PAUL SITHOLE
and
PAUL SITHOLE (Junior) (represented herein by the 1st applicant)
versus
STEWARD BANK LIMITED
and
MAYOR MACHIVEYI MANGEYA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 24 March 2021 & 19 May 2021

Opposed Application

S Ushewokunze, for the applicants
J Koto, for the 1st respondent
No appearance for the 2nd & 3rd respondents

CHIKOWERO J: This is an application for upliftment of caveat number 421/2014 placed on certain piece of land situate in the District of Salisbury called stand 143 Northwood Township of Sumben measuring 4263 square metres held under Deed of Transfer registered number 5115/1999 and Deed of Transfer Registered Number 7783/2015 ("the property.") The applicants also seek an order requiring the second respondent to transfer the property to them within the next 21 days failing which the Sheriff for Zimbabwe should do all such things as are necessary to effect the transfer. Finally, costs are sought against first respondent on a punitive scale.

The property is registered in the name of the first respondent ("Mangeya"). On 30 July 2014 the second respondent ("Steward Bank") instituted proceedings against Mangeya under case number HC 6417/14 for an order to confirm this court's jurisdiction in a loan repayment dispute between the parties. Steward Bank also sought an order allowing it to serve summons in the loan repayment dispute on Mangeya at a certain address in Zambia.

On 31 July 2014 Steward Bank, through its legal practitioners, served a copy of that application on a responsible person called Ashley Barara who indicated that Mangeya had relocated to an unknown destination. In accepting service, Barara indicated that she would hand

up the court process in question to the occupant of the property (the first applicant). Service was effected at the property which is at the centre of the present application as it was said to be Mangeya's address for service in Zimbabwe, although Steward Bank, in making the application, made it clear that Mangeya had relocated to Zambia.

Steward Bank required an order confirming this court's jurisdiction in its loan repayment dispute with Mangeya because the bank intended to sue Mangeya on the basis that he stood as surety in a loan transaction with a company called Orchard Lane (Private) Limited ("Orchard Lane"). The Deed of Surety was signed on 8 May 2012 at Harare. Since Orchard Lane had gone into liquidation before clearing its alleged indebtedness to Steward Bank, the latter wanted to issue summons against the surety.

On 4 August 2014 this court granted a provisional order in favour of Steward Bank. It contained a notice to Mangeya that if he wanted to oppose the confirmation of the provisional order he would have to file a notice of opposition together with one or more opposing affidavits with the Registrar of the High Court at Harare within 30 days after the date on which the provisional order and the application itself was served upon him. Mangeya would also have to serve a copy of the notice of opposition and the affidavits on the bank at the address for service specified in the application.

Further notice given was that if Mangeya did not file an opposing affidavit within the 30 days the matter would be set down for hearing in this court without further notice to him and would be dealt with as an opposed application for confirmation of the provisional order.

Also disclosed was his procedural rights to have the provisional order changed or set aside sooner than the rules of court would normally allow and that, if he wanted to exercise those rights and was able to show good cause for this, he would have to approach Steward Bank's legal practitioners to agree, in consultation with the registrar, on a suitable hearing date. Finally the notice states that if the parties failed to agree on a hearing date or great urgency existed, Mangeya had the option of making a chamber application, on notice to the bank, for directions from a judge as to when the matter could be argued.

The terms of the interim relief granted were that:

> "1. The jurisdiction of the High Court of Zimbabwe in the dispute between applicant and respondent be and is hereby confirmed.
> 2. The Sheriff of the High Court of Zimbabwe or his lawful deputy be and is hereby directed and authorized to attach the respondent's immovable property namely Stand number 51

Northwood Drive Mount Pleasant, Harare and the property shall remain under attachment until the finalization of the loan repayment dispute between the parties in terms of the law

3. The applicant is hereby granted leave to serve the respondent with summons together with this provisional order and annexures at respondent's business address in Zambia being Matonjeni Marketing Private Limited, Plot number 1980 Katanga Road, Lenco Complex Chinika Industrial Complex, Lusaka, Zambia
4. The Sheriff of Zambia, his lawful deputy or assistant or any other officer, empowered or authorised in terms of the laws of Zambia to serve process of the High Court of Zambia be and is hereby directed and authorized to serve the summons referred to in paragraph 3 above and this order upon the respondent or any other responsible person at Matonjeni Marketing Private Limited, Plot number 1980 Katanga road, Lenco Complex, Chinika Industrial Complex, Lusaka, Zambia and shall file with this court a return of service in form of an affidavit, sworn to before a notary public practicing as such in Zambia" (underlining is mine for emphasis)

