

ASSWELL AFRICA GURUPIRA
and
JEAN JANE GURUPIRA
versus
EARTHMOVING & CONSTRUCTION COMPANY (PVT) LTD
and
SANDRA MAUREEN MUIR
and
THE REGISTRAR OF DEEDS (HARARE)
and
THE SHERIFF (HARARE)
and
THE DEPUTY SHERIFF (HARARE)
and
JOHN LEGGATTE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 21 May 2015, 18 June 2015 & 18 May 2016

Opposed application

T Mpofo, for the applicants
A P De Bourbon, for the 1st and 6th respondents
T Stevenson, for the 2nd respondent

MAKONI J: The present application was filed on 7 March 2008 and has raged on with various twists and turns, culminating in the hearing before me.

The background facts are that, on 25 May 2007 the applicants (the Gurupiras) and the second respondent (Muir) entered into an agreement whereby Muir sold to the Gurupiras two (2) issued shares in the first respondent (the company). The company is the registered owner on a certain piece of land situate in the District of Salisbury Town measuring 3066 squares metres common by known as 98 Churchill Ave Gunhill Harare held under Deed of Transfer Number 39/76 (the property). The shares entitled the holder to an exclusive right of occupation and use of the property.

The applicants aver that they paid the purchase price, in instalments. They then encountered problems when they intended to make the final payment as, Muir became evasive. The Gurupiras then filed a court application in HC 6660/07 seeking to compel Muir

to furnish them with her banking details to enable them to make payment of the balance of the purchase price. They finally paid the balance on 13 February 2008 by cheque.

On 11 December 2007 Muir and the sixth respondent (Leggatte) signed a shareholders agreement in terms of which 98 shares in the company were issued and allotted to Leggatte. The Gurupiras got wind of the agreement and they instituted the present proceedings on 7 March 2008 against the company and Muir seeking the following relief

“Whereupon after reading documents filed of record and hearing counsel it is hereby ordered that:-

IT IS ORDERED THAT:-

1. The 3rd respondent is hereby interdicted from transferring the property known as No. 98 Churchill Avenue, Gunhill, Harare also known as a certain piece of land situate in District of Salisbury Town Lands measuring 3066 square metres under Deed of Transfer dated 7 January 1976 (Registration Number 39/76).
2. The sale of the property to any unknown third party be and is hereby set aside.
3. The property in paragraph 1 above be transferred to Asswell Africa Gurupira and Jean Jane Gurupira and the 2nd respondent is directed to sign all the necessary documents to transfer.
4. Should the 2nd respondent fail or refuse to sign the necessary documents to effect transfer the 4th of 5th respondent is hereby directed to sign all the necessary documents to effect the transfer by 3rd respondent to 1st and 2nd applicants.
5. The 1st and 2nd respondents shall bear all the costs of this application on an attorney client scale.”

The application was served by the Deputy Sheriff on both respondents by placing in a letter box. None of the respondents responded and on 21 May 2008 the Gurupiras obtained default judgement. On 16 June 2008, the Gurupiras took transfer of the property into their names. On 23 July 2008, they made an *ex parte* application, in the magistrates' court, for the eviction of the company and Muir and it was granted. On 24 July 2008 the company and Muir and all those claiming occupation through her were evicted.

That is when the company, as represented by Leggatte, became aware of the default judgment and on 22 August 2008, it applied for rescission of the default judgment in Case No. 4211/08. The matter was referred to trial after material disputes of fact became apparent. The trial was held before Mafusire J and on 19 March judgment was handed down. The court made the following order

DISPOSITION

In the circumstances this matter is disposed of as follows:

1. The default judgment granted by this court on 21 May 2008 in HC 1393/08 is hereby set aside.
2. The registrar of deeds is hereby ordered and directed to cancel deed of transfer no 4778/08 over certain piece of land situate in the district of Salisbury, called Stand 12896 Salisbury Township of Salisbury Township Lands, measuring 3 066m², dated 16 June 2008 in the name

of Asswell Africa Gurupira and Jean Jane Rudo Gurupira and to restore the prior deed of transfer no 39/76.

