PHILIPPA ANN COUMBIS
versus
THERIGHT INVESTMENTS (PVT) LTD
and
KUNZE KWAYEDZA ENTERPRISES (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS N.O.
and
THE SHERIFF FOR ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 October 2022 & 21 October 2022

Opposed Application

Adv M Ndlovu, for the applicant
Adv W Nyamakura, for the first respondent
No appearance for the first, 3rd and 4th respondent

CHINAMORA J:

Background facts

This a court application filed by the applicant on 24 May 2022 seeking an order couched as follows:

1. The Deed of Transfer No. 538/2021 registered in the name of the second respondent in respect of a certain piece of land situate in the District of Salisbury called Stand 9064 Salisbury Township of Salisbury Township Lands measuring 754 square metres be and is hereby cancelled.

2. The Deed of Transfer No. 6176/2003 registered in the name of the first respondent in respect of certain piece of land situate in the District of Salisbury called Stand 9064

Salisbury Township of Salisbury Township Lands measuring 754 square metres be and is hereby revived and declared valid.

3. The second respondent shall pay costs of suit on the legal practitioner and client scale.

The background is that, the applicant was previously married to Ronald John Coumbis. A decree of divorce and ancillary relief were granted by the High Court, but the applicant and Mr Coumbis appealed and cross-appealed, respectively, to the Supreme Court. A judgment granted by the Supreme Court as SC 130-21 awarded the applicant 80% shareholding in the first respondent. Mr Coumbis was not cited as a party to the present proceedings.

The applicant averred that while the parties awaited the Supreme Court judgment, the first respondent's board of directors, by resolution dated 11 December 2020, sold Stand 9064 Salisbury Towhship, to the second respondent. The said property was registered in the name of the first respondent. It is the applicant's case that she *"has a clear right to the property in question".* (See para 23 of the applicant's affidavit, at page 5 of the record). She added that she is the beneficial owner of the second respondent and, as such, the first respondent had no right to dissipate its assets. The applicant also stated that the sale of Stand 9064 to the second respondent was a sham sale. In a nutshell, that is the basis upon which she approached this court for the relief that she seeks in *casu*.

The second respondent opposed the application, and argued that the applicant still had her 80% shareholding in the first respondent irrespective of the sale of Stand 9064. It was contended that the applicant's recourse lay against her ex-husband and not the second respondent. Additionally, submitted the applicant, the said sale was lawful as it was authorized by the first respondent's board of directors. It was further argued that the second respondent was an innocent purchaser who was not aware of the litigation between the applicant and her former husband. As such, the second respondent asked for the application to be dismissed with costs on the legal practitioner and client scale. The second respondent made the argument that no cause of action had been properly pleaded. I prefer to deal with this argument in the context of the merits of the case, because if it is established that no evidence exists to back up a cause of action, then the relief cannot be afforded. From the papers before me, that appears to be how the treated this issue. The

other point raised was that the applicant had no *locus standi* to litigate on the sale or disposal of the first respondent's property.

Arguments of the respective parties

It was submitted for the applicant that the application before me was made in terms of s14 of the High Court Act [*Chapter 7:06*] for a declarater, firstly, cancelling the title deed in favour of the second respondent and, secondly, reviving the deed of transfer in favour of the first respondent. *Adv Ndlovu* for the applicant, contended that the Supreme Court judgment (awarding 80% shares in the first respondent) was extant and cannot be vacated except in terms of s167 of the Constitution. Reliance was placed on *Mauritius and Anor v Verspak Holdings (Pvt) Ltd and Anor* SC 2-22 and *Magauzi and Anor v Jekera* SC 54-22. The first cited case dealt with *locus standi*, but was cited by the applicant's Counsel to underpin the point that every person against or in respect of whom an order is made by a court of competent jurisdiction is obliged to obey it unless and until that order is discharged. I will examine later the relevance of this argument.

For the second respondent, it was argued that the Supreme Court order awarding the applicant an 80% shareholding in the first respondent did not award her the property, Stand 9064. *Adv Nyamakura's* contention, in this regard, was that the scope of an order is found within the four corners of that order. Two points were made in this respect. Firstly, a shareholder does not have rights to property owned by a company, and the English Chancery Division case of *Borland's Trustees v Steel Bros & Co (Pvt) Ltd* [1901] 1 Ch 279 was cited in support. The second respondent argued that a share in a company as an interest measured by a sum of money. The second point was made in relation to the case of *Magauzi and Anor v Jekera supra*, namely, that its correct interpretation is that when a court grants an order it has no retrospective effect, but affects all subsequent acts. The submission continued that ownership of shares in a company does not translate to ownership of the property of a company. My attention was drawn to paragraph 17 of the applicant's affidavit (at page 7 of the record), which alleges that the sale of Stand 9064 to the second respondent was *"fraudulent and unlawful".* The second respondent also referred me to para 25 of the same affidavit (on p 8 of the record), which states:

> "It is my belief that my former husband is behind all the shenanigans in a malicious bid to frustrate enforcement of the Supreme Court order".

