SELINAH CHIDO TAYI
versus
EMERY JOZEPH HAJDU
and
VEROCY REAL ESTATE (PRIVATE) LIMITED
and
COTSWOLD GROVE FLATS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 26 March, 2018 and 13 July, 2018

Opposed application

B Diza, for the applicant
K Kachambwa, for the respondents

MANGOTA J: I dealt with this matter on 26 March, 2018. I delivered an *ex tempore* judgment in which I dismissed the same.

On 28 May, 2018 the applicant wrote through her legal practitioners. She requested for reasons for my decision. The letter which she wrote reads, in the relevant part, as follows:

> "We kindly request written reasons to enable us to advise our client accordingly and proceed accordingly."

I state hereunder the reasons for the decision which I made.

At the centre of this application are 8400 "G" class shares of a nominal value of ZW$1.00 each. These entitle the first respondent to ownership of the flat known as number 7 Cotswold Grove Flats, Mabelreign, Harare ["the property"].

The applicant alleges that she purchased the shares from the first respondent through the second respondent. She says she did so in terms of an agreement of sale which the parties concluded on 14 and 15 May, 2015. She states that she paid $80 000 as full purchase price for the shares. She moved the court to compel the second and third respondents to sign and release the share transfer documents for the property to her. Her case, in short, is that of specific performance.

The first and second respondents filed notices of opposition. The third respondent did not. My assumption is that it chooses to abide by the decision of the court.

The second respondent did not file Heads. It is automatically barred in terms of r 238 (2b) of the High Court Rules, 1971. Its case essentially falls into the position of that of the third respondent. That observed matter leaves only the first respondent in the equation.

The first respondent denies having ever entered into the contract of sale of his shares with the applicant. He submits that:

(a) he conferred authority on the second respondent to manage his properties; but
(b) he did not authorise it to sell the shares which relate to the property to the applicant; - and
(c) he did not sell the same to the applicant - and
(d) the signature which appears on the agreement is not his but is a forged one.

It is pertinent for me to make some general observations about the parties' presentation of their respective cases before I delve into the substance of the same. The applicant filed an answering affidavit as well as what she termed a supplementary affidavit. She filed both affidavits on 11 May, 2017.

It is within the applicant's rights to file an answering affidavit to the respondent's opposing papers. The rules of court confer a discretion upon her to file such. They also allow her to file, together with her answering affidavit, supporting affidavits, if such remains her intention. It is, therefore, in the spirit of r 234 of the High Court Rules that she filed, and correctly so, the supplementary affidavit.

As has already been stated, the applicant's affidavits were filed on 11 May, 2017. Her Heads were filed on 4 October, 2016. They were filed some seven (7) months before the answering, and other affidavit(s), were filed. How the stated anomaly came about remains a matter for conjecture which the court cannot comprehend. The applicant, on her part, does not offer any explanation for the observed anomaly which takes its case outside the sequence of motion, or action, proceedings. It is, however, in the interest of the need to maintain a balance as between the parties' respective cases that I remain inclined not to disregard the applicant's affidavits. They, therefore, remain in support of her case.

The first respondent filed his opposing affidavit on 20 December, 2016. He filed what he termed "<u>founding affidavit of expert witness</u>" on 9 October, 2017. He did so five (5) months

after the answering affidavit had been filed. He, in the mentioned regard, violated r 235 of the High Court Rules, 1971. He did not state that he sought, and was granted, leave of the court or a judge when he filed the expert witness's affidavit. In the ordinary course of events, therefore, the affidavit would be disregarded. I, however, remain constrained to disregard the affidavit. I remain alive to the fact that my function as a court, is not to be a slave of the rules which the court designed for its operations. I realise that the attainment of real and substantial justice as between the parties who are before me is more pertinent to my function than a strict adherence to the rules. I make the observation that the evidence of the expert witness would render assistance in the correct determination of the matter which the parties placed before me. I, accordingly, take refuge in r 4C of the High Court Rules, 1971 which allows me to depart from the rules as to procedure in the interest of justice. I, on the mentioned basis, allow the affidavit of the expert witness to remain in, and form part of, the record.

The importance of expert witness's evidence can hardly be over-emphasised. The courts, the world over, place great reliance on such evidence. It assists them to resolve complex situations which courts are confronted with on a day-to-day course of their work. It was for the mentioned reason, if for no other, that the Constitutional Court of South Africa expressed itself well on the subject of expert witnesses when it stated in *Clenister* v T*he President of the Republic of South Africa & Ors* [CCT 28/13) (2013) ZACC 20 that:

> "In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide."

The importance of the same was also crisply stated in *Gentiruco AG* v *Firestone SA (Pvt) Ltd*, 1972 (1) SA 589 (A) at 616 H wherein it was remarked:

> "The true and practical test of the admissibility of the opinion of a skilled witness is whether or not the court can receive <u>appreciable help</u> from that witness on the particular issue. Expert witness testimony on an ultimate issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion…."

