

MUCHENGETI BWAKURA

And

ENESIA BWAKURA

versus

HAMILTON PROPERTY HOLDINGS (PRIVATE) LIMITED

And

FRANK BUYANGA

And

HAMILTON PROPERTIES HOLDINGS (PRIVATE) LIMITED

And

THE SHERIFF OF ZIMBABWE N.O

And

THE CHIEF REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI. 25 March 2022

Civil Trial.

T. Mpofo with T.L. Mapuranga, for the Plaintiff
L. Uriri, with A.T. Mhlotshwa, for the 1st – 3rd Defendants
No appearance for the 4th & 5th Defendants.

MUZOFA J: The plaintiffs sued out summons against the defendants for the cancellation of Deed of Transfer number 1591/10 and ancillary relief arising out of a purported sham agreement between the plaintiffs and the first defendant. The plaintiffs also claimed costs on a legal practitioner and client scale. After hearing parties, I granted the claim. The first defendant has noted an appeal and a request for the written reasons was made. I provide the reasons herein.

The plaintiffs are husband and wife. The first and third defendants are companies duly registered in terms of the company laws in Zimbabwe. The first defendant is under judicial management. The second defendant is a male adult with capacity to sue and be sued. The fourth and fifth defendants are cited in their official capacity.

According to the plaintiffs they entered into a loan agreement with the first defendant .At all times they dealt with the second defendant representing the first defendant. They entered into a sale agreement of their property stand 569 Goodhope Township Lot 6 of Goodhope “*the property*” to secure the loan. They repaid the loan in full. However, when they sought release of their Title Deed, they discovered that title to the property had been transferred to the third defendant. They sued out summons as stated.

The first, second and third defendants filed their pleas denying entering into a loan agreement with the plaintiffs. They insisted that the plaintiffs sold the property to the first defendant. After acquiring the property from the plaintiffs, the first defendant was at liberty to transfer the property to whomever it deemed fit.

The fourth and fifth defendants did not file any opposing papers.

At the pre-trial conference, the following issues were referred for determination:

- i. What was the nature of the agreement between the plaintiffs and the first defendant?
- ii. Whether the transfer of the property to the third defendant was unlawful?

On the date of hearing, *Mr Uriri* made an oral application for leave to file a special plea on prescription and an exception. The application was opposed on the basis that no explanation was given why the plea and the exception were not filed within ten (10) days of service of the summons and declaration to the defendants. Further to that leave to file a special plea cannot be sought on the trial date to take the parties back to the pre-trial stage. A party loses the right to file the special pleas if they are not filed in terms of the rules. On that basis the application must be dismissed, and the trial continue. In response it was submitted that prescription can be raised at any point in the proceedings. It is a question of law.

Rule 119 of the then applicable High Court Rules, 1971 regulated the filing of special pleas and exceptions. Where a defendant fails to comply with the Rules on filing of the special plea, the defendant must seek condonation from the court, failure of which the special pleas are deemed improperly taken¹. In this case I considered the application as an application for condonation to amend the plea. I also considered that the plea of prescription is a point of law that can be raised at any time albeit subject to it being properly raised. Prescription is a matter of evidence; it is a triable cause therefore it is necessary for both parties to lead evidence on the issue². Having considered that it is important for the court to consider all the relevant issues in the disposition of the matter I found it necessary to grant the application for evidence to be placed before the court to deal with the issues. The only way to have the issues raised properly before the court was to grant the application. I granted the application and directed that the matter resume at a later date. *Mr Uriri* advised the court that the documents were ready and could be filed within a short space of time.

When the proceedings resumed the issues were not taken further. No evidence was led to establish when the cause of action arose. Counsel for the defendants did not even refer to the issues taken. The court considered the issues abandoned. In fact as the trial progressed there were intimations of a settlement. At one stage the parties appeared before the court and indicated they had settled. I granted a postponement to 9 July 2021 for parties to file the order by consent. However, the parties could not agree on the finer details of the consent order. They opted to proceed with the trial. The matter was subsequently postponed to 21 July 2021 for continuation. On the appointed date, *Mr Uriri* the then counsel of choice did not appear. *Mr Mlotshwa* appeared for the defendants and the matter proceeded.

The plaintiff's case.

