

JANET MANDA ZA
versus
WHISPER RUKANDA
and
THE REGISTRAR OF DEEDS
and
FARAI AGNES MANDA ZA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2 August & 27 September 2017

Opposed application

S Mzondiwa, for applicant
GR Sithole, for 3rd respondent

TAGU J: The circumstances of this matter can best be understood if the historical background is given first. What happened is that on the 6th April 2005 and at Harare, the applicant Janet Mandaza (hereinafter referred to as the purchaser) entered into a written contract of sale agreement with one Whisper Rukanda wherein Mr Whisper Rukanda (hereinafter referred to as the seller) sold to Janet Mandaza a certain piece of land situate in the district of Salisbury called Stand 2576 Marlborough Township of Stand 2576 Marlborough Township measuring 504 square metres held under Deed of Transfer No. 697/2000. In terms of clause 2 of the agreement the purchase price was Z\$110 000 000.00 (One hundred and ten million dollars). The seller's agent was Property Paradise Real Estates. In terms of clause 3 of the agreement the payment terms were that the purchaser to pay a deposit of Z\$50 000 000.00 (Fifty million dollars) cash to be paid directly to Property Paradise Real Estate upon signing of the agreement of sale. The balance of Z\$60 000 000.00 (Sixty million dollars) was to be paid on or before the 20th of May 2005 to Property Paradise Real Estate.

On the 29th April 2005 the day the last two witnesses appended their signatures on the agreement of sale the purchaser duly paid the deposit in an amount of Z\$50 000 000.00 (Fifty million dollars) cash on receipt number 221 through Property Paradise Real Estate. On the 17th May 2005 the purchaser duly paid the outstanding balance in full of Z\$60 000 000.00 (Sixty million dollars) cash on receipt number 239 through Property Paradise Real Estate. The purchaser was further advised to pay cash Z\$8 804 085.00 (Eight million eight hundred and

four thousand and eighty five dollars) to Atherstone and Cook Attorneys as conveyancing fees for the transfer of ownership from the seller to the purchaser. The purchaser duly paid the full conveyancing fees to Atherstone and Cook Attorneys on the 23rd of May 2005 on receipt number 52875.

However, when the purchaser enquired with Atherstone and Cook Attorneys on the progress regarding the transfer process the purchaser was taken aback when she was told by Messrs Atherstone and Cook Attorneys that the seller had given them a directive not to proceed with transfer as he had cancelled the agreement. The purchaser verified the development and the agent Property Paradise Real Estate confirmed to her that they too had received a verbal communication from the conveyancers about the purported cancellation of the agreement of sale.

The purchaser then approached her erstwhile legal practitioners Mandizha and Company who wrote to the seller asking for clarification on why the agreement of sale had been cancelled without notice to the purchaser by letter dated 6 July 2005. Upon receipt of the letter the seller called for a round table conference with the purchaser and her lawyers. A series of meetings then took place to try and resolve the dispute on the 4th, 16th November 2005 and on the 14th of March 2006. The purchaser indicated that he had failed to convince his wife to accept the transaction in involving the sale of the said property. The seller then made several offers to the purchaser to give her another stand in Marlborough. The purchaser accepted the offer firstly on condition that the alternative stand be secured by the 30th of November 2005. The seller failed to fulfil his promises and offered to secure another stand within 60 days. This again did not materialise.

The purchaser was left with no option but to file a Court application against the seller and the Registrar of Deeds on the 15th June 2006 seeking the following-

- an order compelling the seller to transfer to her title, rights and interest in a piece of immovable property known as Stand 2576 Marlborough Township, Harare;
- an interdict prohibiting the seller from selling and / or transferring the property to any other person serve to herself;
- an interdict prohibiting the seller and any other person claiming right through him from effecting improvements on the property;
- an order barring the Registrar of Deeds from accepting and registering transfer of rights, title and interest in the property to any other person serve herself; and

- an order authorising and directing the Registrar of Deeds to approve and register transfer of rights, title and interest in the property to herself.

On the 26th February 2015 the court granted a default judgment in favour of the purchaser. However, one Farai Agnes Mandaza applied for the rescission of the default judgement and that she be joined to this matter as a third respondent. On the 10th February 2016 the default judgment granted on the 26th February 2005 was rescinded and the third respondent Farai Agnes Mandaza was joined as a third respondent in this matter.

It is pertinent to mention that the seller did not personally oppose the purchaser's application, but only did so through his wife Dorcas Rukanda whom he authorised through a power of attorney dated the 29th June 2006 since he is currently based in the Republic of South Africa. The basis of the opposition by the seller was that basically that the agreement of sale was terminated because the purchaser had not paid the balance of US\$60 000 000.00 in terms of the agreement. However, the first respondent did not file any heads of argument and was duly barred.

