FINWOOD INVESTMENTS (PRIVATE) LIMITED
versus
TETRAD HOLDINGS LIMITED
and
TETRAD INVESTMENT BANK LIMITED

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 27 July & 24 November 2022

Opposed Application- Declaratur

Advocate *Uriri*, for applicant
Ms *F Chinyame*, for 1st respondent
Advocate *T Zhuwarara* with *Advocate R Zhuwarara, for 2nd* respondent

MHURI J: This is an application for a declaratory order confirming Applicant's sole beneficial ownership of Holfren Investments (Pvt) Ltd and Ontarium Investments (Pvt) Ltd. Further it is sought that this honourable court direct the Respondent to surrender all title deeds of immovable property registered in the name of Holfren Investments (Pvt) Ltd and Ontarium Investments (Pvt) Ltd to the Applicant as per para 5 of appliant's founding affidavit.

The relief being sought as per the draft order is as follows:-

1. "That cancellation of the Agreement between the Applicant and Respondent dated 4 February 2014 by the Respondent be and is hereby declared null and void.
2. The Applicant be and is hereby declared the sole beneficial owner of Holfren Investments (Pvt) Ltd and Ontarium Investments (Pvt) Ltd respectively;
3. The Respondent be and is hereby directed to surrender into the custody of the Applicant all company documents, files and assets register of Holfren Investments (Pvt) Ltd and Ontarium Investments (Pvt) within five (5) days of granting of this Order.
4. The Respondent to bear the cost of suit on an attorney-client scale".

Both Respondents are opposed to the granting of the application.

The background of this matter as stated in the Applicant's founding affidavit is briefly that, in February 2014 Applicant and first Respondent entered into a purchase of shares agreement, which shares were owned by two companies Holfren Investments (Pvt) Ltd (Holfren) and

Ontarium Investments (Pvt) Ltd (Ontariun). The consideration for the shares was US$500 000-00 payable in instalments as follows;

1. US$150 000-00 deposited in Tetrad Investment Bank Ltd
2. US$100 000-00 to be paid by 28 February 2014
3. US$250 000-00 to be paid within 120 days from date of last signature.

These two companies Holfren and Ontarium own assets in the form of immovable properties.

Applicant's case as averred in the founding affidavit is that as at 8 September 2020 Applicant had paid in full the purchase price in terms of the agreement and had then become the beneficial owner of Holfren and Ontarium and had the right to control their assets including the immovable properties. By a letter dated 11 September 2020 first Respondent wrote to it alleging that the agreement of sale of shares had been cancelled an account of Applicant's repudiation of the agreement. This notwithstanding, first Respondent handed over three immovable properties in what it called a compromise despite having paid US$150 00-00.

It was its averment further that it never repudiated the agreement and neither did Respondents give it notice in terms clause 11 of the agreement. In its oral submissions Applicant submitted that this was an instalment sale of land which is governed by the Contractual Penalties Act [*Chapter 8:04]* in particular s 7 & 8. Section 8 requires that 30 days notice before cancellation be given and since the agreement gives 7 days, the purported cancellation of the agreement is in breach of the Act. The agreement is therefore extant. Having performed in terms of the contract it is entitled to the Order it seeks moreso clause as 13.5 of the agreement was also not complied with, and also in that first Respondent was blowing both hot and cold by stating that it did not sell the shares and if it did, it did not have the authority to sell.

The first Respondent's position is that the sale was a sale of shares and not that of land, hence the Contractual Penalties Act does not apply. Further, that, the contract itself is void for initial impossibility in that at the time of the sale of shares, first Respondent did not own any shares in the companies. The shares were owned by an entity called Tetrad Securities Limited which later changed the name to Tetrad Investment Bank Limited in 2009. The two Respondents, though they share the name Tetrad are distinct entities with different shareholders. It was also first Respondent's position that the contract was discharged by novation hence the

agreement is no longer extant as it was discharged by performance and that being the case, Applicant has no rights in terms of the original contract.

The second Respondent's position is more or less the same as the first Respondent's. In particular it was averred that the agreement of sale of the shares is null and void as first Respondent purported to sell shares that did not belong to it. The shares belong to it and it has been the legal owner as far back as 2006 and has never transferred them to first Respondent. It reiterated first Respondent's averment that it and first Respondent are two separate legal entities and first Respondent did not have either express or implied authority to sell the shares as such there is no valid agreement of sale of the shares.

It was also second Respondent's position that after Applicant had realized that it had entered into an agreement of sale of shares with the wrong entity, Applicant approached the second Respondent and negotiated the release of title deeds for 3 three properties (64, 65& 66) which it had since paid for. After some meetings and negotiations, a compromise was reached that Applicant be handed over the title deeds for the 3 (three) properties and if it was still interested in the other 7 (seven) properties, it would make an offer. This was despite the fact that in 2014 Applicant had indicated it no longer wished to be bound by the agreement and requested a refund of the purchase price it had then paid.

Second Respondent prayed that the application be dismissed with costs on the punitive scale.

Was the agreement between Applicant and first Respondent an instalment sale of land and therefore falling under the Contractual Penalties Act [*Chapter 8:04]?*

In his founding affidavit, Applicant deposed under paragraphs

> 6: that on 4 February 2014 he entered into an agreement with Respondent for the purchase of shares of two companies, Holfren Investments (Pvt) Ltd and Ontarium Investments (Pvt) Ltd. He stated, I hereto attach a copy of the agreement of sale of shares.
>
> 8: that the two respective companies whose shares were the subject of the agreement own assets in the form of immovable properties
>
> 9: that it was an understanding between the parties to the Agreement that mmovable properties held in respective names of Holfren and Ontarium would become property of the Applicant by virtue of transfer of the issued shares in the respective companies.

