

BROXFIELD ENTERPRISES & ANOTHER
versus
MINISTER OF LANDS AND RURAL RESETTLEMENT & ANOTHER

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 July & 29 August, 2017

Opposed Matter

Mr A *Mambosasa*, for the applicants
Mr K T *Mkwanganwi*, for the respondents

MANGOTA J: This application has more questions than it has answers to them. At its centre are two farms [“the farms”]. These are Doondo and Sholliver. Doondo is registered under deed of transfer number 1176/95. It is 1301, 9074 hectares in extent. Sholliver is registered under deed of transfer number 3802/93. It is 1294, 8868 hectares in extent. Both farms are situated in the District of Lomagundi which is in Mashonaland West Province.

The record shows that Sholliver is registered in the name of the first applicant and Doondo is registered in the name of the second applicant. The applicants are legal entities. They each passed a resolution and conferred authority on one Nicholas Vingirai (“Vingirai”) to file the present application. Their aim and objective are to have the farms which Government compulsorily acquired under its Land Reform Programme delisted.

Government acquired the farms in 2005. It settled its land hungry persons on the same. Its view, at the time of acquisition, was that the farms belonged to a white owner. It was, therefore, its intention to address the colonial imbalances on land ownership patterns of previous governments which, according to it, compelled it to compulsorily acquire the farms.

The applicants’ position is as clear as night follows day. They want to have the farms returned to them. They anchored their application on the policy of Government. The policy discourages Government from compulsorily acquiring land which is owned by indigenous black Zimbabweans.

Whilst the applicants' position is clear, Vingirai's position is not. He departed from the authority which the applicants conferred upon him. He spoke for himself and not for the applicants.

A reading of the founding affidavit which Vingirai deposed to confirms the observations which I make of the matter. He did not mince his words. He said he is the owner of the farms. He said he purchased Sholliver in 1993 through a Sheriff's sale. He said he purchased Doondo in 1995. The whole of his founding affidavit showed that he was speaking for no one else but himself.

I was, under the above described set of circumstances, left wondering if the application was filed by the applicants or by Vingirai who deposed to the founding affidavit. The legal practitioner who appeared for the applicants did not seem to have picked on the observed anomaly. He did not even allude to the stated matter at all in his submissions. The observed matter was, therefore, left to conjecture.

The first paragraph of the founding affidavit reads, in part, as follows:

"I Nicholas Vingirai, do hereby make oath and state as follows:

1. I am the proprietor of the First and Second Applicants..." (emphasis added)

Whatever Vingirai meant to convey by the word proprietor remains anyone's guess.

The applicants, as legal entities, cannot be owned by anyone let alone their member or shareholder. It is trite that, once a company has been legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself. A company which is properly registered in terms of the Companies Act is, in law, a different *persona* altogether from its members [See *Tett and Chadwick: Zimbabwe Company Law*, 2nd ed p 11, *Salomon (Pauper) v Salomon and Co Ltd* [1897] AC 22.]

A company, it is emphasised, has legal existence which is separate from the individuals who are its members or shareholders. Vingirai's assertion which was to the effect that he is the proprietor of the applicants is, therefore, a mis-statement. He may be, as he alleges, the applicants' sole shareholder. He is, however, not the owner or proprietor of the applicants. A *Fortiori* when he stated, as he did in paragraph 8 of the founding affidavit, that the first and second applicants were incorporated in this country in terms of the laws of Zimbabwe.

Vingirai states in paragraph 10 of the founding affidavit as follows:

"10 In 2011 XN Caveats were placed over the property that I hold through the first applicant, and subsequently in 2005 same was endorsed as state land... The same was done in respect of the property that I hold through the second applicant" (emphasis added)

The word property as used in the cited paragraph refers to either Sholliver or Doondo farm. The question which begs the answer centres on whether the farms belong to Vingirai or to the applicants. The farms are registered in the applicants' names. Each applicant, therefore, owns the farm which is registered in its name. Vingirai's assertion which was to the effect that he holds the farms through the applicants is as misplaced as it is confused.

It is pertinent to stress that a company, as a juristic person, is legally an entity which is separate from its members. Its property is not the property of its members. Its debts are not the debts of its members and it has perpetual succession [See *S v Stead* 1991 (2) ZLR, 54 (S)].

The position which Vingirai took, as gleaned from the argument which he advanced, seems to be understandable. He sought to accuse Government of having violated its own policy. He sought to show that, as a black Zimbabwean, Government should not have compulsorily acquired the farms which he said belong to him. His statement in the mentioned regard is evident from a reading of paragraph 8 of the founding affidavit. The paragraph reads, in part, as follows:

"8. I am an indigenous Zimbabwean having been born and raised in this country by indigenous parents. Neither my parents nor myself ever renounced or lost Zimbabwean citizenship at any time."

What he sought to achieve, albeit in a confused manner, becomes clearer if the above cited paragraph is read together with para 11 of the same affidavit which reads, in part, as follows:

"... the acquisitions were done in violation of government's policy on land reform and indigenization because the properties were owned by an indigenous Zimbabwean who meets the definition of such a party as given by the relevant law." (emphasis added).