The plaintiffs gave evidence to buttress their claim. The first plaintiff's evidence was as follows. He jointly owned the property with the second plaintiff. He was introduced by a friend to the first defendant, a company that provided loans in foreign currency. At the time, banks did not

¹ **Sammys Group (Private) Limited v John Bourchier Meyburgh N.O & Ors SC45/15**

² *Dengu v Allied Bank SC52/16, Brooker v Mudhanda & Anor, (2) Pearce v Mudhanda & Anor S 2018 (1) ZLR 33 (5).*

provide foreign currency loan facilities. The plaintiffs required United States Dollars. He entered into a verbal agreement with the first defendant for a loan. He initially dealt with one Ndlovu and Simon Charehwa who advised him of the requisite terms for accessing a loan. The plaintiffs were required to lodge the title deed to the property, sign an agreement of sale, sign a power of attorney appointing defendant's lawyers Nyamushaya or Farai Zuva to do the transfer, a declaration by the seller and then a notice to vacate was to be issued. He queried why an ordinary loan would require such onerous conditions. He was referred to the second defendant.

He engaged the second defendant who advised him that they were in the process of registering a micro-finance with the Reserve Bank of Zimbabwe. While waiting for the process to go through, they were using the first defendant's name. All the required paperwork was the standard procedure if one required a loan. The second defendant assured him that the title deeds would be safe and transfer would only be effected upon breach in the repayments. He believed the second defendant who he described as a soft spoken man. The second defendant indicated to him that he is a rich man and would not steal from the plaintiffs.

Satisfied by the explanation given by the second defendant, the plaintiffs complied with the terms for the processing of the loan. The actual loan agreement was not reduced into writing. What was reduced into writing was the simulated sale agreement.

The second plaintiff signed a special power of attorney authorising the first plaintiff to use the property as security to apply for the loan. The first plaintiff signed the agreement of sale and the second defendant signed the agreement on behalf of the first defendant. The first defendant did not pay the purchase price even if it was stated as \$18 500.00 in the agreement. They did not pay the capital gains tax to ZIMRA. Infact there was no real sale of the property. The purchase price in the agreement was lower than the property's market value. The simulated sale was security for the loan. The second defendant assured him that this was a dummy to secure payment. Both parties understood that there was no intention to sale the property.

A schedule of loan repayments was produced that showed that the plaintiff owed US\$9 309.00 at an interest of 15%. A number of repayments were made which added up to US\$12 754.00. Repayments were made on a cash basis. He obtained the information from HC 2447/12 in which the Attorney General filed an application to interdict the first and second defendants from

transferring certain identified properties into the first defendant's name. The plaintiffs relied mostly on the affidavit by Superintendent Majuta and Akim Ndlovu who narrated how the second defendant, using the first defendant advanced loans to clients and sham sale agreements were signed in respect of immovable properties as security. These transactions also involved a network of professionals to facilitate the sham agreements. For instance the valuers undervalued the property and the capital gains tax was fraudulently obtained. The first plaintiff said he was a victim of the first defendant's uncouth business operations.

All the relevant paperwork, the declaration of sale, the power of attorney to pass transfer, the declaration by seller were drafted at the second defendant's office. The loan was processed. They fully repaid the loan.

The first plaintiff then approached the first defendant to retrieve the Title Deeds to the property. It is then that he discovered that the property had been transferred to the third defendant. He called the second defendant who was in South Africa by then. The second defendant apologised and promised to reverse the transfer as it was made by mistake. Email communications were produced to confirm part of the conversations between the two. The production of the emails was challenged, and I indicated that I will address the issue in the judgment.

The first plaintiff was subjected to lengthy cross examination whose thrust was to discredit his evidence that the sale agreement was security for the loan. It was suggested that this was untenable. In the whole the point made was that since the plaintiff signed the agreement of sale and the attendant paperwork for transfer a valid sale was concluded. All this was denied.

The first plaintiff struck the court as a credible witness. He did not seek to exaggerate what transpired between him and the second defendant. Of note is that it was not disputed that the witness was assured by the second defendant that the sale agreement was entered to secure the loan. It was not disputed that the second defendant apologised for having the property transferred into the third defendant's name.

The second plaintiff also gave evidence. She confirmed that she jointly owned the property with the first plaintiff. She identified with the first plaintiff's evidence. She said she authorised the first plaintiff to obtain a loan and not to sale the property. She confirmed she was aware that the

first plaintiff would apply for a loan from the first defendant. The first defendant had required security in the form of a simulated sale agreement of the property. She authorised the first plaintiff to sign all the requisite paper work. They fully repaid the loan. To their surprise the property was transferred to the third defendant. They did not deal or transact with the third defendant. The plaintiffs then closed their case.

The defendant's case.

Lloyd Hama 'Llyod' an administrator at the first and third defendant companies gave evidence on behalf of the defendants. His evidence did not take the defendants' case anywhere except to weaken it. He conceded that the transfer to the third defendant was improperly made. He denied that the plaintiffs obtained a loan from the first defendant but that a valid sale agreement was entered into. He could not show that the first defendant paid the purchase price and how it was made. He could not show that the capital gains tax was paid. He could not show that the property was ever transferred to the second defendant. His evidence was not supported by any documentary evidence. He said the first defendants' line of business was leasing, buying and selling properties. It did not give out loans.