On the other hand the third respondent Farai Agnes Mandaza opposed the relief sought by the applicant on the basis that the initial agreement between applicant and the seller was terminated, and following the execution of an acknowledgement of debt by the applicant which was filed as an annexure to her opposing affidavit which is handwritten, she also purchased the same stand in good faith for value on the 31st August 2005.

As a result of the joinder of the third respondent, the applicant filed a supplementary founding affidavit in which she disputed the fact that she entered into a settlement agreement with the second respondent. She disowned the handwritten acknowledgment of debt attached to the third respondent's notice of opposition.

Further, she averred that in a double sale scenario as this one the court will unless the balance of equity dictates otherwise, give effect to the first agreement. In this case she is the first purchaser who must be given preference. She therefore was forced to amend her draft order to carter for the third respondent as follows:

“IT IS ORDERED THAT

1. The purported agreement of sale between the 1st and 3rd Respondent in relation to Stand 2576 Marborough Township, Harare is declared null and void.
2. The agreement of sale between the 1st Respondent and Applicant in relation to Stand 2576 Marborough Township, Harare is declared valid.

3. 1st Respondent shall within ten (10) days of this order sign all documents relevant to effect transfer of title, rights and interest in Stand 2576 Marlborough Township, Harare into Applicant's name.
4. Should 1st Respondent fail to act as directed in paragraph (1) above, the 2nd Respondent be and is hereby directed and authorised to sign in 1st Respondent's place and stead all papers relevant to effect transfer of the Stand 2576 Marlborough Township into Applicant's name.
5. 2nd Respondent is directed to register transfer of rights, title and interest in Stand 2576 Marlborough Township, Harare within seven (7) days of the transfer papers being submitted to him.
6. 1st and 3rd Respondent shall bear costs on a legal practitioner and client scale."

At the commencement of the hearing of this application, the counsel for the third respondent took two points *in limine*. The first point was that the applicant erred in filing its supplementary affidavit in that she did not have regard to the provisions of Rule 235 of the High Court Rules, 1971. He submitted that this rule provides that:

"After an answering affidavit has been filed, no further affidavit may be filed without the leave of the court or a judge,"

He said by implication such an application must be made in writing. He said that leave to file supplementary affidavit must first be applied for and obtained as opposed to filing supplementary affidavit, then asking the court to endorse such an unprocedural course of action retrospectively. Reference was made to the case of *Silver's Trucks (Private) limited and Anor v Director of Customs and Excise* 1999 (1) ZLR 490 where it was held that-

"...It only in exceptional circumstances that the court will allow the filing of an additional affidavit. There must be an application for leave to file such an affidavit. The party applying for leave must provide satisfactory explanation for failure to put the information or facts before a court at an earlier stage and for the late filing of the affidavit."

Finally he submitted that rule 4C should not be utilised to cure the fatal defects in applicant's papers.

In response to this first point *in limine* the applicant submitted that the supplementary affidavit is properly before the court because the propriety of the applicant's supplementary affidavit has to be gleaned from any one of the following reasons-

- (a) the nature of the practice of joinder of parties in application proceedings;
- (b) the need to respond or reply to the opposition filed pursuant to a joinder; and
- (c) in any event, should the court not find favour in any of the above reasons, this is a proper case where rule 4C is applicable, failing which an oral application for leave be made at the hearing of the matter. After all no prejudice would be suffered by any of the parties if such were to be granted.

In casu, the applicant argued that her case was specifically against the first and second respondents at the exclusion of the third respondent since she had no knowledge of the third respondent's interest in the matter. It therefore follows therefore that her founding affidavit specifically addressed the first and second respondents and not the third respondent. Thus upon the joinder of the third respondent, it became necessary for the applicant to depose to an affidavit dealing with matters arising from third respondent's opposing affidavit. Therefore, whilst applicant's response is headed supplementary affidavit it was in reality an answering affidavit to the third respondent's opposition.

In my view, in principle I agree that no further affidavits can be filled after an answering affidavit without the leave of the court. *In casu* I am persuaded that while the applicant's affidavit headed supplementary affidavit, it should have been headed "answering affidavit". I do not see any prejudice suffered by the third respondent because that affidavit is specifically answering to the third respondent's notice of opposition. I will condone this error by resorting to rule 4C in the interest of justice.

Even if I am wrong, still r 235 is inapplicable in the circumstances because there is no answering affidavit in the record filed in respect of the third respondent's opposition. Where there are multiple respondents, applicant is entitled to answer (through an answering affidavit) to every respondent's opposing affidavits. So I do not know which answering affidavit the third respondent is referring to. In the circumstances the first preliminary point raised by the third respondent is dismissed.

