ELIZABETH KASHIRI
and
MARIA ROSA MATSVAIRE
versus
THE REGISTRAR OF DEEDS N.O
and
BRENDA CAROL LEEPER
(In her capacity as Executrix Testamentary in the Estate
of the Late Maria Johanna Francisca Logan)

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 8 July and 7 September 2022

Chamber Application

Mr *B Mahuni*, for the applicants
No appearance for the respondents

BACHI-MZAWAZI J:

Introduction

The applicants brought this chamber application seeking relief in terms of s 3 of the Registration of Title and Derelict Lands Act, [*Chapter 20:20*]. Well knowing that their circumstances do not fall within the cited section and rules, as a desperate measure to a desperate situation, the applicants deliberately chose to conceal material facts and information hoping to hood wink and mislead the court. However, their misrepresentations and dishonesty boomeranged right into their faces.

Summarized Facts

In their application, the applicants claim to have purchased immovable property, known as a certain piece of land situate in the District of Salisbury, called stand 346 Good Hope, Township of Subdivision B of Good Hope, measuring 4000 square meters, from one, Douglas Dodzo, in 2002. The second respondent, the executor of the estate, late Johanna Francisca Logan, had, on the 15th of August, 2000, sold the mentioned property on behalf of the estate, to Douglas Dodzo. Title did not pass from the late Johanna Francisca Logan's name, into that of the purchaser, Dodzo, up to date. The property is still in the name of the original registered late owner. It is alleged that, Dodzo, disappeared into thin air, after selling the property to the applicants and

before the successive change of title. The first respondent, cited in his official capacity, the Registrar of Deeds, responsible for transfer of title in immovable property.

The application

The applicants, by instituting a chamber application gave the impression that there were no interested parties and that the matter is uncontentious. In the same vein, they also painted a picture that they qualified to have title transferred in terms of the Registration of Title and Derelict Lands Act, [*Chapter 20:20*].

It is the applicant's case that, they conducted several searches for the seller, Douglas Dodzo, for the purposes of the successive transfer of title, to no avail. His whereabouts are said to be unknown. They attached a letter from their current legal practitioners, dated the 15th October, 2018 addressed to his last known address, as proof of their failed attempts to locate Dodzo. The applicants indicate that the subsequent transfer of the property in issue into their names has been hindered by their failure to find the seller. They further assert, that the documentation they have, enables transfer into their names through the invocation of s 3 of the Registration of Title and Derelict Lands Act fully cited above. They also claim that, since Dodzo has disappeared without a trace and the executor is not opposed to the transfer process then there is no contestation in the matter. Hence this chamber application.

An exposition of the law within the backdrop of the facts and evidence

In terms of r 60(15), in determining the fate of a Chamber application, a judge may raise such queries as he or she may consider pertinent to the disposal of the application. Further, r 60(8)(a) and(b) subscribes that a judge in such applications, is empowered to summon either party and their legal practitioners in chambers to answer and clarify emergent issues as well as the production of relevant evidence.

Faced with this application in chambers and observing that, apart from the above-mentioned letter of the 18th of October, 2018 and unsubstantiated averments by the applicant's Conveyancers, there was nothing on record indicating an exhaustive and diligent search on the part of the applicants justifying the conclusion that they could not locate Dodzo. The first question that came to mind is why the applicants did not pursue the substituted service route to ensure that there is no stone left unturned in their search for the missing person. What further complicates the matter is that, as a case stands and falls on its founding affidavit, the applicants' founding affidavit was silent as to who was in occupation and whether or not this would not turn out to be a deceased estate where the rights and interests of the beneficiaries will be at stake. See *Yunus Ahmed* v *Docking Safaris Private Ltd t/a CC Sales* SC 70/18. These questions