His cross examination established that he was clueless as to what transpired in this case. He could neither deny nor confirm the plaintiffs' claim as he was not privy to the communication between the first plaintiff and the second defendant. He could not explain why a schedule of loan repayments from the first defendant existed if indeed the first defendant did not operate a loan scheme. He said the loan repayments were received by the second respondent. Confronted by the affidavit by Patrick Majuta and the statement made by Akim Ndlovu filed under HC2447/12 he was dumbfounded, could not say much to assist the court. At the end Lloyd simply conceded that he could not dispute the plaintiff's claim. The defendant's case was closed after the concession.

Oral closing submissions were made. *Mr Mpofo* addressed the court in detail on the additional special pleas which I have already addressed. The point made being that they were not taken further. He also addressed the court on the issues referred to trial. I will revert to the submissions in my analysis. *Mr Mlotswa* also made his closing submissions that were just short of a concession to an order by consent. It was apparent that he could not concede since he had no instructions to do so. Legal practitioners often forget that as officers of the court their duty is to uphold the law

and this duty is owed first to the court. He conceded that the second defendant could not rebut the plaintiff's evidence. He conceded that Lloyd being an administrator could not give evidence of any probative value since the first plaintiff dealt with the second defendant who could not give evidence to rebut the claim. I quote verbatim *Mr Mlotshwa's* last statement, "*Hama left the defendant's case weak through his concessions.*"

Besides the concession, it was apparent that the plaintiff's case was not disproved. The claim must succeed. I deal with the issues for trial.

The nature of the agreement between the plaintiffs and the first defendant

It is trite that he who alleges must prove the averments. The plaintiffs' case is that they did not enter into a sale agreement; they actually entered into a loan agreement with the first defendant. The onus is on the plaintiff to prove the averments on a balance of probabilities.

A valid contract is created where there is an offer and acceptance between persons with legal capacity to contract. The concept of offer and acceptance must be understood in light of the underlying intention of the parties to create a common intention to bind themselves by a legally enforceable contract³. There must be a meeting of the minds, a consensus *ad idem*.

Where an issue arises questioning the nature of an agreement, the court must consider all the evidence placed before it and make an objective assessment of the nature of the agreement. This objective test has been embraced in our jurisdiction many decades ago and applied in *Levy v Banket Holdings (Pvt) Ltd*⁴ where the court had this to say,

'In considering whether a contract is concluded between two parties, a court is not interested in the state of mind of the parties considered in the abstract but it must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said or done'

The process involves a consideration of the rights of parties to a transaction to go behind form to reality. In *Commissioner for Customs & Excise v Randles, Brothers & Hudson Ltd*⁵ where DE WET, C.J. had this to say,

³ CONTRACT, General Principles, 6th Edition, Van Huyssteen *at al*

⁴ 1956 R&N 98 (FS) 104-5 cited in RH Christie, Business Law in Zimbabwe, 4th Ed

⁵ 1941 AD 369 at p. 381

'The Court must give effect to the transaction according to what it finds to be the real intention of the parties.'

The court then went on to cite the dictum in *Zandberg v van Zyl*,⁶ where the court said,

'Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose) the parties to a contract endeavour to conceal its real character. They call it by a name, or give it a shape'

In this case the plaintiffs established on a balance of probabilities that they entered into a verbal agreement for a loan with the second defendant. Although it was denied that the first defendant is in the business of advancing loans, there was uncontroverted evidence that it did advance loans. The schedule of loan repayments was placed before the court and is evidence of such business. The plaintiffs also established that the agreement of sale was entered into as security for the loan, there was no intention to sale at all. This too was not disputed. The purchase price was not paid. The communication between the first plaintiff and the second defendant confirms that there was no agreement of sale but a loan agreement. Even if the email communications are not considered, the second defendant spoke to the first plaintiff and confirmed the position as stated by the plaintiff. This evidence was not disputed. What is most telling of this sham sale agreement is that the first defendant did not take occupation of the property, the plaintiffs are still in occupation. There is no evidence that the first defendant tried to assert its rights over the property.

It is therefore the court's finding that there was no meeting of the minds in respect of the sale agreement. There was a consensus *ad idem* in respect of the loan agreement and the terms and conditions. There was no intention to sale the property; there was no real intention to transfer rights. The agreement of sale was a sham agreement. The first plaintiff and the first defendant had a common intention that the sale agreement was not to create the legal rights and obligations which they gave the appearance of creating.

