JOSEPHINE MAKONDORA
versus
THE VINCENT KANONGOVERE TRUST
and
EVISON ZUZE
and
THE REGISTRAR OF DEEDS N.O
and
THE SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 13 October 2021 & 3 February 2022

Opposed Court Application

T Zhuwarara, for the applicant
N Munetsi, for the 1st respondent
L Madhuku, for the 2nd respondent

MUZOFA J. This is an application for a declaratur and consequential relief arising out of a sale of property belonging to the applicant.

The applicant is a female adult who can sue in her capacity. The first respondent is a Trust registered in terms of the laws of Zimbabwe. The second respondent is a male adult. The third and fourth respondents are cited in their official capacity.

The applicant is employed by the United Nations and she is based in the United States of America. She is the owner of a property known as Stand 363 Helensvale Township of Stand 344 Helensvale Township 'hereinafter referred to as the property' held under Deed of Transfer 2111/98.Around March 2018 she was in Zimbabwe. She discovered some building materials on the property. After investigations she discovered that one Mr Kanongovere was the owner of the building materials. Further investigations revealed that the property was allegedly sold to the second respondent by her. It appeared that when the applicant as the alleged seller failed to pass transfer, the second respondent sued out summons to compel transfer under HC 8834/14.Service on the applicant was effected by way of substituted service. A default order was granted. Title then transferred from the applicant to the second respondent. Thereafter the

second respondent sold the property to the first respondent. The first respondent is the current holder of title to the property under Deed of Transfer 4844/17.

The applicant claims to have had no knowledge of these transactions. She reported the matter to the police. She then filed an application for rescission of the judgment in HC 8834/14 under HC 4093/18. The application was granted by consent of the parties.

The applicant avers that she did not sell the property to the second respondent. She did not sign the agreement of sale at all. Someone must have forged her signature. The identity number on the agreement of sale is not hers. She did not receive the purchase price that was paid through F.Mlaudzi who is unknown to her. The address on the agreement of sale is unknown to her, infact it turned out to be non-existent. As a result, she was not served with process under HC 8834/14. Service was effected by way of substituted service as service could not be effected at the given address. The notice for substituted service was flighted in The Herald and The Chronicle newspapers, however at the time she was in the United States. She did not have sight of the adverts for substituted service.

The second respondent opted not to pursue the rescinded matter under HC 8834/14. At Pre Trial stage the second respondent filed a notice titled, 'Claim is moot' on the basis that title had passed to the first respondent despite the rescission of judgment. The matter was removed from the roll.

The first respondent remains on the property unlawfully. She thus seeks the cancellation of the first respondent's title deed and a declaration that she is the lawful owner of the property. She also seeks costs against the first and second respondents on a higher scale.

The applicant raised a preliminary point that the second respondent's notice of opposition is not accompanied by an index in compliance with r227 (2) (d) of the 1971 High Court Rules. To that extent there is no valid notice of opposition. When the matter was heard in argument the preliminary point was abandoned citing the case of *Zimsec v Chinhengo and Anor* HH160/18 where the court held that such non-compliance is not fatal to the proceedings.

The first respondent filed an opposing affidavit which in substance does not oppose the relief sought. The first respondent acknowledges that it is not privy to the sale transaction between the applicant and the second respondent. It is an innocent purchaser that relied on the representations by the second respondent's conveyancers. In essence it shall abide by the court's decision.

The second respondent opposed the application. Three points *in limine* were raised that the applicant's founding affidavit was not properly commissioned in terms of the laws in Zimbabwe. Secondly that the declaratory relief sought is incompetent at law and lastly that there are material disputes of facts that cannot be resolved on papers.

On the merits, the second respondent insisted that the applicant was not defrauded. She sold the property to him and signed the agreement of sale.

I shall address the preliminary points raised for the second respondent first before addressing the merits.

