MICHELLE OSVALDO FILANNINO
versus
SHEPHERD CHIMUTANDA N.O
and
NEWTON JARAVANI
and
BALEDALE INVESTMENTS (PVT) LTD
and
MASTER OF THE HIGH COURT N.O
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 January, 2018 and 4 June, 2018

**Opposed Matter**

*R. Nyapadi*, for the applicant
*Ms G. Tavenhave*, for the 1st respondent
*P.M Mazhande*, for the 2nd respondent
*A. Masango*, for the 3rd respondent

MANGOTA J: I heard the current application on 26 February, 2018. I delivered an *ex tempore* judgment in which l granted the application which had been prayed for.

The third respondent wrote requesting for reasons for my decision. It did so on 16 March, 2018. These are they:

The applicant holds 70% shares in Harare Produce Sales (Pvt) Ltd which, for convenience, is abbreviated to HPS. HPS was placed under judicial management on 28 May, 2013.

The first respondent was appointed HPS's provisional judicial manager. He allegedly failed to live up to the duties of his office as provisional judicial manager. The alleged failure precipitated this application.

The applicant couched the draft order which he moved the court to grant to him in the following terms:

"IT IS ORDERED THAT:

1. 1st Respondent be and is hereby relieved of his duties as the judicial manager of Harare Produce Sales (Pvt) Ltd.
2. Theresa Grimmel of Trivade (Pvt) Ltd be and is hereby appointed the judicial manager of Harare Produce Sales (Pvt) Ltd.
3. Title deed No. 1069/07 in favour of the 3rd Respondent be and is hereby cancelled in terms of section 6 of the Deeds Registries Act.
4. Upon cancellation of Title Deed No. 1069/07, Stand 45A Spurrier Road, Adbennie, Harare be and is hereby transferred to Harare Produce Sales (Pvt) Ltd."

Stand number 45A Spurrier Road, Adbennie, Harare ["the Property"] constitutes the applicant's main bone of contention. The property, he avers, was purchased with HPS's money and was transferred into the name of the third respondent. He alleges that the first respondent became aware of the stated matter as far back as 22 March, 2016. His concern is that, his knowledge of the matter notwithstanding, the first respondent has not acted with speed and resolve to reverse the transfer of the property into the name of HPS. He submits that his legal practitioners wrote requesting the first respondent to attend to the mentioned matter. They wrote him on 17 November 2016, according to him. The first respondent, he states, did not attend to the matter in issue from the time that his attention was drawn to the same todate. He avers that the conduct of the first respondent on the matter as well as in other matters remain prejudicial to HPS in which he is a majority shareholder. He moved the court to enter judgment for him as per the draft order.

The first, second and third respondents opposed the application. The fourth and fifth respondents who were cited in their official capacities did not. My assumption is that they chose to abide by the decision of the court.

The first respondent admits that he became aware of the fact that the property belonged to HPS. He states that the issue of its transfer into the name of HPS remained work in progress. He denies that he performed his judicial management duties below the standard which his expected of a provisional judicial manager. He states that he unsuccessfully made every effort to revive HPS.

The second respondent raises the defence of prescription. He denies that HPS's money was used to purchase the property. He avers that the money came from the third respondent. He submits that the property could be transferred to HPS subject to the latter paying full value for the same to the third respondent. He moved the court to dismiss the application with costs.

The third respondent states that the money which was used to purchase the property belonged to it. It insists that it owns the property. It avers that the second respondent wrote the e-mail which he addressed to the first respondent after he (2nd respondent) had ceased to be its director. It states that the second respondent did not, therefore, have the authority to make the statement which constitutes the contents of the e-mail. It moved the court to dismiss the application with costs on a higher scale.

The record shows that HPS's money was used to purchase the property. Annexures O,P and Q which the applicant attached to his answering affidavit are relevant in the mentioned regard. They state the mentioned fact in a clear and unambiguous manner.

The second and third respondents were being economic with the truth when they asserted that the money with which the property was purchased came from the third respondent. The reality of the matter is that it did not. Their assertion on the same becomes less credible than otherwise when regard is had to what they stated in paragraph 4.6 of their Heads. They said:

> "4.6 An analysis of the transaction shows that what the applicant should have been claiming is the money that was borrowed by the 2nd respondent and the claim arose immediately upon receipt of same by the 2nd respondent in 2003" [emphasis added].

Apart from stressing that what they stated is tantamount to giving evidence from the bar, the entire statement is a complete falsehood. They did not mention it in their opposing affidavit. They produced no evidence to support the allegation which they were making in their heads for the first time. The correct positon of the matter is, therefore, that no loan was ever advanced to the second respondent by the applicant or by HPS. The respondents made the statement as a way of explaining away a difficult situation with which they had been confronted.

The unchallenged statement of the applicant is that the second respondent abused his office as managing director of HPS. It avers that he used HPS's money to purchase the property which he registered in the name of the third respondent in which his wife and child are directors. It states that he benefited the third respondent to the prejudice of HPS.

The above-described set of circumstances show that the second respondent defrauded HPS. He used its money to purchase property which he registered in the name of a company in which he had, or has, a substantial interest.

I mention, in passing, that no legal right can stand on fraud. My views in the mentioned regard find fortification from the remarks of Lord Denning who, in *Lazarus Estates Ltd* v *Beasley*, (1956) IQB 702 (CA) at 712 said:

> "No court in this land will allow a person to keep advantage which he has obtained through fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." (emphasis added)

It stands to good logic and reason that what is obtained as a result of fraud cannot be allowed to stand. The results of a fraudulent act are a nullity. Nothing begets nothing.