3. The following residual issues shall be determined in the main application in HC 1393/08:
 - 3.1 whether or not the agreement of sale between the first and second defendants, namely Asswell Africa Gurupira, of the one part, and the third defendant, namely Sandra Maureen Muir, of the other part, was duly performed,
 - 3.2 whether or not the transfer of shares in the plaintiff company, namely Earthmoving & Construction Company (Private) Limited, by the third defendant to one John Leggatte, should be set aside,
 - 3.3 whether or not the first and second defendants should vacate the premises situate on the property more fully described in paragraph 2 above and which is also known as 98 Churchill Avenue, Gunhill, Harare.
4. The plaintiff shall file its notice of opposition or other such papers in HC 1393/08 within ten (10) days of the date of this order and thereafter the filing of any further documents shall be in accordance with the rules.
5. The costs of the application and of the trial in HC 4211/08, and the costs of the application in HC 6660/07 shall all be borne by the first and second defendants jointly and severally, the one paying the other to be absolved.”

The company in terms of para 4 above, then filed its opposing papers to the present proceedings on 2 April 2014. It took the point *in limine*, that the order sought by the Gurupiras was incompetent, in that they sought transfer of the property and yet they only bought shares in the company. On the same date, the company filed a counter application for the eviction of the Gurupiras. Again on the same date, Mr *Stevenson* filed a Notice of Opposition for Muir. The parties filed further papers up to Heads of Argument.

On 22 January 2015, the Gurupiras filed an application for joinder of Leggatte which he opposed. On 25 February 2016 an order granting joinder of Leggatte was granted. Further pleadings were filed pursuant to the order of joinder. Leggatte also adopted the point as raised by the company. The Gurupiras filed a supplementary affidavit wherein, *inter alia*, they sought an amendment to the draft order.

The matter was set down for hearing on 21 May 2015. A day before the hearing Mr Stevenson filed a document titled

“Take notice that the 2nd respondent hereby files of record a mandate given to her legal practitioners of record.”

A supporting affidavit by Mr *Moyo*, Leggatte’s legal practitioner, is attached. To the affidavit, Mr *Moyo* attached a letter allegedly written by Muir and delivered to him by Leggatte who had allegedly received it from Muir’s son.

On the day of hearing, Mr *Mpofu* moved for the amendment of the Draft Order. Both Mr *De Bourbon* and Mr *Stevenson* did not oppose the amendment. It was therefore granted. The amended Draft Order seeks the following relief.

“WHEREUPON, after reading the documents filed of record and hearing counsel:

IT IS ORDERED THAT

1. An order declaring the 1st and 2nd applicant to be the lawful shareholders of the entire shares in the 1st respondent (the company) and that any purported transfer or appointment of directors by the 1st respondent to the 6th respondent be deemed null and void.
2. An order declaring the 1st & 2nd applicants to be the lawful owners of the 1st respondent (the company's) sole immovable property being Stand 12 896 Salisbury Township situate in the district of Salisbury measuring 3 066 square metres known as No. 98 Churchill Avenue, Gunhill, Harare and that the above property be transferred in favour of 1st and 2nd applicants.
3. An order that the 2nd respondent be directed to sign all necessary documents to effect transfer of both the shares and the property.
4. Should the 2nd respondent fail to sign the necessary documents to effect transfer of the shares and the property, the 4th respondent is hereby directed to sign all necessary documents for 3rd respondent to effect the transfer to 1st and 2nd applicants.
5. The 1st, 2nd and 6th respondents shall bear all the costs of this application on an attorney and client scale jointly and severally each causing another to be absolved.”

The granting of the application to amend the Draft Order disposed of the point taken by the company and Leggatte regarding the competency of the order sought by the Gurupiras.

Mr *Mpofu* took the point, *in limine*, that the second respondent was not properly before the court. He submitted that the default judgment was taken against all respondents. The company applied for rescission of the judgment. In the order by Mafusire J, only the company was given leave to defend the matter. Muir was in default and never applied for condonation.

He further submitted that Mr *Stevenson* deposed to the affidavit opposing the matter. He avers that after the granting of the default judgement he renounced agency after being instructed to hand over Muir's files to another legal practitioner. He was then prevailed upon by interested parties to act on behalf of Muir. Since the company was directed to file its opposing papers within 10 days of the order, he felt compelled to do the same for Muir.

Mr *Mpofu* further contended that Mr *Stevenson* did not have instructions to deal with this matter. He tells some falsehoods on p 136 para 12 when he said Muir's husband signed the agreement with Legatte on 27 May 2008 and yet by then Mr Muir had transferred his one share to his wife and had passed on.

The supplementary affidavit by Mr *Moyo* in para 2 is at variance with what appears in Mr *Stevenson's* affidavit in para 4 and 5. The position put forward by Mr *Moyo* is a false position.

In response Mr *De Bourbon* submitted that the entire judgment was set aside for both the second and sixth respondents. The judgment dealt with the issue of service of the application on Muir and the company. All the issues that the court opined might be determined in the matter, in para 3.2 of the order also involve Muir. She was therefore properly before the court.

