

HAMID SCOTT
versus
UNIFREIGHT LIMITED
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 8 July & 20 September 2022

Application to compel Transfer

Advocate G. Madzoka, for applicant
Advocate T Mpofu, for 1st respondent
No appearance for 2nd respondent

MHURI J: This is an application in which applicant is seeking an order to compel first respondent to transfer to him an immovable property known as number 9 Clyde Road Famona Bulawayo.

The application is opposed by first respondent. In brief, the factual background that gives rise to this application is that in 2008 applicant was one of the employees who were retrenched by first respondent. Among other things applicant's retrenchment package included the option to purchase the house he was living in, namely No 9 Clyde Road Famona Bulawayo. A dispute arose between applicant and first respondent as regards the purchase price leading to the matter being referred to an arbitrator for resolution. The arbitrator's final award, re houses issued on 24 August 2009 states,

"In the circumstances it is ruled that the claimants purchase the said houses at the amounts equivalent to 10 times their retrenchment packages. This in the tribunals view takes care of the interests of both parties as at the time of the Minister's Award.

That the figures may be meaningless today is not of the tribunal's making. For the avoidance of doubt, the parties shall for convenience purposes convert the said amounts to US dollars at the official rate recognised by the Reserve Bank of Zimbabwe as applicable on the date of receipt of the Minister's Award. This in my view meets the justice of the case, for to use the values of houses as an informing factor would be to remove the sale of the said houses from the ambit of the retrenchment package awarded by the Minister....."

On the 18 September 2009 applicant's legal practitioners wrote a letter to the arbitrator advising that an unquantified award is not registrable and thereto attached a document titled

“QUANTIFIED BENEFITS” and requesting the arbitrator to certify the award in its quantities.

On the document applicant’s house was quantified as follows:-

“SCOTT: 9 Clyde Road Famona Bulawayo value = 10 x 3 880 095 360 000
38 800 953 600 000

Last rate recognized by RBZ as at 1 February 2009

361 000 000 000 000

38 800 955 600 000

361 000 000 000 000

= NIL

Chitambo, Scott and Murumbeni are entitled to the above values at no cost.”

The document shows that the arbitrator certified as correct the quantification of the award he issued on 24 August 2009. An appeal was noted with the Labour Court and later the Supreme Court by first respondent which appeals it lost.

In October 2012 applicant applied to the High Court for the registration of the award which was granted on the 1 November 2012. Meanwhile on the 20 September 2012 first respondent had written to applicant advising that following the Supreme Court judgment, it was extending him the option to purchase the house for US \$ 37, 185, 668, 729. 19. The offer was valid for 30 days. Applicant responded to this letter on 14 December 2012 reiterating that the value of the home was nil as quantified by the arbitrator.

On the strength of the registered award, applicant obtained transfer of the house which transfer was however upon application by first respondent and a concession by applicant was declared null and void by this court resulting in first respondent re- taking transfer of the house. This resulted in applicant again filing this application seeking an order compelling first respondent to transfer the house to him.

First respondent raised some preliminary issues, namely that:-

1. There is no proper respondent before the Court.

This point was abandoned hence not pursued.

2. The matter is *lis pendens*.

The application under case number HC 4684/12 which was referred to was withdrawn by applicant on 28 October 2021.

3. The matter has already been determined (*res judicata*)
4. The order sought to be relied upon is superannuated
5. There is no legal basis established for the relief sought.

The third point *in limine* by 1st respondent is basically premised on the proceedings under case HC 9410/13 held before Manzunzu J. The parties were Unfreight Limited versus Hamid Scott, the Sheriff of Zimbabwe and The Registrar of Deeds. The order issued in that case was,

1. “The third respondent’s transfer of immovable property, being a certain piece of land situate in the District of Bulawayo being Stand 5411 Bulawayo Township Lands measuring 1303 square metres also known as 9 Clyde Road, Famaona, Bulawayo, to the first respondent be and is hereby declared null and void and is hereby cancelled.
2. the Deed of transfer No. 262/2013 in favour of the first respondent, be and is hereby cancelled and that Deed of Transfer number 1914/86, in favour of applicant be and is hereby declared to be valid.
3. the third respondent be and is hereby ordered to give effect to his order within seven (7) days of the date hereof.
4. the first respondent shall pay costs of suit.”

It was the first respondent’s submission that the quantification award that applicant relied upon to take title which was then declared null and void is the same quantification award applicant is relying on in the current proceedings. It was submitted that the *causa* in this current proceedings has been considered by this court hence applicant cannot take transfer because the award relied upon is not an award. The order by MANZUNZU J (*supra*) is final and definitive and not yet set aside.

In response, applicant argued that *res judicata* does not arise at all in this case. The *causa* in the current proceedings and the one in case HC 9410/13 are different in that the primary target in HC 94310/13 was a Title Deed which had been registered in favour of applicant, whereas in the current proceedings the issue is whether there is cause for transfer, the relief sought is different from the relief sought in HC 9410/13.

It is trite that where a matter pitting the same parties, and where the *causa* is the same and has been determined by a court of competent jurisdiction, the parties are estopped from bringing the same action again for determination. If a party re-litigates under these circumstances, the doctrine of *res judicata* applies.

The requirements for *res judicata* as stipulated in the case of *BANDA and Ors v ZISCO* 1999 (1) ZLR 340 are that:

- The action must be between the same parties
- Concerning the same subject matter and

- Founded on the same cause of complaint as the action in which the defence is raised.

Is *res judicata* applicable in this case? It is not in dispute that the parties in the case HC 9410/13 are the same as the parties in this application. The case HC 9410/13 was determined by a court of competent jurisdiction.

The application under HC 9410/13 was for an order reversing the registration of the transfer of the immovable property known as 9 Clyde Road Famona Bulawayo. The relief sought and granted by the court was the nullification of the] title deed issued in favour of applicant and restoring title to the first respondent.

In the present application, applicant is seeking an order compelling transfer of the property into his name. His draft order reads:

- “1. The first respondent be and is hereby directed to transfer the property known as No. 9 Clyde Road Famona, Bulawayo to the applicant within 30 days of receipt of this order.
2. In the event that the 1st respondent does not comply with this order, the 2nd respondent is directed to do all that is necessary to ensure that transfer is passed from 1st respondent to the applicant.
3. Costs of suit on a higher scale.”

Prima facie the relief sought in these two applications are different. However a closer look at the basis that gave rise to the two applications reveals that it is the arbitral award issued on the 29 September 2009 (the document on quantified benefits).

It is this award that MUTEMA J registered as an order of the High Court for purposes of enforcement in terms of s 98(14) to the Labour Act [*Chapter 28:01*] and it is on the strength of this order that applicant sought and was granted transfer of title of the said property. It is this title that was declared null and void by MANZUNZU J on the basis of a concession made by applicant’s legal practitioner in respect of the Quantified Benefits document (award) which applicant had relied upon in seeking transfer. It is on the strength of this same document that applicant is seeking an order compelling transfer.

The doctrine of *res judicata* applies. By nullifying the title deed on the basis of the concession in relation to the status of the document, the status of this document was determined. In that regard, applicant cannot re-litigate on the basis of the same document as it stood then.

It is my finding that this point *in limine* was properly taken and I uphold it.

Having found as I did above, I find it not necessary to proceed to consider and determine the other two preliminary issues as the matter rests on the first point.

Consequently, it is ordered that the application be and is hereby struck of the roll with costs.

Mupindu legal practitioners, applicant's legal practitioners
Kantor Immerman, first respondent's legal practitioners