ROSE TIYATIYA
versus
CITY OF HARARE
and
LEE TAKAWIRA

IN THE HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 28 & 29 June 2021

Opposed Application

Mr. A. *Masawi,* for applicant
Mr.R. *Zinhema,* for first respondent

CHILIMBE J

BACKGROUND

[1] The applicant in this matter is the natural mother to second respondent. First respondent is a municipal authority. The dispute between mother, son and municipality relates to a residential property, Stand Number 1887 Kambuzuma Section 5, Harare (Stand 1887 Section 5, Kambuzuma). The rights title and interests in that stand are presently registered in second respondent`s name. His mother the applicant seeks an order cancelling the registration of such rights. That cancellation is meant to pave way for registration of the rights, title and interest in the property in applicant's name.
[2] That is applicant`s claim reduced to its bare essentials. Applicant`s papers related a tale and set out averments which prompted complaints from both respondents. Principally, the two respondents protested that the application was badly pleaded and disclosed no causa.

APPLICANT`S CLAIM
[3] Applicant, who lives in the United Kingdom stated that she purchased the rights title and interest in the immovable property in question on 8 September 2006. The "seller" was one Aquinata Chandomba. Applicant was represented, in the transaction by Philip Mudziviri, whom she referred to as her brother. Philip was authorised thereto by a general power of attorney issued in his favour by applicant. Aquinata and Philip duly executed, a document

titled "Deed of Cession". Under that deed, Aquinata ceded her rights, title and interest to applicant. This document reads in part that; -

> I, the undersigned AQUINATA CHANDOMBA, do hereby cede, assign and transfer all my right, title and interest in and to the agreement entered into by and between my self and PHILLIP MUDZIVIRI, on the 8th day of September 2006 to and in favour of ROSE CHIHOHO,

[4] The Rose Chihoho mentioned in the above document is non-other the applicant Rose Tiyatiya. Chihoho was her married surname whose usage she has since abandoned. It is pertinent to note that the deed of cession referred to in [3] above was neither issued, signed, witnessed, endorsed nor acknowledged by first respondent.

[5] Applicant stated that the deed of cession reflected her intention to have the property registered in her name. But that quest was, according to applicant, frustrated by first respondent. In her founding affidavit, applicant stated thus; -

> 8.To my surprise, and that of my agent Philip Mudziviri, officers of the 1st Respondent at the Kambuzuma District Offices refused to have the property formally ceded to me, insisting, for reasons I failed to comprehend, that the property had to be transferred by cession into the name of my agent, Philip Mudziviri. I did my best to explain to the 1st Respondent`s housing officers that I had bought the residential property in issue for myself and not for Philip Mudziviri or anyone else but they were adamant that it could only be transferred or ceded to someone who was living in Zimbabwe.

[6] This averment formed the crux of applicant`s claim as against first respondent. She persistently contended that first respondent acted improperly as an administrative body by refusing to give effect to her wishes. Inexplicably, first respondent`s officials thereafter effected, in 2007, the cession of the rights, title and interest in the property into Philip Mudziviri`s name.

[7] Applicant averred that she was not pleased with this development. She therefore sustained pressure on first respondent`s officers in a bid to have the property registered in her name. In her founding affidavit, applicant contended that first respondent`s officers eventually relented due to that pressure. They "*apparently shifted ground slightly in my favour*". That compromise took the form of first respondent`s officers acceding to the cession of the property into the names of her children; -second respondent and her daughter Audrey Chihoho. Although applicant did not specifically mention this in her papers, it is common cause that the assignment of rights, title and interest in the property to second respondent was effected in 2012, some 6 years after applicant purchased the property

[8]. Applicant stated that she only reluctantly accepted this *shift* or compromise on the part of first respondent. She expressed that position as follows in her founding affidavit.

