WILDSEARCH SAFARIS AND TOURS (PRIVATE) LIMITED
versus
REQUIT (PRIVATE) LIMITED
and
JOHANNES DONDO
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 & 21 June 2023

Opposed Matter

Mr *T Govere* for the applicant
Adv *S M Hashiti* for respondents

MANGOTA J: At the center of the dispute of the parties is the Remainder of Swindon Farm ("the property") which is situated in the district of Charter. It is 746.7170 hectares in size. It is held under Deed of Transfer No. 8387/ 2002.

The applicant claims co-ownership of the property with the first respondent. It alleges that the first respondent and it purchased the property and therefore acquired co-ownership in the same. It avers that the first and second respondents which are respectively a legal *persona* and a natural person are denying it access to, and utilization of, the property. It moves me to direct the first and second respondents ("the respondents") to allow it access to, and utilization of, the property as well as to have the same subdivided into two equal portions so that it occupies and utilizes its own one half portion of the property leaving the first respondent occupying and utilizing the remaining half portion of the same. It, in short, moves me to grant to it a prohibitory interdict and a *madamus*.

The respondents oppose the application. The third respondent who is cited in his official capacity did not file any notice of opposition presumably because no relief is sought against him. My assumption is that he intends to abide by my decision. The respondents' statement is that one

Eric Nhodza ("Nhodza") who is now late but was husband to the deponent of the founding affidavit fraudulently authored the title deed on which the names of the applicant and the first respondent appear. He, they claim, was a friend of the second respondent during his life-time. He allegedly offered to assist the second respondent who purchased the property from one Anoldus Mauritius Rinke ("Rinke") on 11 November 1998 with payment of transfer fees which the second respondent did not have at the time. Nhodza, they assert, took away with him the title did of the property which the seller, Rinke, passed on to the second respondent after the sale had been concluded. Nhodza, they claim, did not return the title deed of the property to the second respondent when he took it. They allege that Nhodza's surviving spouse and his daughter decided to perfect the fraud which Nhodza started leading on to the current application. They challenge the applicant to produce proof of payment of the purchase price as well as to explain why and how the property ended up being transferred by one Tapiwa Mudambanuki and not by Costa Madzonga legal practitioners who were/are the seller's conveyancers as contained in the agreement of sale which the second respondent concluded with the seller. They challenge the applicant to explain why it did not take occupation of the property if the transfer it places reliance upon was a genuine one. They insist that the applicant should explain why it sought to pay rates in respect of the property twenty years after it took ownership of the same. They assert that an application which is premised on fraud should be dismissed with costs which are at attorney and client scale.

The application cannot succeed.

An applicant who is moving the court to grant to him a final interdict must allege and prove that he has a clear right which he seeks to protect. A clear right is one which is not open to doubt. The latter kind of right is one which is *prima facie* in nature. It is different from a clear right. A clear right must be established on a balance of probabilities: see Hebstein and van Winsen, *The Civil Practice of the High Courts* and the *Supreme Court of Appeal of South Africa,* 5th edition, 2009, pp 1459 -60. The definition of a clear right was succinctly discussed in *Movement for Democratic Change (Tsvangirai) and Others* v *Lilian Timveos and Others*, SC 9/2022 in which the court stated that:

> "…..where an interdict is sought, the right must be established clearly as opposed to it being *prima faciely* established. Thus the word clear in the context of rights in an interdict does not qualify the

right but rather expresses the scope to which the right has been established by evidence on a balance of probabilities."