On 21 August 2014 the Deputy Sheriff of Zambia deposed to an affidavit of service the relevant portion of which reads as follows:

> "On the 21st of August 2014 and at 12:00 pm during the course of my duties, I served a Provisional order together with court application under case number HC 6417/14 issued by the registrar of the High Court of Zimbabwe upon Mr Mayor Mangeya, who then signed to acknowledge receipt of the court processes."

The provisional order was confirmed on 14 January 2015. Mangeya did not file opposing papers. He was in default.

This court granted the provisional order, which it then confirmed, because it was satisfied among other things that the property, which is the subject of the present application, was owned by Mangeya and was within the jurisdiction of this court. See *Stanmaker Mining (Pvt) Ltd* v *Metallon Corporation Ltd* 2004 (l) ZLR 45 (S); *Tenge Fungurume Mining SA* v *Bruno Enterprises t/a Transport Spares and Accessories* (under judicial management) 2016 (1) ZLR 208 (H).

Daniel Mapenda, who deposed to Steward Bank's founding affidavit in that matter, said in paras 22 – 25 of his deposition:

> "22. Now that the respondent is no longer resident in Zimbabwe as is clear from the liquidation report and the finding by the applicant that respondent has established business in Zambia where he is now staying, applicant approaches this court for the confirmation of its jurisdiction over the respondent.
> 23. Respondent has an asset of value within the jurisdiction of this court which is capable of attachment to found or confirm jurisdiction of this court.
> 24. The asset which the applicant has managed to establish so far in its on going investigations is an immovable property in Harare called stand 143 of Northwood Township of Sumben measuring 4263 square metres. See Deed of Transfer number 7783/05 in favour of the respondent annexed "H" hereto. It is applicant's fear that respondent may dispose of this only property so far known to applicant which would make any order of this court *brutum fulmen*.

> 25. From the liquidation report, the letter of demand as well as a letter from applicant's erstwhile lawyers, Atherstone and Cook, which letter is annexed "I" hereto, it is clear that respondent cannot effectively be served any process in Zimbabwe notwithstanding that he gave 51 Northwood Drive, Mount Pleasant as his *domicilium citandi*." (emphasis is added)

51 Northwood Drive, Mount Pleasant, Harare is the physical address of the property called stand 143 of Northwood Townhsip of Sumbem. It is held under two title deeds since Mangeya obtained transfer of the other equal undivided half share at a time when he already held an equal undivided half share in the same property under a separate title deed.

The Sitholes filed the present application on 30 May 2016. They crave the reliefs that I have referred to since they claim that they purchased the property in question from Mangeya on 28 May 2013 for US$170000, paid in full.

Copy of the alleged agreement of sale was attached to the founding affidavit. The pertinent terms are:

1. The applicants were required to pay a cash deposit direct to Mangeya, in the sum of US$31 578 (thirty-one thousand five hundred and seventy-eight United States dollars) upon signature of the agreement of sale.
2. US$21 052 (twenty-one thousand and fifty-two United States dollars) payable direct to Mangeya on or before close of business on 29 May 2013.
3. US$97 369 (ninety-seven thousand three hundred and sixty-nine United States dollars) payable into a specified Wintertons Legal Practitioners Trust Account number held with a named Branch of the Standard Chartered Bank in Zimbabwe.
4. The balance of US$20 000 (twenty thousand United States dollars) payable to Wintertons through 3 equal instalments with effect from 30 June 2013 to 31 August 2013.

Other material clauses of the agreement of sale required the applicants to pay the purchase price in the manner that I have outlined above, and that no variation of the agreement would be valid unless such were reduced to writing and signed by or on behalf of the parties.