> 12.Although I was still at a loss as to why my own property would be transferred to my children and not to me when I was still living, I felt somewhat, more able to live with the new set up since at least the property was now registered in my own children`s names. This was despite the fact that I had not donated the immovable property to them nor did I harbour any intention of doing so, which intention I still do not harbour to date.

RESPONDENTS` CASE

[9] The application was opposed. First respondent in fact raised a number of objections *in limine*. The first one was that the application had been poorly presented. The causa was not distinctly pleaded. That defect left first respondent at sea regarding which area of the law the applicant sought to found her claim. Was she seeking the review of first respondent`s actions or did she seek to proceed in delict? Was she seeking relief on the back of contract? In that regard, first respondent argued that the manner in which the application had been laid out compromised first respondent in its defence.

[10] Further, first respondent stated that in as far as it viewed the matter, the claim had prescribed. The applicant had become aware of the cession from Aquinata Chandomba to Philip Mudziviri in 2007.She had, nonetheless, done nothing about this until 2021 when she launched the present proceedings. Mr. *Zinhema* for first respondent eventually took the position that the points *in limine* were intrinsic to the merits of the matter and so could still be argued as part of the merits.

[11] On the merits, first respondent`s position was that applicant had pleaded her case badly. She had not, it was argued on its behalf, laid out before the court, any evidence of wrong doing on the part of first respondent. It was inconceivable that first respondent`s officers would obstruct applicant`s right to receive rights title and interest in Stand 1887 Section 5 Kambuzuma. The procedure at first respondent was well established. This is why cession was effected into the name of Philip Mudziviri. Had applicant set out a proper application for review, then the basis upon which first respondent`s conduct was being maligned would have been borne out. And in that regard, first respondent would have responded to such grounds accordingly. Mr. *Masawi*, on behalf of applicant submitted that the first respondent ought not have acted on the basis of a "mere" general power of attorney in transferring the rights, title and interests in the property into Philip Mudziviri`s name. Mr. *Zinhema* for the first respondent, drew attention to the nature and purpose of a general power of attorney. It was

first respondent`s position that it had, as an administrative body, conducted itself without blame. It responded to the instructions of applicant`s duly authorised agent.

SECOND RESPONDENT`S POINTS IN LIMINE

[12] The second respondent resisted the application and presented a completely different story to that related by applicant. Firstly, a number of points were raised *in limine* on his behalf. These went as follows; -

i. That the matter was poorly pleaded and cause of action unclear.
ii. That the application, which second respondent took without doubt, to be a review application, had been filed outside the 8-week period prescribed by rule 64(4) of the High Court Rules SI 202/21.
iii. That the matter was afflicted by material dispute of facts incapable of resolution on the papers.
iv. That the applicant lacked locus standi in that the property in question was not registered in her name.
v. That the application was fatally defective for reason of material non-joinder of Philip Mudziviri and Audrey Fadzayi Chihoho.

[13] None of the objections was successful. I disposed of them as follows; -objections (i) and (iii) formed intrinsic arguments on the merits. Objection (ii) could only be sustained if the application was a review application, which it was not. The fourth and fifth points were ill taken. The applicant`s right to approach the court for relief could not be ousted by the mere fact that the property she sought to contest was not registered in her name. Secondly, Philip Mudziviri and Audrey Fadzai Chihoho, whom second respondent claimed had the *locus standi*, had divested their interest in the property. On what basis therefore were they to be joined to the suit, again as per the point in limine raised alleging material non-joinder? In addition, Philip Mudziviri had deposed to an affidavit annexed to applicant`s papers. The contents of his affidavit confirmed the status of a disinterested party. I will return shortly to Philip Mudziviri's supporting affidavit.

