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HC 4574/2002  
SHAKESPEAR KARUWA (in his capacity as the  
Curator of the Estate of the late JUDITH NYEMBA)  
versus  
BONGANI MLAMBO  
and  
CHARSPIERRE WOODWORKS (PVT) LIMITED  
and  
BORM INVESTMENTS (PVT) LTD t/a  
BORM REAL ESTATE

HIGH COURT OF ZIMBABWE  
MAVANGIRA J,  
HARARE, 17 October, 2002 and 19 November, 2003

### OPPOSED APPLICATION

Mr *Karuwa* for the applicant  
Miss *E. Mushore* for the respondents

MAVANGIRA J: Before her death, Judith Nyemba and the 2<sup>nd</sup> respondent entered into an agreement of sale of shares in, and woodworking machinery and equipment of, the 2nd for the sum of \$1200 000. In terms of the agreement the purchase price was to be paid for by firstly, a deposit of \$500 000 on 28 March, 2003. The balance of \$700 000 was to be paid by instalments of a minimum of \$200 000 every three months until it was liquidated. By the time of her death on 12 August, 2000, the said Judith Nyemba had breached the agreement of sale as she still owed \$700 000,00 to the respondent, as she had only paid the deposit. At this juncture it is important to note that the first respondent is the director and majority shareholder in both the second and third respondents.

Judith Nyemba died before rectifying the breach. Miriam Nyemba and Tawonga Nyemba were appointed co-executors to her estate. In November 2000, Miriam Nyemba signed an acknowledge of debt acknowledging that the estate of the late Judith Nyemba owed the 3<sup>rd</sup> respondent, as represented by the 1st respondent, the sum of \$731 309,57. Thereafter, there was a series of court applications. In Case No HC 2705/2001 the applicant was suing for possession of the property in question which had apparently been removed by the respondents. In case numbers HC 10012/2001, HC 10013.2001, HC 10014/2001 and HC 10015/2001 the respondents were suing for payment of various sums allegedly owed to them by the applicant. In Case No HC 10467/2001, the respondents were suing for possession of the property in question.

In Case No HC 10015/2001 the second respondent issued summons against Miriam Nyemba and Tawonga Nyemba claiming payment of \$700 000 and interest, this being the outstanding balance in terms of the agreement that had been breached by the

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late Judith Nyemba. The matter is still pending. Sometime after signing the acknowledgement of debt referred to above, Miriam Nyemba resigned from her appointment and the applicant was appointed curator to the estate.

After his appointment and after the institution of proceedings in Case No HC 10015/2001, the applicant, caused the equipment in question to be advertised with a view to selling it in order to meet the various creditors' claims against the estate. He contends that he did this with the pre-requisite authority of the Master of the High Court. The first and second respondents then applied in Case HC 10467/2001 for a provisional order in terms of which they sought possession of the woodworking equipment pending the outcome of their action in Case HC 10015/2001. There was then correspondence between the parties' legal practitioners and a meeting on 6 November, 2001. After the meeting the respondents' legal practitioners wrote a letter on 8 November, 2001 to the applicant setting out the respondents' claims against the estate of the late Judith Nyemba.

Listed among various other claims the letter also reflected the claim for \$700 000,00 being "balance of purchase price of Charspierre Woodworks", and "interest thereon from 1 April 2000" to the date of the letter in the amount of \$122 500,00. Together with various other claims, the total claim by the first and second respondents as stated in the letter is the sum of \$1 755 134,39.

On 7 November, 2001, an order by consent was issued in Case No HC 10467/01. The first and second respondents herein are the applicants whilst Miriam Nyemba N.O. Tawonga Nyemba N.O. and the Master of the High Court were the first, second and third respondents respectively. The order provides:

"IT IS ORDERED BY CONSENT:

- (i) That the applicants are entitled to take delivery of the property listed in Annexure A until the finalisation of Case No. HC 10015/2001
- (ii) That the applicants together with (the) curator of the Estate late Judith Nyemba be and is hereby given leave to sell to the highest bidder the property, listed in the appendix to Annexure "A" to this application.
- (iii) That each party is to bear its own costs".

The applicant contends that the order was issued as a result of the respondent's

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claim as detailed above as well as the applicant's representations. The applicant also contends that the respondents took possession of the equipment for purposes of safeguarding their claim against the estate of the late of Judith Nyemba in the amount of \$700 000 as claimed in Case No HC 10015/2001.

