

LARRIC SERVICES (PRIVATE) LIMITED

Versus

BLACKIYNX (PRIVATE) LIMITED

And

REGISTRAR OF DEEDS N.O.

And

COMMISSIONER GENERAL (ZIMRA) N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 20 & 30 JUNE & 14 JULY 2022

Opposed application

Mr. *K. Phulu* for the applicant
Ms. *J. Mugova* for the respondent

Introduction

1. This is an application for a declaratory order. Applicant seeks an order couched in the following terms:
 - i. That the sale and transfer of applicant's property namely stand number 11294A Bulawayo Township measuring 4, 674 square metres also known as number 2B Bristol Road, South Belmont, Bulawayo to the 1st respondent under Deed of Transfer No. 1746/2019 are hereby declared fraudulent therefore null and void with no force and effect.
 - ii. Deed of Transfer No. 1746/2019 be and hereby cancelled.
 - iii. Any and all subsequent transactions regarding; or sale; or transfer of this property by 1st respondent to 3rd parties whether innocent or otherwise be and are hereby declared null and void due to 1st respondent's lack of capacity to pass rights in the property.

- iv. The respondents jointly and severally be and are hereby ordered to reverse the transfer of the property being stand number 11294A Bulawayo Township measuring 4,674 square metres, back into applicant's name, within 30 days of granting of this order with all relevant respondents signing all transfer papers. Failing which, the Sheriff of the High Court for Bulawayo be and is hereby ordered to sign all transfer papers at the relevant statutory offices to give effect to this order.
2. The 2nd and 3rd respondents neither filed opposing papers nor participated in the hearing of this matter and I take the view that they are content in abiding by the decision of this court. The validity of 1st respondent's notice of opposition was subject to intense debate in this court, I shall deal with this issue later in this judgment.

Factual background

3. This application will be better understood against the background that follows. At the centre of this application is stand number 11294A Bulawayo Township measuring 4,674 square metres also known as No. 2B Bristol Road South Belmont Bulawayo (property). The property was registered in the name of the applicant, however on the 20th September 2019, it was transferred to the name of the 1st respondent. This transfer was pursuant to an agreement of sale dated 1st February 2016. One Micheal Horwitz signed on behalf of the applicant, on the basis of a board resolution dated 23 February 2019. Applicant disputes the authenticity of the agreement of sale and the board resolution on the basis that at the time these documents were executed Micheal Horwitz had ceased to be a director of the applicant, and therefore he had no authority to represent the applicant. 1st respondent riding on the Deed of Transfer in its name served applicant with a notice to vacate the property. Applicant contends that the transfer of the property to the 1st respondent was fraudulent, irregular and illegal. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary objections

4. Other than resisting the relief sought by the applicant on the merits, the 1st respondent took a number preliminary objections which were subject of intense argument in this matter. These were that there are material disputes of fact which cannot be resolved in motion proceedings; the application is not properly before court; and that applicant is pleading a new cause of action in the answering affidavit and heads of argument which is impermissible.
5. Applicant also took a preliminary objection against the 1st respondent, contending that there is no valid notice of opposition before court and urging the court to deal with this matter as an unopposed application. I heard arguments on the preliminary objections only and reserved judgment.

Is the notice of opposition valid?

6. Applicant contends that the notice of opposition is invalid and therefore the application must proceed as unopposed. There are two reasons given for this submission. The first is that the opposing affidavit opens as follows: “I, Ophir Gwede do hereby confirm that I have read and understood the applicant’s affidavit and respond to the same as follows,” and no more. Mr *Phulu* counsel for the applicant submitted that the deponent did not “make oath” “swear” nor made any form of affirmation as is required of a valid affidavit.
7. I note that the opposing affidavit ends with the following “thus sworn to at Bulawayo on the 23rd day of November 2021.” This shows that what is before court is a sworn affidavit. Ideally it should have opened with the words “I, Ophir Gwede make oath” or such similar phrases. However to hold that it is not an affidavit because it does not have such phrases, when it is clear that it was “sworn to at Bulawayo” and when it shows that the deponent appeared before a commissioner of oaths, and the commissioner appended his signature and affixed his stamp would be to elevate form over substance.

