NESTORAS NESTOROS
versus
INNSCOR AFRICA LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 31 January and 29 October 2007

Adv. *Machaya*, for the plaintiff
Mr *Hwacha*, for the defendant

PATEL J: The plaintiff herein is a former director of the defendant which is listed as a public company. The plaintiff's claim, as amended, is for the transfer to him of 3,625,000 ordinary paid up shares in the defendant company (Innscor). In the alternative, he claims payment of the market value of such shares as at the date of judgement.

The principal issue for determination in this matter is whether or not there was a binding and enforceable agreement between the parties for the allotment to the plaintiff of 4,500,000 shares in Innscor. At the close of the plaintiff's case, Innscor applied for absolution from the instance on the grounds that no such agreement had been established on the plaintiff's evidence and that, in any event, the plaintiff's claim was not only void but also prescribed by law.

Absolution from the Instance

The approach to be adopted in an application for absolution from the instance was succinctly expounded by GUBBAY CJ in *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343, as follows:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E."

Moreover, in considering an application for absolution, the court should lean in favour of continuing the case rather than dismissing it. See *Standard*

Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (HC) per SMITH J at 552-553.

Evidence for the Plaintiff

The plaintiff testified that he first joined Mbanje Bird (Pvt) Ltd (Mbanje Bird) in 1997 as a consultant and later became its Projects Director. At that time Mbanje Bird was owned by Microlite Safaris (Pvt) Ltd (Microlite Safaris) which changed its name to Innscor Africa Limited in December 1997. Innscor, which held all the shares in Mbanje Bird, then became a public company and was listed on the stock exchange in January 1998.

Soon thereafter, the directors of Mbanje Bird, like the directors of other subsidiaries of Innscor, were issued ordinary shares in Innscor. These shares were pooled in terms of a Pooling Agreement dated the 5th of July 1998 [Exhibit 1] which restricted the tradability of the shares for a period of five years.

The plaintiff's four co-directors were allotted 4,500,000 shares each, free of charge, while the plaintiff himself was only given 125,000 shares in Innscor. He discussed this with Zenon Koudounaris, the Deputy Chairman of Innscor, at a meeting held in August 1998. The latter explained that the plaintiff had been given fewer shares because he had only been employed by Mbanje Bird for a few months, but that the remaining shares would be allotted to him in the ensuing five year period. Also present at that meeting was Charles Mbanje, representing Mbanje Bird.

In August 1998 the plaintiff was granted a share option [Exhibit 2] to subscribe to 250,000 shares under Innscor's Share Option Scheme [Exhibit 10]. This was intended to be a bonus or incentive option and not part of the pooling arrangement. In November 1998 the plaintiff was allotted a further 500,000 shares in Innscor which were donated free of charge by his four co-directors to enable him to purchase his home [Exhibit 3].

In March 2002, Innscor entered into a joint venture with Exon-Mobil which for several reasons could not accommodate the plaintiff. He then agreed to resign subject to him receiving his remaining shares. He proposed that he be allotted 3,625,000 shares, being 4,500,000 shares less the 875,000 shares that he had already received. Innscor declined to allot any further shares to the plaintiff.

In a letter from Charles Mbanje to the plaintiff dated the 28th of June 2002 [Exhibit 4] it was explained that the allocation of Innscor shares to the four co-directors was effected in accordance with their respective shareholdings in Mbanje Bird. This alleged shareholding was incorrect as appears from the Return of Allotments for Mbanje Bird dated the 10th of December 1997 [Exhibit 5] which shows that all of Mbanje Bird's shares at that time were held by Microlite Safaris.

According to the plaintiff, although his name does not appear in Mbanje Bird's company returns, his position as a director of Mbanje Bird is reflected on the company's letterhead, as evidenced by Exhibit 4 as well as a lease agreement dated the 17th of July 2000 [Exhibit 6]. The company's registration records were haphazard and inaccurate and did not provide a correct listing of its directors at any given time. This is reflected in its Particulars of Directors dated the 10th of December 1997 [Exhibit 7], Annual Return dated the 11th of April 1997 [Exhibit 8] and Annual Return dated the 21st of March 2000 [Exhibit 9].

Under cross-examination the plaintiff accepted that he was never a shareholder in Mbanje Bird or Microlite Safaris. Moreover, he was unable to produce any Companies Registry record or Board resolution appointing him as a director of Mbanje Bird. In January 1998 there was no clear undertaking, either from Mbanje Bird or from Innscor, that he would be allotted 4,500,000 shares. That undertaking was only made verbally by Koudounaris at the meeting in August 1998. However, at that stage, there was no clarity as to the source of the additional shares.

The plaintiff conceded that the above position is not what is reflected in his Further Particulars or in his Summary of Evidence (which was prepared by himself). The Further Particulars state that the verbal agreement was entered into in January 1998, while the Summary of Evidence contains no specific reference to the meeting held in August 1998. The plaintiff also conceded that the verbal undertaking by Koudounaris in August 1998 was never reduced to writing. Nor was he able to produce any mandate from the Board of Innscor authorising Koudzounaris to make that undertaking.

