

MAKEH ENTERPRISES

Versus

**EXECUTOR NOMINEE ESTATE LATE
GUNTHER KAISER**

And

THE ASSISTANT MASTER

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 25 MARCH 2004

Judgment

CHIWESHE J: The applicant sought a provisional order couched as follows:

“Terms of final order sought

That you show cause to this honourable court why an order should not be made in the following terms:-

1. The first respondent be and is hereby ordered to facilitate the transfer of the assets of Kaiser Engineering Limited to applicant within 15 days of this order, upon applicant paying the purchase price of \$6,6 million.
2. Costs of suit to be paid by the estate of the later Gunther Kaiser.

Interim relief granted

3. The second respondent be and is hereby ordered to register the applicant’s claim against the estate of the late Gunther Kaiser.
4. The first respondent be and is hereby ordered to suspend any transactions related to the sale of the assets of Kaiser Engineering (Pvt) Ltd.”

According to the applicant’s founding affidavit sworn to by its director one Martin Mabvira, the background facts to this application are as follows.

The first respondent is the executor nominee of the estate of the late Gunther Kaiser which estate has as part of its assets a company called Kaiser Engineering (Pvt) Limited, situated at stand 6249, Belmont, Bulawayo. The company was incorporated in 1996 with the two shares held by the late Gunther Rudolf Kaiser and one Kenneth Michael Lee. The two were joint directors of the company. Kenneth Michael Lee resigned his directorship on 7 March 2000. He was replaced by a new director one Paul Andrew Hann who unlike his predecessor held no shares in the company.

In November 2000 the late Gunther Kaiser offered to sell the company to the applicant. At this time Kaiser was in ill health and having problems in paying his workers. He also had problems meeting his tax obligations and paying the rentals for the premises from which the company operated. It was apparently because of this state of affairs that led to negotiations between the applicant and the late Gunther. The applicant avers that Gunther acknowledged that he was the owner of the whole of the issued share capital of the company. It was agreed that the applicant would buy 60% of the issued share capital for \$4 million. The remaining 40% of the issued share capital was to be retained by Gunther (the seller) for a period of 2 years after which the applicant was to pay off Gunther and become the sole owner of the shares of the company. A draft agreement was then prepared by Gunther's legal practitioners - in particular by Mr *Jolliffe* of Messrs Calderwood, Bryce and Hendrie and Partners.

In January 2001 the applicant agreed to purchase the company Kaiser Engineering (Pvt) Ltd. The applicant subsequently discovered that the company was renting premises from which it operated its business. The applicant then advised the company that it would only proceed with the purchase if it also bought the premises.

HB 136/03

To this end the applicant started negotiations with Endurite Properties the owners of the premises. The applicant did so on the assurance that the option to buy the company would remain open pending finalisation of the negotiations between it and Endurite Properties. The applicant was then advised that the company owed Endurite Properties arrear rentals in the sum of \$71 820,00. These had to be paid off first before the premises could be sold. The company was unable to raise this amount. The applicant then offered to pay off this amount on behalf of the company on the understanding that that amount would be deducted from the total purchase price of the shares. Endurite then sold the premises to the applicant for \$1,2 million. The applicant says that it bought the premises because it had been assured that it would buy shares from the company Kaiser Engineering (Pvt) Ltd. With effect from 1 May 2001 all rentals for the premises became payable to the applicant as the new landlord. The company was not in a position to pay the rentals. It was then agreed that the rentals payable from that date to 31 October 2001 (the cut off date for the total handover/takeover process) would be deemed set off from the purchase price. To date the company has not paid any rentals to the applicant. It is also stated by the applicant that the director of the company (Gunther) borrowed from the applicant the sum of \$100 000,00 to pay his medical bills. This amount was to be deducted from the total purchase price – in the same way that unpaid rentals would be set off against the purchase price.

It was expected that the parties would have concluded the agreement by the end of October 2001. On 18 October 2001 the applicant addressed a letter to the company's legal practitioners in the following terms:

HB 136/03

“We are in possession of your draft agreement for the sale of Kaiser Engineering (Pvt) Ltd.

We are happy with the agreement and are prepared to sign this document before 31 October 2001. However we will be happy to have the following for appraisals before the signing date.