8. The second is that the deponent does not state that the facts which she avers are within her personal knowledge and belief true and correct. Mr *Phulu* referred to rule 227(4) of the High Court Rules, 1971 which provides that an affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein. Cut to the bone the argument is that where a natural person testifies on behalf of an artificial person, he or she can do so if he or she can swear to the averments therein.
9. Ms *Mugova* in not so many words conceded that as the deponent is not the 1st respondent, she must fall in the class of those who can depose to the opposing affidavit if he can “swear to the averments” contained in the affidavit. Counsel submitted that the 1st respondent sought and obtained from this court an order to file its notice of opposition out of the time allowed by the rules of court. In the application for condonation (HC 422/21) the deponent who signed the founding affidavit is Ophir Gwede, who also deposed to the opposing affidavit in this application. Counsel argued that in the condonation application, the deponent stated the basis upon which he could testify for the 1st respondent.
10. On the authority of *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) at 173A-B this court is entitled to refer to its own records and proceedings and to take note of their contents. In HC 422/21 it is Ophir Gwede who deposed to the founding affidavit, and therein he said he was employed by the 1st respondent and he was the official in charge of the affairs of the 1st respondent.
11. In *Zimbabwe Open University v Magaramombe & Anor* HH 45/12 the court held thus:

I am satisfied that to insist on a resolution from the applicant that it resolved that the deponent file the founding affidavit on its behalf would be carrying formality too far. The applicant is the Director Legal Services of the applicant. Ms *Mberi* conceded that she has in previous litigation between the parties filed founding affidavits on behalf of the applicant. There has been protracted litigation between the parties. I am satisfied that the application is that of the applicant and not of the deponent to its founding affidavit.
12. In *casu*, the parties have litigated in HC 422/ 21. The notice of opposition in this application was filed pursuant to the order granted by this court in HC 422/21. In HC

422/21 Ophir Gwede the deponent to the opposing affidavit in this application demonstrated his link or connection with the 1st respondent. He said he was employed by the 1st respondent and he was the official in charge of the affairs of the 1st respondent, and had authority to depose to the affidavit therein. He attached a copy of a board resolution which authorised him to act on behalf of the 1st respondent. In essence HC 422/21 is interlocutory to this application. Without the application in HC 422/21 and the order granted therein the notice of opposition in this application would not have been filed.

13. The deponent to the opposing affidavit is only a witness for the 1st respondent. See: *Chiadzwa v Paulkner* 1991(2) ZLR 33 SC @ 36G-H; *Dobbie & Ors ZB Bank Ltd & Anor* HH 126/17. The court knows from the interlocutory application in HC 422/21 the source of the deponent's evidence. He is employed by the 1st respondent and he was the official in charge of its affairs. This case is distinguishable from *Baron v Baron* HB 92/21 where the court found that the entire founding affidavit was laden with inadmissible hearsay evidence. In *casu* the evidence of Ophir Gwede is not hearsay.
14. Rule 233 (1) of the High Court Rules, 1971 says the respondent shall be entitled, within the time given in the court application in accordance with rule 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits. A valid notice of opposition consists of a notice of opposition in terms of Form 29A, together with one or more opposing affidavits. In *casu* the 1st respondent filed a notice of opposition and an opposing affidavit. Therefore there is a valid notice of opposition before court.
15. The preliminary objection regarding the alleged invalidity of the 1st respondent's notice of opposition has no merit and is dismissed.
16. I now turn to deal with the preliminary objections taken by the 1st respondent.

