TOGAREPI MHETU
and
TENDAYI PAULINE MHETU
versus
PRECIOUS KATURUZA
and
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES
and
CITY OF HARARE
and
BEANLOPE PROPERTIES (PRIVATE)LIMITED
and
FREDERICK BWANALI

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 17 September 2015 and 4 November 2015

Opposed Application

T Biti, for the applicants
B Machengete, for the 1st and 5th respondents

MTSHIYA J: This is an opposed application where the applicants seek the following relief:

"**IT IS ORDERED THAT:**

(1) FIRST, Second and Third Respondents must within thirty days of the date of this order do all such things as are necessary, and execute al such documents to enable certain piece of land in the District of Salisbury called 7410 Glen View Township of Glen View measuring 540 square meters to be transferred to the Applicants.

(2) In the event of failure by any of the respondents to carry out the obligation set out in **paragraph 1** above, then the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to sign and execute all such documents on behalf of any of the Respondents to enable transfer of the above property to Applicants.

(3) Within seven days of the service of this order on the Fifth respondent that the Fifth Respondent and all those claiming through him must vacate the above property failure of which the Sheriff of Zimbabwe with or **WITHOUT** the assistance of the Zimbabwe Republic Police be and is hereby ordered to evict from the property, the Fifth Respondent and all those claiming through him.

Alternatively

(4) First and Fifth Respondent jointly and severally each paying the other, the other to be absolved be and are ordered to pay to the Applicants the total sum of US$29 650-00 (twenty-nine thousand six hundred and fifty dollars) together with interest from the 26 January 2013, to date of payment.

(5) The First, Fourth and Fifth respondents each paying the other, the other to be absolved pay costs of suit calculated on a scale between attorney and client."

The applicants are husband and wife who, in January 2013, through the first respondent, sold their Waterfalls property, namely, Stand 1262 Masotsha Ndlovu way, Waterfalls, Harare. They used part of the proceeds from the sale of their Waterfalls property to purchase another property known as Stand 749 Glen View Township of Glen View, Harare, (the property). The latter property belonged to the first respondent.

The applicants, in terms of their agreement with the first-respondent, paid the first respondent US$ 29 000-00 as the purchase price. A Deed of Assignment in their favour was then signed. After the Deed of Assignment the applicants paid US$ 655-00 in respect of rates attaching to the property. They then took possession of the property.

However, in February 2013, they were advised buy one Patrick Disban, of a Real Estate Company called Lightvale Properties, that, under a sole mandate given to him by the first respondent, he had sold the property to the fifth respondent. Indeed in March 2013 the fifth respondent moved into the property and thus dispossessing the applicants.

The dispossessed applicants now seek transfer of the property into their names. Their application is opposed by the first, fourth and fifth respondents.

The first respondent, through a general Power of Attorney given to one Chamunorwa Munetsi (Munetsi), averred that she was not in Zimbabwe when the transaction took place and does not know the fifth respondent. She says she knows one Leonard Bwanali who bought the property through Disbani Patrick Muchupiko of Lightvale Properties on the strength of a power of attorney she had given to her late mother, Susan Katuruza. I want to believe that the said Disbani partick Muchupiko is the same person referred to as Patrick Disbani in the applicant's founding affidavit. She goes on to state that the applicants were probably defrauded by impostors. The first respondent goes on to say she would never have sold her property for US$29 000-00 because she wanted US$45 000-00. In short, she says she does not know the applicants and never sold her property to them.

The fourth respondent raises a point in *limine* by saying it was indemnified by the

applicants upon being granted authority by them to release the purchase price to the first repondent. Indeed a "Bond of Indemnity and release Form" was executed on 26 January 2013 by the first applicant. To that end, the fourth respondent argued, there is no basis upon which it can be sued by the applicants.

The fourth respondent, however, confirms that the transaction took place in the presence of the first respondent who was confirmed as seller. Its evidence confirms the events leading to the transaction as narrated by the applicants.

The fifth respondent confirms that he is in occupation of the property. He says he bought it from the first respondent through her late mother (i.e. first respondent's mother, Susan Katuruza). He said he bought the property on 31 January 2013 when he paid US$ 42 000-00 following an offer he made on 28 January 2012. In the main his averments corroborate those of the first respondent.

