ASHANTI GOLDFIELDS ZIMBABWE LTD
versus
JAFATI MDALA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 17 March 2008 & 27 August 2008

Civil trial

*Mr Magwaliba*, for the plaintiff,
*Mr Manyurureni*, for the defendants,

CHATUKUTA J: The plaintiff sought an order for the eviction of the defendant, and all those claiming occupation through him, from House No 1489 Mushambi Road, Chiwaridzo, Bindura (the property) and costs of suit.

The following facts are common cause. The defendant was employed by the plaintiff until 4 June 2007. On 1 December 2003, the plaintiff entered into an agreement with the workers. The agreement provided that the plaintiff had agreed to sell its houses to sitting tenants identified in a document attached to the agreement. The attachment identified the tenants, the property they were occupying, valuation of the property and the monthly repayments. The defendant was identified on the attachment as one of the sitting tenants. The value of the property that he occupied was placed at $1 200 000 and the monthly repayment was $20 000. At the bottom of the attachment was an endorsement in long hand by one Amar, a signatory to the agreement. The endorsement states “Please amend tenancy changes”.

On 9 December 2003, the plaintiff and the defendant entered into a lease agreement. The agreement provided that the lease was for a period of six months commencing from 1 January 2004. The defendant would pay a monthly rental of $20 000. The monthly rental would be deducted from the applicant’s salary. The defendant had an option to purchase the property after sixty months. The rentals paid over the sixty months would go towards reducing the purchase price. The lease agreement would be terminated, among others, upon termination of employment.

As from 1 January 2003 up to 26 February 2006, the plaintiff deducted an amount identified on the defendant’s payslip as “rent to buy”. The payslip reflected a balance of

"rent to buy" after each deduction. After 26 February 2006, the plaintiff did not deduct any "rent to buy" from the defendant's salary.

Prior to 9 December 2003, plaintiff's employees, including the defendant, were paying rent to the plaintiff. The payslips indicated that what was being deducted was rent. It is only after the agreement of 9 December 2003 that the plaintiff commenced deducting "rent to buy" from the defendant's salary.

On 4 July 2007, the plaintiff wrote to the defendant terminating the contract of employment. The letter advised the defendant that he was required to give vacant possession to the plaintiff by 21 July 2007. On 12 September 2007 the plaintiff again wrote a letter to the defendant advising the defendant that the lease agreement of 9 December 2007 had been terminated. The defendant was invited to visit the plaintiff's office and collect any money paid in excess of the rentals during the lease period. The defendant refused to vacate the property.

The following issues were referred for trial:

"1. Whether the Plaintiff and the Defendant entered into agreement of sale in respect of the immovable property known as 1489 Chiwaridzo Township, Bindura on 1 December 2003?
2. Whether the plaintiff has paid the purchase price in respect of the said property in terms of the said agreement of sale to the Plaintiff?
3. Whether the lease agreement between the Plaintiff and the Defendant entered into on the 9th of December 2003 is a valid and effectual document?
4. Whether by terminating the contract of employment on 4 June 2007 the Defendant breached the lease agreement and therefore whether the Plaintiff is entitled to require the defendant to vacate the said immovable property?"

1. **Was the agreement of 1 December 2003 a sale agreement?**

The plaintiff called one Ajasi Wala. He testified that he was the acting human resources manager of the plaintiff. He had been in the service of the plaintiff for a total of 12 years. He testified that the agreement entered into on 1 December 2003 between the plaintiff and the workers' representatives was a general framework for the disposal of the houses to employees in a bid to retain staff. The agreement only indicated the plaintiff's intention to dispose of the houses to sitting tenants. The agreement was a result of prior negotiations where the intention of the parties was clear that the agreement would not be a sale agreement. He did not participate in the earlier meetings. The individual employees did not sign the agreement. The committee that represented the workers was a housing committee. It did not have a constitution. The values reflected on the document attached to the agreement were intended to assist in computing the rental payable by the sitting tenants. He however conceded that the agreement of 1 December 2003 remained a valid agreement but had to be read together with the agreement of 9 December 2003. As at 26 February, the defendant had paid the amount stated as the "new valuation" in the 1 December 2003 agreement. He further conceded that the rent as per the defendant's payslip was endorsed as "rent to buy". His understanding of the phrase "rent to buy" was payment of rent towards the purchase of a property.

