MARTSMART (PRIVATE) LIMITED
and
BRAINCHILD PROPERTIES (PRIVATE) LIMITED
versus
BRENAN JAMES MICHAEL DE BRUYN
and
ADVANCE AFRICA HOLDINGS (PRIVATE) LIMITED
and
CITY OF KWEKWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 11 June & 5.August 2021

Opposed Application

T.W. Nyamakura, for applicants
T. Magwaliba with *Ms Z Chikukwa,* for 1st & 2nd Respondents
V. Mutatu, for 3rd respondent

[1] TSANGA J: This is an application to compel a cession of rights, title and interests in Stand 7612 Kwekwe Township to the second applicant, *Brainchild Properties (Private) Limited* (**Brainchild**) by the first respondent Brenan James Michael De Bruyn (**Mr De Bruyn**) and the second respondent *Advance Africa Holdings (Private Limited)* (**Advance Africa**). The third respondent, the **City of Kwekwe** is cited in its capacity as the local authority where the property is situated and whose consent is required.

[2] The facts averred by the applicants are that in January 2017 Mr De Bruyn offered to sell the first applicant, Martsmart a 50 % share of rights and interest in the said property. Mr De Bruyn had purchased the property from the City of Kwekwe by way of Deed of Sale on the 24th of December 2015. His approach to the first applicant was said to have been due to financial difficulties in paying off the instalments and hence the need for an investor.

[3] On the 27th of January 2017, the first applicant and Mr De Bruyn entered into a joint venture agreement whereby the first applicant and Mr De Bruyn each became 50% share holders in a special purpose vehicle that was to be created for purposes of developing the property and into which the Mr De Bruyn would cede his rights.

[4] On the 31st of January 2017, Mr De Bruyn then further sold his 50% of the special purpose vehicle that was about to be formed to the first applicant, again purportedly due to hard times that had befallen him and his business. The sale was for US$245 000.00. Thereafter the first applicant also took over the payment of all obligations by Mr De Bruyn to the City of Kwekwe with respect to the payment of the balance of the purchase price. At of 30th January 2017, that balance owing was averred to have been be US$429 982.00.

[5] In February 2017, the second applicant, ***Brainchild***, was incorporated as that special purpose vehicle that had been envisaged. Thereafter the first applicant together with Mr De Bruyn are averred to have visited the City of Kwekwe where Mr De Bruyn advised the relevant officials that he wanted to cede his rights interest and title in the property. The City of Kwekwe was agreeable with the arrangement. Applicant paid Mr De Bruyn the sum of US $250 000.00 as per agreed instalments. Additionally, the balance of the purchase price was paid to the City of Kwekwe by the first applicant. What remained was the cession of rights, title and interest in the said property.

[6] However, that cession was not forthcoming. Despite full payments and honouring of all obligations by the applicants, Mr De Bruyn advised for the first time though written correspondence from his lawyers dated 24 May 2018 (Annexure H) that the transactions entered into by the parties were done without the written consent of City of Kwekwe and were therefore invalid. The same lawyers then wrote on the 1st of July 2019, that in fact the property belonged to the second respondent ***Advance Africa*** and that Mr De Bruyn had erroneously entered into the agreement with the first applicant.

[7] It is averred by applicants that investigations by first applicant then revealed that Mr De Bruyn had on the 8th of January 2018 approached the 3rd respondent requesting a cession of the property into the name of Advance Africa. A cession was deemed by unnecessary by the City of Kwekwe and instead what was done was to reflect the name of Advance Africa in the purchase agreement of 2015. Materially, at that time the full purchased price had already been received and **Brainchild** had already been formed the year prior as the company that was supposed to receive the cession of the first respondent's rights, title and interest in the said property. The request to the City of Kwekwe was therefore submitted by the applicants to have been made well after Mr De Bruyn knew he had received full payment and that the balance of the purchase price had been made by the applicants. The applicants therefore

averred fraudulent conduct on the part of Mr De Bruyn. The City of Kwekwe had advised that they could not effect cession to applicants without a court order.

[8] It is in the above context that the applicants seek an order that the 1st and second respondents sign the cession papers and that the second agreement of sale by cession of rights entered into between the 1st and 2nd respondents with the third respondent be declared null and void.

[9] In opposition, Mr De Bruyn maintained that the property belongs to the ***Advance Africa*** and not to him and that the offer of the property in 2015 had been made to Advance Africa. The deed of sale with the applicants was null and void as ***Advance Africa*** was not part of the joint venture agreement. At the time, he thought he had acquired the property in dispute only to be advised by the City of Kwekwe that he had been erroneously made the purchaser instead of ***Advance Africa***. Since the joint venture agreement was void there was no way at law the applicants could seek to enforce its terms. The steps he had taken in putting the name of ***Advance Africa*** into the agreement of sale with the City of Kwekwe was in order to regularise the position so as to reflect the correct parties and as such there was nothing untoward in the City of Kwekwe amending its original agreement to reflect ***Advance Africa***. His position was therefore that he could not cede rights which he never had. As for the formation of ***Brainchild,*** the special purpose vehicle with the first applicant, he denied any involvement. His offer to pay back monies paid to him had been rejected.

