HB 105/16
HC 2871/14
X REF HC 2906/14

MAXWELL SIBANDA

Versus

GAVIN EDWIN HAYLER

And

HAROLD STANGER HAYLER

And

MARGARET KATE MEEK

And

AUDREY AMY BENEDICT

And

REGISTRAR OF DEEDS N.O.

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 JANUARY & 14 APRIL 2016

Opposed Court Application

S. Mguni for the applicant
Mrs C. Bhebhe for the 6th respondent
No appearance for 1st to 5th respondents

TAKUVA J: Applicant, an employee of the 6th respondent filed this application on 5 December 2014 seeking an order compelling the 1st to 4th respondents to facilitate and register the transfer of an undeveloped stand being a certain piece of land in extent (120 Morgen sixty-four (64) square roods, forty-eight (48) square feet, being the remaining extent of 100 Acre Lot

Henry Mangizan situate in the District of Bulawayo, held in the name of Hayler & Company under Deed of Transfer No. 780/1946.

Further, applicant sought an order authorizing the Sheriff of this court to sign any necessary papers on behalf of the 1st to 4th respondents effecting the transfer of the property to him. The basis of the application is the applicant's claim to have bought the said property on 22 January 2006 from 1st to 4th respondents for the sum of Z$620 000 000,00. He relied on an agreement of sale marked as annexure 'B'. Applicant contended that he could not take transfer immediately because he could not raise the money to bear all the costs involved in taking transfer. He is now desirous of facilitating transfer but his "predicament" is that he has lost touch with all the respondents and is unaware of their present whereabouts.

To overcome this hurdle applicant filed a chamber application on or about the 10th of December 2014 seeking leave from this court to serve the court application on 1st to 4th respondents by publication in the Chronicle Newspaper. On 19 January 2015 this court granted the application per MAKONESE J. Consequent upon that order applicant then caused a publication of this court application in a shortened version in the Chronicle Newspaper on the 19th February 2015.

The 6th respondent was alarmed by this application leading to its decision to oppose it. It then filed an application under cover of case number HC 589/15 seeking to be joined as a party in this particular application. Applicant did not oppose this application which was duly granted.

Having been joined as a party 6th respondent filed its notice of opposition. In her opposing affidavit, the Chamber Secretary and Acting Town Clerk, one Sikhangele Zhou stated that the power of attorney presented to their offices is a forged document that should not be relied upon by this court. She also attacked the authenticity of the agreement of sale (Annexure B) on the basis that it was allegedly signed by only one beneficiary to the exclusion of the rest of them. Further, that beneficiary who allegedly signed did not have the requisite authority to

represent the company. According to her the applicant is clearly trying to fool this court into awarding or transferring the property to him by devious, fraudulent and unlawful means.

At the hearing of this matter, two issues arose for consideration, namely:

(1) Whether or not the 6th respondent has *locus standi in judicio* to oppose the court application *in casu*?
(2) Whether or not applicant has made a good case for the relief sought?

Although applicant had filed heads wherein he addressed the 1st issue *in extenso,* he abandoned it during the hearing. This left only the second issue for determination. Applicant contended that he lawfully entered into a written agreement of sale which was signed by the 1st respondent on behalf of Hayler and Company. On that basis it was submitted that he acquired "just and lawful rights against the 1st to 4th respondent (*sic)* entitling him to sue for specific performance."

As regards fraud allegations against applicant, it was argued that these attempts are "scandalous and baseless." In his answering affidavit and in the heads of argument, applicant stated that the criminal charges were "withdrawn by the National Prosecuting Authority for lack of merit and evidence." Turning to the agreement of sale, applicant submitted that even if there are any irregularities in the "1st respondent's representation of the company in concluding the written agreement of sale such irregularities cannot affect the validity of the agreement in light of the provisions of section 12 (a) as read with section 13 of the Companies Act [Chapter 24:03].

Applicant relied on the legal principle in *Coronsel Investments (Pvt) Ltd* v *Spar Harare (Pvt) Ltd* 2008 (1) ZLR 430 (H) where it was stated at p 430E – F, that;

> "[T]he fraud of an employee working within the bounds of his authority does not render a contract invalid. Section 12 (a) of the Companies Act [Chapter 24"03] provides that any person dealing with a company is entitled to assume that the internal regulations of that company have been complied with. Section 13 provides specifically that liability under section 12 is not affected by fraud."

