TELSPRUIT TRADING (PVT) LTD

And

WINSTON ANDRE MCCONVILLE

Versus

GREAT SERES MINING (PVT) LTD

And

PROVINCIAL MINING DIRECTOR MATABELELAND SOUTH PROVINCE

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 07 & 20 MAY 2025.

Opposed Court Application

Mr M.E.P. Moyo, for the Applicants.
Mr T. Zinto, for the 1st Respondent.
No Appearance for the 2nd Respondent.

NDLOVU J. This is a Court application wherein the applicants seek an order confirming that the agreement of sale entered into by and between the first applicant and the first respondent is null and void, consequently ordering the second respondent to cancel eleven certificates of registration of mining claims after their transfer to the first respondent.

BACKGROUND FACTS.

In May 2024, the first applicant and the first respondent agreed to sell, with the first Applicant selling the following eleven mining claims to the first respondent.

1. Daisy North 3 Registration number GA 3971.

2. Daisy North 4 Registration number GA 3972.

3. Daisy 1A Registration number GA 6318.

4. Daisy 1B Registration number GA 6319.

5. Daisy 1C Registration number GA 6320,

6. Daisy ID Registration number GA 6321.

7. Daisy 1E Registration number GA 6322.

8. Daisy 2A Registration number GA 6324.

9. Daisy EB Registration number GA 6325.

10. Daisy 2C Registration number GA 6326.

11. Galo Registration number 50475.

The purchase price was US$1,500 000.00 ***[One Million, Five Hundred Thousand United States of America Dollars]***. These mining claims are in the District of Gwanda, Matabeleland South Province.

In the agreement of sale, the first applicant was represented by the second applicant, who is its Director. He had a resolution of the Board of Directors giving him authority, to enter into and conclude the agreement of sale.

RELIEF SOUGHT.

The applicants are seeking the following relief in this matter.

"1. The agreement entered into by and between the 1st applicant and 1st respondent in respect of.

i. Daisy North 3 Registration number GA 3971,

ii. Daisy North 4 Registration number GA 3972,

iii. Daisy 1A Registration number GA 6318,

iv. Daisy IB Registration number GA 6319,

v. Daisy 1C Registration number GA 6320,

vi. Daisy 1D Registration number GA 632],

vii. Daisy 1E Registration number GA 6322,

viii. Daisy 2A Registration number GA 6324

ix. Daisy 2B Registration number GA 6325,

x. Daisy 2C Registration number GA 6326,

xi. Galo Registration number 50475 be and is hereby confirmed null and void.

2. 2nd respondent be and is hereby ordered to cancel all eleven certificates of registration after transfer, being transfer numbers 37387, 37388, 37389, 37390, 37391, 37392, 37393, 37394, 37396 and 37397.

3. Eviction of 1st respondent and al] that claim occupation through it from 1st

applicant's mining claims being;

i. Daisy North 3 Registration number GA 3971,

ii. Daisy North 4 Registration number GA 3972,

iii. Daisy 1A Registration number GA 6318,

iv. Daisy 18 Registration number GA 6319,

v. Daisy 1C Registration number GA 6320,

vi. Daisy 1D Registration number GA 6321,

vii. Daisy 1E Registration number GA 6322,

viii. Daisy 2A Registration number GA 6324

ix. Daisy 213 Registration number GA 6325,

x. Daisy 2C Registration number GA 6326,

xi. Galo Registration number 50475

4. That the deposit 1st respondent had paid be withheld by 1st applicant as reimbursement for the mineral value extracted by 1st respondent whilst exploiting the applicant's mining claims.

5. Costs of suit on an attorney-client scale, only if the 1st respondent opposes the relief sought."

APPLICANTS' CASE

The Applicant avers that the agreement of sale entered into between 1st applicant and 1st respondent is illegal and against public policy for violation of *Section 214(1) (b)* and *(2)* of the Companies and Other Business Entities Act, *[Chapter 24; 31],* ***[the Act].*** This is so because, no general meeting of the first Applicant was called or held to initiate, approve or ratify the sale nor was the transaction subsequently ratified or approved. At the time of the agreement of sale and subsequent transfer of the mining titles, the first Applicant owned only those mining claims. It had not owned any other assets before them and had not owned any after them. The eleven mining claims represent 100%

of the value of the first applicant's asset base. The first applicant is also not trading in any other business. After the sale, the applicant was rendered a mere empty shelf.

