable shareholding in Last Hope Estate Dete Holdings (Private) Limited to be transferred to applicant.

4. Zimbabwe Development Corporation pay the costs of this application jointly and severally with Trust Merchant Bank Limited.

*Messrs Majoko & Majoko* applicant's legal practitioners

*Dube, Manikai & Hwacha* first respondent's legal practitioners

*Messrs Kantor & Immerman* second respondent's legal practitioners