THE TRUSTEES FOR THE TIME BEING
OF THE ALFRED DUBE &SHAMISO DUBE TRUST

Versus

LEAH MADZIVADONDO
And
COURAGE KUDAKWASHE MUCHENJE
And
LOVEMORE TAKAVARASHA
And
ZVISHAVANE TOWN COUNCIL

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 3 November 2023
Date of Judgment 24 April 2024

N. Mugiya, for the applicant
PC Ganyani, for the first respondent
No appearance for second, third and fourth

Opposed Application

ZISENGWE J: The applicant seeks an order confirming that the agreement of sale which it entered into with the first respondent in respect of certain immovable property is valid and binding. Pursuant to such confirmation, it seeks an order evicting the first respondent and all those claiming their right on occupation through her from the said residential property. The property in question was identified as Stand No. 1191 Mandara Township, Zvishavane ("the property").

The Background

On 14 November 2021, the applicant, a registered Trust, entered into the aforementioned agreement of sale with the second respondent, one Courage Kudakwashe Mushenje (hereinafter

referred to simply as *"Courage*"). The subject matter being the property. It is common cause that Courage had in turn purchased the property from the third respondent one Lovemore Takavarasha (hereinafter referred to simply as "*Lovemore*").

In turn Lovemore had purportedly inherited it from his late mother Diana Jani who in turn had inherited it from one Oliviate Madzivadondo with whom she was "married" in terms of an unregistered customary law union. From the summons attached to the first respondent's opposing affidavit, she (i.e., the first respondent) is a sister of the late Oliviate Madzivadondo. Lovemore on the other hand was sired from Diana Jani's previous relationship. He is not Oliviate Madzivadondo's child.

The applicant avers that its title to the property is unassailable because it purchased the same from Courage. It claims, through the founding affidavit deposed to by one of its trustees Alfred Dube, that it purchased the property from Courage after performing due diligence and realising that it was free from encumbrances. According to it, efforts to evict the first respondent have proved fruitless.

Courage and Lovemore did not file any opposing papers. Neither did the fourth respondent, Zvishavane Town Council under whose jurisdiction the property is situated. The first respondent however did. In opposing the application, the first respondent avers that the applicant's tittle to the property is defective. She claims in this regard that the registration of the estate of Lovemore's late mother was fraudulently done. She assets that the edict meeting convened for that process fraudulently excluded members of the Madzivadondo family and comprised entirely of Lovemore, who was Oliviate Madzivadondo's step son, and the Jani family (i.e. members of Lovemore's mother's relatives).

However, according to her, when the Madzivadondo family got wind of the registration of Diana Jani's estate and the developments that had since ensued, they sprang into action and mounted a series of court actions to rectify the situation and set aside the processes on the administration of Lovemore's mother's (Diana Jani's) estate.

The first was under ZVGL 77/2007 which according to the second respondent resulted in the nullification of the inheritance of the properly by Lovemore. This was followed by the action under ZVGL 323/2007 which resulted in Lovemore's eviction from the property. The first respondent avers that under ZVGL 08/2018 she filed a claim for the removal of the Lovemore's

name from what she terms "*the files of the property*". According to her the matter was set down for 25 January 2019. However, on the date of the trial, the court ordered a stay of the trial pending the location of the files under ZVGL 77/2007 and ZVGL 323/2007. Subsequently, on 9 January 2020 Lovemore filed an application for the dismissal of the matter under ZVGL, which application according to her was dismissed as being baseless.

She also points out that the same case is pending before the Magistrates Court under ZVGL 193/22. The high watermark of the second respondent's defence to the claim is that tittle to the property never accrued to Lovemore because Lovemore was not a proper beneficiary to the estate of Oliviate Madzivadondo albeit through his late mother. Consequently, Lovemore could not pass title to Courage who in turn could not pass tittle to applicant.

The second respondent further avers that she has been in full control of the property since 2007 after Lovemore had been evicted by the messenger of court. She claims that the applicant is being merely "used" by the Lovemore and Courage.

In its answering affidavit, the applicant pointed out that the second respondent had failed to attach the judgments under ZVGL 77/2007, and ZVGL 323/2007 nor the purported record of proceedings under ZVGL 193/22, the latter which it claims to be unaware of.

The second respondent initially raised two preliminary points, the first challenging the applicant's *locus standi* to institute the proceedings and the second contending that the matter was *lis pendens* as between the parties. She however abandoned both preliminary points during oral arguments in court. The matter therefore proceeded to be heard on the merits.

In heads of argument filed by the second respondent in support of her position, it was argued inter alia, that as at the time of the purported sale of the property, litigation under ZVGL08/2018 had reached litis contestation and a pre-trial conference held.

There are two inter-related issues in this dispute. The first one is whether the agreement of sale in between the Courage and Lovemore in respect of the property was tainted by illegality as the property was subject to *res litigiosa*.

The second issue is whether Lovemore's purported rights over the property had been vacated by the court hence he could not pass ownership to someone else. However, only f the property not subject to *res litigiosa* would it be necessary to consider the second issue.