The second respondent submitted, in this context, that the applicant had failed to plead and prove its cause of action, namely that the sale was tainted by fraud on the part of the first respondent or the second respondent or Mr Coumbis, who was not cited in these proceedings. In this respect, Counsel for the second respondent argued that no particulars of the alleged fraud had been given by the applicant. It was further argued that Mr Coumbis had not been afforded the opportunity to answer the serious allegations of fraud and malice that had been made against him. The second respondent contended that the second respondent was not party to the divorce proceedings and no fraud has been alleged against him. In light of this, the second respondent pointed out that the doctrine of transferred malice was not part the law in this jurisdiction.

Analysis of the case

I will start with the *locus standi* argument first. The second respondent relied on the case of *Wallersteiner v Moir (No. 2)* [1975 All ER 849 (CA) at 857, where LORD DENNING remarked that when a company is defrauded by outsiders, the company is the only part that can sue. This point will not detain me, since *in casu* the applicant does not purport to litigate for the company. On the contrary, her case is that by awarding the 80% shareholding to me the Supreme Court, in fact, awarded Stand 9064 to her. The English authority cited has no application. As such, the point in *limine* raised has no merit and I dismiss it.

It is worth examining the second respondent's argument that the applicant failed to set out a cause of action in the proceedings before me. Put differently, the contention is that as no cause of has been properly pleaded, no relief can be afforded to the applicant. It is trite that pleadings, in any case brought to court, must state in clear terms in the application or, in the case of an action, in the summons and declaration, a litigant's cause of action. There is an important reason for this, and I will explain. In my view, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. This has been stressed in a number of cases in this and other jurisdictions. For example, in *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR), the court made the self-commending remarks that:

> "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed".

I note that the position of the law is the same in South Africa. For instance, in *Imprefed (Pty) Ltd* v *National Transport Commission* 1993 (3) SA 94(A), 108, the court cited with approval the case of *Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 at 198, where it was stated as follows:

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been." **[My own emphasis]**

In England, the same point was aptly made by Lord Edmund-Davies in *Farrell* v *Secretary of State for Defence* [1980] 1 All ER 166 at 173, where Lord Edmund-Davies observed:

> "It has become fashionable these days to attach decreasing importance to pleadings … the primary purpose of pleadings remains, and it can still prove of vital importance …That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it". **[My own emphasis]**

It is hardly open to debate that the law on what constitutes a cause of action is settled in this jurisdiction and elsewhere. In this respect, this court has stated time and again that a cause of action consists of all the facts that must be pleaded in order to establish the relief that is sought by that party. For example, in *Patel v Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86C-E GUBBAY J (as he then was) stated that:

> "In *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J, in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:
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> > "The proper legal meaning of the expression 'cause of action' 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. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.) **[My own emphasis].**

See also *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 54E-F, when the concept *"cause of action"* was defined by MALABA J (as he then was) to mean:

> "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

See also, *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637.

As I have already stated, the second respondent argued that no cause of action can be gleaned from the applicant's founding affidavit. Therefore, it is imperative for me to examine the principle established by the above authorities and identify the intricate link between a founding affidavit and a cause of action. To my knowledge, cases are seldom where absence of a cause of action has been raised in application proceedings. However, I must stress that as with lawsuits brought to court by way of summons, it is in the founding affidavit that an applicant makes averments that establish the relief that he desires in an application. In this connection, it has been stated in a number of judgments of this Court that an application stands or falls on its founding affidavit. For instance, in *Muchini* v *Adams & Ors* SC 47/13 at p 4, ZIYAMBI JA pertinently observed that:

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein* & *van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p 80 where the authors state:
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> > "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out". **[My own emphasis]**

Bearing in mind ZIYAMBI J's elucidation of the law vis-à-vis founding affidavits in application proceedings, it is important to look at the founding affidavit in order to ascertain whether or not the averments as pleaded disclose a cause of action. In other words, I have to decide if the applicant has alleged facts which meet the requirements which establish the relief that he is seeking. As a starting point, let me return to examine the declaratory relief that the applicant is for.