- (1) A copy of the Memorandum and Articles of Association and certificate of incorporation.
- (2) A copy of the CR 14.
- (3) Copies of share transfers if the company was formed as a shelf company.
- (4) Copies of share certificates of the current shareholders.
- (5) A copy of CR2 if there was allotment of shares after date of incorporation of the company.
- (6) Copies for your financial statements for 1999, 2000 and 2001 if they have been prepared. ...”

However the applicant was subsequently informed that contrary to what had hitherto been communicated to it, the company had two shares and therefore a 60 – 40% split of the shares was not possible. The applicant avers that it was only informed of the identity of the other shareholder, one Mr Lee after the death of Gunther. It is obvious that the statement in the draft agreement to the effect that Gunther was the holder of 100% of the issued share capital was to put it mildly misleading. It amounted to a gross misrepresentation. To circumvent this new obstacle it was decided that the applicant explores the possibility of purchasing the company’s assets and goodwill instead. To that end the applicant wrote to Gunther’s legal practitioners on 24 October 2001 as follows:

“Further to our letter of 18 October 2001 with regards the above draft agreement we will be happy if the agreement is modified to reflect the following:

- (1) That Makeh Enterprises is buying all assets, except labour, of Kaiser Engineering (Pvt) Ltd (lock stock and barrel) and the goodwill associated with the use of the word Kaiser

HB 136/03

- Engineering (i.e something like Makeh Enterprises t/a Kaiser Engineering).
- (2) That the new private limited company will give Mr Gunther Kaiser 40% of the issued share capital. This will be \$2 600 00,00 and will be purchased by the purchaser (Makeh) within a maximum of two years.
 - (3) ...
 - (4) ...
 - (5) ...
 - (6) ...
 - (7) ...
 - (8) ...

Please discuss this with Mr Kaiser as a matter of urgency. We have mentioned this to him and it appears he understood our concern. We await your urgent response.”

The applicant believes that this letter was never passed on to Gunther so that he may shed light on the role of the other shareholder Mr Lee. As fate would have it Gunther died on 14 November 2001. At the time of his death the initial draft agreement had not been signed and indeed it appears that the parties had abandoned it altogether and were seeking instead a new and different agreement for the purchase by the applicant of the company’s assets and goodwill as opposed to the company’s shares. Subsequent to Gunther’s death the applicant sought to enforce the terms of the unsigned draft agreement. Gunther’s legal practitioners not surprisingly advised that there was no agreement signed between the parties and therefore there was nothing to enforce. The applicant also sought to have the assets of the company sold to it. Again negotiations with the late Gunther had not been concluded by the time of Gunther’s death. The applicant then sought to buy Gunther’s shares in the company from the beneficiaries of Gunther’s estate. No agreement in this regard materialised between the applicant and those beneficiaries.

The first respondent filed an opposing affidavit. The gist of its argument is that there was no agreement either in relation to the sale of the shares of the company or with regards the sale of its assets and goodwill. In that regard the first respondent is supported by Mr *G A Joliffe* a partner in the firm of Calderwood, Bryce Hendrie and Partners. In his affidavit Mr *Joliffe* states that the late Gunther Kaiser had been a client of his for several years. He had from time to time spoken to Mr *Joliffe* about his intention to sell his business. Specific instructions came on 9 October 2001 when Gunther told Mr *Joliffe* that he wanted to sell his business Kaiser Engineering (Pvt) Ltd by way of a disposal of his shares in the company. On being asked he had told Mr *Joliffe* that he was the sole shareholder “although he was rather vague about this point. He was extremely unwell at the time and looked it, so much so that I advised him to go straight to hospital when he left my office” so says Mr *Joliffe*.

The next day Mr *Joliffe* caused a companies office search to be done in order to ascertain the names of the directors. Thereafter he drafted the share transfer agreement in accordance with the instructions given him by the late Gunther. The applicant collected a copy of this draft agreement and then wrote to Mr *Joliffe* on 18 October 2001 seeking further details of the company. It was then that a further companies office search revealed that a Mr Lee was an equal shareholder with Mr Kaiser. It became apparent that unless Mr Lee agreed to sell his share as well the share transfer agreement would not secure the acquisition by the applicant of the business. This position was communicated to the applicant. The applicant responded by means of a letter dated 24 October 2001 proposing modifications to the draft agreement. Mr *Joliffe* then drafted a further agreement to effect the sale of the company’s assets rather than the shares. By that time Gunther was very ill in hospital.