The property which is the main reason for this application was registered in the name of the third respondent as a result of the second respondent's fraud. Title in the same is tainted with a serious defect. It cannot, therefore, be allowed to stand.

That the second respondent has always regarded HPS as the owner of the property requires little, if any, debate. Annexure E which the applicant attached to his application is relevant. The annexure is correspondence which took place between the first and the second respondents on 22 March 2016.

At 12.09 pm of the mentioned date, the first respondent addressed an e-mail to the second respondent. He wrote:

> "Dear Mr Jaravani
> Kindly confirm that Harare Produce Sales (Pvt) Ltd legally owns the premises (sic) they are situated 45 Sparrier Road, New Ardbennie, Harare." [emphasis added]

The response of the second respondent is contained in the e-mail which he wrote at 3:12 pm of the same date. It reads:

> "Mr S Chimutanda
> I confirm as I have already done to you in the past that the building being used by Harare Produce Sales belongs to it. This is why it has never paid rent to anyone." [emphasis added].

The two respondents' minds were, therefore, *ad idem* on the issue of who between the third respondent and HPS owned the property. The naked truth is that HPS owns the same.

The third respondent's assertion which was to the effect that, when the second respondent wrote the e-mail he was no longer its director and could not therefore bind it was misplaced. The second respondent did not make the statement in his capacity as director of the third respondent. He made it in his individual capacity. He is, after all, the one who defrauded HPS of its money with which he purchased the property which benefitted the third respondent to the actual prejudice of HPS. All he did was to state the true position of the matter. He stated

that position. He had no intention at all to bind the third respondent. His statement did not bind the third respondent or anyone else.

The position of the second respondent at the time of the purchase of the property cannot be underestimated. He was a director of the third respondent and the managing director of HPS. His status in the two legal entities, therefore, opened an avenue for him to defraud one company in favour of the other in which he had personal interests. The third respondent cannot, on the basis of the foregoing, be allowed to reap where it has not sown any seed. It cannot, in other words, be allowed to unjustly enrich itself at the expense of HPS.

The second and third respondent spoke in complete union on the allegation that the claim for cancellation of the deed of transfer number 1069/07 which was made in favour of the third respondent had prescribed. Whether or not what they stated is the correct position of the matter depends on the circumstances of this case.

The applicant states, and correctly so, that his claim is cancellation of the tile deed which was registered in the name of the third respondent and the subsequent registration of the property in the name of HPS. The claim, therefore, raises a dispute of ownership in a thing.

Part II of the Prescription Act [*Chapter 8:11*] is relevant. It assists in the resolution of the above matter. It reads as follows:

> "4. Acquisition of ownership by prescription.
> Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for –
> a) an interrupted period of thirty years; or
> b) a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years" [emphasis added].

It stands to reason that the third respondent cannot acquire, by prescription, a property which was registered in its name in 2007. Thirty years which are stated in the Prescription Act have not as yet elapsed. The defence of prescription is not therefore available to the two respondents.

In so far as the first respondent is concerned, he was aware as far back as before March, 2016 that the property belongs to HPS. He did nothing to transfer the same into the name of HPS. His statement which is to the effect that he required authorisation from HPS's directors and other interested parties to effect the transfer is misplaced. The statement runs contrary to what MALABA J (as he then was) stated in *Feignbaum & Anor* v *Germanis NO & Ors,* 1998 (1) ZLR 286 (HC) wherein he remarked that:

> "such authorisation would be contrary to the object of judicial management, which is that the provisional judicial manager or the final judicial manager must carry on the business of the

> company so that it is able to pay its debts in full, meet its obligations and become a successful concern."

The assertion of the first respondent is the exact opposite of what the law confers upon him. He does not require the authority of anyone other than that of the court to execute his duties as a judicial manager. He, once appointed, is not answerable to the directors of the company which he manages. His very appointment spells out this simple fact that the directors of a company which he is managing have, due to their mismanagement, injured the company which he is enjoined to cure and put it back on course. He therefore has to single-handedly nurse the wounds of the sick company, breathe life into its nostrils and bring it back to life.

Uncontroverted evidence which is filed of record shows that the first respondent failed to turn the fortunes of HPS into a going concern. He admitted in para 4 of his affidavit that HPS has not recovered. He laid blame on the directors of HPS. He alleged that these opened other companies which have the same line of trade as HPS.

What the first respondent is saying is that, where HPS is in competition with other companies, he cannot act to its advantage his status as its judicial manager notwithstanding. That is a very sad statement because competition is the lifeline of any business enterprise. It cannot, therefore, be avoided.

The old adage which says 'when the going gets tough the tough get going' should have properly guided the first respondent. He should not have allowed himself to sink. He should have moved with resolve to remain afloat as the captain of a sinking ship. His recommendation which is to the effect that HPS should go into liquidation is unfortunate. A *fortiori* when it has a property which can turn its fortunes around but for the issue of the property's transfer into its name.

The applicant asserted that he has lost confidence in the manner in which the first respondent is performing his judicial management duties. His views cannot be faulted given the above described set of circumstances. His concerns are warranted. They are nothing but real.

The applicant proved his case on a balance of probabilities. The application is not devoid of merit. It is, accordingly, granted as prayed.

*Muza & Nyapadi*, applicant's legal practitioners

*Tavenhave & Machingauta*, 1st respondent's legal practitioners
*Mazhande Mazhande Legal Practice*, 2nd respondent's legal practitioners
*Muronda Malinga Legal Practice*, 3rd respondent's legal practitioners