

PRECIOUS CHIPUNZA
versus
MOSLEY MASHINGAIDZE
and
THE COMMISSIONER GENERAL OF ZIMBABWE REVENUE AUTHORITY
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 August, 2017.

Chamber application-to compel disclosure of tax information

CHITAPI J: This chamber application is made pursuant to s 34A of the Revenue Authority Act, [*Chapter 23:11*] as read with s 62 of the Constitution, 2013.

The application does not show whether the applicant is male or female. The name Precious is unisex. I have assumed that applicant is female. If I am wrong then the “she” must be construed as “he”. The applicant prays for an order against the second and third respondents as follows as more fully set out in the draft order.

“IT IS ORDERED THAT:-

1. Second and third respondents be and are hereby ordered to furnish the Honourable Court with the full record for transfer of Stand 3206 Mabelreign Township 17 Greeba of Mabelreign measuring 1065 squares held under Deed of Transfer No 4941/11, also known as number 20 St Stephens Road, St Andrews Park, Harare from applicant to Lalapanzi Properties (Private) Limited in the proceedings under Case No HC 11588/11 and to provide this Honourable Court with any information as may be requested or necessary in the determination of the difference between the parties therein.
2. Costs to be the cause.”

This application is made ancillary to case No HC 11588/11 which I will refer to as the main case. In that case, the first respondent *in casu* seeks the eviction of the applicant from the property referred to in the draft order above, damages and costs. The first respondent claims to hold title over the property as registered owner under Deed of Transfer No. 4941/2011. The applicant herein resists the eviction on the basis that the first respondent’s title is tainted with illegality or simply put, is not good in law. The applicant avers that she is the lawful owner of the property whose title deeds she had surrendered as security for the due

payment of a loan of US\$99 000-00 that she borrowed from Frank Buyanga. Frank Buyanga allegedly subsequently transferred the property fraudulently to a shelf company, Lalapanzi Property Limited. The said company also transferred the property to another shelf company Gildastone Holdings (Private) Limited. Gildastone allegedly has a pending action for eviction against the applicant in the Magistrates Court under case No. 123940/10. The first respondent allegedly bought the property from Gildastone Private Limited, hence, the institution of Case No. HC 11588/11 by the first respondent for the eviction of the applicant.

It is not clear whether the applicant herein seeks the restoration of title of the property to her. I did not find a counter claim by the applicant in the record for the main case. Case HC11588/11 is however not before me for determination and I perused the pleadings therein for the purposes of acquainting myself with the background to the application. The views I have expressed on the said case are *obiter*, especially on the absence of a counter claim and what goes with it.

The said case No. HC 11588/11, was according to the applicants' affidavit set down for trial and was assigned to MATANDA-MOYO J on 13 June, 2017. The applicant avers that during the trial, her legal practitioner applied for the trial to be postponed to enable the legal practitioner to subpoena the second respondent to testify on the alleged transfer of the property from herself to Lalapanzi Property Limited. The applicant requires the production of any records in the possession of the second respondent which were used to process a tax clearance for the alleged transfer of the property from the applicant to the transferee. The applicant obviously needs evidence to back up her allegation in her plea in Case No. HC 11588/11 that she did not transfer or divest herself of title to the property.

Section 62 of the Constitution provides for the rights of access to information held by the State or any of its institutions or agencies at every or any level. The right of access to information is not absolute. Section 62 (4) of the Constitution provides that a law or laws should be enacted to give effect to the right. The legislation granting access to information may restrict the access in the interests of defence, public security and professional confidentiality. The extent of any restriction should be "...fair, reasonable, necessary and justifiable in a democratic society based on openness; justice, human dignity, equality and freedom." Whether or not a restriction is justified in terms of the criteria given in s 62 (4) is a matter of both fact and law. Where a dispute arises in regard to a denial of access to

information, a court will have to determine whether to uphold the denial or grant the access and the extent thereof.

The right of access to information is provided for under three distinct instances and to distinct classes of persona. In s 62(1) the right to information is granted to Zimbabwean citizens, permanent residents, juristic persons and the Zimbabwe Media. Information to which the right relates is limited to “interest of public accountability.” In short the person requiring information must qualify to access it by showing that such person or entity falls within the classes of persons or entity who may exercise the right and further such person or entity must show that the information is required in the interests of public accountability.

