

LILLIAN NYAMASOKA  
versus  
CHINA AFRICA COTTON ZIMBABWE  
(PRIVATE) LIMITED  
and  
JU WEBIN  
and  
YU ZENGHU  
and  
JIAN SONG  
and  
DENG YUFEI

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 2, 4 December 2015 & 27 January 2016

### **Civil Trial**

*N. Ranchod*, for the plaintiff  
*S. P Mkushi & Ms T. Manhanzva*, for the respondents

PHIRI J: This is a case in which the plaintiff, Lillian Nyamasoka sought a declaratory order and ancillary relief against the first defendant, China Africa Cotton Zimbabwe (Private Limited) and various other defendants listed as second to fifth defendants.

Paragraph 2.3 of the Plaintiff's Declaration is quite telling in that it states;

“On or about 1<sup>st</sup> April, 2014, the plaintiff was duly appointed as director of the First Defendant.”<sup>1</sup>

Plaintiff also averred, in her declaration, that she is the holder of 1020 shares in the first defendant which equates to 51% of the issued share capital in the first defendant.

She further averred that on or about the 8<sup>th</sup> of April, 2014 together with the first to fifth defendants she concluded a Shareholders Agreement in terms of which the plaintiff acquired the aforementioned shares.

She also alleges that she was duly appointed director of the first defendant on 1 April, 2014 and subsequently appointed as an executive director on 8 April, 2014.

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<sup>1</sup> N.B This was no April fool's joke!

The plaintiff's cause of complaint was that she had been excluded from attending all board meetings or appointing members of the board of the first defendant as set out in the Shareholders Agreement.

She also complained that she had been excluded from participating in or having knowledge of the day to day running of the first defendant's affairs despite having been appointed executive director of the first defendant. Similarly she complained that the defendants refused to accept, recognise or acknowledge that she is a shareholder and director of the first defendant.

Such is the plaintiff's case as outlined in the pleadings.

#### DEFENDANT'S PLEA AND CLAIM IN RECONVENTION

The defendants' filed their plea and claim in reconvention.

They denied that the plaintiff was an executive director and shareholder of the first defendant. The defendants averred that the plaintiff was only a "Trustee Shareholder" in terms of a Deed of Trust dated 8<sup>th</sup> April, 2014. The defendant maintained that the Shareholder Agreement referred to be the plaintiff, was a forged document.

The defendant's lodged a counterclaim against the plaintiff and sought the following relief:

- (a) An order declaring that the defendant is not a director or shareholder of the first plaintiff.
- (b) An Order declaring the defendant is only a Trustee Shareholder in terms of the Deed of Trust dated 8<sup>th</sup> April, 2014.
- (c) An Order restraining defendant from purporting to be and acting as the first plaintiff's director, executive or employee or agent.
- (d) An order declaring that all documents relating to the first plaintiff's affairs and filed by the defendant with the Registrar of Companies at Harare be of no legal effect and are null and void.
- (e) That the Registrar of Companies be and is hereby ordered not to accept any documents concerning the first plaintiff and filed by the defendant.
- (f) Costs of suit on a legal practitioner and client scale

### JOINT PRE TRIAL ISSUES

When this matter was referred to trial the following issues were agreed to as the issues for trial;

- (1) Whether or not the plaintiff is a Shareholder or a Trustee Shareholder in the first defendant and if so what is the plaintiff's shareholding?
- (2) Whether or not the plaintiff is and ever was an executive director in first defendant?
- (3) Whether or not the plaintiff forged the alleged Shareholders Agreement and company documents.
- (4) Whether or not the plaintiff should be restrained from purporting to act as a director in first defendant?
- (5) Whether or not all documents relating to the first defendant's affairs filed by plaintiff with the Registrar of Companies at Harare be declared null and void?
- (6) Whether or not the Registrar of Companies should be ordered not to accept any documents concerning defendant filed by the plaintiff?

### PLAINTIFF'S EVIDENCE IN CHIEF

The plaintiff gave evidence in support of her claim. As part of her evidence she stated the following:

- (a) She came to know the first and second defendants through some colleagues from Tanzania.
- (b) On 7 April, 2014 she was invited to attend a meeting with the first and second defendant where at the second defendant indicated that they required a partner to work with the first defendant for the benefit of the cotton industry. At that meeting the second defendant proposed to appoint her as an executive and shareholder "with a 51 per cent entitlement" she stated that she accepted his proposal.
- (c) A Shareholders Agreement, exh 3, was drawn up. This was dated the 8<sup>th</sup> April, 2014. Among other terms of this agreement, it was agreed that the plaintiff would have 51% shareholding of the company, that is, the first defendant. She led evidence that second, fourth and fifth defendants were present when the

Shareholders Agreement was signed. She also led evidence that most original company documents had been prepared by the second defendant.