It is on the strength of the cited case authorities and the need, on my part, to resolve the issues which the parties placed before me that I accept the affidavit of the expert witness. His qualifications, experience and credentials as stated by him satisfy me that he is well-versed in his area of work. His evidence cannot, therefore, be ignored.

The supplementary affidavit of the applicant states, in clear and categorical terms, that the purchase price for the shares did not find its way to the first respondent. It tended to establish the fact that, at some point, the first and the second respondents entered into some

negotiations with a view to allowing the second respondent to pay the purchase price to the first respondent in instalments. The long and short of the contents of the affidavit is that the first respondent was prepared to ratify the unauthorised conduct of the second respondent, that of Veronica Nyoni in particular.

The affidavit remains assumptive on the allegation that the first respondent knew about the contract of sale. It is a mis-statement for the applicant to allege, as she does, that the first respondent handed his share certificate to the purchaser to be cancelled and replaced with a new one.

Annexure D which she attached to her application is a letter which Messrs Chadyiwa & Associates addressed to her on 16 September, 2016. The letter deals with the applicant's stated matter. The legal practitioners who forwarded the original share certificate to her did not state that they were acting for the first respondent. They said they were instructed by, and they acted for, the second respondent.

It is evident, from the foregoing, that the applicant's reliance on the legal practitioners' letter of 16 September, 2016 is misplaced. The contents of the letter cannot be imputed on the first respondent. The letter was part of the second respondent's giant scheme of fraud.

That the second respondent, Veronica Nyoni in particular, defrauded the applicant and the first respondent is evident from a reading of the affidavit of the expert witness. His statement is that a comparative analysis which he made of the signature which appears in the agreement of sale with the signatures of the first respondent as read from documents which were availed to him for the purpose is not that of the first respondent. His conclusion on the analysis which he made reads:

> "A copy of the questioned document was examined, but the dissimilarities are distinctive. It is my professional opinion that the questioned signature and initials are not authentic. The questioned signatures were not executed by the same hand that wrote the known signatures and initials, E.J Hajdu."

The applicant's statement, on the merits, is that she paid $80 000 as purchase price for the shares. She attached to her application Annexure C. The annexure, she avers, constitutes proof of the payments which she made. It appears at p 17 of the record. It shows the sums which she says she paid as follows:

'DATE	AMOUNT
8 July, 2015	$ 5 000
30 May, 2015	$62 954
26 June, 2015	$ 4 965

20 July, 2015	$ 5 000
28 July, 2015	$ 581
Total paid	$78 500
Balance outstanding	($1 500)

The applicant does not mention if she paid off the balance of $1 500. She produced no receipt for the mentioned sum. There is no evidence that she paid that sum. Her statement which is to the effect that she paid the full purchase price of $80 000 for the shares, therefore, remains questionable.

The generally accepted position which states that he who alleges must prove holds true in this application as well as it does in all other cases-civil and/or criminal-which parties bring before the courts. Reference is made, in this regard, to the case of *Rusitex Agencies (Pvt) Ltd* v *Peter Fungayi Kangara,* HH 9/13 wherein the court, dealing with the issue of *onus,* said:

> "There is direct authority for saying, as I suggest, that the rule placing the *onus* of proving payment on the person who alleges it really depends on the principle that the *onus* is on the person who affirms and not on him who denies … all Roman and Roman Dutch authorities who deal with the subject agree on (the rule's) existence."

In casu, the applicant alleges that she purchased the shares from the first respondent. She should, therefore, have proved her statement in the mentioned regard. A *fortiori* when the first respondent challenges the same as he is doing.

The challenge which the first respondent mounted places her case in a balance. It shifts the *onus* on to her to prove the veracity of her assertions. She cannot rely on the signature which appears on the agreement of sale as proof of the fact that she concluded the contract with him. That is so because he denies being the author of the same. She should, therefore, have produced concrete evidence which shows that his denial was *mala fide.*

It is not for the first respondent to prove his denial. The applicant must prove what she asserts. Where, as *in casu,* she fails to prove that the signature is his, the matter ends there. My views in the mentioned regard find support from a number of case authorities. Amongst those is that of *CSC Ltd* v *Rapid Discount House Ltd*, 2003 (1) ZLR 358 (S) wherein MALABA JA (as he then was) remarked at 365 F that:

> "Once the defendant denied that it signed the documents, it could not be found liable on them until the plaintiff had proved, on a balance of probabilities, that it signed the documents."

The learned judge continued at paragraph G and said:

> "No presumption of the fact that the defendant signed the documents as maker of them…… arose from the mere physical presence of the signature on the documents."