The existence of a clear right in an application for a final interdict is a prerequisite to the consideration of other requirements for the interdict. Where the right which the applicant seeks to protect is non-existent or is of a *prima facie natura,* it is, in my view, an exercise in futility for the court which is faced with the application for a final interdict to proceed to consider the remaining requirements for the interdict. The other requirements which are known to all and sundry are stated in a number of case authorities amongst which are the following: *Setlogelo* v *Setlogelo,* 1914 AD 221 at 227; *Sanachem (Pty) Ltd* v *Farmers Agric-care (Pty) Ltd & Others*, 1995 (2) SA 781 (A) at 789 B-C; *Charuma Blasting & Earthmoving Sycs (Pty) Ltd* v *Njainjai & Ors*, 2000 (1) ZLR 85 (S) at 89 *D and Blue Rangers Estates (Pvt) Ltd* v *Muduvuri & Another,* 2009 (1) ZLR 368 (S). The requirements which go hand-in-glove with the existence of a clear right in an application for a final interdict comprise: (i) an injury actually committed or reasonably apprehended, (ii) the absence of a similar protection by any other ordinary remedy and (iii) balance of convenience which favours the grant of the interdict.

It stands to common sense, logic and reason that, where the right which is the subject of an interdict is non-existent, there is nothing for the applicant to protect. No actual or reasonably-apprehended injury is committed against him by anyone let alone by the respondent. No balance of convenience exists where there is no clear right which favours the applicant in an application for a final interdict. It is for the mentioned reason, if for no other, that I maintain the view that an applicant who moves for a final interdict must, first and foremost, establish the existence of a clear right. It is that right which he seeks to protect when he moves the court to grant a final interdict to him.

That the names of the applicant and the first respondent appear on the title deed, Annexure B, which the applicant attached to its founding papers requires little, if any, debate. Reference is made in the mentioned regard to p 12 of the record. From a *prima facie* perspective, therefore, the conclusion that the applicant and the first respondent co-own the property cannot, in the absence of cogent evidence from the respondent, be disputed.

What the respondents, however, dispute is the manner in which the applicant's name came to appear on the title deed. They allege fraud on the part of Nhodza. They dispute that the property

was ever transferred into the name of the applicant and that of the first respondent. They allege that the property was not transferred into the name of the first or the second respondent. Nhodza, they assert, took the title deed which the seller of the property handed to the second respondent following the agreement of sale ostensibly to assist the latter in paying transfer fees and did not return the title deed to the second respondent until the latter's daughter who deposed to the first respondent's opposing affidavit did a deeds search and discovered, after Nhodza's death in 2014, that:

a) the property had been transferred into the names of the applicant and the first respondent- and
b) title was encumbered in that there was a caveat which was registered in favour of Credsure.

Whilst the names of the applicant and the first respondent appear on the title deed which the applicant filed of record, the name of the applicant appears to hang in the air, so to speak. It alleges that the first respondent and it purchased the property from Rinke. It, as the respondents correctly submit, produces no evidence of the agreement of sale of the property to the first respondent and it. It does not show the sum of money which it paid as purchase price for the property. It produces no evidence which shows that it was/is paying rates in respect of the property from the time that it allegedly acquired ownership in the same to about 2019 when it sought to do so. It does not explain why it took close to twenty years for it to assert its rights to the property which it alleges it acquired ownership of in 2002. It does not explain:

a) how it acquired ownership in the property without a donation being extended to it and without placing before me its own agreement of sale of the property to it;
b) if it has proof of payment of capital gains tax; or
c) if it has proof of payment of stamp duty; or
d) if it has a record of its interview with the Zimbabwe Revenue Authority (ZIMRA); or
e) how two conveyancers- Costa Madzonga and Tapiwa Mudambanuki- came to be appointed by the seller to convey one and the same property to the second respondent and to the applicant respectively.

The applicant is, in short, challenged to establish a clear and cogent statement which shows that it co-owns the property with the first respondent. The applicant has the *onus* to prove that it purchased as well as co-owns the property with the first respondent. The cardinal rule on *onus* is that a person who claims something from another in a court of law has to satisfy the court that he is entitled to it: *Zimbabwe United Passenger Company Limited* v *Packhorse Services (Pvt) Ltd,*

SC 13/17. The same principle was also succinctly stated in *Pillay* v *Krishna*, 1946 AD 946 at 952-953 wherein it was remarked that he who alleges must prove. The applicant should, in the circumstances of this case, produce positive and cogent evidence which shows that it co-purchased as well as co-owns the property with the first respondent. In the absence of such evidence, its claim of the right to co-ownership of the property remains unsustainable.