[14] It is clear that second applicant took the approach to attack applicant`s case with all he could. Quite clearly, objections (ii), (iv) and (v) were baseless. In that regard, it may timely to restate the guidance by MATHONSI JA (as he then was) in *Telecel Zimbabwe (Pvt) Ltd Versus Postal and Telecommunications Regulatory Authority of Zimbabwe (Potraz) and 3 Others HH 446-15* at page 7; -

> Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit, it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis.*

[15] On the merits, second respondent`s case went as follows; -applicant donated the immovable property to him and Audrey Chihoho. Audrey later ceded her share in the property to second respondent and faded from the picture. Applicant`s assertions of impropriety on the part of first respondent were incorrect. She had voluntarily donated the property to him and there was no basis to reverse the donation.

WHAT IS THE CLAIM BEFORE THE COURT?

[16] Mr. *Masawi* for applicant articulated the causa as follows'-firstly, the applicant had a claim against the first respondent for its refusal to register the property in her name. The reasons advanced were that the property could not be registered in the name of a purchaser resident outside the country. In doing so, applicant alleged a dereliction of duty on the part of first respondent. Mr. *Masawi* also referred to the second respondent`s constitutional duty to dispense administrative justice in terms of section 68 of the Constitution. That section provides as follows; -

> **68 Right to administrative justice**
>
> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

[17] On that basis the argument, it becomes quite clear, that it is a review of the administrative conduct of the first respondent is being sought. But in the same breath, it was argued on behalf of applicant that the matter is not one for review. Indeed, the application was not constructed as such. Ignoring the niceties of form and content, it remains a fact that the details of administrative failures by second respondent were still not borne out in the papers. Who exactly are these officers that misled applicant? What exactly did they do or say

and on which dates? These questions formed the mainstay of first respondent`s argument; - that the applicant`s papers did not establish a case against first respondent.

[18] In the same vein, it was submitted on behalf of applicant that first respondent fraudulently misrepresented to her that the property could not be registered in her name. As a result, she was thus forced to acquiesce to the registration of the asset firstly, in the name of Philip Mudziviri and secondly; Audrey and the second respondent. Her consent to these transfers was therefore vitiated by misrepresentation. Misrepresentation, duress and undue influence are actionable wrongs in delict. Which means that in effect, applicant's claim was based in delict but the papers did not again, set out the details sufficient to found a claim in delict.

[19] Further, if misrepresentation induced applicant to act to her detriment, then what was the nature of the misrepresentation? Learned authors Van Huysteen, Lubbe, Reinecke and Du Plessis in their book Contract-General Principles ,6th edition, summarise the elements of misrepresentation as follows n, at page 119; -

> The **elements** of the delict of misrepresentation *in contrahendo* are an *act* (conduct), which undisplays the quality of *wrongfulness*, is accompanied by *fault* or blameworthiness on the part of the wrongdoer, and *causes* an *undesirable result* (either at the very conclusion of the contract or some detrimental result (damage)) flowing from the contract.

[20] Flowing from this assessment is the further question of how the applicant reacted and responded to the misrepresentations. Was her conduct to acquiesce to the cessions from Aquinata to Philip then to second applicant and Audrey reasonable? The applicant gives the following explanation in her answering affidavit; -

> 14 (ii) I was not represented by the said Mr. Muskwe or by any other lawyer in this transaction as I genuinely trusted the 1st Respondent [and] its officials and as I had no reason to believe that they could act so unlawfully, though I continued to voice my displeasure and concern at the refusal by 1st Respondent to effect cession directly to me on the ground that I was living outside Zimbabwe.

[21] The applicant chose to trust the very people who were resisting to carry out her instructions. The recalcitrance of first respondent`s officials was long drawn, enduring for a period of 6 years. Applicant did not furnish detail of the exact manner in which her "pressure" took. Did it not occur to her that the problem needed to be escalated to higher officers? In paragraph 15 of her founding affidavit, applicant suggests that it is only after obtaining legal advice in 2021 that she realised that a remedy against first respondent lay in litigation. This realisation came 14 years after her property had been registered into the name of Philip Mudziviri. This position does not, in my view convey a reasonable or diligent

defence one`s rights and that aspect becomes relevant in assessing a claim of loss caused by misrepresentation.