INNES CJ discussed the same principle in *Lotzof* v *Lotzof*, 1915 AD 127 at 134 and said:

> "Now in view of the denial embodied in the plea, it is clear that the first task falling to be discharged by the plaintiff was to establish that the signature to the note was the signature of the defendant. If he failed to satisfy the court on that point, there was an end of the case. And the onus in that respect being on him, if in the result all reasonable doubt had not been dispelled, then an order of absolution was correct and proper."

RAMSBOTTOM J expressed the principle in a more pronounced manner than other judicial pronouncements which were made on the same. He stated in *Inglestone* v *Pereira*, 1973 WLD 55, at p 70-71 that:

> "If the fact relied on is alleged in the summons and is not denied it is taken to be admitted, but if it is put in issue, it must be proved by the plaintiff to whose case it is necessary. Similarly, if the defendant denies that the signature to the document is that of himself or his agent or if he denies that the signatory was not authorised to sign on his behalf, the *onus* would be on the plaintiff to establish those facts."

The applicant's statement is that she purchased the shares from the first respondent through the second respondent. She produced no evidence which supports the assertion that the first respondent authorised the second respondent to sell his shares. The *onus* is, once again, on her to prove the veracity of her allegation.

The first respondent stated that he authorised the second respondent to manage his properties. He denied that he authorised it to sell his shares.

It is trite that the authority to manage a person's properties does not, in itself, translate into selling one or some of the principal's properties. It was, therefore, incumbent upon the applicant to have satisfied herself of the fact that the second respondent did, indeed, have the authority of the first respondent to sell the shares which relate to the property.

WESSELS JA stressed the abovementioned matter when he stated, in *Revenue Plantations Ltd* v *Estate Abrey & Others*, 1978 AD 143, 145-5, that:

> "It is … essential to see what the exact authorization is of the principal to his agent in every case in which it is sought to make the principal liable for the fraud of the agent…"

That the second respondent, thorough its director Verenica Nyoni, acted fraudulently with the shares of the first respondent requires little, if any, debate. The evidence of the questioned document examiner which has already been referred to in the foregoing paragraphs of this judgment bears sufficient testimony for the observed matter. In line with WESSELS JA's remarks, therefore, the applicant should have conducted due diligence before she signed the

contract of sale. If she had done so, she would have had no difficulty in discharging the *onus* which relates to the stated issue. She would, without further ado, have said she made inquiries with the second respondent which showed her some document which stated that it had the authority of the first respondent to sell the shares. She could, in the mentioned regard, have made reference to the contents of the document which the second respondent availed to her.

The fact that she made some bold statement on the matter shows that she proceeded on the assumption that:

i) the second respondent is the agent of the first respondent who must have
ii) authorised it to sell the shares.

I mention in passing that assumptions are a most dangerous thing for a party to adopt. They convey to it a false impression which, when put to the test, crumbles to pieces leaving the one who relied upon them with little, if any, hope of achieving anything from them. The best a party who enters into serious negotiations with another should always do is to obtain concrete evidence so that when his statements are challenged, as *in casu,* he can stand up, raise his head in the air and insist that he is able to prove what he asserts.

Added to the complexity of the above observed matter is the generally accepted principle that the second respondent, as an estate agent, is not an agent in the strict sense of the word. MAKARAU JA (as she then was) made some incisive remarks on this matter in *Katsande* v *Rumani Real Estate (Pvt) Ltd & Anor,* 209 (2) ZLR 196 (H) at 199 D – G and 200 A. The learned judge quoted extensively from Professor Ellison Khan's article (1980) 97 SALJ 393 who describes the estate agent as a "legal oddity." He said:

> "… generally speaking, an estate agent is not an agent *strict sensu* clothed with authority to transact fully on behalf of his principal. An estate agent is merely mandated to find a prospective purchaser of the seller's property. After accepting the mandate he or she is under no obligation to find the purchaser and no action will lie against him or her for failing to find a purchaser or for finding a purchaser who will not eventually go through with the sale. After finding a prospective purchaser he or she is not clothed with authority to bind his or her principal in the sale agreement. Hence his or her oddity as an agent *strict sensu* would not thus be restricted."

HOEXTER ACJ explained the unique position which the estate agent enjoys *vis-a-vis* the seller of the property. He stated, in *Bird* v *Sammerville,* 196 (3) SA 194 (A) at 202 C – E that:

> "The estate agents on their part did not undertake anything at all, if they wanted to earn a commission, they would have to find a purchaser; but they could not be compelled to earn their commission, nor, if they found a purchaser or purchasers were they bound to introduce him or them to the appellant. They clearly had no authority to enter into a contract of sale on behalf of

> the appellant, nor could they foist on him a buyer without his consent. They could only produce a prospective buyer but they could not force the appellant to sell to him or sell at all; indeed the right to refuse to sell to any prospective buyer or to choose one out of several was always that of the appellant and the appellant only."