[10] In their affidavit, the City of Kwekwe through its representative confirmed that it sold the land to the Mr De Bruyn and that he approached it with a request of cession of rights to ***Brainchild*** due to difficulties he was facing in paying for the property. It was also averred on its behalf that it had had no objection to the property being ceded to the applicants save for the requirement of compliance with development conditions laid out in the agreement of sale between Mr De Bruyn and itself. It also confirmed the payment of the balance of the purchase price by the first applicant.

[11] Further averred was that the amendment of the agreement after the City of Kwekwe knew the property had been purchased by the applicants was a result of an error and erroneous advice and that the second agreement, purporting to reflect **Advance Africa** as

purchaser, should never have been entered into. Their decision to implement whatever this court decides was also indicated.

THE ARGUMENTS

[12] In their heads of argument the applicants pointed to a valid sale with the first respondent and the performance of their side of the bargain or obligations. They also emphasise the invalidity of the City of Kwekwe's decision to register the property into Advance Africa's name after the first respondent had already alienated his rights. Further submitted was that the claim that the property belongs Advance Africa is a sham and that the court should pierce the corporate veil on the basis that the first respondent is attempting to use the second respondent as a means to achieve an act of dishonesty. It was argued that Mr De Bruyn is the face of **Advance Africa** and that his representation as director and owner suffices for the purposes of lifting the corporate veil. *David Govere* v *Ordeco (Pvt) Ltd* & *Anor* SC 25/14; *Cape Pacific* v *Lubner Controlling Investments Pvt Ltd & Ors 1995 (4) SA 790; Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548 at 553G-H. Respondent's conclusion was therefore that the application should be dismissed.

[13] At the hearing, in addition to emphasising those facts in the record which confirm that the sale as being between the Mr De Bruyn and the applicants, what was also highlighted was that in the letter to the City of Kwekwe in January 2018, Mr De Bruyn specifically requested to cede **his** rights to **Advance Africa**. Also highlighted was the fact that if indeed **Advance Africa** was the purchaser of the property in 2015, it would not have taken three years for its Director, Mr De Bruyn, to write a letter requesting cession. Further emphasised was the fact that after writing the letter to the City of Kwekwe, Mr De Bruyn had at the time still received payment from the applicants without disclosing his application for cession of the property to **Advance Africa**. It was also highlighted that there was no proof in the record that **Advance Africa** paid any purchase price to the City of Kwekwe.

Mr De Bruyn was also said to have taken two inconsistent positions, namely that the contract was void *ab initio* and then that the land belongs to **Advance Africa**. It was queried why Mr De Bruyn, if the agreement was void, would have approached the City of Kwekwe to put the property in the name of Advance Africa unless this was merely a strategy to evade his obligations.

[14] Furthermore, applicants emphasised that a party who induces a mistake cannot rely on it to resile from an agreement. See *Standard Chartered Bank* 1997 (2) ZLR 389 SC where it was stated that:

> "A cardinal principle of the common law is expressed in the aphorism: "*nemo ex proprio dolo consequitur actionem*", which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: *"nemo ex suo delicto meliorem suam conditionem facere potest*", which means: no one can make his better by his own misdeed."

In this instance it was said to be undisputed that the Mr De Bruyn entered into an agreement with the City of Kwekwe and was therefore the holder of rights at the time of disposition to the applicant. A retrospective attempt at amendment was therefore emphasised to be invalid. Also reemphasised was that the second respondent, **Advance Africa,** was being used as a sham as there was no reason why it would have accepted payments from complete strangers if indeed it did not know anything about the sale since monies were paid to it.

[15] In their heads of argument, the respondent argued six main points. Firstly, it was argued that the applicants were never owners of any rights, title or interest in the property under dispute as there was never an agreement for the property to be sold to either of them. Secondly, there was no resolution by the City of Kwekwe which resolved to grant written prior consent to any transaction in terms of which applicants were going to receive cession of rights, title and interest in the property. In other words, the alleged consent by the Council was challenged. Thirdly, the agreement to establish a joint venture company **Brainchild** did not establish any ownership in the property as having vested in it. The formation of the company and allotment of shares was argued not to entitle it to property it never owned. The reliance by applicants on a meeting in March 2017 at the offices of the City of Kwekwe where it is said Br De Bruyn undertook to cede the rights in the property to **Brainchild** is said to be insufficient proof of any agreement between Mr De Bruyn and **Brainchild**.