By parity of reasoning, applicant argued that he was entitled to assume that the internal regulations of the company had been complied with.

As pointed out above, there is no appearance for the 1st to the 5th respondents. The 6th respondent strenuously opposed the application. In her founding affidavit the Chamber Secretary and Acting Town Clerk of the 6th respondent, makes the following factual averments:

(1) Applicant's annexure B is signed by Gavin Edwin Hayler representing Hayler & Company. However, there is no company resolution attached to the application showing that Gavin Edwin Hayler had authority to sign on behalf of the company.
(2) Since 1st to 4th respondents are beneficial owners of that property, applicant would have needed Powers of Attorney from these owners for Gavin Edwin Hayler to sign the Memorandum of Agreement of Sale on their behalf. No such powers of attorney have been filed, meaning that there is no independent confirmation from them that they agreed to the sale.
(3) There is no proof that the purchase price which was supposed to be paid in full on the signing of the agreement was even made as applicant had not attached any receipt as proof of payment.
(4) Applicant's assertions in para 2 – 5 of his founding affidavit that he does not know the whereabouts of the 1st – 4th respondents cannot withstand scrutiny for the following reasons:
    (a) Sometime in November 2014, applicant approached the City Valuer with a Special Power of Attorney allegedly from the 1st respondent, the person who had allegedly signed annexure B – the agreement of sale of the property to applicant. This Power of Attorney gave the applicant authority to sign all documents necessary for the property and to represent him "without restriction".
    (b) The said Power of Attorney shows that the said Gavin Edwin Hayler resides at No. 7 Rufus Street, Birchleigh North, Kempton Park, Johannesburg, Republic of South Africa. It is notarised. In view of this, it is "reprehensible to say the least" for applicant to come to court and allege in an affidavit signed on the 5th of

December 2014 that he "does not know" the whereabouts of the respondents when less than a month earlier he met with the respondents, obtained a Power of Attorney, gave the respondents his own details as are endorsed on that Power of Attorney.

(c) The Power of Attorney was signed by one beneficiary instead of the 2nd – 4th respondents. It was notarized in South Africa by a South African Law Firm called Wentzel & Partners, and in particular signed by a Notary Public called J. Mazibuko. Investigations established that although the law firm did exist, it not have a J. Mazibuko in their practice. This information was supplied by the South African Law Society in annexure E.

(d) Further inquiries with Wentzel & Partners revealed that they are not Notaries and they disowned the so called Power of Attorney – see annexure G.

(e) The 6th respondent, convinced that applicant was using forged documents reported him to the police who arrested and placed him on remand – see annexure H which shows that applicant was charged with the following crimes;

(i) Fraud as defined in section 136 of the Criminal Law (Codification and Reform) Act Chapter 9:23 in that he tendered a false power of attorney to the 6th respondent.

(ii) Contravening section 39 (i) (a) of the Regional, Town and Country Planning Act Chapter 29:12 in that he unlawfully subdivided the land in dispute without a permit from the 6th respondent.

(iii) Fraud as defined in section 136 of the "Code" (18 counts) in that with intent to deceive or realizing that third parties mentioned might be deceived and act upon the misrepresentation to their prejudice, applicant sold residential stands which are part of the remaining Extent of 100 acre lot of Henry Mangizan which is the land in issue in this application.

The 6th respondent summarised its argument thus;

"11.8 What is clear from the above is that using the Power of Attorney signed as late as the 10th November 2014, applicant sought to deal with this property. This is why he approached the City Valuer. When he failed, he has tried other means and has filed this court application alleging that the whereabouts of the 1st – 4th respondents are unknown. Surely, if the Power of Attorney is authentic, he should be using that Power of Attorney. Further, if it is authentic, then he knows the whereabouts of at least the 1st respondent, Gavin Edwin Hayler, as his address is on that Power of Attorney. That Power of Attorney as stated earlier, was only signed on the 14th November 2014. Why then come to court on the 5th December 2014 less than 30 (thirty) days later and pretend that their whereabouts are unknown and publish something in the newspapers knowing that they will not see that publication. After all to his knowledge, they would be in South Africa, and so why publish in "The Chronicle" newspaper? This buttresses our view that the applicant has got serious explanations to make and his application cannot stand.