Whether the property was subject to res litigiosa

The doctrine *res litigiosa* refers to property subject to a law suit which under Roman Law cannot be alienated, see *Zimbank (Pvt) Ltd* v *Shiku Distibutors (Pvt) Ltd & Ors* 2000 (2) ZLR 11 (H); *Opera House (Grande Parade) Restaurant (Pvt) Ltd v Cape Town City Council* 1986 (2) SA 65 (C) & *Chenga* v *Chikadaya & Ors* SC-07- 13

In resolving the question of whether or not Lovemore was precluded from disposing of the property as same was subject to the aforementioned doctrine, it is necessary to revisit the question of onus of proof in civil matters. As a general rule, the onus in a civil matter is governed by the age-old principle that he who alleges must prove, in other words he who makes a positive assertion must prove it and not he who denies, see *Pillay* v *Krishna & Another* 1946 AD 946; *Book* v *Davidson* 1988 (1) ZLR 365 (S); & *Astra Industries Ltd* v *Chamburuka* SC-12-12.

In *Astra Industries Ltd* v *Chamburuka* (*supra*) the principle was stated in the following terms:

> "The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegations.
> In *Book* v *Davidson* 1988 (1) ZLR 365 (S) at 384 B-F DUMBUTSHENA CJ quoted with approval the words of POTGEITER AJA in *Mobil Southern Africa (Pvt) Ltd* v *Mechin* 1965(2) SA 706 AD at 711 E-G:
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> > "The general principle governing the determination of the incidence of the onus is the stated in *Corpus luris Simper necessitas probandilcumbitilli quur agit*. In other words, he who seeks a remedy must prove the grounds therefore"

However, to this general principle there are exceptions. Where a defendant raises a special defence to the claim the onus is on him to prove such special defence. In *Pillay* v *Krisha and Another* (Supra) this principle was stated as follows;

> *"*If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it: where the person against whom the claim is made is not content with a mere denial of that claim, but sets out a special defence, then he is regarded quoad that defence, as being the claimant; for his defence to be upheld, he must satisfy the court that he is entitled to succeed on it"

In the instant case, the first respondent having raised the special defence of *res litigiosa*, the onus naturally rested on her to prove the same. In this regard the first respondent attached to her notice of opposition, a copy of the summons under GL 08/2018 issued by the clerk of the Zvishavane Magistrates Court on 05 January 2018.

The summons called upon Lovemore Takavarasha to answer Leah Madzivadondo's claim for;

> ".....the removal of the names Lovemore Takavarasha from the files of Stand No. 1191 Highlands, Zvishavane and those of the plaintiff be put instead".

The particulars of claim in that summons were captured thus:

> **Particulars of claim**
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> The 1st dependant is son of the late Diana Jani. Diana Jani lived in a promiscuous relationship(sic) with the late Oliviate Madzivadondo who is brother to plaintiff when Diana Jani died it was discovered that Diana's relatives wanted to take over the stand in question. There was resistance from the plaintiff's relatives. On 31 December 2016 there was a gathering of all the relatives at the Jani family. It was agreed that the stand in question which had been put under the names Lovemore Takavarasha be put under the names Leah Madzivadondo. Lovemore Takavarasha is the one who actually called the said gathering. Now it's over a year and the 1ST dependant is now dragging his feet. The 2nd defendant is joined for purports of enforcing the order sought.
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> Wherefore plaintiff prays that:
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> a) The names Lovemore Takavarasha be removed from the files of Stand 1191 highlands Zvishavane and those of plaintiff be put instead.
> b) The 1st defendant be ordered to pay costs of suit at legal practitioner/client scale of the matter is defended.

In *Chenga* v *Chikadaya* (supra) it was stated that the service of summons in a claim in *rem*, renders the property the subject matter thereof *res litigiosa*. A claim in rem involves a dispute about a specific piece of property and seeks to resolve that ownership issue against all claimants. OMERJEE AJA summarised the position as follows:

> "It is trite that all personal actions have the effect of rendering their subject matter *res litigiosa* at the stage of *litis contestatio*. The relevant stage is not the time of commencement of action, but the time of *litis contestatio*. In the case of *Opera House (Grand Parade) Restaurant (Pvt) Ltd* v *Cape Town City Council* 1986 (2) SA 656 (C), it was held that in a real action (action in *rem*) the land becomes *res litigiosa* on the service of summons while in a personal action, that status was achieved at the closure of pleadings."

The claim under ZV 08/2018 was clearly one in rem. Therein the first respondent put the property squarely in dispute. The service of the summons rendered the property in question *res litigiosa*. Although the first respondent did not attach proof of service of summons, her assertions that the matter proceeded all the way up to PTC went unchallenged. The probabilities favour her version in this regard.

Ultimately, I am of these considered view that the second respondent has been able to establish on a balance of probabilities her special defence of *res litigiosa*.

It therefore means the sale of the property by Lovemore to Courage, it being the subject of on-going litigation between the former and the second respondent was null and void. Consequently, Courage could not subsequently pass any greater right than Lovemore in the property. This in turn means that applicant's rights in respect of the property are defective. The application therefore cannot succeed.

Having thus found that the property in Question was subject to *res litigiosa*, it is unnecessary to inquire into whether Lovemore's title to the property was defective in the first instance.

Accordingly, the application stands to be dismissed.

Costs

The general rule is that the substantially successful party (which the first respondent has been) is entitled to his or her costs. There is however no justification in awarding of costs on the punitive scale as sought by the first respondent. No recklessness or *mala fides* in mounting the application was established to warrant an award of costs on that scale. Costs on the ordinary scale suffice.

Accordingly, the application is hereby dismissed with the applicant meeting the first respondent's costs.

Mugiya &Muvhami; applicant's legal practitioners

PC Ganyani Legal practitioners; first respondent's legal practitioners