It remains unsustainable on the strength of *CBZ Bank Limited* v *David Moyo and Deputy Sheriff, Harare,* SC 17/18 which held that the title deed, such as the one which the applicant relies upon *in casu*, is only *prima facie* proof of title and that the underlying documents must be placed before the court before it accepts the title deed as conclusive proof of ownership. Because the applicant failed to produce such documents as the agreement of sale, the price which it paid to the seller of the property, its interview with ZIMRA, its payment of stamp duty, its payment of rates in respect of the property and such other documents as relate to its ownership of the property, its statement which is to the effect that the title deed speaks for itself is misplaced. It does not assist its cause at all.

It is a miss-statement for the applicant to suggest, as it is doing, that the title deed speaks for itself. A title deed which has no known history of its origin cannot fit into the *res ipso liquitor* principle. It cannot fit into the principle wherein its ancestry remains untraceable. Because its history has no known roots, it hangs in the air and, in the process it defies all notions of logic as well as reason. It, in short, cannot withstand the vagaries of the cruel weather and is therefore bound to fall to pieces when it is placed under severe scrutiny.

The challenge which confronts the applicant in prosecuting its cause is not only formidable. It also presents a very serious difficulty for it to piece its evidence together to make a complete and coherent statement which is easy for anyone to comprehend. The challenge is simply that the deponent to the founding affidavit may not be privy to what took place between her late husband, Nhodza, and the second respondent. She displays the challenge which confronts her in para 6.2 p 74 of her answering affidavit wherein she states, in regard to the existence or otherwise of the underlying documents, that:

> "6.2 For the record, my now deceased husband, ERIC NHODZA, kept the file containing both the agreement of sale and purchase and the proof of payment and I could not manage to locate the same pursuant to his demise".

It is clear from the above quoted statement that the deponent cannot show anything which supports that her late husband and the second respondent co-purchased the property which she claims the applicant co-owns with the first respondent. She makes an allegation which she cannot prove. She does so only on the basis of hearsay evidence, so it would appear. She knows that hearsay evidence remains inadmissible and cannot therefore be used to support such a claim as the one which the applicant is making in this application.

The law requires that the applicant must produces evidence in support of its case. Where it fails to do so, as is the case in this application, it cannot rely on the title deed which the respondents refer to as a forged document. The applicant's right is therefore not a clear one. It is open to doubt. It is *prima facie* in nature. It cannot support an application for a final interdict which thrives on a clear right for its existence as well as protection.

It is a misdirection for the applicant to make the effort to hide behind the judgment which my sister MHURI J. delivered under HH 248/ 22. The judgment deals with nothing else but the special plea of prescription. It does not deal with the merits of the case. It does not, therefore, defeat the respondents' defence of fraud which goes to the root of the case. Counsel who represented the respondents in this application was clear on the stated matter. His submissions on the same cannot be assailed. They remain valid.

The applicant has no one but itself to blame. It should have realized, as it should, that, once the respondents raised the defence of fraud, its cause could not stand. It should, in the circumstances, have withdrawn the application and proceeded to institute an action. That would have accorded to it the opportunity to state its case, call for *viva voce* evidence to prove its case through cross-examination of witnesses and allowing the court to make findings which are in its favour, if such were/are available to it. It preferred motion proceedings in circumstances where it has no evidence which shows that it purchased the property with the first respondent and, therefore, co-owns it with the latter. That was a miscalculated risk which it placed in front of it making it difficult, if not impossible, for it to proceed. Its attempt to produce fresh evidence in the form of Annexures Q, R, S, T, U and V as contained at pp 62,63, 64, 65, 66 and 67 of its answering affidavit respectively only goes to show the desperate position in which it had placed itself. The annexures which do not give the respondents the opportunity to comment upon them cannot be taken account of. That is a *fortiori* the case when it does not explain why the annexures were not produced in its

founding papers. The law does not allow a party to proceedings to take another by surprise. It encourages parties to a case to lay all their evidence before the court in the founding papers to enable the other party to speak to, or about, them.

