

JOSHUA REUVAYN LEPAR

VS

MATEBELELAND HAULIERS & ANOTHER

IN THE HIGH COURT OF ZIMBABWE
BEFORE: NDLOVU J
BULAWAYO, 11, 22 JULY & 01 AUGUST 2024

Application for a declarator.

Adv. L. Nkomo, for the Applicant.
M. Ndlovu & M. Mpofu, for the 1st Respondent.
No Appearance for the 2nd Respondent.

NDLOVU J

INTRODUCTION.

This is an application for a declaratory order. The basis of the declaratory order sought is an alleged fraudulently instigated cancellation of a Deed of Transfer by the 2nd respondent at the behest of the 1st respondent. The declarator seeks to vindicate the applicant's right of ownership in terms of the *Deed of Transfer No. 2290/2018*.

BACKGROUND FACTS.

The property in question was sold in execution of a judgment of this court. The applicant was the successful bidder. The 1st respondent is its previous owner and has launched several court applications. The sequence of events that gave rise to this application is as follows. *Deed of Transfer No. 2290/2018* was issued in favour of the applicant on the 31st of December 2018. The deed of transfer relates to an immovable property that the Sheriff had sold in executing a

judgment of this court and purchased by the applicant. On the 3rd of October 2019, the 1st respondent obtained a default judgment against the applicant under *Case No. HC 675/2019*. The terms of that default order were interdicting the present applicant from evicting the 1st respondent from the immovable property in question and setting aside the transfer of ownership of that property into the present applicant's name.

Upon the applicant becoming aware of the default order of 3 October 2019, he applied for its rescission under *Case No. HC 2574/2019*. That application for rescission was granted on the 23rd of June 2020. On 25 September 2020, the 1st respondent approached the Registrar of Deeds [the 2nd respondent] and caused him to cancel the applicant's *Deed of Transfer No. 2290/2018* based on a default order that had since been rescinded. The Registrar canceled the applicant's Deed of Transfer purportedly in terms of *Section 8[1] of the Deeds Registries Act [Chapter 20:05], [the Act]*. This was unbeknown to the applicant.

On 5 November 2020, the application under *HC 675/2019* was finalised on the merits, judgment number *HB 249/20* refers. The 1st respondent's challenge to the transfer of title of the property to the applicant was dismissed. The judgment also granted a counter application by the present applicant which counter application sought to evict the 1st respondent from the property.

The 1st Respondent's appeal to the Supreme Court under *Case No. SCB 109/20* was struck off the roll on 15 November 2021. The 1st respondent was evicted from the immovable property on 21 December 2021 in the execution of judgment number *HB 249/20*. On 23 February 2022 the 1st Respondent's application to the Supreme Court seeking condonation and extension of time to appeal against judgment number *HB249/20* was struck off the roll. With that order of the Supreme Court, judgment number *HB 249/20* remained final and definitive.

On 25 April 2022, the 1st Respondent filed another court application under *Case No. HC 735/22*. The cause of action and relief sought was again to challenge the sale in execution and transfer of ownership of the property in issue to the applicant's name. The judgment in that matter was handed down on 22 February 2024 as judgment number *HB 05/24*, dismissing the application. That judgment has not been appealed or set aside and remains extant.

On 27 May 2022, the applicant became aware of the cancellation of the deed of transfer and filed the present application.

RELIEF SOUGHT

1]. The cancellation of Deed of Transfer No. 2290/2018 in the name of the Applicant and the revival of Deed of Transfer No. 492/1997 in the name of the 1st Respondent done by the 2nd Respondent on 25 September 2020 be and is hereby declared unlawful, improper, fraudulent, null and void and is hereby set aside.

2]. The 2nd Respondent be and is hereby ordered to cancel the Deed of Transfer No. 492/1997 in the name of the 1st Respondent and to revive, forthwith, the Deed of Transfer No. 2290/2018 in the name of the Applicant.

3]. The costs of this application shall be borne by the 1st Respondent jointly and severally with its Managing Director DAVID BRUNO PHIRI LUWO, the one paying, the other to be absolved, on the scale of legal practitioner and client.

THE ISSUE.

Whether on the 25th of September 2020 when the registrar of deeds cancelled the applicant's title deed number 2290/18 was it upon an order of court?

THE LAW

The law is clear on the subject matter of the declarator sought, and that law is *section 8[1]* of the Act. That provision proscribes the cancellation of Deeds of Transfer without a court order. It provides as follows:

“8 Registered deeds not to be cancelled except upon order of a court.

(1) Save as otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title, or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any

registered bond not made as security, shall be cancelled by a registrar except upon an order of court.

(2) Upon the cancellation of any deed pursuant to an order of court-

- (a) the deed under which the land or any real right in land was held immediately prior to the registration of the deed which is cancelled shall be revived to the extent of such cancellation unless a court orders otherwise; and*
- (b) the registrar shall make the appropriate endorsements on the relevant deeds and entries in the registers.” [my emphasis]*

The requirements of a declarator are well settled; the applicant has to be an interested party in the subject matter, and the declarator sought should not be academic but should affect the rights sought to be vindicated. *Section 14 of the High Court Act, [Chapter 7:06]* refers.