The defendant testified that on 1 December 2003, the plaintiff and the workers' representatives entered into an agreement to sell houses to sitting tenants. The representatives signed on behalf of all the sitting tenants as there were many of them. The agreement identified the sitting tenants, the property they occupied, the value of the property and the monthly payments towards extinguishing the purchase price. He was one of the sitting tenants and therefore by virtue of that agreement the property in issue was sold to him. He paid the purchase price in full.

*Mr. Magwaliba*, for the plaintiff, submitted the following. The agreement of 1 December was general and brief. It was intended to provide a basis for the second agreement, the lease agreement of 9 December 2003. The agreement was not signed by the defendant personally and therefore the defendant could not benefit from it. The defendant did not allege that the contract of sale was entered into by his agents and here are no sufficient averments to find the doctrine of *stipulation alteri* mentioned in the plea.

The defendant was represented by an *ad hoc* committee who did not have a mandate to represent the defendant. In any event not all the people listed on the attachment purchased the properties. Each person had to sign an agreement of sale.

He submitted that the operative part of the agreement is that "Ashanti Goldfield agrees to dispose of its housing units". This was futuristic and was consistent with the evidence of the plaintiff's witness that the parties were clear that the agreement was the skeleton to a future agreement of sale to be signed by each employee identified in the attachment to the agreement. He further submitted that the agreement did not contain the usual provisions in agreements of this nature such as a provision on transfer of property, breach and termination of the agreement. Although the agreement referred to an agreed price, the attachment referred to a "new valuation". Instead of providing for "instalments" the agreement provided for "repayments". The amounts reflected under "new valuation" should have been named "agreed price" and the last column reflected as repayment should have been titled instalment. Further the endorsement by Amar refers to tenants and no to purchasers. If the persons therein listed were purchasers then Amar would have referred to then as such. Reference to the persons as tenants is indicative of the intention of the parties to that agreement.

*Mr. Munyurureni*, for the defendant, submitted that the agreement was a clear contract of sale. It contained the requisite provisions necessary for a valid agreement. It identified the parties, the *merx,* and the price. The workers' representatives acted as agent of employees. The defendant's payslips further illustrated the existence of a contract of sale by referring to what the plaintiff purported to be mere rentals as "rent to buy".

It appears to me that the parties entered into a valid agreement of sale. In order for an agreement to be valid, it must identify as submitted by *Mr. Munyurureni*, the parties, the *merx,* and the price. (see Christie, Business Law in Zimbabwe, 2nd Ed at page 141). The agreement is very simple. It reads as follows:

> "Ashanti Goldfields Zimbabwe agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats, and Low Density to its employees who are sitting tenants effective 01 December 2003.
> Find the agreed prices attached."

The Attachment has three sections. Each section identifies the locality of houses. Each section, in its heading refers to 'disposal price list".

I found it difficult to understand the evidence of the plaintiff's witness and *Mr. Magwaliba*'s contention that the agreement was an intention to sale and not a sale. The agreement identifies the parties to the agreement as Ashanti Goldfields Zimbabwe on the one part and "its employees who are sitting tenants" on the other. The sitting tenants are identified on the attachment and the defendant's name appears on that attachment. The agreement refers to agreed prices. The fact that the prices are referred to as " new valuation" and not "price" is a matter of semantics. The same applies to the reference of "repayments" instead of "instalments". As stated in *Clement Kovi versus Ashanti Goldfields Zimbabwe Ltd & Anor* HH 83/07 and the cases therein cited, the lack of formal legalese does not vitiate the intention of the parties.

The intention of the parties is further pronounced by the fact that prior to 1 December 2003, the plaintiff collected rent from the defendant. The plaintiff's witness conceded that it is only after the lease agreement that the plaintiff started deducting from the defendant "rent to buy". The witness conceded that the term "rent to buy" applies where rent is paid towards the purchase of a property. It was also clear from the defendant's payslips that the amount that was deducted was the same as stated in the attachment to the agreement. When the amount identified as "new valuation" in the attachment was extinguished the plaintiff ceased to deduct any further amounts from the defendant's salary. I found it highly improbable, as the plaintiff sought to convince me, that the new valuation was intended to establish the rental payable by the defendant. The plaintiff's witness did not explain to my satisfaction the rationale of fixing a valuation of property in order just to determine the rental.

