IN THE HIGH COURT FOR ZAMBIA **2015/HP/017**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

RADIAN STORES LIMITED	**1st PLAINTIFF**
RADIAN STORES RETAIL LIMITED	**2nd PLAINTIFF**

AND

DIPAK PARMAR	**1st DEFENDANT**
PARMAR KANCHAN PRABHUDIS	**2nd DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on 17th March, 2017

For the Plaintiffs	:	*Mr. M. Museba assisted by Mr. L. Mwamba Messrs Simeza Sangwa Advocates*
For the Defendants	:	*Ms. T. Marrietta & Ms. I. Nambule, Messrs Sharpe & Howard*

J U D G M E N T

Case Authorities Referred To:

1. *Robson Sikombe v Access Bank Zambia Limited, SCZ Appeal No. 240/2013*
2. *Carlill v Carbolic Smoke Ball Company (1893) 1 GB 256*
3. *Kakoma v State Lotteries Board of Zambia (1981) Z.R. 111*

Other Works Referred To:

1. *Chitty on Contracts, 28th Edition, London: Sweet & Maxwell 1999*

The Plaintiff took out Writ of Summons seeking the following reliefs:

1) *A declaration that the 1st Defendant is not entitled to the 10% shares in the Plaintiff companies having prematurely resigned from employment before the expiry of the 5 years period from the date of agreement.*
2) *A declaration that the 1st Defendant is not entitled to the 10% shares allotted to him in the Plaintiff companies as he failed to pay the said shares.*
3) *An order that the 1st Defendant surrenders back to the 1st Plaintiff the 2000 ordinary shares registered in the 2nd Defendant's names at the 1st Defendant's request and instance.*
4) *An order that the 1st Defendant surrenders back to the 2nd Plaintiff the 1000 ordinary shares registered in the 2nd Defendant's names at the 1st Defendant's request and instance.*
5) *An order that the 2nd Defendant signs or executes all the requisite documents including share transfer forms and other companies forms transferring the 2000 ordinary shares and 1000 ordinary shares registered in her names back to the 1st and 2nd Plaintiffs' nominees at no consideration*
6) *Costs*

The Statement of Claim discloses that the 1st and 2nd Plaintiffs are limited liability companies incorporated under the Companies Act, and are members of the Radian Group of Companies. The Statement of Claim also discloses that the 1st Defendant is a Zambian national and a former employee of the Plaintiff Companies. Further, that the 2nd Defendant is the 1st Defendant's mother and

holder of shares allotted to the 1st Defendant by the Plaintiff Companies, when he served as Retail Director and Director of Finance respectively.

The Plaintiffs state that sometime in 2010, the Radian Group of Companies reorganised its portfolio in order to grow its business and profits. As part of the reorganisation, the Radian Group decided to allot shares to the Plaintiffs' senior management employees. The 1st Defendant then Director of Finance in the 1st Plaintiff Company was offered 10% shares denominated as 2000 ordinary shares. In similar manner, the 1st Defendant as Director Retail and Finance in the 2nd Plaintiff Company was offered 10% shares denominated as 1000 ordinary shares.

The Plaintiffs state that the 1st Defendant's entitlement to 10% shareholding in both companies was conditional on him continuing in the Plaintiffs' service for a continuous period of 5 years from the date of agreement till 2015. In addition, the 1st Defendant was supposed to pay cash for the shares that were allotted to him. The Plaintiffs further state that the 1st Defendant requested his shares in both companies to be registered in the 2nd Defendant's name

because of personal litigation he was facing in the United Kingdom. The Plaintiff companies accepted the 1st Defendant's request and allotted the shares registered in the 2nd Defendant's name which have never been paid for.

The Plaintiffs further aver that the 1st Defendant abruptly resigned from the Radian Group in 2012, after 2 years without giving the requisite 3 months' notice. The 1st Defendant did not fulfil his obligation to serve in the Plaintiff companies for 5 years contrary to the agreed terms of allotment of shares. As a result, the Plaintiffs aver that they have suffered loss because the 1st Defendant has not fulfilled the mandatory preconditions on his allotment of shares.

The Defendants settled a Defence and did not deny the 1st Defendant's employment in the Plaintiff Companies and the shares allotted to him. The Defendants denied that the allotment of shares was conditional upon the 1st Defendant continuing in service with the Plaintiff companies for 5 years and subscribing to them in cash. The 1st Defendant admitted that he requested his shares to be

registered in the 2nd Defendant's name because of personal litigation he was facing in the United Kingdom.