Mr *Stevenson* submitted that at the time default judgment was taken the issue was transfer of the property and not of shares. He contended that in an emergency one acts to protect his or her neighbour. If the Gurupiras had been successful, it would reflect on his client as she is the one who sold the shares. He submitted that a legal practitioner is allowed to give evidence. He had sought authority from his client's relative, and the letters had just been found by Mr *Moyo*. The fact that he had handed over file HC 66660/08 to another legal practitioner did not prevent him to act in an emergency on behalf of his client. He was the one best placed to know the position.

In reply Mr *Mpofu* submitted that the fact the Mafusire J opined that the issue of service might need determination does not make the Muir a party. In any event service was effected on the *domicilium citandi* in terms of the agreement. If Muir is not happy then she is the one who must attack it. A Notice of Opposition is filed by the respondent. The legal practitioner can file a supporting affidavit as witness. Mr *Stevenson* purports to act as an agent when he has no authority. When notice is given that the issue will be taken up, an attempt is made to validate the authority. Mr *Stevenson* does not do the affidavit himself. Instead Mr *Moyo*, sixth respondent's legal practitioners, deposes to the affidavit. Mr *Stevenson* filed an affidavit in his own name without purporting to represent Muir.

The issue for determination is whether the second respondent, Muir, is properly before me- I will examine the issue from two angles. Firstly whether the judgment by Mafusire J gave Muir leave to defend the matter. Secondly whether the affidavit by Mr *Stevenson* is properly before me in other words is there a Notice of Opposition on behalf of Muir.

In dealing with the first point it is important to determine whether Muir was served with the court application. There is a Return of Service which was rendered by the Deputy Sheriff which reflects that the court application was served at No. 98 Churchill Avenue

Gunhill Harare. It was served by placing in a letter box. The service was on behalf of the first respondent, the company and second respondent-Muir. In terms of clause 9 of the agreement between Muir and the Gurupiras, Muir chose that address as her *domicilium citandi*.

It is trite that the return of service of an officer of the court, whether he be the sheriff, the deputy sheriff or the messenger, has to be accepted a *prima facie* proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. See *Gundani v Kanyemba* 1988 (10 ZLR 226 (SC)). *In casu* Muir has not placed any facts before this court either in the application for rescission or in the present matter that she was not served with the application. None of the witnesses, in the application for rescission, could testify on her behalf on that aspect. All that Mr *Stevenson* could say was that he wondered why the application was not served on his law firm. The answer is to be found in clause 9 of the agreement. Service of the process other than as stipulated in the agreement would have fallen foul of that clause.

Having been served and after the expiry of 10 days, Muir was therefore barred. This is provided for in r 233 (2) of the High Court Rules 1971. She did not approach the court to seek upliftment of the bar. The fact that the company successfully sought rescission of the judgment does not assist her. Mafusire J was clear in his order. He gave the company leave to file its opposing papers. He did not relate to the position of Muir as she had not made an application for the order to be set aside. She cannot therefore cling to the judgment made in favour of the company and allege that it paved the way for her to file her papers in opposition. Mafusire J could not grant what had not been prayed for.

Coming to the second angle, Muir did not file an affidavit neither has one been filed by a party authorised by her.

In terms of r 227 (2) (b) every written Notice of Opposition shall be signed by the respondent or by his legal practitioner. In terms of r 227 (4) (a) an affidavit shall be made by the respondent or by a person who can swear to the facts or averments set out therein.

It is trite that where the Notice of Opposition or affidavit is to be signed by a person other than the respondent, that person must show that he is authorised to do so. The authors Herbestein & Van Winsen- *The Civil Practice of the High Courts of South Africa* 5th Ed p 437 put it this way

“Where an application is made by an agent on behalf of a principal, an averment of the agent’s authority is essential, unless it appears from the affidavits filed in the application that the principal is aware of and ratified the proceedings. A statement that the applicant is acting

in the capacity of agent for the principal in question is a sufficient allegation of authority to make the application.”

In casu, Mr Stevenson filed an affidavit. It is not clear whether it is an opposing or supporting affidavit. In it he avers that he renounced agency after being asked by Muir to hand over her files to some other legal practitioners. In para 7 he asserts

“I have been prevailed upon by interested parties to the instant matter to act on behalf of the second respondent in the absence.....”

It is a telling assertion. He filed the “affidavit” without a mandate from Muir but did so due to some pressure from interested parties.