Whether Claim Prescribed

It seems convenient to deal with the question of prescription at the outset as it is an issue that naturally arises *in limine*. For the defendant, *Mr. Hwacha* argues that the plaintiff's claim has prescribed inasmuch as his demand for the additional shares was made in August 1998 and more than three years elapsed before he instituted the present action in April/May 2003. *Adv. Machaya*, for the plaintiff, counters by pointing to the period during which the promised allocation of shares was to be performed, viz. five years from the inception of the Pooling Agreement in July 1998, and submits that prescription would only begin to run from the end of that period.

In terms of section 16(1) of the Prescription Act [*Chapter 8:11*], prescription in respect of a contractual obligation commences to run as soon as a debt is due, viz. from the time when the claimant's cause of action is crystallised. See *Dube v Banana* 1998 (2) ZLR 92 (H) at 95. The crisp question to be answered in this regard is this: when did the plaintiff's cause of action arise? It certainly was not the date when the promise relied upon was made. It might arguably be the last date for the fulfilment of the promise, i.e. the 4th of July 2003. In my view, the earliest possible date when the plaintiff's cause of action arose was when it was made clear to him that the promised allocation of shares would not materialise, viz. between March and June 2002. On either approach, the plaintiff's claim was instituted timeously and the defendant's exception based on prescription must therefore fail and be dismissed.

Binding and Enforceable Agreement

The first question to consider in this case is the date of conclusion of the contract relied upon by the plaintiff. At paragraph 4 of his Further Particulars, in response to the question "*When was the alleged agreement entered into?*", the plaintiff declared unequivocally "*January 1998*". In his evidence in court, however, the plaintiff altered his position and stated that the undertaking in question was made by Koudounaris not in January but in August 1998. In my assessment of the plaintiff's testimony, this inconsistency was not satisfactorily explained by him, either in his evidence-in-chief or under cross-examination.

Turning to the averred agreement itself, it is necessary to consider the specific terms of the undertaking attributed to the defendant through the agency of Koudounaris. According to Christie: *The Law of Contract in South Africa* (3rd ed.) at p. 30:

> "What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance. ……. It is fundamental to the nature of any offer that it should be certain and definite in terms. It must be firm, that is, made with the intention that when accepted it will bind the offeror."

An offer to enter into a binding contract must be distinguished from preliminary discussions, invitations to treat, offers to negotiate, statements of intention and mere puff. The terms of a contractually binding offer must firm, certain and definite. It follows that vagueness or uncertainty in the terms of an offer is fatal to the existence of the supposed contract. See *Levenstein v Levenstein* 1955 (3) SA 615 (SR) *per* QUENET J at 619.

The offer or promise made by Koudounaris and relied upon by the plaintiff *in casu*, as stated at paragraph 1.1.12 of the plaintiff's Summary of Evidence, is as follows:

> "*I gave Graeme Bird so many shares because I gave him my word and I give you my word, I will sort out your shareholding Nestora.*"

In his evidence to the Court, the plaintiff recollected this verbal promise in somewhat different terminology, but the essence of what was promised is substantially the same. Having regard to the words said to have been used by Koudounaris, it is evident that the purported offer was not couched in certain and definite terms sufficient to constitute an offer for the purposes of a binding contract. In other words, there was no certainty in the terms of the alleged offer.

The first element of uncertainty relates to <u>when</u> the defendant's promise or undertaking was to be fulfilled. The plaintiff avers that the additional shares were to be allocated to him over the duration of the Pooling Agreement, i.e. within five years from the 5th of July 1998. In this respect, there is no clarity whatsoever as to whether the promised shares were to be allotted in instalments at regular intervals or in a single allotment and as to the date or dates when the allotment or allotments were to be made.

Secondly and more significantly, the plaintiff's claim lacks certainty as what was actually promised, in terms of the nature of the supposed share allotment. In his unamended Declaration, the plaintiff averred that the agreement between the parties was that he would be allocated the same "option right" that had been allocated to his co-directors. At paragraph 4 of the plaintiff's Further Particulars, this "option right" is explained as "*the right to purchase ordinary Innscor Africa Limited shares at an agreed discounted price of Z$4.90 per share*". At the commencement of trial, the plaintiff applied to amend his Declaration to delete the references to "option right" and for them to be replaced by references to "shares" *simpliciter*. However, the rest of his pleadings remained unaltered. Thereafter, during the course of the trial, the plaintiff testified that he, like each of his co-directors, was in fact entitled to the additional shares "free of charge" as opposed to shares at a discounted price. In the event, what emerges from the plaintiff's case in this regard is an unhappy ambivalence as between his oral testimony and his unamended pleadings.

Finally, the vagueness that characterises the plaintiff's claim is pointedly mirrored in the actual words attributed to Koudounaris. The essence of the latter's promise to the plaintiff, viz. "*I will sort out your shareholding*" is intrinsically as meaningless as it is open-ended. At best, it constitutes a statement of intention – a promise to look into the plaintiff's grievance with a view to accommodating his claim to be treated as an equal co-director of Mbanje Bird. The promise made by Koudounaris, as I read it, does not in itself constitute a binding agreement giving rise to any clear contractual undertaking by the defendant.

Disposition

In light of my conclusions as to the absence of any binding and enforceable contract between the parties, I deem it unnecessary to canvass the additional submissions made by counsel as to the authority of Koudounaris to bind the defendant and the legality of the plaintiff's claim in the context of section 75 of the Companies Act [*Chapter 24:03*].

In the result, the defendant's application for absolution from the instance is granted and the plaintiff's claim is dismissed with costs.

Majome & Company, plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendant's legal practitioners