In their submissions, the applicants spell out the issues for determination as follows:

"(a) Whether or not the First respondent has competently opposed this matter;
(b) Whether or not the Applicants concluded a binding agreement with the First Respondent;
(c) Whether or not the Applicants are entitled to the main relief sought;
(d) Whether or not the Applicants are entitled to the alternative relief sought"

Although not formally adopting the above issues, the respondents have not raised different issues for determination. All they have done is to respond to the applicant's submissions on the issues listed above.

I am in agreement with the applicants on the identification of issues. To the extent that the determination of this matter is largely anchored on what happened between the applicants and the first respondent, it is of crucial importance to start by establishing whether or not the first respondent has indeed competently opposed the relief sought by the applicants (i.e. the point in *limine* raised by applicants). If there is no competent opposition from the first respondent it will mean that the property was indeed sold to the applicants. There would therefore be "nothing" that the fifth respondent could have bought from her. In my view, that would signal success for the relief sought by the applicants. It is therefore imperative to commence by addressing the said point in *limine* raised by the applicants relating to the status of the opposing affidavit filed by Munetsi on behalf of the first respondent on 26 June 2014. The opposing affidavit followed the filing of this application on 12 June 2014.

Apart from saying the first respondent was not in Zimbabwe, at the time of the transaction, Munetsi does not tell us whether or not as at 26 June 2014 the respondent was still

out of Zimbabwe. However, in their heads of argument, the first and fifth respondents make the following submissions:

> "It is common cause the First Respondent was in the United Kingdom at the material time, no wonder why she sought to fit (sic) and proper to grant a general Power of Attorney in favour of me Chamunorwa Munetsi"

The above suggests that she would not have granted a power of attorney to Munetsi if she was in the country.

The only General Power of Attorney granted to Munetsi is the one dated 1 August, 2013. It is important to note that the said power of attorney purports to have been executed in Harare by a person who claims to have been in the United Kingdom. If indeed the first respondent was in the United Kingdom the power of attorney should have been executed before a notary public or "a commissioner of the High Court appointed by the High Court to take affidavits or examine witnesses in any place outside Zimbabwe."

Rules 3 and 4 of the High Court (Authentication of Documents) Rules 1971 provide as follows:

> "3. Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated-
>
> (a) by a notary public, mayor or person holding judicial office; or
> (b) in the case of countries or territories in which Zimbabwe has its own diplomatic or consular representative, by the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul0-general, consul or vice consul.
>
> 4. An affidavit sworn before and attested by a commissioner outside Zimbabwe shall require no further authentication, and may be used in all cases and matters in which are admissible as freely s if it had been duly made and sworn to within Zimbabwe.
>
> 5. nothing contained in these rules shall prevent the acceptance as sufficiently authenticated by any court, tribunal or public office of any document which is shown, to the satisfaction of such curt, tribunal or public office, to have been actually signed by the purporting to have signed the same."

I shall therefore proceed on the understanding that the power of attorney was indeed executed out of this jurisdiction. It is that general Power of Attorney that ought to give Munetsi the authority to swear to the opposing affidavit.

As is their right, the applicants have also challenged the status of Munetsi's affidavit on the ground that the contents therein are hearsay.

The above provisions of the law enable any part in court proceedings to swear to an

affidavit from wherever they are as long as the said provisions are complied with. This means the first respondent could have easily sworn to an affidavit on her own to put up her case or to support the averments of her agent(s). That was not done and furthermore, to compound the problem, the document purporting to give authority to Munetsi was not executed in terms of the rules quoted above. It therefore means Munetsi was never enabled to swear to the opposing affidavit. That means there is no opposing affidavit before the court from the first respondent.

I do not agree, however, that even if , Munetsi was enabled by the general Power of Attorney to swear to the founding affidavit, a special power of attorney, which, in my view, is restrictive, would necessarily have been the correct document, as submitted by the applicants. I believe that if properly executed, a general power of attorney, authorising Munetsi "to manage and take charge of all affairs of the first respondent in Zimbabwe" would have sufficed. Unfortunately, because of the failure by the first respondent to follow the rules there is no such General Power of Attorney. The purported General Power of Attorney, apart from being irregularly introduced into the proceedings, only saves to non-suit the first respondent.