amongst several eyebrow raising others, prompted my request to see the parties in terms of r 60(8)(a) and (b) and 60(15) of the 2021 High Court rules, and also to impress upon substituted service. Moreso, when the Registration of Title and Derelict Lands Act, in s 8, speaks of substituted service by publication through a provisional order of this court. Moreover, substituted service is a legal tool whereby a party to a dispute, whose whereabouts are unknown may be served or informed of impending actions. In other words, it is an important method of serving documents where there are challenges in effecting personal service. As the name connotes it is a way of replacing personal and direct service of court process or any documents. In essence, it is an alternative way of bringing originating documents to the attention of the intended recipient. Alternative service can take many forms, registered post, on a reasonable person or in the modern technological world through facsimile, email or even social media. The most popular method being through the publication in a local newspaper or press. See, *Jubane (nee Khumalo)* v *Jubane* HB 97/2017 *and Amanda Gayle Peters* v *Macdonald Peters,* HH 453/18.

It normally applies to situations whereby the person to be served cannot be located, or maybe evading service to frustrate initiated legal proceedings against him. In any given jurisdiction, the rules of the court therein, set out instances and the manner substituted services of court process and related court documents can be served. In this jurisdiction, the whole of r 15 of the 2021, High Court rules is devoted to service of all process including informal the manner of service.

Service by publication is made through a chamber application before the court. See *Amanda Gayle Peters* v *Macdonald Peters* HH 453/18. Likewise, in the Australian case *of Miscamble* v *Phillips and Hoeflich* (No,2) [1936 St Rd Qd 272 at 274 cited in *Queensland Construction & Engineering P/L* v *Wagner* [2011] QDC171, it was stated that:

> "The primary object of substituted service, is to bring to the knowledge of the person in respect of whom substituted service is sought the whole proceedings, so that he can take such steps as he thinks proper to protect his interests and rights. It is not proper to substitute service of process in a court of law when there is no belief that the service will bring the proceedings to the knowledge of the person in question or of any person representing his interests."

The Australian courts also embraced and endorsed the modern global trend of service through the social media plat forms just to ensure service is received. In *MKM Capital Pty Ltd* v *Corbo and Poyser* [2008]SC 608(16December2008), the Supreme Court ordered substituted service *via* face book. Closer to home, in line with the dynamic shift in modern cyber world,

the South African court in *CMC Woodworking Machinery (Pty)Ltd* v *Pieter Odendaal Kitchens* (KZD) (unreported case no 6846/2006,3-8-2012, paved way to service through social media guided by the Canadian decision, in *Bolvin & Associes c Scott 2011* QCCQ 10324(CanLII).

In casu, after the applicants had complied with the directions of this court to proceed in terms of s 8 of the governing Act, they requested for an order as sought concealing the fact that that publication had triggered response from an interested party. The court learnt of the existence of a third party, with competing interests in the property when it called the applicants to explain issues referred to earlier on. Not only that, the person in question, to the knowledge of both applicants and their legal practitioners, had purchased the property from a totally different seller in 2003 and had been in occupation ever since. Furthermore, they did not disclose that pursuant to the substituted service by press publication the said third party, Chengetai Mary Gaza, had launched two parallel lawsuits in case HC 35/22 and Another.

The applicants failed to explain why they never took vacant occupation of the property since 2002 nor the terms of the occupation clause of their own agreement of sale if any. When asked to produce the original agreement of sale so as to ascertain from the occupational clause when vacant possession was to pass, they only produced two tattered pieces indicating only the first and last pages. Their explanation being that the information got lost in the twenty-year period. To further exacerbate the applicants' state of affairs, it was mind boggling why they had waited for a good twenty years, two decades without ascertaining their rights to the property they had genuinely purchased. This then casts doubt as to the authenticity of the complete but unauthenticated agreement of sale they had attached to their papers.

In that regard the following issues emerge.

Issues

i. Whether or not the application complies with rules governing chamber applications?

ii. Whether or not the applicants have satisfied the requirements necessitating change or transfer of title in terms of the Registration of Title and Derelict Lands Act, [*Chapter 20:20*]?