The second point *in limine* raised by the third respondent was that there is a material dispute of facts and that this matter must be referred to trial. I do not seem to see the disputes of facts here. It is common cause that the seller sold the property to the purchaser who is the applicant first. The seller then cancelled the sale after being paid in full as evidenced by copies of the receipts produced in court. The seller went on to sell the same property to the third respondent. The issue to be decided therefore is which agreement the court must give effect to. In the result the second point *in limine* is dismissed.

ON THE MERITS

Without repeating the facts of the case, it is clear that this is a scenario of a double sale. Two issues are to be resolved. The first is which contract of sale must take precedence in a double sale scenario. The second is was there any novation.

The law on double sale was well established in our jurisdiction. This was set out in the case of *Guga v Moyo and others* SC-130-00. In this case it was held that-

“The first purchaser should succeed...the second purchaser is left with a claim for damages against the seller, which is usually small comfort. But note that applies only in the absence of special circumstances affecting the balance of equities.”

So the starting point is that in a double sale scenario the first agreement should take precedence over the second sale and the second purchaser's remedy lies in a claim for damages against the seller unless there are special circumstances affecting the balance of equity. In the present case Janet Mandaza bought the property in question first on the 6th of May 2005 and made full payment by the 17th May 2005. The third respondent Farai Agnes Mandaza bought the same piece of land on the 31st of August 2005. The third respondent claimed that there are special circumstances warranting that her later agreement to be given preference. She further submitted that the applicant novated on the agreement as evidenced by an acknowledgment of debt dated the 14th of March 2006.

I carefully scrutinised the said acknowledgment of debt which is handwritten. It talks of an amount of ZAR 16 200.00 which Janet Mandaza is alleged to owe Whisper Rukanda. It does not state what this money was for. This document was denied by the applicant. It should be noted that the attached document alleged to have had the effect of cancelling or novating the first contract is dated 14 March 2006, almost seven months after the date of signing of the second contract between first and third respondent. This obviously obliterates the bona fides of the third respondent. The document could have been forged and it rendered the third respondent's story untruthful. It shows the third respondent is lying that she bought the property because the first sale had been cancelled. In my view this is not an authentic document. The law is clear that documents that are not public documents must be proven. Hoffman & Zefferth, *The South African Law of Evidence*, 4th Ed p 389, observe that evidence is normally required to satisfy the court as to the authenticity of any tendered documents.

See also- U-Freight Enomar (Pvt) Ltd v Matebuka HH-05-03 at p 8.

In *H & Dwitkopen Agencies and Fourways Est v De Sousa* 1971 (3) SA 941 TPD, it was held at p 940E that:-

“The law in relation to the proof of private documents is that they must be identified by a witness who is either (i) the writer or signatory thereof; or (ii) the attesting witness, or (iii) the person who found it in possession of the opposite party or (v)a handwritten expect, unless the document is one which proves itself...”

In the present case the said acknowledgment is a photocopy which is not certified by the commissioner of oath. The third respondent did not state how she got hold of it yet she is not privy to the contract is neither a signatory nor an attesting witness to the document. Even

if it is admitted into evidence it does not amount to the cancellation of the contract between the applicant and the first respondent neither does it amount to novation of the old contract of sale.

In the circumstances the court found no justification or circumstances that warrant it to give preference to the second contract. The applicant has managed to prove her case and the following order is made:

IT IS ORDERED THAT

1. The purported agreement of sale between the 1st and 3rd Respondent in relation to Stand 2576 Marlborough Township, Harare is declared null and void.
2. The agreement of sale between the 1st Respondent and Applicant in relation to Stand 2576 Marlborough Township, Harare is declared valid.
3. 1st Respondent shall within ten (10) days of this order sign all documents relevant to effect transfer of title, rights and interest in Stand 2576 Marlborough Township, Harare into Applicant's name.
4. Should 1st Respondent fail to act as directed in paragraph (1) above, the 2nd Respondent be and is hereby directed and authorised to sign in 1st Respondent's place and stead all papers relevant to effect transfer of the Stand 2576 Marlborough Township into Applicant's name.
5. 2nd Respondent is directed to register transfer of rights, title and interests in Stand 2576 Marlborough Township, Harare within seven (7) days of the transfer papers being submitted to him.
6. 1st and 3rd Respondents shall bear costs of suit on a legal practitioner and client scale.

Sawyer & Mkushi, applicant's legal practitioners
C. Nhemwa & Associates, 3rd respondent's legal practitioners