IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

LILONGWE REGISTRY

Commercial Cause No. 387 of 2020

BETWEEN

CLAYNAT INVESTMENT LIMITED.....1ST CLAIMANT

LEON SWART.....2ND CLAIMANT

AND

VOEDSEL TOBACCO (A FIRM).....1ST DEFENDANT

INNOCENT MAHUFE.....2ND DEFENDANT

Coram: **HON JUSTICE K. T MANDA**

Nankhuni for the Claimants

Chiwaya for the Defendants

M. Nanga Court Clerk/Interpreter

RULING

This is the claimant's application for summary judgment on a claim of the Malawi Kwacha equivalent of USD700, 000, interest of 5% above the bank lending rate on the claimed sum plus costs of the action. The defendant opposed the application.

Background

The facts in this matter are not contested for the most part. On or about the 7th of September, the claimants and the defendants executed a sale agreement whereby the

defendant bought and was to acquire 100% shareholding in a company by the name of Central African Cattle Limited from the claimants. According to the claimant, at the time of the parties executing the sale agreement, they disclosed to the defendants that Central African Cattle Limited was a dormant company which had two farms in Kasungu registered under Deed Numbers 85406 and 37805, as part of its assets.

The claimant further informed the court that it was a term of the contract that upon executing the agreement, the defendants would remit the agreed purchase price directly into the claimants' bank account of choice. It is now not in dispute that the defendants did not remit the purchase price as agreed by the parties. It was in this regard that the claimants filed this law suit.

In their defence the defendants basically raised two issues. The first one being that after the contract was executed they discovered that there was encroachment on the farms and that the trees which they had intended to use in their tobacco growing had been cut. On this note it must be stated that the defendants did state that when they were conducting their due diligence of the farms they did not fully appreciate the boundaries of the farms so as to note that the same had been encroached. It is however not clear from the defendants' assertions whether their lack of appreciation of the farm boundaries was on account of the claimants' misrepresentations or that the claimants had committed some misfeasance leading them not to appreciate the said boundaries.

It was the defendants' contention that the payment of the consideration was also dependent on the claimants fulfilling of all terms and conditions of the contract and one such condition according to the defendant was the production by the claimants of the certificate of official search from the Ministry of Lands. According to the defendant, the claimants never obtained the said certificate of search but rather they did after the transfer of shares had been done. In this regard the defendants sought to argue that the claimants had breached a term of the contact.

The second issue which the defendants raised in this instance was that the contract between the parties was void ab initio on the ground that the same was illegal in that there was non-compliance with section 35 of the Competition and Fair Trading Act. In the alternative, the defendants asserted that the sale agreement had been materially varied by the claimants by allowing the defendants to conduct the due diligence

exercise on Central African Cattle and its properties. In view of this, it was the defendants, argument that the claimant thus waived their right to insist on immediate payment. Further, the defendant was of the view that because the claimants did not disclose that there was encroachment onto 100 hectares of the land, then the contract was voidable.

Issues

This case does raise a number of issues. The first is of course the question whether it can be stated from the facts that the defendants have a good and arguable defence. This is of course in view of the fact that there was no dispute on the fact that the parties did execute a sale agreement and that the defendants have not made the agreed payment under that sale agreement.

In examining the defence, the first thing that the defendants raised was that the transaction between the parties was an acquisition of a company and was thus supposed to comply with section 35 of the Competition and Fair Trading Act. In this regard, the defendant stated that there was failure to obtain authority from the Competition and Fair Trading Commission before the sale agreement was executed. This failure according to the defendants rendered the sale void ab initio.

Further, the defendant also argued that the contract/sale agreement was wholly void for mistake, fraud and/or the doctrine of "*ex turpi causa non oritur action*" (from a dishonorable cause an action does not arise).