In seeking to prove that he paid the purchase price in full the first applicant attached copies of manually executed deposit slips and computer generated receipts of the following payments, effected at the Bedfordview and Greenstone branches of Nedbank Limited, South Africa, into Interlink Trading 37 CC's account:

28 May 2013 R300 000

30 May 2013 R200 000

4 June 2013 R200 000

8 June 2013 R260 400

21 August 2013 R65 000

Also attached to first applicant's Founding Affidavit as proof of payment of portion of the purchase price is a bank deposit slip dated 3 June 2013 reflecting a US$50 000 payment into Wintertons' Trust Account held with the Kwame Nkrumah Branch (Harare) of CBZ Bank Limited. The first applicant claims to have paid the balance of US$13 605 sometime in 2013, bringing the total amount paid to US$170 000, but claims to have misplaced proof of the US$13 605 payment.

The first applicant claims that the Rand payments, at the rate prevailing on the day each payment was effected, equalled US$31 579, US$21 052, US$20 725, US$26 303 and US$6 736 respectively.

Since they have nothing to do with the loan repayment dispute between Steward Bank and Mangeya, having purchased, fully paid for and occupied the property, the applicants contend, the caveat should be uplifted and transfer of the property effected in their favour. There exist special circumstances justifying such reliefs, they maintain.

Not so, says Steward Bank. Mangeya did not sell the property to the applicants at all. It follows that no purchase price was paid. Applicants are conniving with Mangeya to assist the latter to evade its liability to Steward Bank by trying to free the property from the exigencies of the caveat.

The first applicant filed an answering affidavit to deal with the issue of connivance. Pursuant to receipt of the bank's opposing affidavit it addressed an undated letter, received by Wintertons Legal Practitioners on 26 July 2016, requesting copies of the Power of Attorney to pass transfer and the Declarations by the Seller and the Purchasers relating to the property. The requested documents, all dated 28 May 2013, were then attached to the answering affidavit. Also attached to the answering affidavit is a Zimbabwe Revenue Authority Capital Gains Tax Assessment invoice, reflecting the date of assessment as 23 June 2016, requiring Mangeya to pay Capital Gains Tax in the sum of US$8 500 by 21 July 2016. The first applicant also attached a rates clearance certificate issued by City of Harare on 11 June 2013 (valid up to 31 August 2013) in respect of the property in question.

Mr *Koto* asked me to expunge Mangeya's affidavit from the record. Despite Mr *Ushewokunze*'s resistance, I granted the oral application and gave reasons for so doing. Mangeya was served with copy of the court application on 1 November 2017. He was again served with copy of the same application on 13 July 2018. In terms of r 233 (1) of the High Court Rules, 1971 he had up to 27 July 2018 to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits, if he were opposing the application failing which he would be barred in terms of r 233 (3). I accepted Mr *Koto*'s argument that Mangeya was barred because he did not file a notice of opposition and opposing affidavit within the time prescribed by the rules or at all. What he did was that, on 27 July 2018, Mangeya filed an affidavit stating that he was not opposed to the granting of the application and then went on, in that affidavit, to volunteer certain information in support of the application. That affidavit, which was in substance a supporting affidavit to the application (despite not being so headed) is unknown to the rules. It was not attached to a notice of opposition. It irregularly stood on the record. Mangeya was barred because that which he filed on the 10th day after service of the application is not what the rules provides for. I found it strange that Mr *Ushewokunze*, not being Mangeya's legal practitioner, sought to argue that since Mangeya's affidavit was filed after the applicants' answering affidavit, r 235 empowered the court, after the irregular filing of that affidavit, to grant leave to Mangeya to do that which he had already done. After all, the deponent to that irregularly filed affidavit was not even in court to ask me to do anything. I record that in *Chamisa* v *Mnangagwa and Others* CCZ 21/19, in interpreting similarly worded provisions of its Rules the Constitutional Court held that there is no provision in the rules permitting a respondent to file an affidavit supporting an application. These are the reasons why I expunged Mangeya's affidavit from the record.

I turn to the merits of the application.

I consider that the applicants failed to prove their case on a balance of probabilities.