The 1st Defendant averred that over the course of his employment, he and other directors who were allotted shares collectively paid for the shares in monthly instalments of K300,000 to the old shareholders. The money was recorded in the Plaintiff companies' 'red book'.

The 1st Defendant admits that he was required to give three (3) months' notice prior to his resignation and that before, during or after his resignation, which the Plaintiffs accepted in writing, the precondition on the allotment of shares was never raised as an issue. The 1st Defendant denies that the Plaintiffs have suffered loss as a result of his conduct and avers that the Plaintiffs are not entitled to the reliefs claimed.

At trial, **Murali Kuppuswami**, the Executive Director, Radian Stores Limited testified as **PW1**. His evidence was that the 1st and 2nd Plaintiff companies are part of the Radian Group and that the 1st Plaintiff Company was incorporated in 1981. It was also his

evidence that the initial shareholders in the 1st Plaintiff Company were AB Patel and MC Patel holding shares through his wife SM Patel. PW1 testified that as the Radian Group expanded, the initial shareholders decided to restructure its operations and to introduce new shareholders in 2010. The introduction of new shareholders and allotment of shares was reduced to a document called the "White Paper".

It was PW1's testimony that the White Paper encapsulated the intentions of the parties by assigning responsibilities to the different shareholders as well as the compensation that was to be paid to the old shareholders. The White Paper also allotted shares to the new shareholders in the following proportions: the 1st Defendant and Abilashi were allotted 10% shares in the 1st and 2nd Plaintiff companies, whilst PW1 received 5% shares.

According to PW1, the White Paper attached two mandatory conditions for the allotment of shares; firstly that the shares were to be paid for in cash; and secondly, the new shareholders were to continue in service of the Radian Group for five years up to 2015.

PW1 testified that after the restructuring, the 1st Plaintiff's business was redefined and concentrated on imports, exports and wholesale. The 2nd Plaintiff Company was given the retail portfolio. It was PW1's further testimony that the 1st Plaintiff retained the stock in trade. The shareholders agreed that the old shareholders were to be compensated US$10 million dollars and US$ 5 million dollars by the 1st and 2nd Plaintiff companies, respectively. The compensation was to be paid in monthly instalments of K300,000 as stated in the White Paper. The new shareholder's payment for shares was not included in the K300,000 compensation to the old shareholders.

PW1 also testified that in 2007, Abilash was recruited as Marketing Manager in the 1st Plaintiff Company. In 2008 the 1st Defendant was recruited as Chief Accountant in the 1st Plaintiff Company and later as Executive Director for the Radian Group in 2009.

PW1 further testified that the old shareholders allotted the new shareholders shares on the basis of trust and commitment to the Radian Group. PW1 added that the old shareholders trusted

that the new shareholders would genuinely contribute to the growth of the Radian Group. In addition, the new shareholders were supposed to pay cash for the shares, which terms they accepted. PW1 stated that because of the personal litigation the 1st Defendant was facing in the United Kingdom, the other shareholders agreed to register his shares in his mother's name, the 2nd Defendant.

It was PW1's evidence that the 1st Defendant worked for the Plaintiff companies from 1st April, 2010 to 4th February, 2012 when he resigned. PW1 stated that on resignation, the 1st Respondent did not satisfy the mandatory conditions in the White Paper as he did not serve the Radian Group for the expected period, nor did he pay for his shares. PW1 concluded with a prayer to the Court to order the 1st Defendant to surrender the shares held by the 2nd Defendant to the Plaintiff companies and for the other reliefs set out in the statement of claim.

In cross-examination, PW1 conceded that the contract of employment between the Plaintiff companies and the 1st Defendant had no provision on his shares because it was signed after the White Paper. He stated that the mandatory condition which

prohibited an employee from resigning his position was implied in the White Paper. He also stated that the executive management team was entitled to salaries, bonuses, commissions and dividends.

In re-examination, PW1 stated that the White Paper created a contractual and mandatory obligation on the 1st Defendant to work for the Radian Group for five years. He reiterated that shares were allotted to the new shareholders on the basis of trust and hard work, in addition to other benefits of employment that the new shareholders enjoyed.