11.9 We may also draw the Honourable Court's attention to the fact that applicant has brought a number of applications seeking transfer of land to him on the basis that the land had been donated to him. He has sold most of those pieces of land and is now failing to transfer them. What is common in all these eases is that he will target the absent landlords' properties that have not paid rates for more than five years and property owners who are more than 100 years old. He would know that these people would no longer be in Zimbabwe and probably deceased and there would be no-one to contest those applications. It is our view that applicant is perpetrating a massive land scam which must be investigated because innocent people are being or may be defrauded of their hard earned cash.

12. As of now, there are 20 more stands which are being investigated because he acquired them under dubious circumstances. We hardy spend a day without a person coming to our offices complaining that they bought a stand from him and that he is failing to transfer it to them. These donations are suspicious and must therefore be investigated because the Donors are all white, who have not paid rates for a long time and he would divert the bills to his box number first before claiming a Donation. The Donors are in most cases no longer in Zimbabwe and are either deceased or too old.

13. It is our view therefore that this application should be dismissed as applicant is not entitled to the Transfer of the property. At the very least, he should explain that Power of Attorney and why it has turned out to be fake. He must explain why he did not use that Power of Attorney for purposes of this application and why he is now pretending that he does not know the whereabouts of the 1st respondent when it is endorsed on that Power of Attorney. In any event, the sale agreement is suspect as stated above." (my emphasis)

As a result of these fraudulent machinations, 6th respondent prayed for the dismissal of applicant's case with costs at an attorney and client scale.

I have deliberately set out the parties' averments in their papers in order to expose not only the seriousness of the allegations but also the response to those allegations. Let me turn to the applicant's responses in the answering affidavit. I must point out that I find applicant's argument not only flawed but also anchored on fragile reasoning. I say so for the following reasons:

(a) When it was pointed out to him that Gavin Edwin Hayler (Gavin) could not represent the company in the agreement of sale since there is no company resolution authorizing him to do so, his response was; "All relevant documents" were exhibited to him at the time of contracting. Interestingly, he does not specify or attach these documents to his answering affidavit. Surely, once challenged, the evidentiary burden shifted to him to prove this point. He did not do so. Instead he proffered a lame and unconvincing explanation.
(b) Further, upon being confronted with an averment that for the agreement of sale to be valid, applicant would have needed Powers of Attorney from the beneficial owners authorizing Gavin to sign on their behalf, applicant exposes his naivety by stating;

"<u>It is therefore premature for the 6th respondent to speculate that those relevant papers will not be produced before the 5th Respondent.</u>" (the emphasis is mine)

Now what I find preposterous and unbelievable is that this contention presupposes that these "relevant documents" are in applicant's possession and that he will produce them at the appropriate time, namely before the 5th respondent for purposes of transferring title to himself. The critical and determinative question that begs an answer is why has applicant failed to produce these documents now in order not only to strengthen his case, but more importantly to be candid with the court. Why is he withholding such crucial piece of evidence from the court? I take the view that applicant's failure to attach these documents is a clear indicator of his full knowledge that these documents are fictitious or at the very

least are bogus in that they were fraudulently acquired. Applicant's response is thoroughly incredible.

(c) Also, he has unsatisfactorily dealt with the question of how the pretium was paid. Asked about proof in the form of a receipt, all he could say was "it was paid *in casu* upon signing of the agreement." Applicant should have done more by perhaps attaching affidavits from those indicated as witnesses to the agreement. He in fact has not fully identified these "witnesses" to the agreement of sale.

(d) Applicant admitted that he approached the 6th respondent's City Valuer brandishing the bogus power of attorney. He contended that the purpose was "not meant for conveying title to me, but for subdivision of the property." See paragraph 14 of his answering affidavit. The purpose for which he produced the forged document is neither here nor there. In any case why was applicant subdividing property that has not been registered in his name.

