DUPONT AGRICOLE DE PORTUGAL S A
versus
LEXRAC INVESTMENTS (PRIVATE) LIMITED
and
YAKUB MOHAMED
and
INGRID LEVENDALE
and
COMMANDER OF THE ZIMBABWE DEFENCE FORCES N.O
and
MINISTER OF DEFENCE AND WAR VETERAN AFFAIRS N.O
and
MUTUSO, TARUVINGA AND MHIRIBIDI
and
PROUD FAMBISAI MUTUSO
and
THE LAW SOCIETY OF ZIMBABWE
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 18 January 2024 & 4 February 2025

COURT APPLICATION

Adv T W Nyamakura, for the applicant
Adv T Zhuwarara, for the 1st , 2nd and 3rd respondents
B Mudhau, for the 6th and 7th respondents

MANZUNZU J:

INTRODUCTION:

In more than three quarters of the opposed court applications filed in this court, respondents raise one or more preliminary points. This is one such case. In some instances, preliminary points are argued to greater length than the merits of the case itself. This invariably results in judgments to dispose the preliminary points which may either succeed or fail. In *casu*, the 1st, 2nd, 3rd, 6th and 7th respondents raised a number of preliminary points which are subject of this judgment.

BACKGROUND

In this application the applicant seeks the following relief;

"The 1st, 2nd and 3rd Respondents, jointly and severally, the one paying for the other to be absolved, be and are hereby ordered to pay the Applicant the sum of US$1,138,819.80 (One Million, One Hundred and Thirty-Eight Thousand, Eight Hundred and Nineteen United States of America Dollars and Eighty Cents).

2. The issuance by the 9th respondent of certificate of Registered Title No. 01968/2018 be and is hereby declared null and void.

3. Consequent to paragraph 2 hereof, the tittle deed No. 2644/2018 registered in favour of the Zimbabwe Defence Forces be and is hereby declared null and void.

4. The original Deed of Transfer No. 6192/12 Lot 6 Block X Ardbennie Township of Ardbennie, measuring 8 109 square meters is declared to be valid, and enforceable.

5. The Mortgage Bond No. 01130/2012 registered in favour of the Applicant by the 1st Respondent is declared to be valid, binding, and enforceable with the result that the property known as Lot 6 Block X Ardbennie Township of Ardbennie, measuring 8 109 square meters is declared specially executable.

6. In the event that the mortgage bond number 01130/2012 and Deed of Transfer No. 6192/12 has been cancelled in the 9th Respondent's register, the 9th Respondent is ordered to revive said documents, such that title in respect of Lot 6 Block X Ardbennie Township of Ardbennie, measuring 8 109 square meters reverts to the status as at the date of registration of Mortgage Bond No. 01130/2012.

7. The 1st, 2nd and 3rd Respondents be and are hereby ordered to pay the Applicant costs of suit on an Attorney Client Scale, jointly and severally with one paying for the other(s) to be absolved."

The applicant's case is predicated upon the following facts;

(1) On the basis of two loan agreements signed between the applicant and the 1st respondent on 15 March 2012 and 9 April 2015, the applicant transferred the amounts of US$660 000 and US$75 000 respectively to the 1st respondent.
(2) There were exchange control approvals for the two loans by the Reserve Bank of Zimbabwe as required by the law.
(3) The 2nd and 3rd respondents bound themselves as sureties and co-principal debtors.
(4) The initial due dates for the re-payments of the loans were 22 March 2013 and 31December 2015.
(5) The 1st respondent defaulted in payments despite the extension of the repayment period to 30 June 2014 and later to 31 December 2018 to the extent that the loan accrued to US$ 1,138,819.80.
(6) In 2022 under case number HC 345/21 the applicant sued the 1st, 2nd and 3rd respondents for the recovery of the debt, but it resulted in an absolution from the instance based on a technically in that the power of attorney was found to be defective.