[16] The fourth submission was that of privity of contact. It is therefore argued that the amendment effected as a result of the letter of 8th January 2018 can only be effected at the instance of the parties to the agreement and that the applicants were not parties to that agreement. (*Burdock Investments Pvt Ltd* v *Time Bank of Zimbabwe Ltd &Ors* 2003 (2) ZLR 437 at 441B). It was argued that nothing binds **Advance Africa** nor the City of Kwekwe to transfer the property the applicants. Fifthly, it was submitted that the allegations of fraud are

not supported by factual evidence. Lastly, it was argued in the heads of argument that the proceedings are neither spoliatory in nature as the applicants never obtained possession of the property, nor are they vindicatory as they never owned the property.

[17] At the hearing, Mr *Magwaliba*'s emphasis was that for applicants to get the relief they seek they must establish a contract they are rely on and that the contract imposes obligations which they seek. He submitted that the law upon which the applicants rely on had also not been identified. His further point of emphasis was that the joint venture agreement entered into on 27th January did not oblige Mr De Bruyn to transfer property to the first applicant. It was said to merely oblige the parties to the contract to establish a joint venture company as equal shareholders. Equally, the agreement of the 30th of January 2017 whereby shares were sold was said to also not carry that obligation. The sale of shares agreement was said to oblige Mr De Bruyn to transfer his 50% shareholding to applicant to the first applicant.

[18] Following formation of the joint venture company **Brainchild**, he also argued that the intention was to have it apply to City of Kwekwe to obtain Mr De Bruyn's rights. Since **Brainchild** was not in existence at the time, his core argument now shifted to the implications of this reality from the perspective of s 47 of the then Companies Act [Chapter 24:03] and now section 32 of the new Companies and Other Business Entities Act [Chapter 24:31] regarding ratification of pre-incorporation contracts. His thrust was that the pre-incorporation requirements were not pleaded yet paragraph 2 of the draft order requires transfer of rights to **Brainchild** in terms of a contract that pre-existed its establishment. For that to happen, he argued that the agreement must have been in writing and upon its registration **Brainchild** must have included as one of its objects the ratification or adoption or acquisition of rights and obligations in respect of such contracts. That agreement must have been delivered simultaneously with the registration documents. His point was that there was nothing in the applicants' cause of action that related to ratification of pre-incorporation contracts. As such, he argued that no rights that can be enforced by the second applicant **Brainchild** as there was no privity of contract between it and the first respondent Mr De Bruyn. The cause of action being contractual, the gist of his submissions was that there must be conformity with the Companies Act. He therefore moved that this application be dismissed.

[19] In response Mr *Nyamakura* for the applicants argued that the ratification thrusts were new arguments which had not been the core of their opposing affidavit. With application proceedings standing or falling on their affidavits, he therefore emphasised that a party cannot plead one case and expect judgment on a different case. Mr De Bruyn's affidavit was said to have nothing to do with the arguments made on pre incorporation contracts. His position all along was that he did enter into an agreement but that he had made a mistake. Mr *Nyamakura* also submitted in response that nowhere had it been pointed out in the record where Mr De Bruyn or **Advance Africa** had argued that the latter's articles do not permit activities in joint venture. Nowhere did they also allege that the agreement was never delivered. As such, he submitted that the court could not be asked to make conclusions in the air. Furthermore, he argued that there is no legal onus to disprove something which has not been pleaded, the position of the law being that parties are bound by their pleadings and so is the court. He re-emphasised that it had not been disputed that at the meeting with the City of Kwekwe, Mr De Bruyn had confirmed that he had no objection to the intended cession. As such what is not denied was said taken to be admitted. Also re-emphasised was that why would Mr De Bruyn have allowed the applicants to pay US$250 000.00 if he was not selling rights to land to them.

[20] In the final analysis, he therefore argued that the first and second respondents had not pleaded any valid defence in particular as the 3rd respondent had clearly averred that it would have never signed the second agreement if the first respondent had been honest. He therefore sought costs on a higher scale against the first and second respondents but no costs against the third respondent.

[21] The third respondent simply argued in its heads of argument and at the hearing that the basis of its decision that it had acted in error had been fully articulated in its affidavit and that it would therefore abide by the decision of the court.