- (d) She also led evidence that an Indigenisation Clearance was obtained, and the Zimbabwe Investment authority licence was also amended.
- (e) She further led evidence that the CR14 form lodged with the companies' office recorded her as director of the company and this had been prepared by her under the specific authority of the second defendant.
- (f) The plaintiff led evidence that she prepared and lodged, with the companies' office, various other documents relating to allotment of shares and Investment licence of the first defendant etc. to reflect the outcome of a board meeting that had been held in respect of the first defendant. The plaintiff also led evidence that Share Certificates were prepared on the basis of the Shareholders Agreement. These were prepared by a legal practitioner known as "Chatambudza."
- (g) The plaintiff led evidence that she was an officer of the first defendant and she exercised and carried out her fiduciary duties, such as, ensuring that licences of the first defendant were regularised and that NSSA regulations were complied with. She also travelled to Glendale, Gweru and Checheche carrying out the business of the first defendant.
- (h) In her evidence in chief the plaintiff denied that she held her 51% shares in Trust for and on behalf of Bantu Investments (Pvt Ltd as had been alleged by the defendants.

She stated that she recalled signing a Trust Deed which had been "Manufactured" by the second defendant. She indicated that to her knowledge Bantu Investments was a company that was incorporated in the Seychelles. She averred that the Trust Deed was a document **"...in violation of the Investment Laws of the land and the Exchange Control regulations"**

She vehemently denied that Bantu Investments was a shareholder of the first defendant neither was any disclosure made to the Zimbabwe Investment Authority or the Ministry of Youth, Indigenization and Economic Empowerment that Bantu Investments was a shareholder to the first defendant.

### CROSS EXAMINATION OF THE PLAINTIFF

The second question posed to the plaintiff was;

“Confirm the first time you met Mr Ju (Wen Bin) was on the 7<sup>th</sup> April, 2014?”

#### Answer

“Confirmed”

Note, in para 2.3 of the plaintiff’s declaration, the plaintiff stated the following;

“2.3. On or about 1 April, 2014, plaintiff was duly appointed as a Director of the first defendant.”<sup>2</sup> (The underlining is mine)

In my view this is where the defendants should have closed their cross examination and sealed their case!

Nonetheless the defendants proceeded (in my view “painstakingly”) to cross examine the plaintiff.

The following evidence was obtained from the plaintiff during cross examination;

(a) That the first time the plaintiff met the second defendant was 7 April, 2014, and it was the intention of the parties to hold discussions on the subject of the purchase of shares.

In fact the Shareholders Agreement reflected that the plaintiff proposed to purchase shares.

(b) There was no purchase of shares. The plaintiff did not effect any payment towards the purchase of the shares in dispute.

(c) The plaintiff spoke about a “Pre-Finance Agreement” under which the plaintiff’s 51% “majority” shareholding would be “self-financed” by way of dividends to be realized from the sales and revenue of the company.

(d) There was discussion on the subject of appointment of the plaintiff as an executive director. However under cross examination, the plaintiff conceded that there was no;

- (i) Notice of a board meeting-
- (ii) Agenda of such board meeting

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<sup>2</sup>Again his was no April fool’s joke!

- (iii) Resolution of such board meeting appointing her as director or executive Director of the Company.
- (iv) Letter of appointment of the plaintiff as executive director of the first defendant.
- (v) The plaintiff did not attend the board meeting.
- (e) The Share Certificate, exh 8 (e) was dated 1 April, 2014 and yet the plaintiff alleged that she first met the second defendant on 7 April, 2014.  
The plaintiff's answer was that she was not the "Manufacturer" of this and other documents but all these were done at the instance of the second defendant.
- (f) The plaintiff did not know the value of the company or the value of the shares she was buying.
- (g) In terms of exh 12, being the letter titled "The Ministry of Youth, Development Indigenization<sup>3</sup> and Empowerment" and dated 8 April, 2014 the plaintiff was to acquire shares through a payment plan "based on the season shareholding dividends on an indigenization plan structured as follows;  
"1<sup>st</sup> year - 10 % (Lilian Nyamasoka)  
2<sup>nd</sup> year - 20 % (Lilian Nyamasoka)  
3<sup>rd</sup> year - 35 % (Lilian Nyamasoka 5% Farmers 10%)  
4<sup>th</sup> year - 45% (Lilian Nyamasoka 10%)  
5<sup>th</sup> year – 51% (Lilian Nyamasoka 6%)  
  
Resultant shareholding shall be Lilia Nyamasoka 41% and Farmers 10%. All shareholding shall be acquired during a period of 5 years."

It is confirmed that

- (h) Up to the present date no profits or dividend have been made by the first defendant.
- (i) The plaintiff averred that the Deed of Trust, was done at the instance of the second defendant and she just signed it although she did not know what it was talking about.

The plaintiff insisted that she had never read this Trust Deed which declared that she holds shares for the benefit of Bantu Investments Company. She insisted that she hold shares on her own behalf and that the Trust Deed was an illegal document.