> 13: that as of 8 September 2020 it became the sole beneficial owner of Holfren and Ontarium vested with the right to control its assets, which include the immovable assets.
>
> 18: that Parties freely and voluntarily entered into an agreement for the sale of shares, and it paid the purchase price of the shares and that it therefore acquired shares in Holfren and Ontariun.

The agreement itself is headed “AGREEMENT OF SALE OF SHARES”
And states under paragraphs

(e) that the seller is the sole beneficial owner of Holfren Shares in the capital of Holfren and the Ontarium Shares in the capital of Ontarium which have as their respective sole assets the properties described in the Schedule hereto

(f) that the seller is desirous of selling the Holfren Shares and the Ontarium Shares (together known as “the shares”) to the purchaser who is desirous of purchasing the said shares.

1. That the seller sells to the Purchaser who purchases the Shares subject to terms and conditions

   3.1 that the purchase price of the shares in US$500 000-00.

   4. That occupation of properties shall pass to Purchaser on transfer of the shares
   5. That registration of transfer of shares into purchaser’s name shall be upon payment of purchase price in full.
   6. Upon payment in full, the seller to deliver to the Purchaser, the certificates of the shares, signed resignation of directors of Holfren and Ontarium, resolutions of directors or shareholders of Holfren and Ontarium necessary to approve and give effect to the transfer of the shares
   7. The risk and profit in the shares shall vest solely with the Purchaser with effect from the effective date.

The above narration clearly shows that the subject of the sale were the shares and not land. There is nowhere either in the founding affidavit or in the agreement of sale is it

mentioned that the parties entered into sale of land agreement. I am therefore not persuaded that this was an instalment sale of land. The Contractual Penalties Act [*Chapter 8:04]* in particular s 8 thereof does not apply in this case.

It is clearly shown on the Share Certificates of both Holfren and Ontarium and this is not in dispute that as at the 1st October 2006 the registered proprietor of the shares was Tetrad Securities Limited. On 20 May 2009, Tetrad Securities Limited changed its name to Tetrad Investment Bank Limited (second Respondent). It is also not in dispute that the agreement of sale of the shares entered into on 4 February 2014 was entered into by Tetrad Holdings Limited and not by the second Respondent. It therefore goes without saying that the shares were "sold" by a company which did not own the shares. As submitted by both Respondents' counsel, correctly so, in my view, the agreement would not be capable of performance. The first Respondent could not pass or give transfer of rights which rights it did not possess itself. Support is found in the cases of *Zavazava & Another* v *Tendere & Others* HH 740/15 and *Lungisani Moyo* v *(1) Musiyiwa Nyamukondiwa (2) Sibangani Mzizi* HB 41/18 in which MATHONSI J (as he then was) had this to say quoting from *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20 A-C

> "…. No one can give what he or she does not have and no one can transfer any right greater than he himself possesses. It means that where a person who is not the owner and possesses no mandate to do so purports to sell or transfer property, such sale or transfer is a nullity."

That being the case therefore Applicant cannot enforce an agreement which the owner of the shares was not party to. The agreement, as a result is a nullity and performance is an impossibility.

Further, the submission that the shareholders of the two Respondents are different despite the use of the name "Tetrad" went unchallenged. With no evidence to show that the two Respondents' are one legal unit, the Respondents' submission that the two are separate legal entities carries the day. As submitted by first Respondent, courts do not treat the principle of separate legal personality lightly. In the case of *Anderson Manja and 98 Others*

v

Sheriff of Zimbabwe
Gurta Mining AG SC 9/21.

MATHONSI JA with MAVANGIRA JA and UCHENA JA concurring reiterated the legal position regarding separate legal persona principle. Quoting PATEL J (as he then was) in the case of *Deputy Sheriff Harare* v *Trinpac Investments (Private) Limited and Another* 2011 (1) ZLR 548(H) at 552 A-C.

> " it is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it.
> But where fraud dishonesty or other improper conduct (…) is found to be present, other considerations will come into play.
> The need to preserve the separate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil."
>
> The judge went further
> "…..what comes out from the authorities is that the court will disregard a company's separate personality where an element of fraud or other improper conduct in either the establishment or use of a company or in the conduct of the company's affairs exists."

I am not persuaded by Applicant's submission that because in its letter of the 11 September 2020 first Respondent referred to both Respondents, this means the Respondents' are one single unit. Paragraph 3 relied upon by Applicant reads as follows;

> "Accordingly, neither Tetrad Holdings nor Tetrad Investment Bank is entitled to sell or hand over to you any additional properties over and above the three listed above.
> You are however free to make an offer for the remaining seven (7) properties to Tetrad Investment Bank, which will consider your offer and decide whether or not to sell to you in its sole discretion."

This in my view is not evidence enough upon which one can conclusively say that the two Respondents were one single unit, neither is it reason to piece the corporate veil.

All having been considered, it is my conclusion that Applicant's application cannot be granted. To that end therefore it is ordered that the application be and is hereby dismissed with costs on the ordinary scale.

Mutamangira & Associates, applicant's legal practitioners

Mushoriwa, Pasi Corporate Attorneys, first respondent's legal practitioners
Mawere, Sibanda Commercial Lawyers, second respondent's legal practitioners