The second instance is provided for under s 62 (2) of the Constitution. The right does not discriminate in respect of who may enjoy it unlike in s 62 (1) where the right appears to be limited to Zimbabweans, permanent residents of Zimbabwe and Zimbabwean media and legal persona. The right is very wide in respect of to whom it applies. The information to which the right relates is information held by the State or any person. Every person including the Zimbabwe media enjoys such right of access to information. The information must however be required “for the exercise or protection of a right.” The person or entity requiring the information must therefore allege and prove a legally cognizable right which is sought to be protected.

The third instance is provided for in s 62 (3). The right relates to correction of records of information concerning the person exercising the right. Such information to be corrected must be held by the State, its institutions or agencies at every level. The affected person must show that the information for which a correction or deletion is sought is false, erroneous or misleading. The information must relate to that person.

The applicant did not specify the subsection of s 62 which she relies upon for this application. From a reading of the pleadings in case no. HC 11588/11, the applicant denies that she is no longer the owner of the property in dispute. The applicant therefore seeks to protect her right to the property and its enjoyment which goes with ownership of the same. The applicant is thus premised on s 62 (2) of the Constitution. Where a party invokes the provisions of an enactment including the Constitution, it is important that the party avers such facts as are necessary to qualify the party to rely on and satisfy the requirements of the provision. It should not be left to the judge to make out the qualifications from piecing together uncoordinated pieces of information or facts.

The applicant has premised her application on s 34A of the Revenue Authority Act, [Chapter 23:11]. The Act establishes the Zimbabwe Revenue Authority (ZIMRA) whose basic mandate is to act as the agent for the State to collect and enforce payment of revenue due to the State. Property transfers are susceptible to capital gains tax and no transfer of immovable property is registrable in the absence of a tax clearance. The applicant therefore requires the second respondent to produce the clearance which enabled the transfer of the property in dispute to be transferred.

Section 34A of the Revenue Act enjoins every employee of Zimra, every person authorised to receive payment or to examine records under the control or custody of the Commissioner General relating to collection and safe custody of public moneys and audit of public accounts in terms of any law to keep secret and aid in keeping secret all information coming to their knowledge in the exercise of their functions.” Information can only be divulged to authorised persons as listed under s 34 A (z) (a) (i-iii). Sections 34A (1) and (2) read as follows:

- “(1) Any person who –
- a) is employed in carrying out the provisions of this Act; or
 - b) is authorised to receive payment of any revenues in terms of any of the Acts specified in the first schedule; or
 - c) examines records under the control or in the custody of the Commissioner-General in terms of the laws relating to the collection and safe custody of public moneys and the audit of public accounts; shall, subject subsections (2) and (3), keep secret, and aid in keeping secret, all information coming to their knowledge in the exercise of their functions.
- (2) No person referred to in subsection (1) shall, except in the exercise of this functions under this Act or unless he is required to do so by order of a competent court –
- a) Communicate information coming to his knowledge in the exercise of his functions to any person who is not –
 - i. The taxpayer or other person to whom the information relates or by whom the information was furnished; or
 - ii. The lawful representative of the taxpayer or other person to whom the information was furnished; or
 - iii. A person to who the provisions of the laws referred to in paragraphs (a) and (b) of subsection (1) require the information to be communicated; or
 - b) Allow any person who is not person referred to in subparagraph (i), (ii) or (iii) of paragraph (a) to have access to any record under the control or in the custody of the Commissioner-General which contains information referred to in that subparagraph.”

Apart from the listed exceptions or persons upon whom information may be disclosed in terms of the Revenue Act, and as apparent from s 34 A (2), a competent court may grant an order authorising that disclosure be made.

In para 19 of the applicants' affidavit, she states as follows:

“19 However, I am advised that in terms of s 34A of the Revenue Authority Act [Chapter 23:11] Third respondent or its officials may not provide information about other tax papers, except upon the strength of an order of a competent court.”

The applicant in para 6 of the founding affidavit states:

“6 I am advised by my legal practitioners, which advise I verily accept to be true and correct, that the legal requirement to be satisfied by an applicant in such a matter is that:-

(a) applicant must hence a genuine interest and cause to be furnished with information which is in the possession of the third respondent and / or its officials.”