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<sup>3</sup> Correct title should be "Ministry of Youth, Indigenisation and Economic Empowerment

- (j) The plaintiff averred that all documents lodged at the Companies' office were so amended and or lodged at the instance of the second defendant and or in her capacity as executive director of the first defendant.

#### APPLICATION FOR ABSOLUTION FROM THE INSTANCE

In their application for absolution from the instance the defendants contended that the plaintiff;

- (a) proffered different contradictory versions of her claims of shares
- (b) has not yet acquired any shares because she is waiting for the first defendant to make a profit and declared dividends and then use the expected dividends to purchase shares in the first defendant.
- (c) has not yet paid for any shares.
- (d) has not established any evidence that there was a contract for the allotment of shares.

It is a finding of this court that these submissions for and on behalf of the defendants should be upheld.

I found that the evidence of the plaintiff was equally incredible. I have already alluded to the fact that it is incredible that the plaintiff led evidence that she first met the second defendant on 7 April, 2014, and, that, she was appointed director of the first defendant on 1 April, 2014.

The plaintiff herself was not a credible witness.

I also hold that the plaintiff is clearly not the current holder of 51 per cent shares of the second defendant because, by her own admission, she is yet to acquire these shares by virtue of profits or dividends to be declared by the first defendant.

The plaintiff neither has knowledge of the value of her shares nor has she paid for them.

It cannot be reasonably held that plaintiff's evidence is credible and in the circumstances no reasonable court can uphold the plaintiff's claims that she is current holder of 51 percent shares of the first defendant nor was she appointed director or executive director of the aforesaid company.

I therefore for these reasons uphold the defendants' application for absolution from the instance.

In an application for absolution from the instance the test is:

is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any degree of *exactitude* than by saying that it is the sort of mistake a definition which helps not at all.”

See *Supreme Service Station 1969 (Pvt) Ltd v Goodridge (Pvt) Ltd* 1971 (1) ALR 1

(A) as per Beadle J at p 55.

In *Wallar v Industrial Equity Limited* 1995 (1) ZLR 87 (S) Gubbay J (as he then was) held that;

“An application for absolution from the instance is akin to and stands on the same footing as an application for the discharge of the accused at the end of the state case. In that situation, he is entitled to his discharge on any or separate charge on which there is insufficient evidence to justify his being put on his defence. Similarly in a civil action if there is no evidence on which a reasonable judicial officer could or might find for that plaintiff upon some or the separate claims or on the main or alternative cause of action, there is no impediment to it ordering absolution upon them and refusing it in respect of the remainder.”

In the present case I therefore dismiss the plaintiff’s case in so far as the plaintiff’s sought in paras (a) to (d) of plaintiff’s claim. The evidence led by plaintiff is manifestly unreliable so much that no reasonable court would uphold her claims.

#### DEFENDANT’S CLAIM IN RECONVENTION

I will refer to the Parties as they have been cited in the claim in Convention.

In defendant’s claim in reconvention the defendant submitted that:

“the plaintiff” was only a Trustee Shareholder in terms of a Deed of Trust dated 8 April, 2014 entered into between Bantu Investments Company Limited and the defendant.”

The defendants sought an order declaring that the defendant is only a Trustee Shareholder in terms of that deed of trust.

I am in agreement with submissions made for and on behalf of the plaintiff that the Trust Deed is intended, by the defendants to obviate the requirements of the Indigenisation Economic and Empowerment Act [*Chapter 14:33*].

I hold that the Trust Deed is not enforceable in terms of the laws of Zimbabwe and its provision cannot be invoked against the plaintiff.

I also agree that the trust deed was never disclosed or intended to be disclosed by the defendants to the Registrar of Companies, the Zimbabwe Investment Authority or the

Ministry of Youth, Indigenisation and Economic Empowerment. Clearly its purpose was to circumvent the laws of Zimbabwe.

I hold, in agreement with the plaintiff, that the Trust Deed is invalid and not capable of enforcement in Zimbabwe, notwithstanding that the plaintiff also signed that document.

This court is not bound to enforce a contract which is illegal. *Agson Mafuta Chioza v Smoking Siziba* (2005) ZWSC 4 ( as per Ziyambi JA).

In the present case the plaintiff objected to the enforcement and or legality of the Trust Deed and accordingly I hereby dismiss para (b) of the relief sought in defendant's counterclaim.

For that reason I hold that it is appropriate that this court shows its displeasure by dismissing defendant's claim in respect of para (f) of the defendant's claim in reconvention and thereby denying the defendants their claim for costs of suit in this whole matter.

Accordingly I order the following:

1. That the defendant's claim for absolution from the instance be and is hereby upheld.
2. The defendants' claim in reconvention in terms of paras (a), (c), (d) and (e) be and is hereby upheld.
3. That the defendants' claim in reconvention in respect of paragraphs (b) and (f) be and is hereby dismissed.
4. That each party pays its own costs of suit.

*Hussein and Ranchod Legal Practitioners*  
*Sawyer & Mkushi*, defendants' legal practitioners