Law and Analysis

The law on summary judgment is well settled and I need not restate it here. Further me also observe that when it comes to contracts, a party to a contract is entitled to terminate the same where there has been a fundamental breach of the contract. In terms of mistake, fraud or misrepresentation, the contract can be deemed, on proof, void *ab initio* or voidable. As for illegality, the contract is void *ab initio* if the same goes against a law or public policy.

In the context of this matter before me, I must state that the defendants in this instance have raised a number of defences which are somewhat convoluted. Going through the defences, I was left with the feeling that the defendants just decided to throw everything out there and hope and pray that one or two of them would work.

That I believe is not good advocacy. Equally dismaying are arguments which are made in the "alternative", which to me clearly suggests a lack of appreciation of the facts of the case, the evidence and the law. In short, this demonstrates a lack of a cohesive argument.

The first argument the defendant raises in this instance is that the sale between the parties was void ab initio in that it offended the provisions of section 35 of the Competition and Fair Trading Act. Now the stated section is about the control of mergers and takeovers and is applicable in situations where such a merger or takeover is likely to result in substantial lessening of competition in any market. For starters, it is my considered opinion that this matter is not about a merger or an acquisition, this more so considering the fact that Central African Cattle was a dormant company.

Broadly speaking, mergers and acquisitions refer to the process of one company combining with one another to form a new legal entity under the banner of one corporate name. Being a dormant company, Central African Cattle, was clearly not a participant in the market and thus not a competitor. Further still, the mischief that section 35 intends to address is the result of lessening competition in the market, the defendants have not demonstrated that their acquisition of such a dormant company will lessen competition in the Malawi market. In this regard, let me state that I did find the defendant argument to be vexatious and misconceived. Ignorance of the law has never been a defence and it is to be assumed that when the defendant was entering into the sale agreement they must have been fully aware of the provisions of section 35, such that if the defendants were aware that that they would be committing an offence, then they should not have gone ahead and committed the same. However, let me state that in looking at the facts of this case, I am inclined to conclude that the defendants' argument on this note is a lame one and as already stated, vexatious.

Secondly, the defendants did state that there was a mistake, fraud or that the claimants acted dishonorably and tortuously (according to the maxim *"ex turpi causa non oritur action"*). Again I must state that I did find this argument to be convoluted. In the first place a mistake is an erroneous belief held by one or both parties to a contract at the time of its formation. A mistake may arise as to the: a) subject matter or terms of the contract; b) identity of the other party; c) nature of the

transaction. Mistake should not be confused with a misrepresentation where a party is induced to enter into a contract on the basis of a misrepresentation, whether innocent, negligent or fraudulent. From the defendants' defence, they have not asserted or pleaded what the mistake under the contract was. Suffice to say the subject matter of the contract and the terms were clear so was the identity of the parties and the nature of the transaction. The fact that the defendants say that the claimants breached the terms of the contract by not obtaining the certificate of official search from Ministry of Lands, does not mean that the supposed "breach" was a mistake.

Further, when it comes to fraud, rules which govern both pleading and proving a case of fraud are very strict. In ***Jonesco v Beard*** [1930] AC 298 Lord Buckmaster, said, at p 300:

> "It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires"

It is well established that fraud or dishonesty must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake* 7th ed (1952), p 644; ***Davy v Garrett*** (1878) 7 Ch D 473, 489; ***Bullivant v Attorney Genera; for Victoria*** [1901] AC 196; ***Armitage v Nurse*** [1998] Ch 241, 256. This means that a party who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

Here it must be stated that it is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to just simply say "wilfully" or "recklessly". Such language is equivocal.

The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading; it is also a matter of substance. As I have said, a party is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

What we see from the defendant in this instance is just a mere assertion that there was fraud and dishonesty without any particulars of such fraud or dishonesty. These assertions of course seem to be centered around the allegation that there was encroachment on the farms belonging to Central African Cattle. Much as encroachment can be considered as an encumbrance in that it reduces the size and value of the encroached property, such an encroachment does not amount to fraud. Further, while an undisclosed encroachment could render a title unmarketable, its existence can be noted and the contract of sale can be rendered subject to the existence of such encroachment. Here the consideration being that an encroachment is unlawful, a nuisance and a trespass which entitles the inured party to seek a judicial remedy in ejectment.