The first issue is, whether or not the application complies with the rules governing chamber applications? Evidently, this being a chamber application it is brought in terms of r 60 of Statutory Instrument No. 202 of 2021. In other words, r 60 of the 2021 High Court rules, governs applications of this nature. However, r 60(3) states:

> "A chamber application shall be served on all the interested parties unless the defendant or the respondent, as the case may be, has previously had due notice

> of the order sought and is in default or unless the applicant reasonably believes one or more of the following:
>
> a. The matter is uncontentious in that, no person other than the applicant can reasonably be expected to be affected by the order sought or object to it."

Of particular interest to the circumstances of this case is r 60(3a), above. This rule is meant to safeguard the interests of interested parties who may be affected by a decision affecting their rights and interests in which they had not been made a part to. It is in tandem with the common law principle of the right to be heard, *audi alteram partem rule.* The rationale being that, every person in a democratic society should be given an opportunity to defend themselves in actions or lawsuits that involve them or their interests. See, *Cook* v *Abrahams and 5 Others* HH 263-21, *T.M. Supermarkets(Private) Limited* v *Nkomo & 2 Others* SC 26/18, *Bere v JSC and Other*, SC 1/22.

The applicant gave the impression that, on the face of it, the matter was uncontested. That no other person other than the applicants can reasonably be affected by the order sought. They were not candid with the court. Litigants who do not only conceal but deliberately misrepresent important facts from the court alienate themselves from the court's favor. An exhibition of dishonesty is both unpalatable and unacceptable especially from legal practitioners who are also officers of the court. It is defeatist to the interests of justice which we are all obligated to serve. From way back, in the English case of, *Rex* v *Kensington Income Tax Commissioner*: *Ex Parte Princes Edmond de Polignac* (1917) 1 KB 486, Viscount READING CJ, in relation to *ex parte* applications, said, at p 495-496:

> "Where an *ex parte* application has been made to this court for a rule nisi or other process, if the court comes the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the facts, the court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the court that it had been deceived."

In the case of, *Van Lear v Begley Bros* 1957 R&N 902, (SR), it was held that:

> "The utmost good faith is required from a litigant who seeks relief in an *ex parte* application, and if he misleads the court in any material respect he renders himself liable to have the proceedings dismissed or to be penalized in a special order for costs."

BERE J, (as he then was), in, *Central Pvt Ltd* v *Pralene Moyas and Anor*, HH 57/12, had this to say on litigants who misrepresent facts to the court:

> "It is an accepted position that courts detest or frown upon those litigants or legal practitioners who desire to derive the simplicity of the court by deliberately withholding vital information which has a bearing on the very matter that the court is called upon to determine."

Most recently, is the instructive dictum in, In *Lilian Timveos and Anor Douglas Mwonzora and Others* HH370-20, extracted from n the case of *Sadiqi* v *Muteswa* HH 281-20, *(unreported)* both cases by MAFUSIRE J, at page 7 to 8 which is as follows:

> "Litigation is not a game of wits. It is a serious and scientific process to resolve disputes amongst individuals and settle problems in society. The search of the truth is paramount. It is a duty thrust upon everyone. A party that conceals material information from the court must be unworthy of its protection or assistance. If you seek relief, you must take the court into confidence laying bare all the relevant facts of the matter."

The doctrine of candidness before the court, was further extrapolated by the court of ultimate jurisdiction in Civil non constitutional matters, the Supreme Court, in the case of *Terera* v *George Lentaigne and Others* SC 93/21, wherein it was emphasized that, there is need for candidness in explanation to deserve empathy from the court.

The applicants knew from the onset that the matter was contentious but nevertheless proceeded with it as a chamber application. Hence the deliberate non- disclosure of the third parties with vested interests in the source of dispute. In view of the, dishonesty, misrepresentations and material non-disclosure of crucial facts chronicled herein as well as, the emergent of other interested parties, the application does not satisfy the requirements of rules governing chamber applications. It falls foul of r 60(3)(a) of the 2021 high court rules.