(e) When applicant was challenged to explain why he contended in an affidavit signed on 5th December 2014 that:

"he does not know the whereabouts of the respondents" when less than a month earlier, he met with the respondent, obtained a power of attorney and gave the 1st respondent his own details, he wrote in paragraph 10 of his Answering Affidavit; "My dealings with 6th respondent and its officials was strictly on business basis and not as an employee. I must state that it is not correct that I travelled to South Africa in November 2014 to meet the 1st respondent. The said Power of Attorney was attested to in my absence and posted to me. 1st respondent used to do hunting and safari business in Zimbabwe. I lost contact with him in 2008. However, one of his business associates indicated that he had come into contact with him during hunting expeditions in the transfrontier game parks and other conservancies in Zimbabwe and the Southern Region. I then agreed that 1st respondent grant me a power of attorney for purposes of subdivision of the property in dispute. I did not travel to South Africa at this stage as alleged." (my emphasis)

What is noteworthy here is that the applicant has deliberately not divulged the name of the so-called business associate". Not only that, applicant has not provided details of how this mysterious person assisted him to communicate with Gavin. More importantly, applicant does not mention where and when he himself met this person. Even the description of the hunting area is vague. In my view, this whole episode is a figment of applicant's imagination. It never took place at all.

(f) Although admitting that the power of attorney "turned out to be unauthentic", applicant stated that this in fact spurred him to mount this application. Astonishingly he omitted to mention this fact in his founding affidavit. He also did not attach the forged power of attorney. All he said is; "My predicament now is that I have lost touch with the respondents and I am as such unaware of their present whereabouts." (my emphasis)

What is puzzling is why applicant was not candid with the court. He certainly did not put the court into his confidence by intentionally concealing this crucial fact from its eyes. It appears applicant was trying to pull the proverbial wool over the court's eyes. More interestingly and baffling is why Gavin would *mero motu* forge a power of attorney that would benefit applicant. This is not only odd but highly improbable and illogical too.

(g) Applicant used the fake power of attorney well knowing that it was bogus. It purports to appoint him as Gavin's "attorney in Zimbabwe …" when it is common cause that applicant is not an attorney in Zimbabwe. Notwithstanding, he proceeded to parcel out land and sell it to innocent third parties. The so called power of attorney tells a lie and applicant nevertheless used it and eventually uttered it to the City Valuer.

(h) As regards the criminal charges, applicant has proffered a bold denial without addressing his mind to the specific factual averments therein. He has deliberately avoided to explain why he subdivided the land in question in October 2014 without a permit from 6th respondent. More tellingly, he has skirted the allegation that he sold portions of the land in question between October 2014 and February 2015 before he acquired title to that land.

(i) For some strange reasons, applicant totally underplays the seriousness of the criminal charges he is facing. In his answering affidavit he adopts a cavalier approach in stating that the charges were not sustainable as I was "placed off remand". Further, in his heads of argument he submitted that; "… the criminal charges against the applicant which were preferred at the instance of the 6th respondent were withdrawn by the National Prosecuting Authority for lack of merit and evidence as shown by annexure I … There is no basis whatsoever to impugn the applicant's *bona fides* in the circumstances." (my emphasis)

Quite to the contrary, annexure I which is an extract from the Court Record Book shows the result as "Further remand refused. State to proceed by way of summons." Therefore, to state that the charges were withdrawn for lack of evidence, is to misrepresent the facts. In my view, the charges and facts as outlined in the state outline, constitute a solid and reasonable basis for the suspicion that applicant is engaged in fraudulent activities. A *prima facie* case has clearly been established. The fact that the state will proceed by way of summons does not make the allegations less serious, doubtful or ice cold. These charges are certainly not dead and buried, to the contrary, they are alive and kicking.

(j) While applicant's founding affidavit is silent on what efforts he made to locate the 1st respondent or any of them, he surprisingly, in paragraph 13 of his answering affidavit, has the audacity to state; "A fair attempt had been made to locate the 1st respondent but to no avail. Hence the court application was lodged in December 2014". This submission falls short of stating what exactly it is that applicant did to locate the 1st respondent. More significantly he does not say why he did not go to the address on the power of attorney in South Africa. Such conduct is very odd and illogical. I take the view that applicant did not go there or attempt to initiate any kind of communication with 1st respondent at that address because he knew 1st respondent was not resident at that address.