The above-stated principle was succinctly discussed by Herbstein and van Winsen in their *Civil Practice of Superior Courts of South Africa,* 3rd edition. Page 80. The learned authors state of the principle in the following words:

> "The general rule…which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon to either affirm or deny".

The wise words of the learned authors were repeated with considerable clarity in *Bayat & Ors* v *Hansa & Anor*, 1955 (3) SA 547 (N) at 553 wherein it was remarked as follows:

> "…..an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his opposing affidavits) still less make a new case in his replying affidavits".

The applicant does not state any exceptional circumstances which justify the production of the annexures in the answering affidavit. Nor does it explain why these were not produced in its founding papers where they should have been tendered to allow the respondents to comment upon them as it is their right to have done. Its production of the annexures after the event is impermissible at law. It is akin to taking the other party by surprise which, as is known, is a violation of the other party's right of reply.

The case of the applicant and the respondents presents a formidable material disputes of fact. The applicant, for instance, places reliance on the deed of transfer as evidence that it co-owns the property with the first respondent. It produces no other evidence which supports its claim.

The respondents, on the other hand, allege fraud on the part of Nhodza. They insist that the property was never transferred to the first or second respondent because Nhodza, who was the second respondent's friend during his life-time, took the seller's original title deed with him from the second respondent and did not return it to the latter until he died. They, in effect, challenge the

authenticity of the title deed which the applicant attached to its founding papers. That, according to them, is a document which Nhodza forged and uttered to the third respondent and presumably to ZIMRA. All this is evidence which is contained in the respective affidavits of the parties.

It is trite that where an applicant is relying on a disputed fact whose proof lies in the memories of witnesses to the fact, as the applicant did *in casu,* it is utterly incompetent for such an applicant to proceed by way of application: *Jirira* v *Zimcor Trustees Limited,* HH 98/10. Where the applicant has taken a wrong turn and proceeded by application procedure where there are disputes of fact when he should have proceeded by summons action, the court has a discretion either to refer the matter to trial for *viva voce* evidence to be led or to dismiss the application: *Howard Muzulu* v *Rebecca Katiyo & Anor*, HH 789/15. The court would opt to dismiss the application where, at the time the application was made, the applicant was aware of the disputes of fact but proceeded that notwithstanding: *Masukusa* v *National Foods Ltd & Anor*, 1983 (1) ZLR 232 (H) at 236 C-D.

The respondents drew the applicant's attention to the existence of material disputes of fact in the case. The applicant chose to bury its head in the sand. It insisted that there were no such when such are evident on the parties" papers which are filed of record. It placed reliance on its name which appears in the purported title deed. The fact of the matter is that there are such disputes of fact which cannot be resolved on the papers which it placed before me. I cannot, in the circumstances of this case, refer this case to trial. I can only but dismiss it without any further ado.

Because the applicant failed to establish a clear right for its application for a final interdict and a *mandamus,* it becomes unnecessary for me to consider the remaining requirements for the remedy which it is moving me to grant to it. Those, in my view, can only come into the equation where the applicant has proved that it has a clear right which it seeks to protect. It failed to prove such clear right. It proved a *prima facie* right which does not qualify for the remedy of a final interdict. Its application cannot therefore succeed. It cannot succeed on the stated ground as well as on the ground that its application is fraught with material disputes of fact which it refused to see when it should have taken note of them.

The applicant failed to prove its case on a preponderance of probabilities. The application is, in the result, dismissed with costs.

Govere Law Chambers, for the applicant
Mambosasa Legal Practitioners, for the first and second respondents