LAW AND LEGAL ANALYSIS

[22] The above facts and legal arguments have been stated in detail for the reason that they largely speak volumes as to what transpired. There is no doubt that Mr De Bruyn entered into the agreement with the intention of selling his interests to the land and not those of **Advance Africa** as he later purported to aver. The record indeed shows that the letter he wrote to the

Town clerk of City of Kwekwe requesting the property to to be put into the name of **Advance Africa** mentioned nothing about a mistake having been made. It is a critical piece of evidence in the record which was referred to by the applicants. It appears an annexure J on p 71 and reads as follows:

> " **Re: cession stand 7612**
> Thank you for the time you afforded me last month to discuss the above matter in preparation to develop the above property. **I have taken a decision** to request cession of stand 7612 into the name of Advance Africa Holdings Pvt) Ltd Reg Number 7871/2013. This is to create a special purpose vehicle in which the funders of the project will take up the necessary shareholding." (Emphasis added)

It is very clear from that letter that it was his own interests that he sought to transfer. Applicants fulfilled their obligations and therefore had a legitimate expectation that the property should be ceded to them. There was no question of a mistake in that they were dealing with Mr De Bruyn. Moreover, the position of the City of Harare is clear that the agreement was with Mr De Bruyn and that they had no problems with him ceding his rights as per the parties' agreement. The intention of the parties was also very clear, mainly that a company would be formed to which the cession would be made. This court does not agree that the meeting at the City of Kwekwe was insufficient proof of the agreement as the weight of the facts supports that there was such meeting and that an agreement to cede was communicated and accepted thereat. The backdated registration of the property by Mr De Bruyn into the name of **Advance Africa** was improper and made with ill intentions not to honour the contract.

[23] The new position that Mr Magwaliba now sought to rely on at the hearing regarding gravamen of the dispute as being the non-ratification of a pre-incorporation contract was indeed never pleaded. It is an established principle of our law that an applicant's cause stands or falls on his founding affidavit and not in an answering affidavit while the defence of a respondent stands or falls on his opposing affidavit. See *Cossam Chiangwa & Ors* v *Apostolic Faith Mission in Zimbabwe & Ors* SC 67/21. The same applies in action proceedings where plaintiff and defendant are as a general rule bound to their pleadings. The reasons for this requirement have been articulated as arising from the general purpose of pleadings which is clarify issues that are at stake and those issues which the court must determine. In *Kali* v *Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182, this purpose was explained thus:

> "The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another."

See the weight of authorities as well as their nuances discussed in detail in the case of *Medlog Zimbabwe (Private) Limited* v *Cost Benefit Holdings (Private) Limited* SC 24/18.

[24] Regardless of this accepted principle, it is also true that the court also takes the view that pleadings are made for the court and the not the court for the pleadings. But it is certainly not a discretion that a court would exercise lightly to find that an issue that was not pleaded explicitly in an opposing affidavit for instance is nonetheless fundamentally intertwined to those issues that were raised. This is particularly more so in this case where, as stated, it is crystal clear that the agreement that the applicant entered into was with the first respondent and that there was no question of any mistake at the time. This was simply an afterthought to resile from the agreement. Moreover, as stated the City of Kwekwe is categorically clear that in acted out of error in permitting the alteration of the agreement to reflect the name of **Advance Africa** as the purchaser backdated to 2015. It also has no objections to transferring the property to the applicants.

[25] This court is fully satisfied that Mr De Bruyn's attempt to resile out of the contract he entered into with the applicant is mala fide and his claims are not borne out by the facts which have been captured in detail. The applicants have indeed been put to unnecessary costs by a party who is motivated by dishonesty in not wanting to fulfil his side of the bargain. The agreement was with Mr De Bruyn and it was him who sold his interests in full knowledge of what he was doing and what he intended. He must therefore bear the costs of this application on a higher scale. The application is therefore granted in favour of the applicants as follows:

IT IS ORDERD THAT

1. The agreement dated 24th December 2015 between 2nd and 3rd respondents in respect of Stand Number 7612 Kwekwe Township be and is hereby declared to be null and void and of no force and effect.
2. 1st and 3rd Respondents be and are hereby ordered to sign the necessary transfer documents to effect cession and registration of title rights and interest in Stand

Number 7612 Kwekwe Township to 2nd Applicant within 10 days of receipt of this order.

3. The Sheriff of Zimbabwe be and is hereby ordered to sign the necessary transfer of documents for the registration of cession of rights, title and interest in Stand 7612 Kwekwe Township to 2nd Applicant should the 1st and 3rd Respondents fail to sign such transfer documents within the period stipulated in paragraph 2 above.
4. The 1st and 2nd Respondents be and are hereby ordered to pay costs of suit on a legal practitioner and client scale.

Wilmot & Bennett: Applicant's Legal Practitioners
Messrs Mavhiringidze and Mashanyare: 1st Respondent's Legal Practitioners
Messrs Mawadze and Mujaya Legal Practitioners: 2nd Respondent's Legal Practitioners
Mutatu & Partners: 3rd Respondent's Legal Practitioners