The first preliminary point is that there is no valid founding affidavit before the court. It was submitted that the affidavit having been deposed to in the United States of America, it is subject to s4 of the High Court (Authentication of Documents),1971 'the Rules' which is now s85 of the 2021 Rules. The affidavit must have been deposed before a commissioner of oaths appointed by this court. Section 3 is not applicable in this case since an affidavit is not a document. In addition, there must be evidence that the person who signed the affidavit is indeed a notary public. The court was referred to the case of *Tawanda v Ndebele 2006* (1) ZLR 426 (H) for this submission.

The point taken was opposed. It was submitted that in terms of s3 of the High Court (Authentication of Documents) Rules, 1971, the affidavit was properly authenticated by a notary public who affixed his seal or stamp from New York in the United States of America. In addition, it was submitted that the *Tawanda v Ndebele* case (supra) is not applicable in this matter. The court in that case related to a power of attorney and not an affidavit.

The starting point is that the Rules deal with authentication of documents. Authentication is the verification of a signature on the document. The Rules do not deal with the commissioning of affidavits. An affidavit must therefore be understood for what it is. It is a statement made under oath duly administered by a person authorised by law to do so.

Section 2 of the Rules defines a document to include an affidavit but does not include an affidavit sworn before a commissioner. Two sets of affidavits emerge from there. One is the affidavit that requires authentication in terms of s3 by virtue of it falling under the definition of a document. The second affidavit is that signed by a commissioner appointed by the High Court.

A document needs only be sworn to before a person authorised by the law of the place where it was made to make it an affidavit. This is the point made in the *Tawanda v Ndebele* case (supra), where although the court was dealing with the authority of a Notary Public, the court had to consider if the solicitor who signed the Power of Attorney was a Notary Public in terms of the laws of the United Kingdom. In my view where a party relies on an affidavit signed by a commissioner who was not appointed by the High Court, that affidavit must be authenticated in terms of s3 of the Rules. The onus is on the party that alleges some inappropriateness in the commissioning of the affidavit to show that the affidavit was not properly commissioned.

The second form of affidavits are those where commissioners are specifically appointed by the High Court to take affidavits or examine witnesses. To my mind this arises in instances where evidence is required, and the deponents cannot appear in court. Thus, on a proper consideration upon application the High Court can appoint a commissioner to take affidavits. Such affidavits require no further authentication as set out in s4 of the Rules. The reasoning is that the Court has already entrusted and authorised the person to take such affidavits. It follows then that not every affidavit executed outside Zimbabwe needs to be signed by a commissioner appointed by the High Court. This is applicable in limited circumstances only.

From the foregoing, I come to the conclusion that, the Rules do not require that every affidavit executed outside Zimbabwe be signed by a commissioner appointed by the High Court. It would suffice where the affidavit is signed by a person authorised to take affidavits in that respective jurisdiction and that affidavit is authenticated for use in court in terms of the Rules. It would result in an absurdity to construe s4 of the Rules to mean that all affidavits executed outside Zimbabwe must be signed by a commissioner appointed by the High Court. A commissioner must be recognised as such in that jurisdiction where the affidavit originates. Our Rules have a limited application in the authentication of such an affidavit. Nothing precludes the same person if he or she is both a commissioner and a Notary Public to sign the document as long as the seal of office is affixed thereon.

In this case the affidavit was sworn to before a Notary Public who affixed his signature. The affidavit was sworn to in New York. It is trite that he who alleges must prove. It was not shown that the Notary Public is not a commissioner in terms of the law applicable in New York. The Notary Public who signed the affidavit need not be appointed by the High Court to

commission the founding affidavit before the court. I was not referred to any authority and I could not find any authority in support of the interpretation ascribed to s4 of the Rules. Despite the novelty of the preliminary point raised for the second respondent I find no merit in it. It is accordingly dismissed.

In respect of material disputes of facts, it was submitted that allegations of fraud and forgery cannot be resolved without oral evidence. The applicant must have proceeded by way of action.

For the applicant it was submitted that there are no real disputes of facts incapable of resolution on the papers. The applicant has placed before the court all the relevant documents including a handwriting expert opinion. The second respondent has not availed any document to show that he indeed purchased the property from the applicant. The applicant's denial amounts to a bare denial. The court must take a robust approach and determine the matter on the papers. Alternatively, the court can summon evidence to clarify any issue or refer the matter to trial on specific issues.