As way back as 21 August 2015, the Deputy Sheriff of Zambia served copies of a court application to confirm this court's jurisdiction over Mangeya in his loan repayment dispute with Steward Bank. I have referred to pertinent portions of the founding affidavit in that matter which make it clear that Steward Bank were praying for an order to attach the property in question to confirm jurisdiction on the basis that the same belonged to Mangeya. Not only that, a copy of the provisional order setting out Mangeya's procedural rights in the event that he were opposed to confirmation of the provisional order was one of the court papers that was served on him. The

provisional order clearly set out the interim relief that this court had already granted to Steward Bank. That relief was an attachment of his property, which is the property in question, until the finalization of his loan repayment dispute with Steward Bank. The draft summons in that matter, wherein Steward Bank was claiming provisional sentence in an amount of US$2450 000 plus interest, was part of the application served on Mangeya. If he knew that the property was no longer his and he had in his possession and control all the documents that the first applicant has now attached to the founding and answering affidavits, why is it that Mangeya did not oppose the confirmation of the provisional order? In my view Mangeya, (who is a legal practitioner himself), did not oppose the application for confirmation of the provisional order because he did not sell the property to the applicants on 28 May 2013. The property belongs to him. That is why title is still registered in his name.

Mr *Ushewokunze* conceded, properly so, that this court is entitled to make reference to its own records and proceedings and to take note of the contents thereof. See *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC). I observe that Steward Bank issued summons against Mangeya on 13 August 2014. The matter is under case number HC 6787/14. In responding to the summons Mangeya avers in his plea filed on 29 September 2014 and signed on his behalf by Mr *Mugandiwa* of Wintertons:

> "3.11 The Defendant is opposing the confirmation of the provisional order granted in matter HC 6417/14."

Although I am not dealing with HC 6417/14 it occurs to me that this averment is untrue. As already indicated the provisional order granted in HC 6417/14 was confirmed on 14 January 2015, unopposed and in default of Mangeya. This was about four months after Mangeya filed a plea, through a legal practitioner, averring that which I have found to be misleading.

The court order for attachment of the property in question to confirm this court's jurisdiction in HC 6417/14 is no longer provisional. It is final. Mangeya has not applied for rescission of that order. The order is extant.

The first applicant was aware of the institution of the matter under HC 6417/14. It changes nothing that he was not cited as a party in that suit. If it is true that he had purchased the property at the centre of that suit the previous year, and for as much as US$170 000, then one would expect him to have been vigilant when the court application was served on his sister-in-law, at that property, on 21 August 2014. After all, in the event no action were taken by him to be joined in the suit, the property stood in danger not only of being encumbered but also of being sold in

execution in the event that Steward Bank succeeded in obtaining judgment against Mangeya in the loan repayment matter. The draft summons in what was to become case number 6787/14 was part of the court process served on first defendant, through his sister-in-law, at the property. This was a day after that court process was issued. The provisional order had not yet been granted.

After caveat number 421/2014 had been noted against the title deeds of the property, the Assistant Sheriff, on 30 September 2014, proceeded to the property in question and attached the same. The notice of attachment of immovable property is part of Steward Bank's opposing papers. The notice includes the following:

> "NOTICE TO EXECUTION DEBTOR
> You are required to deliver to me all documents in your possession or under your control relating in any way to the immovable property described above.
> NOTICE TO OCCUPIER
> In all matters relating to the immovable property described above, you are required to act with the knowledge that the property is now under judicial attachment."

The probabilities are that if indeed the applicants had purchased this property for the substantial sum of US$170 000 on 28 May 2013 and had paid off the balance of the purchase price on a date not disclosed to the court but "sometime in 2013," which is the same year the property was bought, then concrete action needed to have been taken by the first applicant to protect his interests. Such interests were under threat. The first time it was the court application to found jurisdiction which was served at the property. Just over a month later the property itself was attached. So these two incidents should have jolted the applicants to protect their interests. Instead, the provisional order was then confirmed, unopposed.