(k) Applicant's denial of the allegation that he targets absentee landlords' properties is hollow in that while he, tongue in cheek states "The property owners who have either sold me land or donated to me are all in Zimbabwe and alive," he has dismally failed to

parade them before the 6th respondent to prove his case once and for all. Applicant is the only person who knows where these people are. Surely, if these people freely and voluntarily sold or donated their properties to applicant, why is that all of them have suddenly become difficult to locate. Is it a mere coincidence that applicant has failed to produce even a single seller or donor. I think not. In the result, I find that applicant has not dealt with this allegation in a meaningful manner.

(l) As regards applicant's wobbling argument that even if there were any irregularities in the 1st respondent's representation of the company, such irregularity cannot affect the validity of the agreement in light of the provision of section 12 (a) as read with section 13 of the Companies Act, my view is that the sections are inapplicable to the case *in casu* for the simple reason that applicant *in casu* is not an innocent 3rd party dealing with a company official.

The letter and spirit of section 12 (a) *supra* is to protect the interests of a 3rd party who innocently deals with an official of a company who is not clothed with the requisite authority or one who fraudulently enters into a contract with a 3rd innocent party. See the words of LORD SIMON in *Morris* v *Kanssen* [1946] 1 ALLER (HC) at 592 when he said that:

"The rule in *Royal British Bank* v *Turquand* (The Turquand on Indoor Management Rule) provides that persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and one is not bound to inquire whether acts of internal management have been regular. The rule renders proof by the company that the internal formalities have been complied with insufficient to enable it to escape liability under the contract, hence the rule is not merely an application of the rebuttable presumption *omnia praesumuntar rite esse acta."*

Hahlo's *South African Company Law Through The Cases* 5ed at p 460 repeats the rule thus:

"Under the rule also known as the indoor management rule persons dealing with the director or manager of a company who openly exercises authority which he could have under the constitution of a company provided that some act of internal management was performed, are entitled to assume that that act was performed."

In our law, the rule is captured in s 12 of the Companies Act which states;

"Any person having dealings with a company, or with someone deriving title from a company shall be entitled to make to following assumptions and the company and anyone deriving title from it shall be estopped from denying their truth:

(a) that the company's internal regulations have been duly complied with;
(b) that every person described in the company's register of directors and secretaries or in any return delivered to the Registrar by the company in terms of section one hundred and eighty-seven, as director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager and secretary as the case may be, of a company carrying on business of the kind carried on by the company; or
(c) that every person whom the company, acting through its members in a general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company has been duly appointed and has authority to exercise the functions customarily exercised by an officer or agent of the kind concerned."

The spirit of these statutory provisions is that the "person/s" dealing with the company must do so in good faith. Where there is *mala fides* or illegality then as a matter of justice and morality, the third party cannot be protected or assisted to benefit from his own criminal enterprise. *In casu*, the totality of the evidence points to one conclusion, namely that the applicant has engaged in nefarious activities amounting to criminal conduct.

Evidently, applicant unashamedly intends to feather his own nest at the expense of other people's sweat. Obviously, such conduct is disgraceful and outrageous in that applicant could be stealing from the dead. In my view, to grant this application would intolerably hurt the conception of justice in the minds of sensible and fair-minded persons.

For these reasons, I am convinced on a balance of probabilities that the agreement of sale and the power of attorney are forged documents. Consequently, the so called sale is a sham and this court cannot enforce an illegal contract. I find the explanation given by the applicant

untenable, mainly because he is not being truthful. His reasoning, submissions and conclusions are so flawed that nothing meaningful comes out of them. Applicant has failed on a balance of probabilities to establish good cause for the order he seeks.

As regards costs there is merit in the 6th respondent's submission that applicant should be ordered to pay punitive costs. Applicant's conduct is totally unacceptable in that after he was informed that the power of attorney was unauthentic, he had no good reason to continue to seek enforcement of the agreement of sale involving Gavin. He persisted with his *mala fide* application even after 6th respondent indicated its interests and advised him of its grounds for opposing the application. Applicant was unperturbed, choosing instead to trudge on, forcing 6th respondent who relies on public funds to incur legal costs. The court shall show its displeasure at this conduct by an order of punitive costs.

Accordingly, it is ordered that the application be and is hereby dismissed with an award of costs on attorney and client scale.

Dube, Mguni & Dube, applicant's legal practitioners
Coghlan & Welsh, 6th respondent's legal practitioners