[22] Mr. *Masawi* also argued on behalf of applicant that section 71of the Constitution broadly defined "property" to include rights and interest. In that regard, applicant was within her rights to pursue the rights, title and interests reposed in Stand 1877 Section 5 Kambuzuma and currently vested in second respondent. In this respect, applicant was effectively *rei vindicatio* relief.

[23] The test for *rei vindicatio* was articulated by this court in *Lafarge Cement (Zimbabwe) Limited versus Mugove Chatizembwa HH 413-18 [at pages 2-3]; -*

> The principles of the actio *rei vindicatio* are settled in our law. The owner of property has a vindicatory right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold. The occupier would only have the defence of estoppel. *See Mashave v Standard Bank of South Africa Ltd 1998 (1) ZLR 436 (S) at 438 C; Chetty v Naidoo 1974 (3) SA 13 (A*) at 20 A-C; *Oakland F Nominees (Pty) Ltd v Gelria Mining and Investment Co Ltd 1976 (1) SA 441 (A) at 452A. 3 HH 413-18 HC 1998/18.*
> Indeed, the principle of the actio *rei vindicatio* is that an owner cannot be deprived of his or her property against his or her will. All the owner is required to prove is that he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove a right to retention. See *Jolly v Shannon and Anor 1998 (1) ZLR 78 (H) at 88 A-B; Stanbic Finance Zimbabwe Ltd v Chivhungwa 1999 (1) ZLR 262 (H); Zavazava & Anor v Tendere 2015 (2) ZLR 394 (H)* at 398 G.

[24] The question to ask is; -has applicant established the requirements of *rei vindicatio*? I think not. On that basis then, has applicant clearly established a cause of action? Under whatever specie of law as may entitle her to the relief sought? In *Timothy Mukahlera v Clerk of Parliament and 3 Others 107-05*, this court held, at page 4; -

> The "cause of action" in relation to a claim is "the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim" (*per* WATERMEYER J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637). Similarly, in *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 85, GUBBAY J (citing *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, and *Read v Brown* (l888) 22 QBD 131) defined the cause of action as being "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court". Again, Smith J in *Dube v Banana* 1998 (2) ZLR 92 (H) at 95, observed that "the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action". See also *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 45.

[25] See also *Otto Chimwanengara versus The Sheriff of The High Court of Zimbabwe (N.O) and Debra Chambara HH 487-18 at page 3* and *Cavin Chifamba v Norbert Mutasa and 2 Others HH 16-08* where it was said in the latter decision at page 4; -

> The purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action. Thus, for example in a divorce action, the allegation of irretrievable breakdown is imperative while in a delictual claim for bodily injury, fault has to be averred against the defendant.

[26] The applicant strenuously denied that she donated the rights, title interest in the property to second respondent. It was quite puzzling as to why her own flesh and blood had now turned hostile against her. The applicant had an opportunity to shed more light on what exactly transpired. This opportunity lay in the form of Philip Mudziviri himself. Philip attended at Kambuzuma District Offices, he dealt with first respondent`s officials as well as second respondent during the engagements and processes to transfer the rights, title and interests in Stand 1887, Section 5 Kambuzuma. Philip was at the heart of it all yet his affidavit was bereft of any detail regarding what exactly happened. Philip merely associated himself with contents of applicant`s affidavit. Yet applicant`s affidavit reflected the view of a party who was located in distant England.

DISPOSITION

[27] Applicant sought to upset the rights, title and interest now vesting in the person of second respondent. The application came before the court with an imprecise claim, whose causa could have been better pleaded. Given the foregoing findings, I am not satisfied that the applicant has made a case for the relief sought.

Accordingly, the application is dismissed with costs.

Mufuka and Associates-applicant`s legal practitioners,
Gambe Law Group-first respondent`s legal practitioners,
Muronda Malinga Legal Practice-second respondent`s legal practitioners.