

TETRACH ENTERPRISES (PVT) LTD
versus
IRVINE MANHIRE
and
TECHMATE ENGINEERING (PVT) LTD
and
MUNICIPALITY OF KWEKWE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 27 MAY AND 2 JUNE 2016

Opposed Application

Ms C.T. Mugabe for the applicant
B. Muzenda for the 2nd respondent

MATHONSI J: The applicant is an incorporation based in Kwekwe and so is the second respondent. In HC 2978/15 the applicant sued out a summons seeking an order declaring null and void the cession of certain stands in Kwekwe to the second respondent and for the restoration of all rights and interest in those stands to it on the pain of attorney and client costs.

When the second respondent entered appearance, the applicant brought this application for summary judgment on the basis that it has not a *bona fide* defence and that appearance was entered for purposes of delay only. The application is opposed by the second respondent while the other two respondents, Irvine Manhire, who executed the cession from Tetrach Investments (Pvt) Ltd, an apparently non-existent entity, and the third respondent which is the local authority owning the stands in question, stayed far away from these proceedings.

The facts are that on 15 February 2011 Tetrach Investments (Pvt) Ltd passed a resolution purporting to be a company, to sell stand numbers 6544, 6533, 6534, 6535 and 6536 Kwekwe Township, Kwekwe to the second respondent for a price of \$35000-00. In the same resolution signed by a “company secretary,” it authorized Irvine Manhire to sign the power of attorney to pass transfer and to sign all other documents in connection with the sale.

It has not been explained what position Irvine Manhire held but *Ms Mugabe* who appeared on behalf of the applicant admitted that he was, at the material time, employed by the applicant and not by Tetrach Investments (Pvt) Ltd which she also admitted did not exist. So, if ever there was an entity in existence at the time, it was the applicant, which also employed Irvine Manhire. It is also worth noting here that the deponent of the founding affidavit is one Charles Manhire who shares a surname with Irvine and that the resolution dated 23 November 2015 giving him authority to represent the applicant in legal proceedings is written on a letterhead which gives the applicant's name only as "Tetrach." It does not have "Enterprises (Pvt) Ltd" or "Investments (Pvt) Ltd."

It is also significant that the signature of the secretary on the latest resolution of the applicant resembles that appended on the resolution of 15 February 2011 allowing Irvine Manhire to cede the stands. The aid of a handwriting expert is not required for one to see that the secretary of the applicant who signed the resolution on 15 February 2011 is the same secretary of the applicant.

Whatever case, it is common cause that in February 2011 the stands were registered in the name of Tetrach Investment (Pvt) Ltd at the offices of the third respondent and that they were ceded to the second respondent in February 2011 as confirmed by a letter from the third respondent dated 18 September 2015. The second and third respondents and Tetrach Investments (Pvt) Ltd signed the cession agreement then with the latter represented by Irvine Manhire, who is said to be now in Dubai.

Having observed that the third respondent's rates account was in the name of the applicant even after the cession, it is not clear when the third respondent's records were changed to reflect the applicant as the holder of title although it is admitted by the applicant that a correction was made at some stage, the applicant then instituted these proceedings.

Without bothering to explain why its official, the first respondent, alienated the properties and how he is related to Charles Manhire the deponent of the founding affidavit, the applicant says that when he signed the cession agreement as he did, the first respondent was not authorized by the lawful owner, the applicant. For that reason the cession was unlawful and fraudulent. The applicant insists that the cession was a nullity for want of authority on the part of the first

respondent and also by reason that the applicant's name was erroneously cited in the third respondent's records "which error was corrected a long time ago." The applicant adds that "no legal persona answering to the names of Tetrach Investments (Pvt) Ltd exists."

Now, in my view this is a trifle. It is even more so when considering that Charles Manhire the deponent says he is "one of the directors of the applicant." He does not take the court into confidence as to who the other directors are and deliberately does not disclose the status of Irvine in the company. Other than saying that Irvine did not have authority, the applicant's papers are completely silent about this individual. The applicant trifles with the court when it seeks to found a cause of action on such vagueness and the fact that there was an error at the municipal offices in recording its second name. For that reason, even though it is one of its officials who executed the cession, it should be allowed to reclaim the properties without even explaining what became of the purchase price. Life can never be that easy.

Summary judgment is an extra ordinary remedy in the sense that it denies a party who has shown a desire to contest a claim, an opportunity to do so. It is a procedure conceived so that:

"a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem* --- when all the proposed defences to the plaintiff's claim are unarguable, both in fact and in law ----."

(*Chrisma v Stutchberry* 1973 (1) RLR 277).

Conversely, in order to succeed in defeating a summary judgment application the respondent must set out a *bona fide* defence by alleging facts which, if established at the trial, would entitle him to succeed; *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F – G; *Jena v Nechipote* 1986 (1) ZLR 29 (S).

In my view, that is what the second respondent has done. It has shown that an official of the applicant sold the properties to it and signed the agreement to pass the right, title and interest in the properties to it. This has been confirmed by the municipality which superintends the properties. The applicant seems to be hiding behind a finger, not a very effective instrument for cover, and is obviously taking advantage of an insignificant error in records to try and reverse what is, on the face of it, a genuine sale.

There must have been a reason for the parties to record the name of the seller as Tetrach Investments (Pvt) Ltd when it did not exist. It is either because the second respondent's due diligence search had revealed that the records showed it as the title holder, or the applicant's official wanted to mislead.

Whichever way the facts point to the existence of triable issues as the second respondent's case is clearly arguable.

In the result, it is ordered that:

1. The application for summary judgment is hereby dismissed.
2. The applicant shall bear the second respondent's costs.

Lunga Gonese Attorneys, applicant's legal practitioners
Messrs Hore & Partners, 2nd respondent's legal practitioners