I am aware that first applicant says he appeared at the offices of Wintertons where Mr Mugandiwa is said to have told him that everything was under control. But it must not be forgotten that Mangeya caused the said office of the court to file a plea containing an untrue averment relative to Mangeya's opposition to confirmation of the provisional order. More importantly, from service of the court application under case number HC 6417/14 in August 2014 up to the end of that year the applicants took no positive steps to protect their interests in the property. Not only that. 2015 came and went by with the applicants still folding their arms. It was only on 30 May 2016 that the applicants filed the present application. Given these circumstances I am unable to accept that applicants purchased the property in question for a whopping US$170 000, fully paid, in 2013. That the first applicant, the second applicant and their other family members have been

in occupation of the property since 2014 should have galvanized the applicants into action much sooner if indeed they purchased this property. I find it odd that one is quick to part with as much as US$170 000 to purchase a property, and to occupy that property but be lackadaisical when it comes not only to obtaining title, ensuring that the seller's title is not encumbered but, where a caveat is noted, not being vigilant in approaching the court with an application for an order to have the caveat uplifted. One does not need to be an owner of the property that one is ocupying. What confronts me here just does not add up.

There are serious challenges with what has been put before me as the agreement of sale. That document is clear that the US$170000 had to be paid in United States dollars, in certain instances directly to Mangeya and in some instances through Wintertons' Standard Chartered Bank Trust Account. Nothing of that sort ever happened. All but one of the instalments were paid in South Africa. They were paid into Inter Link Trading 37 CC's Nedbank Limited's account, in rand. Those payments, reflected on the bank deposit slips and computer generated proof of the deposits, do not reflect the identity of the person who was depositing those funds. The receipts prove that these were franchise fees being paid to Inter Link Trading 37 CC. Despite the first applicant being in Harare on 28 May 2013 signing an agreement of sale containing a clause that the initial deposit in the sum of US$31 578 was payable to Mangeya directly on signing of the agreement an unknown person was in South Africa on the same day depositing R300000 into Inter Link Trading 37 CC's bank account. If the latter was the agreement of the parties on the currency and mode of payment why not simply couch the agreement of sale in line with what actually happened? Why is it that the documentary evidence tendered by the applicants in an attempt to substantiate their case, instead of doing that, is actually destroying it? The agreement of sale is speaking to one thing. The rand denominated bank deposit slips are speaking to something entirely different. The purpose of adducing documentary evidence is to allow such testimony to speak for itself. It is not only the agreement of sale and the rand denominated deposit slips which are contradictory. The first applicant has, in his affidavit, come up with a version which is not borne out by those deposit slips. He says those payments were in fact the rand equivalents of the United States dollars instalments paid towards liquidating the purchase price. There are too many unsatisfactory features about the applicants' case for me to accept this version. It finds no favour with me.

When a person makes a payment into a legal practitioner's trust account, that lawyer issues a receipt reflecting the reason for the payment. It may not, on its own, be a matter deserving of an adverse inference that the only payment effected through Wintertons was made into that firm's CBZ Bank account rather than the Standard Chartered Bank account specified in the agreement of sale. What is important is that applicants deliberately decided not to attach copy of the receipt issued by Wintertons in respect of the 3 June 2013 US$50 000 payment. The result is that there is no link demonstrated between that payment and the alleged purchase price of the property.

Indeed, I agree with Mr *Koto* that there is no link between the purported agreement of sale and all the documents placed before me as proof of payment of the US$170 000.

I observe as well that the picture portrayed by the applicants is unusual in conveyancing practice. The purchase price should be paid into the conveyancer's trust account. That money is released to the seller only upon registration of title in favour of the purchaser.

It was common cause that Mangeya's spouse, Charity, was already employed by Inter Link Trading 37 CC as way back as 25 June 2012. That predates the alleged agreement of sale of 28 May 2013. It was common cause that Mangeya owned or controlled the Inter Link Trading 37 CC Nedbank Limited account into which the rand deposits were made. Mr *Koto* submitted that what this case illustrates is that Mangeya simply handed up copies of the rand denominated bank deposit slips to first applicant to enable the latter to institute the present application in an attempt to extricate that property from the exigencies of the final order in HC 6417/14. I agree.

Having found that the purported agreement of sale is a sham it necessarily follows that the draft Power of Attorney to Pass Transfer and Declarations by Seller and Purchasers' Agent, all purportedly drawn up on 28 May 2013, suffer the same fate. So do their 'progeny', the rates clearance certificate issued by council. The Zimbabwe Revenue Authority's Capital Gains Tax invoice shows the date of the tax assessment as 23 June 2016. This was after Steward Bank had filed its opposing papers on 13 June 2016 and served same on the applicants' legal practitioners. That tax invoice was then attached to first applicant's answering affidavit. So the applicants were building up their case as the matter progressed. Even then it was neither alleged nor proved that the capital gains tax was ever paid.