The 1st Defendant **Dipak Parmar** testified as **DW1.** His evidence was that he was employed by the Plaintiff companies in 2008 and assisted in their growth and expansion. He stated that he was part of the senior management staff that were rewarded shares in the Plaintiff companies as a consequence of their efforts.

DW1 testified that the restructuring split the Radian Group business into two separate companies, namely Radian Stores Limited and Radian Stores Retail Limited. He stated that one of the cornerstone conditions for the restructuring was that the

management team would be allotted shares as a reward for their achievement. DW1 further testified that at the time of allotment of shares, it was made clear that the new shareholders would compensate the old shareholders AB Patel and MC Patel a sum of K300,000 per month.

DW1 also testified that the conditions for restructuring were set out in the White Paper which allotted shares to the new shareholders and the remuneration package for the management team. DW1 also testified that none of the new shareholders were given conditions for the allotment of shares. Further, since the old shareholders were paid K300,000 every month, the management team had to forfeit the money meant for bonuses and sales commission and other entitlements.

DW1 insisted that the shares allocated to him were for the work that he had already done. He also stated that if the contention by the Plaintiff companies is that K100,000 represents 5% of shares in Radian Stores Limited and Radian Stores Retail Limited, then it was inconceivable because the Plaintiff companies' combined value is much greater.

In cross-examination, DW1 maintained that the old shareholders were paid K300,000 as compensation for the shares. He conceded that his signature was on the White Paper and did not own stock in either of the Plaintiff companies. He further conceded that derivative 6 in the White Paper stated that one had to work for the Plaintiff companies for five years but disagreed with the assertion that the shares allotted had to be paid for on real cash terms. DW1 agreed that the White Paper listed the remuneration package for the management team.

In re-examination, DW1 testified that his shares were allotted to him outside his employment. He stated that had the shares been conditional on his five years' service with the Plaintiff companies, then they would only be allotted to him after five years and not before. DW1 maintained that the shares were allotted on the basis of and for achieving the growth and expansion of the Radian Group.

Learned Counsels filed written submissions for which I am indebted. I will not reproduce them suffice to state that I will refer to them in the judgement. I have seriously considered the evidence adduced and the written submissions of the parties filed herein.

The issues that fall for determination in my considered view are two-fold: firstly, whether the 1st Defendant's acquisition and holding of shares in the Plaintiff companies was dependent on the conditions set out in the White Paper and, secondly, whether or not the 1st Defendant should surrender the shares he holds in the Plaintiff companies.

There is no dispute that the Plaintiff companies employed the 1st Defendant between 2008 and 2009, respectively, as Retail Director and Executive Director. There is general agreement that the Radian Group was restructured and consequently the two Plaintiff companies were created with specific portfolios. As part of the restructured organisation, the old shareholders allotted shares to new shareholders who were picked from the senior management team. The choice of new shareholders was based on the trust that the old shareholders had in the senior executives and for their commitment to the Radian Group. PW1, DW1 and Abilashi were allotted shares under the new arrangement.

The parties further agree that the vision for the restructured Radian Group of Companies was reduced into the "White Paper". The White paper had six derivatives providing the values of performance for the shareholders as follows:

1. ***Less involvement or selective participation by existing shareholders/directors may involve key issues and financing and management issues of a material nature.***
2. ***Executives shall get some shareholding total not exceeding 30% of the equity on real cash terms.***
3. ***Item 2 automatically dilutes the stakes of the present shareholders in Radian Stores.***
4. ***Two or three tier structure is envisaged for the capitalisation of both the Companies.***
5. ***Capital volume shall augment for the operations of these companies for the first five years without any further injection of capital from shareholders.***
6. ***Automatically this restructuring throws the net on the executives for their continuity in service with this group for the next five years to 2015.***

It was strongly contended and canvassed by Learned Counsel for the Plaintiffs that the White Paper was a binding contract and tied the 1st Defendant to a five year service obligation to the Plaintiff companies as well as payment for the allotted shares. In this regard, Learned Counsel referred to the **Learned Authors of Chitty on Contract** who state that:

> ***"Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect".***

Learned Counsel further referred me to the case of **Robson Sikombe v Access Bank Zambia Limited**[1] where the Supreme Court stated thus:

> ***"The Learned Counsel for the respondent opposed the arguments made in support of ground six. It was Ms. Mutemi's submission that a party is bound by the terms of the agreement which he freely enters into...The law is trite that a party is bound by the terms of an agreement that he voluntarily enters into. We do not wish to undertake the difficult task of explaining very elementary principles of the law of contract in this regard. Suffice it to state that we agree with the submissions of the Learned Counsel for the Respondent on this point"***

Learned Counsel submitted that on the basis of the terms of the White Paper, a contractual obligation had been created for all the shareholders which the 1st Defendant was bound to perform.

