

SHOMET INDUSTRIAL HOLDINGS (PVT) LTD
And
YAN YU
versus
VINCENT TOM-BARRIS
And
WASHINGTON FRERA
And
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 3 November 2020 & 17 February 2021

Opposed Application – Interdict

Ms R Zimvuma with Ms T Rusinahama & Mr T Murondo, for applicant
Mr A Gumbo, for 1st respondent
Mr MC Chigudu, for 2nd respondent

CHAREWA J: On 7 November 2018, applicants obtained, on an urgent and *ex parte* basis, a provisional order which granted them the following interim relief:

1. That first and second respondents is barred and/or restrained from using in any manner and for whatever purpose, a certified copy of Deed of Transfer 621/2009 issued in lieu of the original on 31 October 2018; and
2. That third respondent is barred and/or restrained from acting on the said certified copy of Deed of Transfer.

The present matter seeks confirmation of the provisional order in the following terms:

1. That third respondent be ordered to expunge from his records, such certified copy of Deed of Transfer
2. That the original Deed of Transfer in the second applicant's custody be recognized as the authentic deed of transfer in favour of the first applicant

3. That first and second respondent be ordered to surrender to third respondent, within seven (7) days, the certified copy of the deed of transfer in their possession
4. That the respondents be permanently barred and/or restrained from using or acting upon, the certified copy of deed transfer in lieu of the original
5. In case of default, the Sheriff for Zimbabwe be authorised and/or empowered to retrieve from first and second respondents, the certified copy of deed of transfer and surrender it to third respondent.

Background

First applicant was incorporated on 17 March 2006, with second applicant and her husband being the sole directors. Second applicant's husband is now deceased. In 2009, second applicant purchased the property known as Lot 358 of Prospect measuring 25, 1499 hectares and caused it to be registered, on 2 February 2009, in first applicant's name under Deed of Transfer 621/2009.

At all times, second applicant was also the company secretary. On 10 October 2013 and 18 March 2014, three additional directors were appointed, but they did not include the first and second respondents. On 27 September 2017, a new CR14 purportedly resigned all the directors of the company and in their place appointed the first and second respondents and a Mr Norman Ngoshi, who is not party to the suit, as the sole directors.

This last CR14 was purportedly predicated upon a loan agreement entered into between second applicant's husband and first and second respondent's company, Christian Community Life Assurance (Pvt) Ltd, on the 9th day of May 2017, whereby second applicant's husband was to receive a loan of USD2 200 000 to be secured by 100% of his shareholding in first applicant. According to first and second respondents, this loan agreement was subsequently converted, on the 10th day of May 2017, into a straight exchange or sale of second applicant's 100% shareholding in first applicant and Christian Community's gold claim registration number 40638 (Foot 62, Mountain View Farm, Bindura).

However, according to applicants, the loan agreement was in fact cancelled for breach by Christian Community in that, not a single cent was paid out to applicants thereon. In fact the applicants aver that the purported subsequent exchange/sale agreement is a forgery.

On becoming aware of the CR14 dated 27 September 2017, second applicant filed a complaint with the third respondent on 7 May 2018 and caused a report of fraudulent conduct by the first and second respondents to be registered with the police. In spite of this first and second respondents proceeded, in October 2018, to advertise that they had lost the Deed of Transfer for Lot 358 of Prospect and wished to apply for a certified copy, which certified copy they obtained on 31 October 2018. It is not in dispute that at all material times, second applicant was in possession of the original deed of transfer which was never in the first and second respondent's possession and which they never in fact, lost.

By order of this court in HC7259/19 dated 30 October 2019, applicants obtained a provisional interdict against any developments on or interference with their rights to Lot 358 of Prospect. By further order of this court in HC 4088/19 dated 22 June 2020 the purported agreement of sale between second applicant's husband and Christian Community Life Assurance (Private) Limited was declared null and void. These orders are still extant.