It seems to me that the fact that the agreement was not signed by the defendant personally does not negate the fact that the persons who signed the agreement on behalf of the employees were doing so on behalf of the employees including the defendant. The contention by the plaintiff that the workers' representatives did not have the defendant's mandate to negotiate on his behalf is baseless. As submitted by *Mr. Manyurureni*, the General Manager and the Finance Director of the plaintiff signed the agreement. This is, in my view, as high as you can go in a company. To then allude that these senior persons were negotiating on behalf of the plaintiff with people who did not have a mandate to represent the persons they purported to so represent is preposterous. Further, the plaintiff's witness testified that the agreement was the skeleton to the agreement of 9 December 2003. The 9 December agreement was the flesh. The two should therefore be read together. The assumption that can be safely drawn from that evidence is that the plaintiff was negotiating with persons it believed had a mandate to represent the defendant. The contention by the plaintiff that the workers' committee did not have a mandate to represent the defendant would therefore give the impression that the plaintiff was negotiating in bad faith.

**2. Whether the defendant paid the purchase price in respect of the said property**

It was the plaintiff's evidence that the amount paid by the defendant was rental. The defendant testified that it was payment towards the purchase price. As already indicated above, the defendant's payslip clearly indicates payment of "rent to buy". The rent was in the amount provided in the attachment to the agreement of 1 December 2003. It is common cause that as of 26 February 2006, the defendant's payslip reflects a nil balance. In fact, the defendant had a credit balance of $1 170. 80. It is therefore my view that the defendant had paid the full purchase price for the property.

3. Whether the lease agreement entered into on the 9th of December 2003 is a valid and effectual document?

I have held that the agreement of 1 December 2003 was a valid sale agreement. Before a plaintiff could be able to claim that defendant was bound, it ought to demonstrate *consensus ad idem*. The parties must understand each other in the sense that there is a meeting of the minds. There can be no contract where the parties negotiate at cross purposes. . (See Christie, in The Law of Contract in South Africa, 3rd edition at pages 30-33 and Mackeurtan's Sale of Goods in South Africa 5th edition by Dr. Hackwill at pages 5-6).

Both parties were agreed that the lease agreement did not novate the agreement of sale. They were further agreed that the two agreements should be read together. However, *Mr. Magwaliba* argued that the lease agreement was intended to give flesh to the earlier agreement. The lease agreement provided for the option to purchase which was intended in the agreement of 1 December 2003. The defendant affixed his signature to the lease agreement and therefore is bound by that agreement.

*Mr. Manyururen*i argued that the lease agreement did not annul the agreement of sale. He submitted that the defendant signed the agreement under the impression that he was entering into an agreement to facilitate payment of the purchase price. It was not the intention of the defendant to postpone the purchase of the property by five years and that a new purchase price was to be arrived at using the formula in the lease agreement. It was contended that the parties had therefore negotiated at cross purposes.

It appears to me that the parties were indeed negotiating at cross purposes. The parties had on 1 December 2003 entered into a sale agreement which gave the defendant the right to purchase the property. It is inconceivable that only eight days later, he would, willingly, enter into a lease agreement which would take away his right to purchase the property and substitute it with a lesser right, an option to purchase the same property after a period of five years. The agreement of 1 December 2003 was silent on the parties entering into a lease agreement. The explanation by the defendant that he was of the view that the second agreement was intended to facilitate the deduction of the rent to buy is, in my view, reasonable. It therefore appears to me that the lease agreement was void *ab nitio*.

I have not considered it necessary to determine the fourth issue, whether by terminating the contract of employment on 4 June 2007, the Defendant breached the lease agreement where I have held that the lease agreement was a nullity.

In the result, the plaintiff's claim is dismissed with costs.

*Magwaliba & Kwirira*, plaintiff's legal practitioners
*Munyurureni & Company*, defendant's legal practitioners