It is plainly clear that, she seeks a declaratory order which cancels Deed of Transfer No. 538/21 in the name of the second respondent. The basis for asking for this kind of order is that, firstly, the Supreme Court order which awarded her an 80% shareholding in the first respondent means that the property, Stand 9064, could not be sold to the second respondent. The case of *Borland's Trustees v Steel Bros & Co supra* is germane to this issue. FARWEL J (at 287-291) had this to say:

> "A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s 16 of the Companies Act 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount. That view seems to me to be supported by the authority of *New London and Brazilian Bank v Brocklebank".* **[My own emphasis]**

See also *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors (of Navigator Holdings Plc and Others)* [2007] 1 AC 508

I respectfully agree with the learned judge's conceptualization of shares in a company, and see nothing from the Supreme Court that remotely tells me that the apex's view was anything different from that held by FARREL J. The second basis contended by the applicant is that the aforesaid property was sold and transferred to the second respondent as a result of the fraudulent conduct of Mr Coumbis whose aim was to defeat the Supreme Court order. I have to ask whether the case for the relief asked for was properly pleaded and is evident from the papers before me. My view is that the case as pleaded in the applicant's founding affidavit cannot found the relief sought. The Supreme Court order is clear that what was awarded to the applicant are shares in the company, Theright Investments (Pvt) Ltd, and not the property, Stand 9064. It seems to me that such an court order cannot be interpreted to mean that, shares *ipso facto* mean, Stand 9064. If that was the case, the Supreme Court would have said so in specific terms. At any rate, the decision in *Magauzi and Anor* v *Jekera supra* cannot be interpreted as authority for the proposition that a judgement has retrospective operation. The interpretation urged by Counsel for the second respondent appears to me to be the correct one.

I move to focus on the aspect of the allegation that the sale was tainted by fraud and, therefore, susceptible to being set aside. Having looked at the pleadings (particularly, paragraphs 17 and 25 of the founding affidavit), I observe that the particulars of the alleged fraud and malicious conduct on the part of the contracting parties (the first and second respondents) have not been given and proved. In my view, it is not enough to make a bald allegation of fraud, without giving a minimum of particulars supporting the alleged deleterious conduct. It is helpful to point out that, in cases where setting aside a sale after transfer under common law, our courts have stresses the need to allege and prove the allegation of fraud or bad faith. In this context, in *Makuyana and Anor* v *Standard Bank of Zimbabwe and Ors* HB 52-07, NDOU J stated the law as follows:

> "Once transfer has been effected, the person seeking to impeach the sale and transfer must allege and prove fraud, bad faith or knowledge of any defect on the part of the purchaser when he bought the property at such sale – *Sookdeyi & Ors* v *Sahadeo & Ors* 1952(4) SA 568(A) at 571H-572A and also 569H; *Twine Wire Agencies (Pvt) Ltd* v *CABS, supra* and *Mapedzamombe* v *CBZ, supra*, at 260E-H". **[My own emphasis]**

The above remarks were made in a different context, but the view I take is that they are equally apposite where one seeks to have a transfer of a property cancelled after title has already passed to a third party. I have already noted that the applicant did not allege and give particulars which show that there was fraud or bad faith on the part of either the seller (first respondent) or the purchaser (second respondent). These are the particulars which, in my view, necessarily establish a cause of action for an applicant who makes an application to cancel title after transfer has been effected.

Let me now turn my attention to the question whether, in any event, the allegations of fraud or malice on the part of Mr Coumbis, who is not before the court, is a sufficient reason for cancelling the transfer of Stand 9064 to the second respondent. My answer is that such a basis far-fetched and unreasonable. Common sense dictates that it would have required the applicant to cite Mr Coumbis so that he is placed in a position to answer the serious and damaging allegations against him. As things stand, I am unable to make any adverse findings against a party who is not before me to found the relief that the applicant is seeking. If the applicant believes that Mr Coumbis

acted in a manner detrimental to her 80% shareholding, there would obviously be a remedy which resides in other areas of the law, but certainly not in the application in *casu*.

Conclusion

I have come to the conclusion that the 80% shareholding that the Supreme Court order awarded the applicant in the judgment in SC 130/21 is not the same as saying that she was awarded the property, Stand 9064. As I have said, that is a misinterpretation of that order. In any event, I am also satisfied that the applicant has not established the cause of action that is the foundation of the relief sought. Either way, I am not inclined to grant her the declaraters that she has asked for.

Consequently, the issue of costs arises. The second respondent has asked for costs on an attorney and client scale. I find no reason to depart from the general rule that costs follow the result. The issues before me were not complex. The Supreme Court order, upon which the relief sought was based, is clear on what was awarded to the applicant, and is not in any way ambivalent. Moreover, what intrigued me were the allegations of fraud and malice made against a party not before the court and the invitation that I make an adverse finding against such a party in order to found the relief sought before the court. That is unacceptable. Hence, the displeasure of the court had to be reflected in my treatment of the aspect of costs. Thus, I do not have any reason for not granting costs on the higher scale of attorney and client as prayed for by the second respondent.

Disposition

Accordingly, I grant the following order.

1. The point in *limine* on locus standi be and is hereby dismissed.
2. The application be and is hereby dismissed.
3. The applicant shall pay the second respondent's costs on the scale of attorney and client.

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Samukange Hungwe Attorneys, second respondent's legal practitioners