In rebuttal, Learned Counsel for the Defendant argued that it is a settled principle of the law of contract that in order for a contract or an agreement to be valid and binding, both parties have to be in one mind as to the nature of the agreement. Counsel cited

the celebrated case of **Carlill v Carbolic Smoke Ball Company**[2] which states thus:

> ***"One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law – I say nothing about the laws of other countries – to make a contract".***

My attention was equally drawn to the case of **Kakoma v State Lotteries Board of Zambia**[4] where Sakala J, as he then was, declined to enforce a contract by reason of the fact that the purported contract had failed to prove that the parties intended to create legal relations when he held that:

> ***"....but one thing is common in both clauses, namely, the transaction was never intended to create any legal relationship but binding in honour only".***

After carefully examining the parties contested positions, I now have to deal with issue whether the White Paper had the force of contract on the allotment of shares to the 1st Defendant. From the derivatives in the White Paper, I am unable to discern that mandatory conditions were created for the 1st Defendant's allotment

of shares. If anything very loose language was used in derivative No. 6 to set out the expectations of the executives as follows:

> ***"Derivatives ...6. Automatically this restructuring <u>throws the net</u> on the executives for their continuity in service with the group for the next five years to 2015".***

I am not convinced that the words "throw the net" which are capable of multiple interpretation created a mandatory obligation that had the force of law. To borrow Sakala J's expression, in the **Kakoma** case, I would dare to state that the White paper was merely binding in honour and was not intended to create any legal relationship.

I further take the view that if the Plaintiffs had intended to create a legal relationship with the 1st Defendant vide the White Paper, then they should have embodied the mandatory obligations in the 1st Defendant's contract of employment. This was not the case.

PW1 in his testimony told the Court, that the White Paper was drafted before the 1st Defendant's employment in the Plaintiff companies. Surely, if the mandatory obligations were meant to

bind the 1st Defendant, then they should have been included in his contract of employment. I have had occasion to peruse the 1st Defendant's contract of employment dated 1st October, 2010 in the parties' bundles which sets out among others, the following:

> ***"PERIOD OF CONTRACT: Your contract is for the period of 12 (twelve) months. It will commence on 01-10-2010 and shall automatically terminate without further notice on 30-09-2011. There will be no renewal of this contract or continuation thereof beyond the expiry date and your employment with the Company will end unless a further written contract is entered into between you and the company. Upon the lapse of this contract you will not be entitled to any retrenchment benefit or to any pay in lieu of notice or otherwise and there will be no benefits carried over to a new contract".***

I have no doubt in my mind that both the Plaintiffs and 1st Defendant freely and voluntarily executed the fixed term contract. That being the case, I find that it was never the Plaintiffs' intention to tie the 1st Defendant's allotment of shares to his contract of employment given that it was for a fixed term. In any event, the Plaintiffs did not led evidence to show that the 1st Defendant was offered a subsequent contract upon which the mandatory obligations were included.

In the circumstances, I am inclined to agree with DW1's contention that his allotment of shares was done independently of

his contract of employment. It is highly plausible that DW1 was allotted shares after assisting in the growth of the Radian Group. I also find DW1's evidence that the shares allotted to the new shareholders were fully compensated by the K300,000 monthly payment to the old shareholders is also plausible.

I have considered the possibility of examining the White Paper's effect in the context of the parole evidence rule. I however, find that the White Paper, which preceded the 1st Defendant's contract was not encapsulated in that contract. For this reason, I am fortified to state that the White Paper did not intend to create mandatory and binding obligations on DW1's allotment of shares.

In view of my findings above, I hold that the 1st Defendant is entitled to the shares allotted to him in the Plaintiff companies. As a result, it is no longer necessary for me to address the issue whether 1st Defendant should surrender his shares.

I award costs to Defendants to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 17th day of March, 2017

M. Mapani-Kawimbe
HIGH COURT JUDGE