Vingirai was either being economic with the truth or was completely confused when he stated as he did. I say so because under the heading '*Nature of Application*' he stated in clear and categorical terms that the properties belonged to the applicants. He did not say they belonged to him. He, at any rate, did not produce any evidence which supported his claims as he stated them in the greater portion of the founding affidavit. Annexures C and D which he attached to the application showed that both farms are registered in names of the applicants. They are not registered in his name let alone in the name of any natural person.

The first respondent fell into Vingirai's plan. The response which he gave in his opposing affidavit serves but to confirm my unmistakable observations on the same. He said:

“The applicants’ farms were lawfully acquired by the State in 2005 under the impression that they were owned by a white owner as was reflected on the information obtained from the 3rd Respondent’s offices ... It was only after the applicant made representations that the 1st Respondent was satisfied that the farm was formerly owned by the applicant and thus the acquisition was not desirable given that it was contrary to the spirit and objective of the land reform programme, although legal.”

The spirit and objective of the land reform programme is succinctly spelt out in s 289 of the Constitution of Zimbabwe. The section pronounces principles which are a guiding policy on agricultural land. It reads, in part, as follows:

“In order to redress the unjust and unfair pattern of land ownership that was brought about by colonialism, and to bring about land reform and the equitable access by all Zimbabweans to the country’s natural resources, policies regarding agricultural land must be guided by the following principles -

- a) land is a finite natural resource that forms part of Zimbabweans’ common heritage;
- b) subject to section 72, every Zimbabwean citizen has a right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of agricultural land regardless of his or her race or colour;
- c) the allocation and distribution of agricultural land must be fair and equitable, having regard to gender balance and diverse community interest;
- d)
- e)
- f) no person may be deprived arbitrarily of their right to use and occupy agricultural land “ [emphasis added]

It is clear, from a reading of the above cited section of the constitution, that Government’s policy on land reform aims at economically empowering natural persons. It has nothing to do with such juristic persons as the applicants. My observations in the mentioned regard find support from the use of the following words which appear in the body of the section: *Zimbabwean, Zimbabwean citizen, his or her race or colour and / or gender balance*.

Research which I was pleased to make showed that the policy is in consonant with the work of such learned authors as Hahlo who, in his *South African Company Law*, 6th Edition, page 11 stated that:

“*A company has neither a body to be kicked nor a soul to be damned.*”

The policy also resonates well with case authorities which are outside our jurisdiction. Among those cases is that of *Gumede v Bandhla Vukani Bhakiti Ltd*, 1950 (4) Sot 560 (NPD), wherein, the court held that a company whose shareholders and directors were Africans was not itself a “*native*”. Carslisle A.J.P said at page 561G:

“In *Dadoo Ltd and others v Krugersdorp Municipal Council*, 1920 AD 530, 552 INNES CJ pointed out that a company could not have an enemy character. It has neither body, parts or

passions. It cannot be loyal or disloyal; neither of course does it possess any characteristics which belong to a race of people.”

I must confess that I was not able to find, in this jurisdiction, any case authority which is on the same wave length with the above cited case. I, however, venture to state that, given the corporate personality which a company enjoys as was enunciated in *Salomon v Salomon (supra)*, our courts will not materially depart from the position which courts in other jurisdictions have taken and continue to take of the matter. My view finds fortification from the following obvious matters: A company is what the law says it is. It is a fictitious person. It is distinct from a natural person in that it is not endowed with the five senses which a natural person has. It is not a citizen of any country and it has no gender. It is just what it is and it is recognised as such.

I looked at the application which was placed before me with a considerable sense of disquiet. Disquiet because none of the legal practitioners who represented either side of the legal divide was able to pick on this important point which lies at the very foundation of company law. None of them, as legal practitioners, was able to demonstrate to me that the application which was based on the policy of Government was a none-starter. The policy is supportive of natural, and not juristic, persons.

No one doubts that Vingirai, as an individual, is a Zimbabwean. He is a citizen of this country and so are his parents as well as his grant parents.

The fact that Vingirai has shares, or is the sole shareholder, in the applicants does not confer upon the applicants citizenship status. They cannot be said to be Zimbabweans on the basis that their sole shareholder is a Zimbabwean. They have no colour, race, tribe or gender. They are legal entities which cannot benefit from the policy which Government enunciated with a view to economically empowering its citizens who suffered a lot of disadvantages during the colonial period.

An application which is based on the allegation that the applicants are indigenous Zimbabweans is false. They are not Zimbabwean citizens. They are legal entities. They are what the law says they are – juristic persons. They cannot, therefore, benefit under the policy of Government on land reform as the deponent to their founding affidavit purported to suggest.

The court has considered all the circumstances of this case. It is satisfied that the application was misplaced. It cannot, therefore, stand. It is, accordingly, dismissed with costs.

Mambosasa, applicant's legal practitioners

The Attorney General's Office, respondent's legal practitioners