Both parties referred to the applicable law where such an issue arises. From the decided cases it is apparent that a real dispute of fact arises where material facts alleged by the applicant are disputed and traversed by the respondent in detail to leave the court wondering where the real truth lies and such truth can only be ascertained by way of oral evidence. See *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132.The respondent's defence must be set out in clear and cogent detail. A bare denial of the applicant's material averments does not suffice. See *Muzanenhamo v Officer in Charge CID Law & Order and Ors* CCZ3/13, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Pty Ltd* 1949 (3) SA 1155 (T). Courts are enjoined to ascertain if indeed a real dispute of fact exists that is incapable of resolution on the papers. In this regard case law has established that courts must take a robust approach and decide matters on the papers where it does not result in prejudice to either party. Indeed, motion proceedings maybe defeated where every disputation of fact by the respondent is taken as raising a real dispute of fact incapable of resolution on the papers. It is the court's duty to analyse the evidence before it and come to an informed decision whether a real dispute exists.

Even where there is a dispute of fact the court has options. It can take a robust approach and resolve the matter on the papers. It can allow any person to give oral evidence in terms of r229B of the 1971 High Court Rules or refer the matter for to trial with the application standing

as the summons. It also has an option to dismiss the application where the applicant should have realised that a dispute existed at the time of filing the application. See generally *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H), *Zimbabwe Bonded Fibreglass (Pvt) ltd v Peech, Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) where these options where discussed.

In this case the applicant has demonstrated by way of the title deed that she is the owner of the property. She avers that she did not sign the agreement of sale. She attached an expert opinion from a Forensic Document Examiner (FDE) and the agreement of sale between the applicant and the second respondent. The conclusions of the FDE were disputed by the second respondent by simply stating that the applicant signed the document. The second respondent did not address his mind to the expert opinion. No relevant issues were raised to counter the evidence. In essence the second respondent's denial remained a bare denial. Secondly the applicant attached her work schedule which showed that between 14 November 2006 and 20 November 2006 she was in New York. The work sheet showed that she was off sick. This evidence was not related to at all by the second respondent. The second respondent was content to make bare denials.

It would appear then from decided cases that the court must look to what the applicants traversed as the basis of the application and the factors relied upon by the respondent in opposition. The detail in the opposing affidavit is critical. In this case the opposing affidavit is scantily set out it lacks material averments. The opposing affidavit cannot be said to have traversed the issues that the court cannot decide the matter in the absence of oral evidence. In my view a dispute exists in this case, but it can be resolved on the papers. It is a palpable deficiency to just state that since there is an allegation of fraud or forgery the matter must be dealt with in action proceedings. The determinant factor is whether what the applicant avers juxtaposed to the respondent's factual basis for opposing the application leaves the court wondering where the truth lies. In this case the court is of the firm view that the matter can be disposed on the papers.

In the result the preliminary point is dismissed.

The last preliminary point is that the order sought is incompetent. It was submitted that at the time of the transfer there was a competent court order. The transfer was therefore valid *ab initio* and the court cannot declare invalid that which was valid *ab initio*. It was submitted

that our law follows the abstract system of transfer of ownership not the causal system. The court was referred to the definition of these terms in *Siberberg and Schoeman's Law of Property* (5th Edition) at pages 74-75. In essence the causal approach entails that transfer depends on a valid underlying contract. Where the underlying contract is defective transfer cannot pass. The abstract approach is opposite the causal approach. Transfer would pass notwithstanding that the underlying contract is defective.

In opposing the preliminary point, the Mr *Zhuwarara* did not directly address the issue on the causal or abstract approach. However, it was submitted that in granting the order the court has to determine whether the applicant has a substantial interest in the matter, the right and if this is a proper matter for the court to exercise its discretion and grant the order. As the registered owner of the property the applicant did not sale the property. Although the first and second respondents maybe innocent purchasers the applicant can vindicate her property since it was sold without her consent. The *rei vindicatio* remedy is available to her.