A sham agreement is one where the steps take the form of a legally effective transaction but the parties intend that the transaction should not have the apparent legal consequences, or any

⁶ 1910 AD 302 at p. 309

legal consequences. In *Mac Adams v Fianders Trustees and Bell N.O*⁷ the court succinctly described a sham agreement as follows,

“dishonest in as much as the parties to it do not really intend it to have inter parties the legal effect which its terms convey of the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between them”.

As properly submitted for the plaintiffs a simulated transaction cannot be given effect⁸.

In the result, it is apparent that there was a loan agreement between the plaintiffs and the first defendant. The sale agreement was not intended to be what it set out to be. It was a disguised transaction, yet the first defendant acted upon it. The plaintiffs did not intend to sell and transfer their rights to the first defendant. Similarly, the first defendant through the assurances of the second defendant did not intend to receive rights and interests in the property. In light of these circumstances the court appreciates *Mr Mlotshwa's* difficulty in defending the case.

Whether the transfer of the property to the third defendant was unlawful

Llyod conceded that the transfer was unlawful and it must be reversed. The concession was properly made. The transfer did not follow the legally envisaged sequence. Section 11 of the Deeds Registries Act (Chapter 20:05) provides that ‘transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made’

In this case there must have been transfer from the plaintiffs to the first defendant. No proof was placed before the court of such a transfer. It means then the first defendant did not receive legal title to the property. It is trite that no one can pass a right greater than what he holds. The first defendant had no rights in the property and therefore could not transfer or cause it to be registered in the name of the third defendant.

On that basis the transfer was unlawful.

⁷ 1919 AD 207 at p395-6

⁸ *Camden Nurseries Pty Ltd v Aussie Growers (Aust) Pty Ltd* [2017] NSWSC 1770 (15 December 2017).

The plaintiffs requested for costs on a higher scale. Costs always follow the cause unless there are special reasons to depart from the settled position. In this case the defendants entered into the sale agreement well aware that they had an ulterior motive. They were aware that this was a sham agreement yet they went on to cause the transfer of the property into the third defendant's name. Secondly, in the face of damning allegations against the second defendant, the second defendant chose not to give evidence. This meant the plaintiff's averments were not disputed yet the defendants insisted on defending the matter. Where a litigant has defence and insists on defending the matter the court must show its displeasure by granting costs on a higher scale. Such conduct does not show a genuine intention to protect interests but a mere chance game and courts cannot be used for that purpose. Courts have to deal with serious litigants who intend to protect their rights and interests. Thirdly, it is clear that agreement of sale is a pactum commissirium which is illegal. I have no doubt this a case that requires exemplary costs on a higher scale against the first, second and third defendants.

In the result the following order was made:

IT IS HEREBY ORDERED THAT:

Accordingly the claim is granted.

1. The Chief Registrar of Deeds be and is hereby ordered to cancel Deed of Transfer (Regd. No. 1591/10 dated the 16th of April, 2010, which wrongfully, unlawfully and illegally transferred Stand 569 Good Hope Township of Lot 6 of Good Hope (the property) to Hamilton Property Holdings Private Limited (the company) from the first plaintiff and second plaintiff.
2. The 1st defendant, the 2nd defendant and the 3rd defendant, be and are hereby ordered, (jointly and severally and in *solidium*, the one signing the others to be absolved) to sign all documents necessary to transfer the property to the first plaintiff and the 2nd plaintiff from the company.

3. Failing (2) above, that the Sheriff of Zimbabwe or his lawful deputy, be and is hereby authorized to sign all documents necessary to transfer the property from the company to 1st plaintiff and 2nd plaintiff to correct the position.
4. The Chief Registrar of Deeds be and is hereby ordered to approve or accept documents either signed by the first defendant or the second defendant or the third defendant, or signed by the Sheriff of Zimbabwe, or his lawful deputy, transferring the property from the company to the first plaintiff and the second plaintiff.
5. The 1st defendant, the 2nd defendant and the 3rd defendant (jointly, severally and in *solidum*, the one paying the other to be absolved), be and are hereby ordered to pay all the taxes, duty and costs required to transfer the property from the company to the 1st plaintiff and the second plaintiff, and
6. The 1st defendant, the 2nd defendant and the 3rd defendant (jointly, severally and in *solidum*, the one paying the other to be absolved), be and are hereby ordered to pay costs of suit on legal practitioners and client scale.

Chihambakwe, Mutizwa & Partners, plaintiffs' legal practitioners

R Chibaya Law Chambers, 1st, 2nd and 3rd Defendants' legal practitioners.