JULIAN F BOWL
and
OLIVER J BOWL
versus
KANGAUSARU INVESTMENT (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 November, 2022 and 1 March 2023

Opposed Matter

E Mubaiwa, for the applicant
R H Goba, for the respondent

MANGOTA J: On 31 July, 2012 a legal entity which is known as Roberts Drive Investments (Private) Limited ("Roberts") sold to Kangausaru Investments (Private) Limited ("Kangausaru"), the first respondent herein, 3000 Class F Shares. The shares relate to Unit No. 8, 75 Roberts Drive, Msasa, Harare ("the property").

Kangausaru's purchase of the abovementioned shares made it the owner of the same and the lawful occupier of the property. It defaulted in its payment to Roberts of levies, rates and other charges for its occupation of the property as a result of which Roberts successfully sued it to recover from it the sum of ZWL$ 200 182.85 which arose from its occupation of the same. Roberts filed the suit under HC 662/21. Roberts and Kangausaru entered into a consent order in respect of HC 662/21. Clause 2 of the consent order reads as follows:

> " 2. The applicant is entitled to sell 3000 Class F Shares held by the first respondent under share certificate number 25 in order to liquidate levies, rates and other charges owed by the first respondent in the amount of ZWL$ 200 182.25 which arose from the first respondent's occupation of Unit 8, Roberts Drive, Msasa, Harare".

It is on the strength of the above-cited consent order which my sister TSANGA J issued on 4 June, 2021 that Roberts sold to one Julian F Bowl and one Oliver J Bowl, the applicants herein, shares which Kangausaru owns or used to own. The sale of the shares took place on 7 June, 2021. Purchase by the applicants of 3000 Class F Shares conferred upon the latter ownership of the same

making them the lawful occupiers of the property. They, in the mentioned regard, filed this application in which they move me to evict from Unit No. 8, Roberts Drive, Msasa, Harare Kangausaru and all those who occupy the same through it.

Kangausaru opposes the application. It claims ownership of the shares. It insists that it is the lawful occupier of the property. It alleges that the shares which are the subject of its dispute with the applicants cannot be owned by different parties simultaneously. It claims that it has never dealt with the applicants. It insists that it did not ever transfer its shares to them. It challenges them to state how they came to own the shares. It observes that the share transfer certificate which is attached to the founding affidavit was/is signed by one Kevin James Shadwell and one Crescence Mazhindu who, it insists, are not directors or officers of Kangausaru which, according to it, did not give them any authority to act on its behalf. It avers that the applicants have never been in occupation of the property and that they do not own any shares in the same. It states that the agreement which it signed with Roberts on 31 July, 2012 has never been cancelled and is, therefore, extant. It moves me to dismiss the application with costs.

The question which begs the answer is who, between the applicants and Kangausaru, owns the shares which are the subject of this application. The party which owns the shares, it stands to logic and reason, has the right to occupy the property. This is how it should be.

Evidence which is filed of record shows that the matter appears to be a double-sale of the shares. Roberts sold them to Kangausaru and later to the applicants. The observation which I make in the mentioned regard finds support from a reading of the share certificate(s) which Roberts issued to each of the parties who are in the dispute which is before me.

At the sale of the shares to Kangausaru, Roberts issued to the latter certificate number 25. This appears as Annexure OA2. The annexure is attached to Kangausaru's notice of opposition. It is at p 57 of the record. The certificate, it is evident, is extant. It has neither been cancelled nor interfered with in any way.

The applicants hold a similar certificate of shares. Reference is made in the mentioned regard to share certificate number 27. They attached the same to their application. They marked it Annexure D. The annexure appears at p 43 of the record.

The existence of two share certificates –Annexures 0A2 and D- does, in a large measure, create a material dispute of fact which, from a *prima facie* perspective, I cannot resolve on the

papers which the parties placed before me. This is a *fortiori* the case given that Annexure OA2 is extant and has not been cancelled. It follows, from the observed set of circumstances, that *dicta* which the applicants cited in support of their application would apply in an equal measure to the defence of Kangausaru. Among the *dicta* which the applicants placed reliance upon are such case authorities as that of *Sibanda* v *Pentaville Investments (Private) Limited*, HH 14/03; *Graham* v *Riddley*, 1931 TPD 476; *Goudini Chrome (Pty) Ltd* v *MCC Contracts (Pty) Ltd*, 1993 (1) SA 77 at 82 *and Chetty* v *Naidoo*, 1971 (3) SA 3 (A). It cannot, on the strength of the foregoing, be suggested that Kangausaru's defence to the claim of the applicants is without merit. It is, in fact, with merit.

I observe, at this stage, that Kangausaru's share certificate, number 25, Annexure OA2, was issued on 17 December, 2020. I also observe that the applicants' share certificate, number 27, Annexure D, was issued on 22 June, 2021. It follows, from the observed matter, that, if the set of matters which the parties presented to me portray a double-sale, Kangausaru's share certificate would take precedence over that of the applicants. My view in the mentioned regard finds fortification from the principle which the court enunciated in *Charuma Blasting & Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors*, 2000 (1) ZLR 85 (S) at 92 A-D. The principle, in short, is to the effect that, in a double-sale, the earlier in time is the stronger at law. This is a *fortiori* the case where, as *in casu*, the second purchaser, the applicants, knew of the earlier sale of the shares to Kangausaru.

MCNALLY JA aptly discussed the double-sale principle in *Guga* v *Moyo & Ors*, 2000 (2) ZLR 458 wherein he, citing the learned words of MACDONALD J in *BP Southern Africa (Pty) Ltd* v *Desden Properties (Pty) Ltd* 1964 RLR 7G, remarked as follows:

> "In my view, the policy of the law will be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract….I agree with the view expressed by Professor McKerron that save in 'special circumstances' the first purchase is to be preferred".