Evidently, this was a contentious issue not deserving the chamber application procedure. This disqualified the matter from both from the angle of the law governing chamber applications, the provisions for change of title and the relief sought. I would have ended by simply dismissing the matter on the first issue, but due to potential abuse by likeminded unscrupulous litigants, to the well- intended piece of legislation that assists parties with genuine and deserving situations and transactions, encountering difficulties in transferring rights in property where the other party goes missing or will be evading transfer of the same, I will explore the other issues raised herein.

On the second issue, whether or not the applicants have satisfied the requirements for transfer of title in terms of the Registration of Title and Derelict Lands Act, [*Chapter 20:20*]? It is my finding that the applicants have failed to satisfy the re requirements for change of title by virtue of s 3 of the Registration of Title Act. Having made a finding that there was dis-honesty and material disclosure accompanied by the fact that there is in existence a person with

competing rights in the property under contestation, I am of the opinion that this is not the situation envisaged by the legislature in enacting the Registration of Title and Derelict Lands Act, [*Chapter 20:20*].

This section simply streamlines and lists those who qualify to make applications to this court for an order directing the responsible authorities to effect transfer and situations in which such applications can be made.

Section 3 of the Registration of Title and Derelict Lands Act, [*Chapter, 20:20*] specifies that:

> "Persons having acquired title to derelict land may apply to High Court to order registration of such title
> Any person who, by prescription or by virtue of any contract or transaction or in any other manner, has acquired the just and lawful right to ownership of any immovable property in Zimbabwe registered in the name of any other person and cannot procure the registration of such property in his name in the land register, the register of occupation stands or the register of claims, as the case may be, in the manner and according to the forms for that purpose by law provided, by reason of the death, mental incapacity, insolvency or absence from Zimbabwe of the person in whose name such property stands registered as aforesaid or of any person or persons through or from whom such right has been mediately or immediately derived or owing to any other cause may apply to the High Court to order the registration of the title of such property in his name, in the land register, the register of occupation of stands or the register of claims, as the case may be.
>
> Provided by reason of the death, mental incapacity, insolvency or absence from Zimbabwe of the person in whose name such property stands registered."

As already stated, it is applicable to people with genuine transactions who are impeded from acquiring title from the original title holders in circumstances stipulated therein. *In casu*, I am not even convinced of the authenticity of all the un-commissioned documents placed before me and the veracity of any of applicants' claims as to the agreement of sale and the missing person. There is nothing indicating, that Dodzo is dead, insolvent or absent from Zimbabwe. Let alone that he indeed transacted with the applicants, in the face of a torn original agreement of sale with no clauses or terms whatsoever.

A finding has already been made that there are interested parties and that this application has been brought through material non-disclosure of their existence. The facts of this case have revealed that there is more to the case than meets the eye, there are two sellers and two competing rights of people who purchased the same property from two different sellers. Either way, the dispute as has developed is irresolvable in a chamber application. It thus, cannot stand. The applicant's situation does not fall under the section. This explains why the applicants were reluctant to search the allegedly missing seller by publication. This is an

illustration of the height of deceit and dishonesty by both the applicants and their counsel. They wanted to outmuscle the persons with competing rights in the property who had obtained vacant possession through the unorthodox use of an inapplicable law. The fact that the applicants did not obtain vacant possession and occupation of the property they seek to reclaim twenty years down the line is detrimental to their position leading them to this desperate course. Such conduct is abhorrent and deplorable. *In Dube* v *Turfwall Mining Private limited* SC 10/19 it was remarked that, for obvious reasons, courts are averse and detest dishonest litigants bent on misleading the court. The function of the court is to do justice. Lies are detrimental and incompatible with the due administration of justice in that they are bound to mislead the court.

Disposition

For the above reasons, the application is dismissed with costs

Scanlen & Holderness, applicants' legal practitioners