The issue

The issue, which the parties are agreed on is whether or not the first and second respondent misrepresented to the third respondent that the deed of transfer was lost or destroyed and were thus entitled to a replacement.

In limine

The first respondent raises the preliminary point that that there is no issue before the court for it to determine. The applicant objects to the raising of the point *in limine* without notice and without due regard to the rules of procedure.

I subscribe to the applicant's objection. While the rules are made for the court (and not the court for the rules), they are created for the purposes of regulating the conduct of matters brought before the court, and are an essential tool to the due administration of justice. The practice that seems to have developed among legal practitioners, that they can ignore the rules and still be heard on any point must be discouraged. This is particularly so where no leave or condonation, or even any explanation as to why a litigant has decided to ignore the rules is proffered. In any event, given that I do not subscribe to the notion that there is no issue before

the court, I uphold the applicant's objection to the belated and unprocedural manner in which the point *in limine* has been raised.

For its part, the applicant seeks the expunging of paragraph 5.7 of the respondents' heads of argument as being factual averments which were not raised in the opposing affidavit. The respondents concede that the sentences complained of do offend the purpose of heads of argument and should be struck off. Accordingly, paragraph 5.7 of respondents' heads of argument, at page 213 of the record, is struck off.

By the same token I give short shrift to first and second respondents' submission that there is fatal non-joinder of the registrar of companies. Clearly, respondents have not properly acquainted themselves with r87(1) which provides as follows:

"87. Misjoinder or nonjoinder of parties

- (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

This is more particularly in this case where the non-joined party is merely acting in his official capacity and has no interest in the substantive outcome of the matter.

Finally, respondents seek postponement of these confirmation proceedings pending determination of an application for rescission of judgment in HC4088/19 by way of HC4083/20. Further it is respondent's contention that the matter is pending an appeal determination in the Supreme Court in SC159/19. Additionally the issues before this court stand to be determined in HC7259/19. Respondents submit that there already exist two conflicting decisions which have dealt with the issues before the court in this matter such that if it proceeds, there is likely to be a third conflicting judgment. They therefore urge the court to decline to hear this matter at this stage.

It seems to me that the respondents are litigants who will grasp at any straw to keep the wills of justice from turning. Firstly, the alleged pending Supreme Court matter is non-existent. It was withdrawn on 30 June 2020. The allegedly pending application for rescission of judgment in HC4083/20 is at a standstill. Respondents are not prosecuting it. The last document

filed therein is applicant's notice of opposition. Respondents have neither filed an answering affidavit or heads of argument.

In any event the decisions in HC4088/19 (for which rescission is sought) and HC7259/19 are separate and distinct issues from what is before this court. Those matters decided on issues of *locus standi* (which I decline to revisit, despite the respondents' invitation, as there is already an extant judgment in that regard); the competency of the relief sought and the validity of the sale agreements upon which respondents sought to change company documents in their favour.

The parties have already conceded that the sole issue before this court is whether or not the first and second respondent misrepresented to the third respondent that the deed of transfer was lost or destroyed and were thus entitled to a replacement. This is not an issue which has been decided upon by the court.

Postponement is not to be had for the mere asking. It is within the discretion of the court to grant postponement on good and sufficient grounds.¹ Besides, the applicant has the right to be heard to finality and to equal protection before the law.

Therefore, I find that no reasonable basis has been made for postponing this matter and I accordingly dismiss the application for postponement without further ado.

Did first and second respondent misrepresent to the third respondent that the deed of transfer was lost or destroyed and were thus entitled to a replacement?