I do not intend to interrogate the accuracy of otherwise of the applicant's assertion which I think is correct broadly speaking. I have already commented on s 62 of the Constitution which allows a party access to information required for the protection of a right. Section 34 of the Revenue Authority Act restricts the disclosure of tax information.

Whilst it is correct to state as the applicant asserts in para 19 of the founding affidavit, that the respondents cannot provide information about other tax papers without an order of court to that effect, I do not understand the applicant to be seeking an order of disclose of another person's tax affairs or records. The applicant alleges a fraudulent transfer of her property. As the property owner, it is the applicant or her agent who would have completed the capital gains tax returns and provided the documents and other information required for purposes of tax assessment. It is the applicant who would have a duty to pay the tax and as such, is the tax payer.

Following on the above, the applicant would fall under the exceptions in s 62 (2) (a) (i) of the Revenue Act. The applicant has not stated that the respondents refused to furnish her with information, documents and records pertaining to the transfer of her property. It would indeed be strange if the respondents refused to do so because the information and tax records she wants relate to her property. In my view it was necessary for the applicant to have first requested for the information from the first and second respondents before petitioning the court for relief. The response from the first and second respondents if a denial of the

request would inform the judge or court as to whether or not there exists lawful grounds for the first and second respondents to withhold the information and to grant appropriate relief.

The applicant has also gone round this particular application the wrong way. From the applicant's depositions, the documents and information sought relates to a matter which is partly heard before another judge and stands postponed to be concluded. Any applications relating to evidential matters relevant to the trial should be dealt with by the trial court. That court has already heard evidence from witnesses who have testified to date. That court is best placed to determine the issue of the relevance and materiality of the information sought to be placed before it by the applicant. A situation of conflict in decisions may arise whereby I rule that the information sought should not be disclosed yet the trial court considers that it is material to its determination of the issues before it. There is nothing in the Revenue Authority to say that the application for disclosure of information cannot be made orally during the hearing. There is therefore no need for the applicant to exit the trial court and make a separate application concerning a matter before the trial court to obtain an order for discovery or disclosure of information intended for use in the trial court.

Apart from the undesirability of getting two different courts or judges to deal with what essentially are issues relating to a matter before one of the courts or judges, I hold the view that the present application should not be brought as a chamber application. Section 34 A of the Revenue Act does not provide that the court order of disclosure envisaged therein where sought should be applied for by way of chamber application. The applicant has also not justified why the application has been made in terms of r 226 (1) (b) as read with r 226 (2). In my view r 226 (2) should be strictly adhered to. Applications generally should be brought as court applications in terms of r 226 (1) (a). Whilst r 4 (c) as read with r 229 c gives a court or judge the latitude to depart from the rules, the departure should not be used as a licence to litigants especially represented actors to disregard the rule book in the hope that failure to comply with rules will always be condoned. The rules are law and courts of law must follow the law. Chamber applications are more expeditiously dealt with than ordinary court applications. It is for this reason in my view that the rule maker placed stringent conditions and provided the qualifying criteria for an application to be dealt with as a chamber application.

I have toyed around with what appropriate order to give to dispose of this application which clearly is non-suited. The application as I have already indicated is one made in the

course of ongoing proceedings before another judge sitting in court. It is also brought as a chamber application quite wrongly in my view. At best the applicant could have requested that the application be placed before the judge dealing with the main trial. It does not however appear that the respondents have been prejudiced by the shortcomings in this application both as to form and substance. If I dismiss the application, the order becomes final in nature and the applicant may be hamstrung should she seek to bring the application before the judge presiding over the trial or in any other manner as she might be advised.

Disposition

Following on Superior Court Practice Direction No. 3 of 2013, to the extent that I have reasoned that the application is non-suited, both as to form and substance, I consider the appropriate order to be one striking the matter from the roll. On the authority of *Matanhire v B P Shell Marketing Services (Pvt) Ltd* 2004, (2) ZLR 147 (S) the application is struck off the roll of chamber applications as being non-suited.

Makuwaza & Magogo, applicant's legal practitioners
Messrs Mushoriwa Pasi, 1st respondent's legal practitioners