Judgment No S.C. 117\2001
Civil Appeal No 40\2000

KOALA PARK ESTATES (PRIVATE) LIMITED v P A BANKS & SONS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
McNALLY JA, MUCHECHETERE JA & SANDURA JA
HARARE SEPTEMBER 4 2001 & FEBRUARY 11, 2002

E. Matinenga, for the appellant

R.M. Fitches, for the respondent

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 21 January 2000 in which the court ordered judgment for the respondent in the sum of $800 000,00 together with interest thereon. It also entered judgment in the counter-claim in the sum of $51 906,16 together with interest thereon. Each party was ordered to bear its own costs. There is also a cross-appeal in respect of the counter-claim.

The facts in the matter are that the respondent ("Banks and Sons") leased the appellant's ("Koala Park's") farm from 1985. The parties entered into two lease agreements. The first lease agreement terminated at the beginning of 1981 ("the old lease") and the second agreement ("the new lease") commenced from 1

March 1991 to 28 February 2001 subject to an option to renew the lease. In September 1991 one David Dyer ("Dyer") purchased 95% of the shares in Banks and Sons. In 1994 the parties had a disagreement which resulted in Koala Park suing Banks and Sons for eviction from the farm. Koala Park was successful in its action and Banks and Sons were duly evicted from the farm.

Before Dyer acquired the said majority shareholding in Banks and Sons, the latter had made certain developments on the farm. It claimed payment of $2.9 million dollars as compensation for the improvements. It further claimed a further $1.7 million dollars being what it considered was the increased value of the farm occasioned by the improvements. The total claim was therefore $4.6 million. During the trial the claim was reduced to $1.7 million being compensation for the improvements only. Koala Park counter-claimed in the sum of $184 000,00 for the value of the items which it alleged Banks and Sons had unlawfully removed from the farm.

The court *a quo* found the following facts as not being in dispute; that the claims are based on the new lease; that although the old lease contained certain standard clauses, clauses such as clauses 10 of the new lease did not exist in the old lease; that Koala Park is a subsidiary of a company called Fort Concrete; that the managing director of Koala Park held and continues to hold shares - 5% - in Banks and Sons; that at some point during the year 1991 before Dyer purchased the said majority holding, the managing director of Koala Park was at different times a director of Banks and Sons and the Chairman of its board of directors.

Clauses 8 and 10.1(e) of the new lease read as follows:-

"8. The Lessor agrees to resolve in writing with the lessee within the first twelve months of this lease, the amount and procedure of compensation due to the lessee at the end of this lapse of period or at the time notice is given in terms of Clause 2.3 of this lease agreement, for its costs of existing buildings under previous agreement and future new buildings including alterations, additions and improvements to existing buildings.

…

10.1 That the Lessee shall …

…

(e) Not make any alterations or additions to the buildings or improvements on the farm or erect any new buildings or effect any new improvements thereon unless the Lessor's prior written consent shall be first had and obtained (such consent not to be unreasonably withheld).

PROVIDED THAT any alterations or additions which may be permitted by the Lessor shall at the termination of this lease become property of the Lessor, without compensation therefore to the Lessee unless otherwise agreed in writing by the parties."

The Court *a quo*, in my view, properly interpreted the relationship between the above clauses as follows:-

"In terms of clause 8 the parties would agree on the procedure for assessing the amount of compensation where such compensation was payable. A clear case of where such compensation was payable was in respect of buildings existing as at the time of the new lease agreement. Compensation was not payable in respect of improvements subsequent to the date of the new lease agreement unless the parties had agreed in writing that compensation would be paid in respect thereto. Otherwise in terms of clause 10.1(e), any alterations or additions permitted by the Lessor would only become the property of the Lessee at the termination of the lease period but would not be subject to compensation. Clauses 8 and 10 are, therefore, related and must be construed together in respect of new developments made on the farm by the plaintiff. Clause 10.1(e) has no relevance to the question of compensation for buildings in existence at the time of the new lease agreement.

The plaintiff based it claim on clause 8. That it is so, appears in paragraph 6 of its declaration which states that the claim for $4,6 million was in respect of a butchery building and a bottlestore building. These structures, it was agreed or it was common cause were in existence at the time that the new lease agreement was conducted although certain minor improvements were effected on them by the plaintiff."