After the matter had been postponed, Mr *Moyo*, for Leggate, filed a supplementary affidavit whereby he asserted that he had discovered a letter from Muir’s son authorising Mr *Stevenson* to act for Muir. It is clear that this is an attempt to validate the actions of Mr *Stevenson*. Mr *Stevenson* does not depose to the supplementary affidavit to explain why he was quite categorical in his affidavit that “he had been prevailed upon”. This does not explain why he filed the affidavit in his name without an averment that he had been authorised by Muir to defend the proceedings and to depose to the opposing affidavit.

If the interested parties thought that his evidence would assist them, then he should have deposed to an affidavit which they would attach to their own papers.

In any event Mr *Stevenson* does not have personal knowledge about some of the critical matters in this case. He has no independent knowledge of whether the Gurupiras discharged their obligations or not in terms of the agreement. He does not know whether Muir cancelled the agreement and if so how.

Mr *Stevenson* is either mistaken on the facts or he did not tell the truth in his affidavit. In para 12 of his affidavit he states

“The agreement signed by the second respondent and her husband Ramon Charles Muir on 27 May 2008 with John Leggate, who signed on 28 May 2008.....”

It is common cause that the agreement with Leggate was entered into by Muir only. By the time of that agreement, her husband was late. She owned the two issued shares in the company with her husband’s share having been transferred to her in 2006. Whatever information that he placed before the court is hearsay and it is inadmissible. And such information does not constitute Muir’s opposition.

In view of the above there is no opposition filed by Muir and the matter will be related to on that basis.

This leaves the court with the Gurupira's position and that of Leggate in the main and the counter-application.

Mr *De Borboun* contended that at best, the Gurupiras own two shares of the 100 issued shares in the company. That right is in dispute as they failed to pay the purchase price and the agreement terminated in terms clause 13. Leggate owns the remaining 98 issued shares. The Gurupiras have no proof in the form of certificates that they own the two shares. There is no entry in the share register.

The other issues that he addressed relating to the transfer of the company property to the Gurupiras were taken care of by the amendment to the draft order.

It was further submitted that you cannot give any relief which impacts on Muir in her absence.

In respect of the counter-application Mr *De Borboun* contended that the Gurupiras are in unlawful occupation of the property that belongs to the company in which Leggate was the majority shareholder. There is no arrangement, contractual or otherwise in terms of which the Gurupiras can claim a right to reside in or occupy the property.

The Gurupira's position is that they discharged their obligation in terms of the agreement. The agreement still subsists. It makes the agreement with Leggate a double sale.

It was further submitted that once Muir had sold the two shares, she lost rights to deal with those two shares. She could not do the allotment of the other shares as that is done by directors and not shareholders. She would need a quorum of 2 (two) directors as provided for in terms of s 169 (v) of the Companies Act [*Chapter 24:03*].

The Gurupira's position can only be responded to by Muir who is not before the court. The position of on law is settled on this point. In *Fawcett Security Operations Pvt Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121 SC it has stated:

“The simple rule of the law is that what is not denied in affidavits must be taken to be admitted”.

In *casu*, no evidence has been placed before the court to controvert the Gurupira's assertion that they complied with their obligations. There is also no evidence that the agreement was cancelled. As it is, nothing stands in the way of the grant of the order as sought by the Gurupiras.

In my view the applicants have not established a legal basis for the property to be transferred into their names. The property is the sole asset of the company. The applicants will be the shareholders of the company. They will have to deal with the property in terms of

the Companies Act. Any reference to transfer of the property in the draft order will therefore be deleted.

In view of the findings I made above, Leggate's counter-application cannot succeed. In the result, I will make the following order

IT IS ORDERED THAT

1. An order declaring the 1st and 2nd applicant to be the lawful shareholders of the entire shares in the 1st respondent (the company) and that any purported transfer or appointment of directors by the 6th respondent to the 1st respondent be deemed null and void.
2. An order that the 2nd respondent be directed to sign all necessary documents to effect transfer of the above mentioned the shares.
3. Should the 2nd respondent fail to sign the necessary documents to effect transfer of the shares, the 4th respondent is hereby directed to sign all necessary documents to effect transfer of the shares to the 1st and 2nd applicants.

The 1st and 6th respondents shall bear all the costs of this application on an attorney and client scale jointly and severally each causing another to be absolved.

4. The 6th respondent's counter- application is hereby dismissed.

Sawyer & Mkushi, 1st & 2nd applicants' legal practitioner
Gill, Godlonton & Gerrans, 1st & 6th respondents' legal practitioners