HB 136/03

As a result Mr *Joliffe* was unable to refer the new proposals to him. Mr *Joliffe* says he advised the applicant accordingly and further advised that as was the case in the original draft agreement Mr Lee's consent to the sale of the assets of the company would also be required.

The question to be addressed in this application is firstly whether there was a valid and enforceable agreement entered into between the applicant and Gunther Kaiser pertaining the sale of the company shares or Gunther Kaiser's shares in the company. There is no doubt that negotiations took place with a view to sell to the applicant the company's shares. It is also common cause that Gunther's legal practitioners drafted an agreement to that effect. Before the draft agreement could be signed it was discovered that Mr Lee was a joint shareholder with Gunther and that his consent would be required to effect transfer of all the shares in the company. On being informed of this development the applicant sought that the draft agreement be modified to reflect the sale not of shares but of the company's assets. The applicant did not at that stage insist on his rights in terms of the draft agreement. He proposed instead a new agreement altogether. Clearly applicant abandoned the draft agreement as the basis upon which negotiations would be conducted. The applicant, given his conduct in that regard, cannot be heard to say that the draft agreement should be the document upon which the order sought should be granted.

In any event a draft agreement is not until it is signed by both parties a binding and valid contract. At best it constitutes an offer which may be rejected or accepted by the other party. The applicant itself upon receipt of the draft agreement sought from the would be seller certain information before signing the document. On the basis of that information the applicant would have been at liberty to reject the terms of

the draft agreement altogether or demand certain amendments in line with the information at hand. In fact that is precisely what happened when applicant sought that modifications be effected to reflect that the subject matter of the intended agreement be the assets and goodwill of the company and not its shares. The applicant at that stage proposed an agreement which had not been contemplated in the draft agreement.

The applicant sought to argue that the draft agreement was a mere reflection of a verbal agreement reached by the parties. There is no evidence of such verbal agreement on the papers. No reference is made to it in the numerous correspondences filed of record. Mr *Joliffe* who was in the centre of the negotiations denies the existence of any agreement at all, verbal or otherwise. It is unlikely in any event that a commercial transaction of this nature would be couched verbally. I am satisfied that the intention of the parties was to have their agreement reduced to writing and signed by both parties. I would hold therefore that no valid agreement for the sale of the company's shares existed between the applicant and Gunther Kaiser. For the same reasons no valid agreement existed between the applicant and Gunther Kaiser for the sale of the latter's shares in the company.

That being the case the question whether Gunther Kaiser was in view of the presence of another shareholder previously not disclosed to the applicant competent to dispose the full shares of the company does not arise. The applicant has extensively cited authorities on that point. Whilst the applicant's expose in that regard may be the correct legal position in the event that an agreement had indeed been concluded by Gunther on behalf of the company or on his own behalf, the facts of this matter

clearly show that no agreement was in fact reached. The expose is therefore simply irrelevant to the present facts.

Secondly, there is no factual basis upon which it can be held that an agreement existed regarding the sale of the company's assets and goodwill. The proposal was never put to Gunther Kaiser who by then according to Mr *Joliffe* was too ill to handle the business of the company. The proposal remained an offer and nothing more. The applicant has sought to negotiate the purchase of the late Gunther's shares in the company with the beneficiaries of the late Gunther's estate and/or the executor nominee of that estate. The negotiations have not yielded any agreement. Again for that reason the applicant has absolutely no case against the beneficiaries or the executor nominee.

Curiously, although the applicant sought the transfer to it of the company's shares or alternatively its assets and goodwill, the applicant has not cited the company as respondent in this application. Neither the first respondent nor the second respondent has the power to transfer the company's shares or assets.

The applicant says that the company owes it rentals which rentals would have been credited to the purchase price if the agreement had been concluded. Clearly those rentals can be recovered by suing the company. As regards the moneys advanced to the late Gunther for his medical bills the same can be recovered from either the company if the company had been obliged to meet that expense or simply from the estate itself.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

James, Moyo-Majwabu and Nyoni applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners first respondent's legal practitioners