I comment in passing that although counsel for the applicant submitted that our courts follow the abstract approach, the court was referred to one case *Commissioner of Customs and Excise v Randles Brothers and Anor* 1941 AD 369 where the approaches were discussed. No recent cases were referred to confirm the approach by our courts. What is clear however is that our courts recognize and guard the right of ownership jealously. An owner of property can vindicate it against anyone including innocent purchasers. The *actio rei vindicatio* is available to an owner whose property is in the possession of another without her authority. It does not matter how many innocent purchasers are involved as long as the owner of the property did not give his/her consent. There is no parity when it comes to the *rei vindicatio*. See *Chetty v Naidoo* 1974 (3) SA 13 (A). In *Nzara &Ors v Kashumba & Ors* SC18/18 is a case of a sale of property without the owner's consent noted,

> "One of the critical maxims of property law is *nemo plus iuris transfer e protest quam ips habet* – translated as meaning that an owner cannot, as a general rule, be deprived of his property against his will. Therefore, where an owner's property is sold and delivered without his consent his right to ownership can be vindicated from any person. Silberberg and Schoeman in their Second Edition of "The Law of Property" at page 268 make it clear that the maxim stands firm even where the third party acquires the property in good faith, having paid a fair market value and acted in all innocence. Our law calls for ruthless vindication and protection of the right of ownership".

In essence where the owner has not given consent to the sale, there is no valid contract to talk about. Our courts certainly follow the causal approach. Even where the underlying contract was valid at the time of transfer but it is later shown that the underlying contract was in fact invalid and remains so, the court is at large to invalidate the transfer. The point that the court cannot set aside that which was valid *ab initio* is misplaced.

The applicant's submissions are persuasive. The order sought is competent. In determining whether to grant the order, the court will consider the applicant's right and the validity of the alleged agreement between the seller referred to as the applicant and the second respondent. The onus is on the applicant to show on a balance of probabilities that she did not sell the property to the second respondent. If she succeeds the sale can well be set aside and the natural consequence follows that the sale agreement between the second respondent and the first respondent crumbles.

The preliminary point is dismissed.

I now consider the merits of the case.

This court can grant declaratory relief in terms of s14 of the High Court Act. The applicant must demonstrate that he/she has a direct or substantial interest in an existing, future or contingent right which becomes the subject of inquiry. The issue must be real, the courts will not decide on abstract or academic issues. The court also takes into account public policy considerations whether this would be an appropriate case to grant such an order. See generally *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S).

The court has to determine if it is the applicant who sold the property to the second respondent.

The following is common cause. The second respondent purportedly purchased the property from the applicant and an agreement of sale was signed on 14 November 2006.The applicant is alleged to have signed the agreement. The purchase price was paid through Barclays Bank to one F Mlaudzi of Beitbridge.

The agreement of sale has salient features that incorrectly identified the seller who is alleged to be the applicant. First it is the address. The applicant's address was given as Farm 14 Astorne Farm West Nicholson. The address is non-existent. The Deputy Sheriff's return of service shows that a diligent search was made of the farm. It is recorded on the return of service that the Deputy Sheriff went to Plot 14, Atherstone Farm probably on account of some

similarities in the names. It is from this farm that the office learnt that there is no Farm known as Astorne Farm in West Nicholson. Further steps were made to verify the information. The Deputy Sheriff approached the Ministry of Lands, Gwanda office and it was confirmed that no such farm exists in West Nicholson. The applicant denied neither ever providing such an address nor even entering into the agreement with the second respondent. Her address is different from what was set out in the agreement of sale.

Secondly the identity number on the agreement of sale is not the applicant's. The applicant's identity number reflected on a page of her Passport filed of record is 63-127484E34 yet the agreement of sale reflects 63-114813D47 as the applicant's identity number.