APPLICATION.

In his opposition to this application, the 1st respondent sought to argue that the application under *HC 735/22* was pending finalization and sought to rely on the defence of *lis pendens*. He also sought to re-argue the arguments that resulted in judgment numbers *HB 249/20* and *HB 05/24*. The arguments raised in the notice of opposition, no longer apply. The court makes a finding in judgment number *HB 05/24* that the ground challenging the sale in execution and the transfer of title to the applicant is *res judicator* based on judgment *HB 249/20*.

The rescission of the default judgment meant that the default judgment had been extinguished, was no longer in existence, and of no force. When the 2nd respondent cancelled the deed of transfer on 25 September 2020 there was no extant order of court sanctioning that cancellation. The cancellation was done in violation of *section 8[1]* of the Act. There lies the unlawfulness of the cancellation of the deed of transfer. Therein lies the fraudulent misrepresentation by the 1st respondent in causing the 2nd respondent to cancel the *Deed of Transfer No. 2290/2018*. The 1st respondent’s conduct was fraudulent because he deceived the 2nd respondent to act as he did based on an already rescinded default judgment. The 1st respondent was aware that the default judgment had been rescinded and knowingly

misrepresented the status of the default judgment to the 2nd respondent. That conduct was a fraud.

With respect, counsel for the 1st respondent has argued away from the 1st respondent's opposition. He argued that the matter was long resolved. He is correct on that point. The judgments **HB 249/20** and **HB 05/24** address that very point. However, to say the cancellation was not fraudulent because there was a court order is self-contradictory on the common cause facts. To attempt to cloth that fraudulent act with *section 8[2]* of the Act is, with respect, a struggle in reconciling the facts of the matter with the relevant applicable law. Had the cancellation been made before 23 June 2020, reliance on *section 8[2]* would be legitimate and legally valid. However, the offending cancellation was on 25 September 2020, more than three months after the rescission of the default judgment on 23 June 2020. The cancellation therefore was not compliant with *section 8[1]* of the Act because there was no order of court authorizing it. The provisions of *section 8[1]* are condition precedent to the provisions of *section 8[2][a]* of the Act. Without complying with *section 8[1]* one cannot seek reliance on *section 8[2][a]* in respect of reviving the previous deed of transfer.

What remains is that the cancellation was unlawful. It was illegal because it was not done in compliance with the provisions of the Act, as there was no court order sanctioning that it be done. It should also be noted that the 2nd respondent has not opposed this application. It follows that an inference can be made that the 2nd respondent knows or at least believes that his actions were unlawful.

While judgments **HB 249/20** and **HB 05/24** have resolved the ownership of the property dispute between the parties, the resolution has not come with the reversal of the cancellation of the **Deed of Transfer No. 2290/2018** that had been unlawfully and fraudulently done on 25 September 2020. The only available means for the applicant to give effect and security to that dispute resolution was through this application. As an interested party, he prays that the cancellation of the deed of transfer by the Registrar of Deeds be set aside and the **Deed of Transfer No 2290/2018** be reinstated. The applicant can only sleep well knowing that his property is registered in his name at the office statutorily empowered to keep the "DNA" of all

immovable property in Zimbabwe, the Deeds' Registry. This application cannot be faulted. It is properly before this court, and the relief sought is bona fide in the circumstances.

DISPOSITION

The present applicant has satisfied the requirements for a declaratory order. The applicant is vindicating his right of ownership of an immovable property which right was unlawfully interfered with through the fraudulent cancellation of the title deed. A good case has been made out for the declarator sought.

COSTS

Given the sequence of events highlighted above the 1st respondent ought to have abandoned his opposition to this application, especially after the judgment in **HB 05/2024**. It was an abuse of the court process by the 1st respondent to continue opposing the present application. Costs on a punitive scale are merited in the circumstances of this case. This matter has to come to finality. I, therefore, grant the following order.

ORDER

- 1]. The cancellation of Deed of Transfer No. 2290/2018 in the name of the Applicant and the revival of Deed of Transfer No. 492/1997 in the name of the 1st Respondent done by the 2nd Respondent on 25 September 2020 be and is hereby declared unlawful, improper, fraudulent, null and void and is hereby set aside.*
- 2]. The 2nd Respondent be and is hereby ordered to cancel the Deed of Transfer No. 492/1997 in the name of the 1st Respondent and to revive, forthwith, the Deed of Transfer No. 2290/2018 in the name of the Applicant.*
- 3]. The costs of this application shall be borne by the 1st Respondent jointly and severally with its Managing Director DAVID BRUNO PHIRI LUWO, the one paying, the other to be absolved, on a Legal Practitioner and Client scale.*

NDLOVU J

Danziger & Partners, Applicant's Legal Practitioners.

Samp Mlaudzi & Partners, Respondents' Legal Practitioners.