It is, in my view, as a result of its realization of its unique position as an estate agent that the second respondent sought to suggest that the applicant and the first respondent concluded the contract of sale. The reality of the matter is that the first respondent did not sign the contract. The probabilities are that, in its effort to defraud him of his shares, the second respondent, through Veronica Nyoni, negotiated the contract of sale with the applicant and forged the first respondent's signature on the same.

It is trite that a contract born out of fraud is a nullity. Fraud begets nothing. It, in fact, unravels everything. Reference is made, in this regard, to the famous words of Lord DENNING who, in *Lazarus Estates Ltd* v *Beasley* (1956) 103 702 (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."

Both the applicant and the first respondent fell victim to the second respondent's fraud. The status *quo ante* the fraud which was perpetrated against them, therefore, obtains.

The assertions of the applicant as measured against those of the first respondent introduce into the equation material disputes of fact. The applicant should have remained alive to the observed matter. She should have realised that the statement of the first respondent would disenable the court to resolve the matter which she placed before it on the papers. She should, in the circumstances of this case, have withdrawn her application with a view to proceeding with the same through an action. Her persistence with the same in the face of real and uncontroverted challenges which the first respondent mounted works to her detriment.

It is an accepted fact that where material disputes of fact exist, the court has a discretion. It can refer the matter to trial. It can, in the alternative, dismiss the application altogether. See *Magurenje* v *Maphosa & ors* 2005 (2) ZLR 44 (H).

I am, *in casu*, constrained to refer this application to trial. My reasons for the view which l hold are many and varied. Chief among them is that the applicant failed to realise, from the first respondent's denial of the signature which appeared in the contract, that she could not prove that the signature was his on the papers which she had filed. She failed, unreasonably though, to appreciate that proof of such a denial of the signature required concrete evidence

from such expert witnesses as questioned document examiners. She was aware of the need for such critical evidence when she persisted with the application. She has no one else to blame for her misfortunes but herself.

It is pertinent that litigants be warned. A litigant who proceeds by way of motion, instead of action, proceedings when, in his mind, he fears disputes of fact would arise and persists with the same even where such are not only apparent but are clearly existent, should blame no one else but himself when, as a result of the same, the court dismisses his application.

It is accepted that motion proceedings are quicker and more expedient than action proceedings. They, however, have their dangers which litigants must always remain alive to. It is, in my view, prudent and more expedient for a litigant to take the longer and, probably more expensive, route than the shorter one which offers little, if any, hope to him because of the dangers which inherently remain in it. If the longer and more expensive route produces good results for the litigant, it stands to better reason and good logic for him to follow that route than to take the route which offers no result to him. The choice, however, remains that of the litigant who moves the court to enter a judgment in his favour. A reasonable litigant will always weigh his options and do that which is reasonable to him.

The applicant was a very naïve purchaser. She said she concluded the contract of sale with the first respondent. She states, in the same breadth, that she paid the purchase price into the trust account of the second respondent.

Simple common sense does not support the position which she took. It makes little, if any, sense for her to sign the contract with the seller of shares and deposit the purchase price for the same into someone's trust account.

The fact that Veronica Nyoni who is the director of the second respondent got arrested for dishonesty supports the view which l hold of the matter. The applicant should have conducted due diligence before she parted with her money. She should have satisfied herself of the following matters which were pertinent to her case:

i. that the first respondent authorised the second respondent to sell the shares;
ii. that the second respondent was, indeed, the agent of the first respondent in the negotiations which related to the sale of the shares – and
iii. that the first respondent authorised her to deposit the purchase price into the trust account of the second respondent.

The probabilities are that she did nothing of the above stated matters. She, therefore, fell victim to the craftsmanship of the second respondent much to her disappointment.

The first respondent's statement is that he did not see the applicant's letter of 22 February, 2016. In stating as he did, he shifted the *onus* onto the applicant to prove that he saw the same. The applicant failed to discharge that *onus*.

The applicant acknowledges that the first respondent is the owner of the shares which are the subject of this application. Her knowledge of that matter notwithstanding, she moves the court to compel the second and third respondents to sign and release to her the share transfer documents which relate to the property. She does not explain how these can do so without the consent of the first respondent who is the owner of the share certificate.

The second respondent whom she describes as the agent of the first respondent cannot be held liable for acts which it did on behalf of its alleged principal. The third respondent's involvement in the application remains unclear. The two respondents cannot, at any rate, give to her what they do not have. The order which she moved the court to grant to her is, therefore, incompetent.

The applicant failed to prove her case on a balance of probabilities. The application is, in the premise, dismissed with costs.

Mhishi Nkomo Legal Practice, applicant's legal practitioners
Coghlan, Welsh & Guest, 1st respondent's legal practitioners
Antonio & Dzvetero legal practitioners, 2nd and 3rd respondent's legal practitioners