(7) On the 21st March 2012, soon after securing the principal loan, the 1st Respondent registered Mortgage Bond No. 01130/2012 in favour of the Applicant against its property namely certain piece of land, situate in the district of Salisbury called Lot 6 Block X Ardbennie Township of Ardbennie, measuring 8 109 square meters held under Deed of Transfer No. 6192/11. The original title deeds were surrendered to the applicant, and the same is still held by the Applicant and the copy with the Deeds office being endorsed with the encumbrance.

(8) Despite all these security measures, the 1st Respondent, through 2nd Respondent successfully transferred the property to the Zimbabwe Defence Forces by obtaining a Certificate of Registered title, which process the applicant says was fraudulent and was handled by the 6th respondent.

This application was commenced on 3 August 2023. The founding affidavit is deposed to by one Melina Matshiya who avers that she is the applicant's legal practitioner and has been nominated to represent the applicant and has attached a resolution of the Board of Directors passed on the 17th of May 2023 as confirmation. She further averred that the facts and allegations set out in the affidavit are all within her personal knowledge and are to the best of her belief both true and correct.

On the basis of these facts, the applicant seeks relief as outlined supra.

The application was opposed by the 1st, 2nd, 3rd, 6th and 7th respondents. The other respondents, despite being properly served with the application, did not file any opposing papers. They are therefore barred.

The 1st, 2nd and 3rd respondents raised preliminary points in their opposing papers while 6th and 7th respondents raised preliminary points in the heads and only became apparent at the hearing.

Preliminary points by 6th and 7th Respondents:

Two preliminary points were raised. I will deal with them in turn.

a) Misjoinder

This preliminary point was raised for the first time in the written heads. The reason why the 6th and 7th respondents allege a misjoinder is that, the applicant apart from

alleging a dereliction of duty by the respondents in the processing of the certificate of registered title, no direct relief is being sought against these two respondents.

Mr *Nyamakura* in response said it was necessary to cite the 6th and 7th respondents because of the serious allegations of misconduct against them. In the circumstances they had the right to be heard.

It must be noted that the 6th and 7th respondents chose to raise the issue of misjoinder at the very end of their case when they could have raised the issue in the notice of opposition. They chose to oppose on the merits and have even argued the matter on the merits. I see no valid reason for this preliminary point at this late stage and as such it must fail.

b) Failure to exhaust domestic remedies

This is another point raised by Mr *Mudhau* on his feet at the hearing which is bound to fail as it has no merit. It is common cause that the applicant seeks no relief against the 6th and 7th respondents. The point should have been valid had the applicant sought relief against these two respondents. In such circumstances, the respondents would have said, applicant could get the relief sought through internal remedies. This is not the case. The preliminary point must fail.

Preliminary points by 1st, 2nd and 3rd respondents:

a)Prescription

It was argued that the debt which became due on 31 December 2018 prescribed by 1 January 2022. This was so in terms of section 15 (1) (d) of the Prescription Act which says;

> "The period of prescription of a debt shall be— (*d*) except where any enactment provides otherwise, three years, in the case of any other debt."

The present application was filed on 3 August 2023.

The applicant in response has argued from four fronts. The first one is that the debt has not prescribed by virtue of section 15 (a) (i) of the Act, which provides that;

" The period of prescription of a debt shall be—
(*a*) thirty years, in the case of—
(i) a debt secured by mortgage bond;"

Second leg of the argument was that the prescriptive period was interrupted when the applicant brought in an action against the respondents for the recovery of the same debt under case number HC 345/21.

The third was that an application for a declaratory order does not prescribe as it a declaration of the position of the law.

Fourthly, the 2nd and 3rd respondents renounced the defence of prescription in the Deed of Surety'

These four legal positions are all valid and correct to the extent that the preliminary point of prescription is buried. The court will not labour itself in reciting the authorities relied upon by the applicant.

c) No Authority by Deponent

The respondents mounted an attack on the resolution which confers authority on the deponent to the founding affidavit. Firstly, the attack was on the dates whether it was dated 17 or 12 May 2023. The second attack was on the signatories if such were authorized. Thirdly, whether the signatories were duly authorized directors or President and secretary of the applicant."