The question in this instance is of course whether the claimants can be deemed to be dishonest in that they failed to disclose the encroachment. In this regard, inference of the existence of dishonesty has to be made from the facts of the case. It should be stated that the defendants did of course not plead dishonesty or misrepresentation on the part of the claimants. All the defendant did was to assert *"ex turpi causa non oritur action"*. While it is true that no action can be founded on an illegal or immoral conduct, it is my considered view that the defendant ought to have particularized the said illegality or immoral conduct committed by the claimants with regards the issue of encroachment. Now even if the claimants were aware of the encroachment and did not disclose it, at best this would have been an issue of misrepresentation or

dishonesty but definitely not one about illegality or immoral conduct. And as things stand, the defendants neither pleaded misrepresentation or dishonesty. Let me add that if the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud.

Further, it is also noted from the facts that throughout the negotiations of the sale agreement, the defendants did have the advice of counsel under the style of Kawelo Lawyers. Further still, it was stated in the facts and the same is not in dispute that Kawelo Lawyers did go to visit the farms as part of their due diligence. It is certainly the duty of a smart buyer to conduct an inspection of the property before buying the same as normally property is sold in its condition at the time of the exchange (see ***Wickens v Cheval Property Developments Ltd*** [2010] EWHC 2249 and ***Taylor v Hamer*** [2002] EWCA Civ 1130). In this instance, it was the assertion of Kawelo Lawyers that when they visited the farms, they did not wholly appreciate the boundaries and thus were not able to notice that 100 hectares of the said farms had been encroached (as per paragraph 10 of the sworn statement of Reward Mahufe). However, there was no evidence that the defendants adduced or pleaded that their lawyers' failure to appreciate the boundaries and the encroachment was on account of fraudulent misrepresentation by the claimants. In this regard it must be reiterated that because Central African Cattle was dormant for some time, its farms would have been vulnerable to encroachers. This cannot be construed as misfeasance on the part of the claimants since there is no suggestion that the claimants actually willfully acquiesced or deliberately encouraged the encroachment with the aim of injuring the claimants' interests. Rather, what is clear from the facts in this instance is that the defendants' lawyers did not do a proper job in conducting their due diligence.

Conclusion

From the foregoing, it is my considered view that the defendants in this instance do not have a good and arguable defence. I do not honestly think that the failure by the claimants to obtain a certificate of official search from the Ministry of Lands amounts to a breach of contract. This is more so considering the fact that the defendants did execute the transfer of shares knowing fully well that there was no certificate of official search.

In any case, a certificate of official search only goes to inform if there are any encumbrances on the property like cautions or charges. A certificate of official search will not show if there has been encroachment on the land. In order to ascertain that the land was being sold as it was advertised, there was need for the defendants to conduct a proper and thorough due diligence before the exchange, which the defendants did not do. From the facts and evidence so far before me, the defendants' failure to conduct a due diligence cannot be particularly attributed to any action or conduct of the claimant.

In conclusion, let me state that I do not think that the defendants have raised any issues in this instance which require to be argued at a full trial. It is certainly not open to the defendant so simply make unparticularised assertion of mistake, illegality, fraud, dishonesty, or make unfathomed pleadings in the alternative, with the hope that the court will glean a defence from the same. In view of this I will enter summary judgment for the claimants in the equivalent sum of Malawi Kwacha to the sum of USD700, 000 plus interest thereon. The claimants are also awarded costs of this action. The interest will be assessed if not agreed and the costs will be taxed if equally not agreed.

Made in Chambers this.....day of.....2020

K.T. MANDA

JUDGE