Neither was it alleged nor proved that the applicants paid the transfer fees to Wintertons to enable title in the properly to be registered in favour of the applicants.

This case is distinguishable from *Moyo* v *Muwandi* SC 47/03 and *Deputy Sheriff – Harare and Moyo* v *CBZ Bank Ltd* HH 640/15. In those matters there was acceptable evidence of the respective immovable properties having been sold to and the purchase prices paid by *Muwandi and Moyo* respectively. The purchasers had acted with vigilance to protect their interests. Those circumstances, in combination with other factors, satisfied the Supreme Court and this Court, respectively, that special circumstances had been established to justify the relief sought by those litigants. Since the applicants have failed to satisfy me that they purchased the property and, resultantly, that they paid the purchase price in full the conclusion is inescapable that they did not prove the existence of special circumstances such as would have entitled them to the reliefs that they seek.

I must remark that even on their version the applicants failed to prove that they paid the purchase price in full. He who alleges must prove. In para 10 of his founding affidavit the first applicant said:

> "...I paid the other balance of US$13 605 again sometime in 2013 (to bring the total to US$170 000) but I happen to have misplaced the proof of the said balance."

What first applicant is saying is that he has only alleged that he paid the purchase price in full but is conceding that he has failed to place evidence before the court to substantiate his allegation. It must follow that even on his version the case for the applicants has not been proved on a balance of probabilities. A purchaser who has not paid the full purchase price for an immovable property is not entitled to transfer.

That the applicants, through *Mr Ushewokunze*, strenuously opposed the oral application for an order expunging Mangeya's affidavit from the record, taken together with all the evidence that I have analysed in this matter, is indicative of connivance between Mangeya and the applicants. It cannot be a coincidence that the expunged affidavit was in substance a supporting affidavit to the application in this matter.

In dismissing Mangeya's exception to the summons in the debt repayment matter (HH 474/16) this court opened the judgment by saying:

> "The trial in this matter aborted. The defendant took a point *in limine*. I dismissed it and said I would provide written reasons at the end of the trial. Defence counsel said he had instructions to appeal. He submitted that no leave to appeal was required. But he wanted written reasons to facilitate the intended appeal because, as he said, by practice, the Supreme Court countenances no appeal which is not accompanied by the judgment appealed against. Inevitably, the proceedings were adjourned indefinitely."

At pp 8 – 9 the court continued

> "The plaintiff prayed for costs *de bonis propriis* against the defendant's counsel. This is a position which is not without my sympathy. It seemed plain to me, and obviously to the plaintiff as well, that the defendant's game plan, aided and abetted by counsel, was to thwart the trial from getting off the ground. He succeeded. All manner of spanners were thrown in the works. An exception that was patently frivolous and vexatious was taken. Despite the plaintiff's protest, it was persisted with, albeit in a modified form. When I dismissed it, the defendant said he wanted my reasons solely in order to appeal.
>
> It is one's right to appeal where such right is available. But defence counsel said categorically leave to appeal was not required.
>
> Yet my decision was classically an interlocutory order with no definitive effect...
>
> Such type of an order is ordinarily not appealable without leave."

The reasons for judgment under HH 474/16, portions of which I have quoted, were made available on 17 August 2016. The exception itself was dismissed on 18 March 2016. That is about 5 years ago. I have read through the record to which HH 474/16 relates. Nothing therein suggests that Mangeya has appealed the judgment rendered under HH 474/16.

Mangeya connived with the applicants to endeavour to secure upliftment of the caveat through the filing and prosecution of the present application. That is abuse not only of court process but of the persons of the applicants themselves.

It seems to me that despite having been cited as the second respondent, the brains behind this suit is Mangeya himself. It is for this reason that I have decided not to saddle the applicants with a punitive order of costs.

In the result, the application is dismissed with costs.

Ushewokunze Law Chambers, applicants' legal practitioners
Koto & Company, 1st respondent's legal practitioners