The discrepancy in the identification of the applicant's address and her identity number raises a suspicion that the second respondent may not have dealt with the applicant. It was not even suggested that the applicant could have misrepresented her credentials

The applicant also demonstrated that at or about the 14 November 2006 she was not in Zimbabwe. An extract from her employment records show that from 14 to 20 November 2006 the applicant was on sick leave. It can be safely concluded that she was in the USA and was sick. This evidence was not controverted. It therefore admits of no doubt that the applicant could not have been in Zimbabwe signing the agreement of sale on the 14 November 2006 and be sick in the USA.

Lastly the applicant denied that she affixed her signature on the agreement of sale. To support this averment she attached the FDE report. The affidavit was compiled by one Alec Kaguru a Digital Forensics Expert. He examined the signature on the agreement of sale and 15 other samples of the applicant's signatures from documents she signed in 2000, 2006, 2013, 2014,2015, 2016, 2017 and 2018. Most of the documents are business documents for instance one signed in 2017 is a Software License Agreement, a Power of Attorney signed in 2018 and a Contract Acknowledgement and Acceptance signed in 2018. Using acceptable methods embraced in their field the expert opinion was that the author of the signature on the agreement of sale is not the person who signed the fifteen documents submitted for examination. This evidence was not seriously controverted. The respondent simply insisted that the applicant signed the document. Where an expert opinion is provided it cannot be disproved by a simple averment. The respondent must lay some valid foundation challenging such an opinion. In the

absence of such, the court accepts that the applicant did not sign the agreement of sale she is alleged to have concluded with the second respondent.

In the result, the applicant has demonstrated that she has an existing right derived from the Deed of Transfer that she holds; she is the owner of the property. The property having been sold without her consent, she has a right to recover the property from whosoever is in possession of it. This is the very essence of the *rei vindicatio* principle. I have already set out the principle and how it is applicable in this case. See *Nzara &Ors v Kashumba & Ors (supra).* In terms of the law, once the first agreement of sale is found to be invalid, as in this case the subsequent sale agreement falls away too. Nothing can stand on an invalidity, it would surely collapse. This means the agreement between the second respondent and the first respondent must be declared invalid.

The court is satisfied that the applicant has discharged the onus on her.

The applicant requested for costs against the first and second respondents. I find no justification to order costs against any of the parties. In my view the second respondent was a victim of some fraudsters. Similarly, the first respondent unknowingly purchased property with a tainted title. This case is one of the many cases that courts deal with times without number where the unscrupulous in our society reap where they did not sow by selling houses that do not belong to them. This is a clarion call to the purchasers, legal practitioners involved in sale transactions and indeed all involved in the sale of immovable property to come up with systems that protect purchasers.

From the foregoing the following order is made.

The application as follows:

I. The Deed of Transfer No. 1894/2017 in favour of the 2nd respondent and 1st respondent respectively in respect of the immovable property described as a certain 4651 square metres of land called Stand 363 Helensvale Township situate in the district of Salisbury, be and is hereby declared null and void.

II. The 3rd respondent is hereby directed to cancel Deed of Transfer No. 1894/2017 in favour of the 2nd respondent and 1st respondent respectively in respect of the immovable property described as a certain 4651 square metres of land called Stand 363 Helensvale Township situate in the district of Salisbury, and to make

any appropriate endorsements on the said Deed of Transfer and entries in his registers to reflect the said cancellations.

III. The Deed of Transfer No. 2111/98 is hereby declared the valid deed in respect of the immovable property described as a certain 4651 square metres of land called Stand 363 Helensvale Township of Stand 363 Helensvale Township situate in the district of Salisbury.

IV. The 1st respondent and all those occupying through it the immovable property described as a certain 4651 square metres of land called Stand 363 Helensvale Township of Stand 363 Helensvale Township situate in the district of Salisbury registered under Deed of Transfer Number 2111/98, shall give vacant possession of the said property to the applicant within seven (7) days of this order, failing which the 4th respondent or his lawful deputy is hereby authorized and directed to evict them and give vacant possession to the applicant.

Mhishi Nkomo Legal Practice, applicant's legal practitioners
Tendai Biti Law Firm, 1st respondent' s legal practitioners
Lovemore Madhuku Lawyers, 2nd respondent's legal practitioners.