The resolution is part of the record. I was at pains to appreciate the respondents' argument. The resolution attached to the application is dated 17 May 2023. The resolution is signed by the secretary of the board of directors of the applicant and that is sufficient in our law. I agree with the applicant that this point is a Strawman's argument that is intended to raise dust and ought to be dismissed.

Locus standi

Locus standi in judicio refers to ones right, ability or capacity to bring legal proceedings in a court of law. It comprises of two elements, firstly the capacity of a person to litigate and secondly, a direct and substantial interest in the right which is the subject matter of the litigation. See; *Makarudze & Anor* v *Bungu & Ors* 2015 (1) ZLR 15 (H).

It was argued that the fact that the applicant failed to plead its capacity in the founding affidavit must be treated as fatal to the application. In the circumstances of this case I do not think so. The parties are not visitors to this court. They have a history of being in and out of this court. If the plaintiff's capacity is indeed an issue, then the defendants ought to lay out the facts for such challenge. In the absence of such challenge I am not persuaded that this matter be struck off the roll. The preliminary point must fail.

Dispute of facts

The respondents allege that there are disputes of fact which cannot be resolved on paper in that the whole premise of applicant's claim is disputed by the 1st to 3rd respondents. This claim was initially brought as an action in HC 345/21 and a trial commenced but resulted in an order for absolution from the instance based on a technicality.

It is argued for the 1st to 3rd respondents that at the time the applicant chose to proceed by way of motion in these proceedings, it was well aware of the fact that all its allegations against the 1st to 3rd respondents were hotly disputed and contested.

The onus is on the respondents to show, not only the presence of disputes of fact but that such disputes cannot be resolved on paper.

The applicant maintains that the respondents failed to discharge the onus upon them. The respondents adopted the pleadings in HCH 345/21 in which they also denied, like in the present case, that the agreements were lawful in that such loans were simulated transactions meant to circumvent banking laws of the country.

The applicant earlier on brought its claim through a summons and I believe on the realization that the motion proceedings were not suited to resolve the disputes. The applicant has then decided to proceed by way of motion in a situation it is aware there are material disputes of fact. I agree with the respondents when they say the applicant gambled by proceeding by way of motion and has chosen that procedure at its peril .

The applicant should have sought guidance in our Rule 7 (1) (b) of the High Court (Commercial Division) Rules, 2021which provides that;

> " (1) Proceedings—
> (*a*) …
> (*b*) in which there is likely to be a substantial dispute of fact or for any other reason a person considers that the proceedings may not appropriately be instituted by way of an application, shall be instituted by way of a summons commencing action."

There is an allegation of fraud and the contention that the applicant's claim is born of an illegal contract cannot be resolved on paper. How then is the application to be disposed of. Herbstein &Van Winsen, The Civil Practice of the Superior Courts of South Africa third ED at the foot of p61 the learned authors state that, " Courts will only order that a matter brought by way of motion proceedings be dealt with by way of trial proceeding or be dismissed if there is a real dispute of fact between the parties". See Bercorp (Pvt) Ltd Nyoni 1992 (1) ZLR 352.

The respondents asked for the dismissal of the application because the disputes were foreseeable. I agree. The application should therefore fail as was adjudged to be the correct manner of dealing with a litigant who brings an application knowing that there are material disputes of fact that could arise: see *Zimbabwe Power Company* v *Intrateck Pvt Ltd* SC 39/21.

DISPOSITION

The application be and is hereby dismissed with costs

Wilmot & Bennett, Applicant's Legal Practitioners
Tavenhave & Machingauta, 1st, 2nd & 3rd Respondents Legal Practitioner