Material disputes of fact

17. 1st respondent contended that this application presents a material dispute of facts which cannot be resolved on the papers before court. It was argued that there was a sharp contestation between the litigants regarding the authority of Michael Horwitz to conclude the sale agreement. It was contended further that the unproven allegations of fraud and impropriety against the actions taken by the applicant's own member or former members who were not joined to this application but were key players in the transactions required resolution through oral evidence. It was argued further that a material dispute exists regarding the authenticity of the documents used for the transfer of the property, and the confirmatory affidavit deposed to by one Mr Brian Crooks.
18. It was further submitted that applicant ought to have foreseen the possibility of a material dispute of fact arising as a result of the circumstances of this case. 1st respondent submitted that this application must be dismissed with costs of suit on a punitive scale.
19. Per *contra* Mr *Phulu* submitted that the issues in this application are capable of being proven on the basis of the papers and averments filed of record. Applicant in its heads of argument submitted that the matter turns on the following issues, which agreement / documents in fact and in law constitutes the basis of the transfer of the property by the Registrar of Deeds; whether Michael Horwitz fraudulently purported to be a director of the applicant when he signed the board resolution dated 23 February 2019, and the extract from the minutes of the board dated 23 February 2019; whether the power of attorney to pass transfer signed by Lordwell Moya consequent to Michael Hortwitz fraudulent act is valid; and whether the tax clearance issued by the 3rd respondent on the basis of fraudulent misrepresentation was valid?
20. Applicant contends that the agreement dated 1 February 2016, was one of the documents that was used to facilitate the transfer of the property to the 1st respondent. It was submitted that the other key part of the transaction is the purported swop agreement, which purports to be premised on the 2016 agreement with the board resolution of the 23 February 2019. It was argued that the board resolution of the 23 February 2019, and the extract of the minutes dated 23 February 2019 were signed by Michael Horwitz. It was contended that all the matters regarding the status of Michael

Horwitz and Brian Stephen Crook could easily be determined on the papers. It was argued that there are no material disputes of facts in this matter, it is capable of being resolved on the papers.

21. It was submitted further that this preliminary objection has no merit and must be dismissed.

22. In *Muzanenhano v Officer In Charge CID Law and Order CCZ 3/13* the court held thus:

As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Masukusa v National Foods Ltd & Another* 1983 (1) ZLR 232 (S) at 235A; *Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co. v Midlands State University* 2006 (1) ZLR 531 (H) at 534E-F.

The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by Makarau JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. See *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions ((Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* S-146-86; *Boka Enterprises v Joowalay & Another* 1988 (1) ZLR 107 (S) at 114B-C; *Kingstons Ltd v L.D. Ineson(Pvt) Ltd* 2006 (1) ZLR 451 (S) at 456C-D and 458D-E. The respondent’s defence must be set out in clear and cogent detail. A bare denial of the applicant’s material averments does not suffice. The opposing papers must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard. See the *Room Hire Co.* case, *supra*, at 1165, cited with approval in *Vittareal Flats (Pvt) Ltd v Undenge & Others* 2005 (2) ZLR 176 (H) at 180C-D; *van Niekerk v van Niekerk & Others* 1999 (1) ZLR 421 (S) at 428F-G.

23. It is on the basis of these legal principles that this preliminary objection must be viewed and considered.
24. 1st respondent's version was that on the 1st February 2016, applicant and 1st respondent executed a memorandum of agreement of sale. Applicant was represented by one Micheal Horwitz, designated in the agreement as a director of the applicant. On the 23rd February 2019, the board of directors of applicant are said to have resolved to transfer the property to 1st respondent. The board through a resolution allegedly authorised one Lodwell Moya to sign documentation to effect the transfer of the property. The property has been transferred to 1st respondent.
25. Applicant's version is that the sale and transfer of the property to the 1st respondent was fraudulent, irregular and illegal. Applicant contends that it did not receive the purchase price as per the agreement of sale relied upon by the 1st respondent, nor did it pay the Capital Gains Tax for the purposes of transfer. It was contended that when the agreement of sale was signed Michael Horwitz had seized to be a director of the applicant. A copy of the Form Cr. 14 is attached, it shows that Micheal Horwitz resigned on the 13 March 2017.
26. From a closer reading of the papers filed of record, it is apparent that the court is faced with two mutually destructive versions from the applicant and the 1st respondent. For the court to find for the applicant in this application, it must reject 1st respondent's version, and if it has to find for the 1st respondent it must likewise reject the version of the applicant.
27. Michael Horwitz signed the agreement on behalf of the applicant; signed the board resolution authorising Lodwell Moya to sign any documentation on behalf of applicant to complete the transaction and effect transfer to the 1st respondent; and signed extracts from the minutes of a meeting of the board of directors dated 23rd February 2019. Applicant contends that Michael Horwitz had no authority to act as he did because he had resigned as director on the 13 March 2017. What is conspicuous about this matter is that Michael Horwitz has not himself been joined to this application.