Nowhere in their pleadings do the first and second respondent deny that they were never in possession of the original transfer deed to Lot 358 Prospect. The law is trite: anything that is not denied is admitted.² Yet in his affidavit in terms s20 of the Deeds Registries Regulations (RGN 249/77), second respondent swears that Deed of Transfer 621/2009 dated 2 February 2009 has either been lost or destroyed, and that a diligent search for it has been to no avail. However, it is a fact that at all material times that deed was never lost or destroyed. The legitimate custodian thereof, second applicant, had it with her. First and second respondents do

¹ Midkwe Minerals (Private) Limited v Kwekwe Consolidated Gold Mines Limited & Ors SC 358/2012 (SC54/13)

² Fawcett Security Ops (Pvt) Ltd v Director of Customs & Excise & others SC 1993(2) ZLR 121 @ 127 F

not aver, in their opposing affidavits, that their purported diligent search encompassed enquiries with second applicant or, given their claim to ownership of first applicant, erstwhile, officers of first applicant who include second applicant.

Regard must also be had that at the time that the first and second respondents made their representations to third respondent, the matter was already before the police and had been reported to third respondent as an alleged illegal takeover of first applicant. There was thus, already a dispute regarding ownership of first applicant and its congruent assets which obviously first and second respondent wished to circumvent by obtaining the title deeds clandestinely.

Much has been made by the respondents regarding the fact that the application for a lost deed was published in a publicly circulating newspaper, but short of scouring the classified advertisements, there was no way, applicants would have known of the first and second respondent's moves. Besides, s20 of the Deeds Registries Regulations envisages that an application for replacement of a lost or destroyed title deed must be made by a *bona fide* possessor who has lost possession. Therefore, where one never had possession, it is a misrepresentation to make such an application.

Moreover, this application for a lost deed is predicated on an agreement of sale of shares. Clearly a shareholder is not entitled to possession of title deeds in a company, unless, he is a sole trader, or is an officer mandated with the day today management of the company. That second respondent is a director does not entitle him as of right to make such application. The second respondent's application to the third respondent does not provide a basis upon which he made such an application. In any event, as already stated, the agreement for the sale of shares stands nullified and an extant order bars respondent from directorship. Clearly therefore, any application made to the third respondent was based on a misrepresentation.

The court was invited to find that allegations of fraud were unfounded since there was no proof of prosecution or conviction. With respect, that is not the issue before this court. The court is only concerned with whether there was a misrepresentation that induced the third respondent to issue first and second and respondent with a duly certified copy of the title deeds,

and if so, whether any prejudice or harm stands to befall the applicants unless the provisional order is confirmed.

I have already found as a matter of fact that respondents never possessed the title deed to enable them to report it as lost or destroyed. Incidentally, s20 (6) requires that the circumstances of the loss or destruction be specified, which respondents failed to do. There was thus misrepresentation inducing the third respondent to issue a certified copy of the deed. And clearly, applicants stand to suffer prejudice if the provisional order is not confirmed as the original title deed they hold is to all intents and purposes invalidated.

Disposition

In the premises the provisional order is confirmed in the following terms:

1. Third respondent be and is hereby ordered forthwith to expunge from his records Certified Copy of Deed of Transfer No. 621/2009 issued in lieu of the original on 31 October 2018.
2. The original Deed of Transfer No. 621/2009 in second applicant's custody be and is hereby recognized as the authentic Deed of Transfer in favour of first applicant.
3. First and second respondents be and are hereby ordered to surrender, within seven (7) days of the grant of this order, the Certified Copy of Deed of Transfer No. 621/2009 issued in lieu of the original on 31st October 2018 to third respondent.
4. A permanent interdict do issue against the first, second and third respondents from using or acting on the Certified Copy of Transfer Deed No. 621/2009 issued in lieu of the original on 31 October 2018.
5. In case of default, the Sheriff for Zimbabwe be authorised and/or empowered to retrieve from first and second respondents, the certified copy of deed of transfer and surrender it to third respondent.
6. First and second respondents shall pay the applicants' costs of suit.

Ruth Zimvumi Legal Practice, applicants' legal practitioners
Messrs Muringi Kamdefwere, 1st respondent's legal practitioners
Messrs Zinyengere Rupapa, 2nd respondent's legal practitioners