It is also the applicant's contention that the respondent elected to sue for specific performance of the contract and they cannot be allowed to approbate and reprobate by claiming ownership of the said equipment. Furthermore, the respondents accepted the applicant's appointment as curator bonis to the estate of the late Judith Nyemba in terms of the order by consent in Case No HC 10467/2001 cited above, and they cannot now claim ownership of the equipment in question. The fact that the respondents have opted to sue for specific performance is made all the more clear from the acknowledgement of debt signed in November 2000 by Miriam Nyemba and the claim as reflected in the summons and declaration in Case No HC 10015/2001.

The applicant states that he was shocked when after receiving the purchase price of \$3,5 million, the respondents tendered to the estate of the late Judith Nyemba the sum of only \$812 500. The respondents' legal practitioners in a letter dated 9 May 2002 stated:

"We refer to our letter of the 8<sup>th</sup> November, 2001 and enclose herewith our cheque in the sum of \$812 500,00 broken down as follows:

Deposit by Miss Nyemba towards purchase of Charspierre Woodworks	\$500 000,00
Add interest thereon from the Date of Payment 28/3/2000 at 30% per annum to 28 <sup>th</sup> April, 2002	\$312 500,00
Total due to Estate Late Judith Nyemba	\$812 500,00"

The applicant contends that the correct amount to be tendered should have been \$1 744 865 61 hence the respondents still owe the estate the sum of \$932 365,61, the respondents themselves only being entitled to claims amounting to \$1 755 234,39 as shown in the letter dated 8 November, 2001 already referred to above. He also contends that it is both illegal and unjustifiable for the first respondent to claim commission in the sum of \$350 000,00 in terms of the agreement of sale to the third party, that is, Varsveld Tours and Safaris (Pvt) Ltd. He contends that the respondents have become unjustly enriched as they clearly elected to sue for the payment of the

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balance of the purchase price and only took possession of the equipment to facilitate the sale thereof to the highest bidder, with the active participation of the applicant.

Furthermore, there are a number of creditors to the estate whose claims amount to over \$1,5 million and who will obviously be prejudiced by the respondent's actions. The applicant thus prays for an order to compel the respondents to pay the sum of \$932 365,61 which, he contends, they have unjustifiably withheld.

The respondents on the other hand contend that in consequence of the breach of contract by the late Judith Nyemba, the second respondent cancelled the agreement and removed the machinery from where it was kept by Miriam Nyemba. They contend that in Case No HC 2705/2001, the court ordered that the property or equipment in question remained first and second respondents property and that because of rentals due to the third respondent by the late Judith Nyemba's estate, the property belonged to the third respondent as well.

In the opposing affidavit sworn on behalf of all the respondents by the first respondent, it is stated:

- "8. Under the court order the aforesaid Miss Miriam Nyemba took control of the machinery again in the hope that she would settle the amounts due to Charspierre and to Borm Investments. Predictably she did not. I then caused a writ of delivery to be issued and the goods were again delivered to me.....
9. Miriam Nyemba then took delivery again by virtue of the provisional order in Case Number 7664/2001 (but) the property remained mine and Borm Investments.
10. Out of exasperation and desperation I then caused summons to be issued for the recovery of various sums owed. The case numbers are HC 10012/01, HC 10013/01, HC 10014/01, HC 10015/01, magistrates case numbers 39979/01 and 39980/01. I have since instructed my legal practitioners to have all the cases withdrawn since I have recovered the sums claimed in those cases and because Miss Miriam Nyemba and Mr Tawonga Nyemba have been removed as executors.
11. Meanwhile the applicant was appointed the Curator Bonis of the estate. He proceeded to advertise the property for sale resulting in me against (again) applying to this Honourable Court resulting in the Court Order in case Number 10462/2001(10467/2001) (Annexure 'H;') to the urgent chamber application.
12. Mr Karuwa, Mr Mabulala and I had a meeting at which I outlined my claims to Mr Karuwa. I did not relinquish ownership of the property by virtue of Annexure 'G'. What it simply met (meant) was when the machinery had been bought the estate would recover the deposit.
13. After everything has been said, the most important things to note are the provisions of the original agreement of sale and the court order in case number 2705/20001. What is not in dispute is that the machinery is mine and Borm Investment, that the late Judith

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Nyemba and or the executor breached the agreements, and that in terms of clause 13 of the agreement 'no intitude (latitude) extension of time or other indulgence shall be deemed a waiver of such party's rights or shall preclude the 2<sup>nd</sup> defendant from enforcing such rights on any future occasions'.