28. The papers show that the agreement of sale was executed on the 1st February 2016, and Michael Horwitz resigned on the 13 March 2017. The signing of the agreement of sale preceded the resignation. 1st respondent contends that at the time the agreement of sale was signed Michael Horwitz was a director of applicant and had the necessary authority. Applicant contends that there is no board resolution authorising Michael Horwitz to sign the agreement in 2016. It is also clear from the applicant's affidavit in HC 422/21 which is part of these papers that the title deed of the property was given to 1st respondent's representative during the negotiations that culminated in the signing of the "offer to purchase." In its answering affidavit applicant says the title deed was given to 1st respondent pursuant to the 2018 "offer to purchase," and 1st respondent used the title deed to get transfer on the basis of the disputed 2016 agreement.
29. What is clear is that the 2016 agreement was signed before Michael Horwitz resigned his directorship of applicant. This court cannot say on the papers how he could after his resignation produce or create a façade of a board resolution and an extract of the minutes in the name of the applicant.
30. The property is in the name of the 1st respondent. It is clear that Michael Horwitz, who is at the centre of the transfer of the property to the 1st respondent was until the 13 March 2017 a director of applicant. All the documents he executed whether during his directorship or after he ceased to be a director, he executed them in the name of the applicant. Put differently, he comes from "applicant's house" and whether he committed a fraud against the applicant is matter that cannot be decided and resolved on the papers. Particularly where the alleged fraud involved a third party, i.e. transferring the property of a company wherein he was a director or former director to a third party. There is an underlying factual issue as to who indeed was defrauded, if there was a fraud, i.e. between applicant and 1st respondent?
31. 1st respondent contends that there is a dispute regarding the authenticity of the documents used for the transfer of the property, and the confirmatory affidavit deposed to by Mr Brian Crooks. There is a contestation whether Michael Horwitz had authority to conclude the sale agreement and the documentation to facilitate the sale. To compound the difficulty in resolving this matter on the papers is that Michael Horwitz

himself the alleged fraudster has not been joined in this application. Attempting to resolve these disputes on the papers on these facts would cause an injustice to either of the parties. My view is that the factual disputes in this case are material, will affect the outcome of the litigation and are genuine.

32. To try and prove its case applicant filed a detailed answering affidavit covering five pages and twenty-two paragraphs. To me filing such a detailed and lengthy answering affidavit shows the sting of the notice of opposition. It cannot be wished away as something of no moment.
33. The mutually destructive versions in this application leave the court with no ready answer to the dispute between the parties in the absence of further evidence. My view is deciding this matter on the papers would cause an injustice to either of the litigants.
34. The truth of the matter is that there are material disputes of fact in this application which cannot be resolved on the papers. What then is the consequence of an application marred with material disputes of facts? Ms *Mugova* submitted that in the circumstances applicant knew or ought to have known before filing this application of the existence of real and substantial disputes of facts in this matter. Applicant did not make submissions regarding what should happen in the event the court finds that there were disputes of fact which cannot be resolved on the papers.
35. Where the court has found that there are material disputes of fact, it has a discretion as to the future of the proceedings. It may dismiss the application, or order that oral evidence be heard in terms of 59(26) (b) of the High Court Rules, 2021, or refer the matter to trial.
36. The application may be dismissed with costs when applicant should have realised when launching the application that a serious dispute of fact was bound to develop. See: *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (HC). On the facts of this case, and in particular that Michael Horwitz continued signing applicant's documents when he had resigned the office of director of the applicant persuades me not to dismiss this application. I take the view that the justice of this matter requires that it be referred to

trial, for evidence to establish, amongst other issues whether Michael Horwitz committed a fraud against the applicant.

37. Having found that the objection that there are material disputes of fact in this matter has merit, it is not necessary for me at this stage to consider the other preliminary objections taken by the 1st respondent, i.e. that is application is not property before court, and that applicant cannot be permitted to plead a new cause of action in its answering affidavit and heads of argument.

38. What remains to be considered is the question of costs. 1st respondent sought costs on a legal practitioner and client scale. My view is that this is a case where costs should be in the cause.

In the result, it is ordered that:

- i. The preliminary objection on material dispute of facts is upheld.
- ii. This matter is hereby referred to trial.
- iii. For the purposes of trial, the notice of application and notice of opposition filed of record herein shall respectively stand as the summons and notice of appearance to defend.
- iv. The plaintiff (the applicant herein) shall file his declaration within 10 days from the date of this order.
- v. The matter shall thereafter proceed in accordance with the Rules of this Court.
- vi. The costs of this application shall be costs in the cause.