It is a special circumstance in a double-sale that the property has already been transferred to the second purchaser: *Charuma Blasting & Earthmoving Services* v *Njainjai (supra).* In such a case, preference is more often than not accorded to the second purchase.

The question which begs the answer is whether or not the share certificate, Annexure D, which Roberts issued to the applicants passed ownership of 3000 Class F shares to them. The answer to the question is, in my view, in the negative. It is in the negative for a variety of reasons amongst which are the following:

i) It is a fact that, before Roberts sold the shares to Kangausaru, Roberts possessed as well as owned the same. It passed possession and ownership of the shares to Kangausaru when it sold them and issued share certificate number 25 to Kangausaru.

ii) The issuance of share certificate number 25 transferred ownership of the shares from Roberts to Kangausaru. It follows, from the stated matter, that Roberts ceased to be the owner of the shares with effect from 17 December, 2020. As at the mentioned date, therefore, Kangausaru became the owner of the shares.

iii) Given the above-observed set of circumstances, therefore, one is left to wonder what magic Roberts employed to regain ownership of the shares which it relinquished to Kangausaru on 17 December, 2020.

iv) The logical thing for Roberts to allege would be that the consent order, HC 662/21, conferred ownership of the shares to it.

v) The consent order, unfortunately for it, appears not to have been thought through. All it does is that it allows Roberts which was the applicant in the case to sell shares which Kangausaru not only held but also owned and not more than that.

vi) The consent order does not tell how Roberts would regain ownership of the shares which it passed on to Kangausaru and be able to sell the same to the applicants or to anyone else for that matter.

vii) Having divested itself of ownership in the shares, Roberts could not give to the applicants what it did not have. It no longer had ownership of the shares. It could not therefore pass ownership of the shares which it did not have to the applicants.

viii) It is a trite principle of law that no one can give what he does not have. R.H. Christie reiterates the meaning and import of the principle in his *Business Law in Zimbabwe, 2nd edition, Juta & Co. Ltd,* pp 249-250 wherein the learned author states that:

> "the general rule that the seller can give no better title than he has operates in favour of the true owner".

ix) It is a fact that no one can give what he does not have and no one can transfer any right which is greater than he himself possesses: *Mushava* v *Standard Bank of South Africa Ltd,* 1998 (1) ZLR 436 (C).

x) Silberberg & Schoeman bring out the abovementioned principle in their *Law of Property, 2nd edition, p* 72 wherein they state that:

xi) "where a person is not the owner and possesses no mandate to do so purports to transfer property, such transfer is a nullity".

xii) The Memorandum of Agreement of Sale of Shares in terms of which Roberts purports to have sold Kangausaru's shares to the applicants says it all. It appears at p 120 of the record.

xiii) A reading of the same shows that the chairman of Roberts one Kevin James Shadwell who is not in any way connected or related to Kangausaru posed as the latter's representative and purported to have sold its shares to the applicants.

xiv) In purporting to sell Kangausaru's shares as he did, Mr Shadwell portrayed nothing but clear fraud. He did not state that he was/is authorised by Kangausaru to sell its shares. He is not an officer let alone a director of Kangausaru.

xv) Roberts placed itself in a very invidious position when it purported to have sold as well as transferred ownership in the shares of Kangausaru to the applicants. The sale of the shares to the applicants is, therefore, a complete sham and so is the purported transfer of ownership in the shares to the applicants.

xvi) It is a clear fact that nothing legal can flow from a fraud. The purported sale and transfer of shares to the applicants is null and void on account of fraud: *Katirawu* v *Katirawu*, HH 581/07.

xvii) Roberts cannot be allowed to hide behind the consent order the terms of which it violated left, right and center.

xviii) The consent order would have assisted it in a great measure if Roberts had involved the second respondent who is the sheriff for Zimbabwe in the sale of Kangausaru's shares. It is, in point of fact, only the court which has the capacity to divest a person of his ownership in a thing and transfer it to another. The court, acting through the sheriff, would have divested Kangausaru of its ownership in the shares and had the same properly as well as legally transferred to the applicants. It is the function of the sheriff to execute court orders and, in doing so, he is clothed with the authority to act in the interests of those in whose favour a judgment has been entered.

xix) The fact that Roberts purports to have conferred ownership in the shares to the applicants without cancelling Kangausaru's share certificate compounds the applicants' defective title in the shares. All the above goes to show the self-help which Roberts and the applicants stand guilty of.

xx) Forfeiture of shares clause 11, p 61 of the record, which Roberts and Kangausaru incorporated in the Memorandum of Agreement of Sale of Shares, Annexure OA4, which the two parties signed between them on 31 July, 2012 will not assist the applicants either. It will not assist them notwithstanding that Kangausaru defaulted in the payment of its rates, levies and other charges to Roberts for its occupation of the property. It will not do so because Roberts did not ever forfeit Kangausaru's shares to itself. The agreement of sale of shares which it concluded with the applicants through its chairman, Mr Shadwell, fortifies the view which I hold of the matter.

When all has been said and done, therefore, it stands to reason and logic that Kangausaru's defence to the claim of the applicants cannot be assailed. The defence is not without merit.

Kangausaru owns the shares which are the subject of this application. The applicants' case falls to pieces in the circumstances of the present application

The applicants failed to prove their case on a preponderance of probabilities. The application is, accordingly, dismissed with costs.

Nyahuma Law Chambers, applicant's legal practitioners
Ziumbe & Partners, first respondent's legal practitioners