Angela Dicks and Sharon Davidson are the shareholders of the first applicant.

When the second applicant purportedly sold the property to the first respondent, the first applicant was going through potential restructuring and the second applicant was of the view that it would be best to dispose of the asset and help in the restructuring exercise.

The decision to sell and divest a company's core business is not a workers' decision but that of the owners. Directors being mere workers of a company are estopped from making such decisions. The members of the company are the ones to make such decisions and in specific terms. The transaction was carried in contravention of the Act for the want of authority of the shareholders. The shareholders are not pleased with the transaction, as not only did it violate the statute but it also diminished their share value as the mines were sold prematurely and even then the purchaser has failed to pay. The mining claims were so1d without a full enquiry of their selling price and specific terms.

FIRST RESPONDENT'S CASE.

In its opposition, the respondent retorted that the first applicant is approaching this court without exhausting all locally available remedies for dispute resolution in terms of the contract between the parties. The applicants, according to the first respondent, are supposed to go the Arbitration route before coming to this Court with a dispute concerning their Agreement of Sale.

The first respondent cannot be made to pay for the business blunders of the applicants. In terms of the law, there are exceptional circumstances when the second respondent can be called upon to cancel certificates of registration. Business blunders are not and cannot be one of those exceptional circumstances. The second applicant was armed with a Board resolution in the transaction. The first respondent acted based on the papers presented to it by the applicants. An agreement of sale was signed by the parties and a price was paid in full. There was a meeting of the minds and the sale is a regular sale. The applicants cannot try to cancel an agreement lawfully entered into, at their behest. There is nothing peculiar about the transaction to warrant its cancellation. Whether shareholders are pleased or not is not grounds for cancellation of a legally binding agreement.

In alleging that they were not paid, without stating how much is outstanding, the second Applicant is trying to be cunning in his dealings. They should know what to do if the shareholders are owed, per the contract. Nothing has been put before the court to show that these claims were the only assets the first applicant had.

The application is made in bad faith, and no good and sufficient cause has been shown for the relief the applicants are claiming. The application must be dismissed with costs on a higher scale.

ISSUES FOR DETERMINATION

1. ***Whether or not the Applicants have proven that the eleven mining claims constitute the whole assets or a greater part of the first Applicant's assets.***
2. ***Whether there is any doctrine of unanimous consent which constitutes a defence for failure to comply with s 214 of the Act.***

THE LAW

Section 214 1(b) and 2 of the Act states that:

> ***(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting-….***
>
> ***(b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.***
>
> ***(2) No resolution of the company shall be effective as approving of the differential issue or allotment of shares to a director or of disposal in terms of subsection 1 (b) unless it authorises, in terms, the specific transaction proposed by the directors."***

In *Ngatibataneyi (Private) Limited* v *Tobias Venganayi Moyo & Anor SC 13/07*

the Court, *per* MALABA JA, *[as he then was]*, stated that;

> *"Even if it were accepted by the learned Judge that Florence Hlatshwayo represented in the statement recorded in the agreement of sale that she had been authorized by a board of directors at a meeting of 8 March 2005 to sell the property on behalf of the appellant, that decision would not constitute valid authority for the purposes of s 183. There was no suggestion that Judith Paradzai was present at that meeting. It is clear to me that the agreement entered into by Florence Hlatshwayo on behalf of the appellant with the first respondent was in contravention of s 183 of the Act. It had no legal effect"*

S 183 of the previous Act referred to is the equivalent of *s 214* of the Act.

The Court went on to say;

> *"The intention behind s 183 was to protect the assets of a company from disposal by directors without the knowledge and consent of the shareholders… Section 183 places the disposal of the whole or greater part of the assets of the company outside the ambit of the application of the Turquand rule embodied in s 12 of the Act."*

In *Farren v The Sun Service SA Photo Trip Management (Pty) Ltd [2003] ALL SA 406 (C)* when interpreting *section 228* of the South African Companies Act, the equivalent of our section 214, *Held*;

> *"As far as section 228 is concerned, an agreement concluded on behalf of the company in contravention of the section has no legal effect unless and until it is ratified by the shareholders."*

He who alleges must prove. In the absence of evidence to prove an allegation, the court cannot appropriately resolve a factual dispute.