Koala Park's case on the matter was based on the provisions of clause 8. In a letter dated 4 June 1991 to P A Banks it stated the following:-

"LEASE AGREEMENT CLARIFICATION

Section 8 of the 1/3/91 Lease Agreement calls for the Lessor to resolve in writing with the Lessee concerning compensation at the end of the lease period or when notice is given by either party in terms of 2.3 of the Lease.

Currently all the land and the buildings thereon are the property of this company. No compensation is appropriate at expiry or termination of the Lease.

But in terms of 10.1.e the Lessee may at its own risk carry out additional building (with Lessor's written consent). Ownership passes to Lessor, when the Lease ends/or is terminated.

The particular possibility arises that the Lessee could build something, that the land could be acquired by Government soon after, and the Lessor would receive compensation, which would not be very fair.

In these circumstances, Lessor would feel obligated to proceed by having separate valuation for such (authorised) improvements by the Lessee, and passing to the Lessee the actual amount of compensation received from Government.

Provided always that, any such arrangement is recognised as being subject to the Lessor's sole discretion …"

The court *a quo* was of the view that the contents of the above letter were accepted by P.A. Banks. The learned judge reasoned that:-

"It was written by the Defendant's Managing Director to the Plaintiff before the controlling shareholding in the Plaintiff company changed hands. It was written by the Managing Director of the Defendant to the Managing Director

> or Chairman of the Plaintiff who, it seemed happened to be the same person. I say this because Mr Shelton ('Shelton') who gave evidence for the Defendant was less than candid as to whether at the time he wrote the letter he was Managing Director of both the Plaintiff and the Defendant or Managing Director of the Defendant and Chairman or Director of the Plaintiff. He told the Court that at this time the directors and shareholders of the Plaintiff and the Defendant who it would appear, were the same individuals were engaged in a dispute among themselves. Confusion reigned supreme and the leadership was, according to Mr Shelton and using his own words, ' a confused leadership.'
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> …
>
> Mr Shelton failed to tell the court who exactly was the Managing Director or Chairman of the Board of Directors of the Plaintiff all the time. His allusion to a lot of confusion and misunderstanding among the shareholders and a confused leadership, suggest to me that he may have been ducking the fact that he was the Managing Director or Chairman of both the Plaintiff and the Defendant at this time. That he held both positions was the evidence of the Plaintiff's witness Mr Dyer, which I must believe in the face of Mr Shelton's inability to tell the court who was the Managing Director of Chairman of the Plaintiff at this time.
>
> Without specifically informing the court as to who the board members or shareholders of the Plaintiff were at this time or its Managing Director and Chairman, Mr Shelton stated that the letter was placed before the Plaintiff's board of directors and was accepted by them. That acceptance meant that the building in existence, at the end of the old lease agreement, were not to be the subject of compensation contrary to what was stated in clause 8.
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> It is on this basis, therefore, that the Defendant states that compensation for the old structures was no longer payable to the Plaintiff. Plaintiff was not entitled to it."

The learned judge in the court *a quo* however, accepted Mr Dyer's evidence (for the plaintiff) to the effect that he only became aware of the above quoted letter in 1995, that is, some four years after he had purchased majority shareholding in P.A. Banks for $1.6 million dollars. That when he purchased the shares he believed that part of P.A. Banks assets was the right to receive compensation in terms of clause 8 at the termination of the lease agreement. Dyer therefore believed that P.A. Banks would be compensated for the buildings existing at the time. The learned judge did not believe Shelton's evidence to the effect that P.A.

Banks was sold to Dyer with less the right to compensation in terms of clause 8. He therefore found that the said letter was an attempt to hive away assets which rightfully belonged to P.A. Banks. I consider the learned judge's finding and reasoning proper and unassailable. There is no reason to question his finding on credibility. In the result his finding that Koala Park was obliged to pay compensation for existing buildings in terms of clause 8 was proper and correct.

In connection with the cross-appeal I am also of the view that the learned judge's reasoning and finding on the issue is unassailable. I however agree that the order of compensation in this respect should be corrected to $900 000,00 instead of $800 000,00. It is clear that the court made a mathematical error in its calculations.

In the result the appeal is dismissed with costs. The cross-appeal is also dismissed with costs. The court *a quo*'*s* order is however amended in clause 1 thereof by the deletion of $800 000,00 and substitution of $900 000,00.

McNALLY JA: I agree

SANDURA JA: I agree

Wintertons, appellant's legal practitioners

Manase and Manase, respondent's legal practitioners