14. What I did was to indulge the late Miss Nyemba, the erstwhile executors and the curator but such indulgence does not in any way detract from any ownership of the machinery. If the machinery is mine why should I only recover what I am owed by the estate and remit the rest to the estate?
15. Finally, I confirm that the purchase price has been paid in full to me less the sum of \$812 500,00 which was paid to the curator out of my goodwill. Having used the machinery for a period in excess of eighteen months the estate should not have been paid a cent at all. I did not breach the agreement, Miss Judith Nyemba did".

The applicant prays for the application to be dismissed with costs, alternatively to be referred to trial because of the various disputes of fact which haunt the matter.

In my view the starting point is the agreement of sale involving the late Judith Nyemba. It is Annexure D to the application. The agreement is entered into by and between the second respondent "duly represented by Davison Basira (in his capacity as Secretary"; being the seller and Judith Nyemba, being the purchaser. The agreement states in the preamble:

"Whereas the Seller is the sole beneficial owner of all the issued shares.....

And Whereas the Purchaser has agreed to purchase the shares and shall be liable for the payment of the purchase price.

And Whereas the company is the owner of certain movable property as per the attached inventory.

And Whereas the Purchaser wishes to acquire all of the interest of the Seller in the company and through such interest the property;

Now therefore....."

The purchase price is stated in the agreement as being the sum of \$1200 000,00".

It is common cause that the late Judith Nyemba had paid a deposit of \$500 000,00 by the time she died, leaving a balance of \$700 000,00.

In November 2000, Miriam Nyemba, in her capacity as executor dative, signed an acknowledgement of debt, acknowledging indebtedness to the third respondent represented by the first respondent, in the sum of \$731 309,51.

In case No HC 10015/2001, in which the second defendant is the plaintiff and Miriam Nyemba and Tawonga Nyemba the defendants, the claim, filed on 19 October,

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2001, is for the "payment of \$700 000,00 together with interest thereon". This being the balance outstanding in terms of the said agreement of sale. Furthermore, in their letter dated 8 November, 2001, the respondents' legal practitioners set out the estate's total indebtedness as being the sum of \$1 755 134,39, in which amount is included the sum of \$700 000,00 together with interest thereon as already stated above. The final paragraph of the said letter reads:

"Kindly let me have your assurances that these sums will be paid upon the purchase (purchaser) paying you the purchase price".

In the letter of 8 November, 2001 the \$700 000 is described as the "balance of purchase price from Charspierre Woodworks". Significantly, in the plaintiff's declaration in Case No HC 10015/2001 it is stated, *inter alia*, -

"3, On the 24<sup>th</sup> March, 2000 the late Judith Nyemba entered into an agreement of sale with the plaintiff in terms of which the plaintiff sold to Nyemba all issued shares in the plaintiff's company together with all the company's movable assets"

The claim therein is for \$700 000,00, also described as the balance outstanding in terms of the agreement of sale. In my view, it cannot be any clearer, that in the circumstances, the respondents herein obviously elected to enforce the agreement and sue for specific performance.

I am in agreement with the applicant that the respondents having made such an election, it was no longer open to the them to seek to cancel the agreement. The respondents' contention that the first respondent only indulged the late Miss Nyemba, the erstwhile executors and the curator, does not hold. The letter of 8 November, 2001 and the summons in Case No HC 10015/2001 cannot, by any stretch of the imagination be described as actions of indulging the applicant nor his predecessors. They are a clear indication of an election to enforce the contract. Such an election precluded the making of any subsequent contrary election. The respondents have not shown how and when, if ever. They cancelled or purported to cancel the agreement. Nor have they explained

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why they paid the sum of \$812 500 to the applicant save to indicate, lamely in my view, that this was out of goodwill.

In my view the respondents have clearly acted in such a manner, that the applicant ought to be granted the relief he seeks as he has clearly proved the justification for same. I thus have no hesitation in granting the relief sought.

In the result, it is ordered as follows -

1. That the respondents be and are hereby ordered to pay, jointly and severally, the one paying the others to be absolved, the sum of \$932 365,61 to the applicant together with interest thereon at the rate of 25% per annum calculated from 9 May 2002 until date of final payment.
2. That the respondents pay the costs of this application jointly and severally the one paying the others to be absolved.

*Karuwa & Associates*, applicant's legal practitioners  
*Mabulala & Motsi*, respondent's legal practitioners