Circle Tracking v *Mahachi SC 4/07*.

Goliath v *Member of the Executive Council for Health, Eastern Cape 2015 (2) SA 97 (SCA).*

In *Delta Beverages (Pvt) Ltd* v *Murandu SC 38/15***,** it was stated that:

> *"…parties are expected to argue their cases so as to persuade the court to see the merit, if any, in the arguments advanced for them. They are not expected to make bald, unsubstantiated averments and leave it to the court to make of them what it can."*

An application stands or falls on its founding affidavit.

In *Central African Building Society v Finormagg Consultancy (Private) Limited as Anor SC 56/22,* it was stated that;

> *"It is trite that an application stands or falls on its founding affidavit. The founding affidavit sets out the case that a respondent is called upon to answer."*

In *Austerlands (Pvt)* v *Traded and Investment Bank Ltd & Otrs SC 92-05***,** the Court remarked as follows:

> *"The general rule has been laid down in this regard that an application stands or falls on its founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent is called upon to affirm or deny."*

In *Kaskay Properties (Pvt) Ltd* v *Minister of Lands HH 762/ 18* the court had this to say:

> *"A litigant who makes a conscious decision to sue through motion, as opposed to action proceedings is enjoined to anticipate the respondent's defence. He must include in his founding*

affidavit all evidence which supports his case including such evidence as will rebut the respondent's defence."

In *Construction Resources Africa (Private) Limited v Central African Building And Construction Company (Private) Limited t/a Central African Building Construction SC110/22,* the principle of unanimous consent was deemed to be part of our law by BHUNU JA, MATHONSI JA and KUDYA AJA. It was stated as follows;

"The concept of unanimous consent is derived from the English law principle of unanimous agreement. The concept prescribes that the consensual decisions made or approved, whether at the same time or separately by the sole directors or shareholders of a company outside the prescript of a formal resolution are valid and binding, provided that they are intra vires the memorandum, articles of association and constitution of the company. The principle places the transaction on the same pedestal with a transaction that is strictly compliant with the prescribed formalities of a resolution….In determining the validity of a contract of purchase concluded by a conflicted board of directors and for which no general meeting of members had been held to approve the agreement but where the evidence showed that they all knew of its terms and accepted them LORD DAVEY in ***Salomon v Salomon and Co. Ltd 1897 A.C. 22 at 57*** *said: "I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members."*

APPLICATION OF THE LAW TO THE FACTS;

The applicants have made various claims. The onus of proving those claims legally lies with them. The provisions of *s 214* are clear and so is their purpose. The elements of *s 214* briefly are;

[a] There must be assets, that are all the company has or form a greater part of the company's assets,

[b] There must be a complaint by the shareholders,

[c] The assets must have been disposed of without a resolution of shareholders.

[d] Notwithstanding the want of express shareholders' authority, they must not have later ratified the transaction.

Needless to say, these requirements must be proven to a sufficient degree without fail before the sale is nullified, otherwise, the section becomes an avenue of abuse by a dishonest party to a contract. It is not enough to make allegations without proving them. *S 214* of the Act is an exception to the general rules of doing business in the commercial world.

[a] Assets.

It is trite that there be evidence that what was sold constituted the whole or a greater part of the first company's assets, for the provisions of *s 214* to avail to a litigant in the position of the applicants in this case. It is trite that where a factual allegation is made, it follows that it must be proven by he who makes it. In this case, the applicants in an endeavour to discharge that onus on them, attached a letter from an individual purporting to be a Bookkeeper of the first applicant and written on the first applicant's letterhead. The letter was written on 13 March 2025, 10 months after the conclusion of the contract. This can hardly be the quality of evidence required to substantiate the claim that in May 2024 the 11 mining were the only assets owned by the first applicant. Evidence in the form of a Balance Sheet or Financial Statements of the first applicant covering the period of the sale should have been pleaded and attached to the founding affidavit to substantiate the averment on assets. A letter by a Bookkeeper probably in the employ and management of the second applicant is insufficient for the intended purpose.

[b] Shareholders' complaint.