Even if one were to assume that the first respondent was in Zimbabwe on 1 August 2013 when she granted the General Power of Attorney to Munetsi, I would still accept the submission by the applicants that Munetsi's averments are hearsay. There is nothing to show that he was ever present when the transaction took place. He clearly lacked personal knowledge of the facts. Therefore I agree with the applicants when they submit:

> "10. It is now settled that, only a litigant with the knowledge of the facts can swore an affidavit. This much was settled by Makarau J in the leading case of *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 at 297 B-C where the following was stated:-
>
> > '…. For first-hand hearsay evidence to be admissible under the Act, the evidence must be about a statement made orally or in writing by another person. The person who made the statement must be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mount of that person ere he present and testifying…..'
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> 11. Further, in the same case at 297 D – E the court held as follows:-
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> …. In having recourse to the provisions of Section 27(1) of the Civil Evidence Act in order to determine whether the contents of the affidavit could be admitted, the source of the information and the basis of belief by the deponent were not given, so it was not possible to determine whether, if the source of the information were present and testifying, such information as was supplied to the deponent would have been admissible"

(Also see *Christopher Zvinavashe* v *Nobuhle Ndhlovu* HH 3/13)

Taking into account the principles of law explained in the above submissions, the first respondent is, in my view, clearly non-suited.

Consequently, if the first respondent is non-suited, it means this court is disabled from refusing to recognise the existence of a binding agreement between the applicants and the first respondent. It is therefore reasonable, on a balance of probabilities, to conclude that the applicants purchased the property from the first respondent as alleged. That finding means all the averments by the fifth and fourth respondents are of no legal consequence as relate to the rights of the applicants. This is so because, upon the applicants having complied with the agreement of 25 February 2013, the first respondent was estopped from selling the property to the fifth respondent or to anyone else.

It is also important to note that "the absence of the first respondent at the time of the transaction" is in all probability a false story created and intended, by the first respondent, to hide fraudulent deals. This is so because there is evidence to show that on 10 January 2013 she was in Zimbabwe. The transaction in *casu* was concluded on 25 January 2013. The balance of probabilities points to the fact that she was in Zimbabwe. The applicants' assertion that they personally dealt with the first respondent and concluded the transaction in her presence cannot be disbelieved.

Given the full circumstances of this case, I am unable to deny the applicants' submission that the first respondent has, through bogus powers of attorney, failed to erase the parties' agreement of 25 January 2013. It is an authentic and enforceable agreement.

The first point in *limine* is therefore upheld and accordingly the first respondent has failed to competently oppose the relief sought by the applicants. That failure impacts on the positions of the fourth and fifth respondents. Their stances herein could only be worth considering if the first respondent had opposed the relief sought by the applicants. The application should therefore succeed. I also believe that the applicants are entitled to the main claim. In the absence of opposition from the first respondent there would be no basis to deny the applicants the main relief.

The hopeless attempt by both the first respondent and the fifth respondent to mislead the court deserves an order of costs on a higher scale against both.

I therefore order as follows:-

(1) The First, Second and Third Respondents must, within thirty days from the date of this order, do all such things as are necessary and execute all such documents to enable a certain piece of land in the District of Salisbury, called Stand 7410 Glen View Township of Glen View measuring 540 square metres, to be transferred to the Applicants.

(2) In the event of failure by any of the Respondents to carry out the obligation set out in paragraph 1 above, then the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized to sign and execute all such documents on behalf of any of the Respondents to enable transfer of the above property to the Applicants.

(3) Within seven days of the service of this order on the Fifth Respondent, the Fifth Respondent and all those claiming through him must vacate the above property, failure of which the Sheriff of Zimbabwe with or without the assistance of the Zimbabwe Republic Police, be and is hereby ordered to evict from the property, the Fifth Respondent and all those claiming through him; and

(4) The first and fifth respondents, the one paying the other to be absolved, shall pay costs of suit on the client and legal practitioner scale.

Messrs Tendai Biti Law, applicants' legal practitioners
Messrs Rubaya & Chatambudza, 1st and 5th respondents' legal practitioners
The Director of Housing & Community Services, 2nd respondent
City of Harare, 3rd respondent
Messrs Mupawaenda & Musara, 4th respondents' legal practitioners