The shareholders must register a complaint. The shareholders must disassociate themselves from the transaction. See *Ngatibataneyi Private Limited* v *Mayo and Anor [supra*]. The court cannot and should not determine that critical issue based on speculation or bold claim without any evidence. Nothing from at least one of the shareholders has been placed before the court to assist it in judiciously resolving the dispute between the parties. A resolution or affidavit by the shareholders initiating this litigation would have made this an open and shut case. There is no such resolution before this court.

[c] Shareholders Authority.

That this transaction happened without the shareholders' express authority is a factual issue that has been alleged and not meaningfully challenged by the first Respondent. All the first respondent has said is that the second applicant was armed with a Director's Resolution and it acted on it. Want of a shareholders resolution authorising the sale has been satisfactorily proven by the applicants.

[d] Ratification by the shareholders.

The contract was in May 2024. Later around August 2024 the mining claims were transferred to the first respondent. Seven months later this application was filed. Can it be said that the first applicant's shareholders were not aware of the sale agreement? It should be noted that in terms of the contract in issue, the parties agreed that the purchase price would be paid by the first respondent in cash or transfer as follows:

(a) *US$100 000.00 [One Hundred Thousand United States Dollars] upon the signing of the agreement.* ***[May 2024].***

(b) US$700 000.00 [Seven Hundred Thousand United States Dollars] upon transfer and registration at the Ministry of Mines. ***[August 2024].***

(c) US$700 000.00 [Seven Hundred Thousand United States Dollars] to be paid six months after the title registration. ***[February 2025].***

Both parties are not clear concerning the payment of the purchase price. The Applicants allege a breach but do not give details. On the other hand, the first respondent argues that the purchase price was paid but is equally conservative with the details of those payments. This application was filed on the 17th of March 2025. The final payment should have been made by February 2025. In as much as the first respondent has been coy about the details of payment it however alleges without contradiction that payment was made and was accepted by the shareholders.

The following averments by the first applicant in its founding affidavit are telling. It states in part as follows;

> *"Indeed the 1st Respondent is itself in material breach of the invalid agreement as it has failed to pay the consideration and is in brazen breach. This has only fuelled the shareholders of the 1st Applicant in their fury … In this case it is even worse as absolutely all was sold. And only breaches realised from it".*

The first applicant does not end there. It continues to state as follows in ***paragraph 14*** of its founding affidavit;

> *"The shareholders are not pleased with the transaction, … it also diminished their share value as the mines were sold pre-maturely and even then the purported purchaser failed to pay, they were sold without a full enquiry of its selling price and specific terms".*

In my view, the above excerpts betray and expose the true nature of the issue behind this court application. It is not that the shareholders were not aware of the transaction or did not ratify it. There might have been no written resolution to dispose of the mining claims, but their disposal was known and approved or at the very least was ratified by the shareholders.

The above conclusion is bolstered by the;

> ***.silence by the shareholders that accompanied the lapse of 10 months between the sale and this application.***
>
> ***.transfer and registration of the mining claims in issue in the name of the first respondent.***
>
> ***.coming and passing of the payment dates before this application was lodged.***

. failure by either party to categorically state what was paid and or what is owed.

.absence of an affidavit/resolution from the shareholders in this application.

If the shareholders were not aware of the sale, or did not approve of it or did not ratify it, surely they would have either complained earlier or at least they would have registered their gripe expressly in this litigation and driven it themselves especially if it is true that the mining claims were the only assets of the first applicant.

In my view, there was unanimous consent to the sale of the 11 mining claims by the shareholders. The first respondent has therefore successfully on the authority of *Construction Resources Africa [Private] Limited* v *Central African Building And Construction Company [Private] Limited T/A Central African Building Construction [supra],* defended the noncompliance with *s 214* of the Act by the applicants. The shareholders were always aware of the sale and accepted and approved it. This application is fuelled by an alleged breach. The agreement of sale between the parties is valid and binding.

DISPOSITION.

The Applicants have failed to establish and prove their claim. They have failed to prove a case warranting that they are granted the relief they are seeking. The shareholders consented to the sale of the eleven mining claims to the first respondent. The noncompliance with s 214 of the Act by the applicants has been successfully defended by the first respondent. This application is accordingly dismissed with costs.

ORDER

The application be and is hereby dismissed with costs.

NDLOVU J.

Butshe And Associates, Applicants' Legal Practitioners.

Chivandire Mavhaire And Zinto Law Chambers, 1st Respondent's Legal Practitioners.

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