ROBIN CHARLES BALCH
versus
WINCOURT (PRIVATE) LIMITED
and
ANDREW MACHIHA
And
SWERMA MACHIHA
And
BARCLAYS BANK OF ZIMBABWE LIMITED
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 26 September 2018 & 3 October 2018

Opposed Application

K. Makumbera, for the applicant
F. Girach, for the 4th respondent

MATHONSI J: The applicant was a co-director and shareholder of the first respondent, an investment vehicle through which a property known as stand 226 Sinoia Township situated in the district of Lomagundi, also known as 4 Windsor Court, Greenwood Terrace, Mzari in Chinhoyi (the property) is owned. The said company holds title to that property by deed of transfer number 3282/85. It is some kind of loose connection in which 4 blocks of flats at that property randomly constitute 25% shareholding each with the applicant being the proud owner of one block and therefore a 25% shareholding.

At some stage in 2006 the second respondent, who has apparently stirred very clear of these proceedings despite being cited along with his wife (as 3rd respondent) and being served with the application, became the majority shareholder of the first respondent with a 75% shareholding and therefore holding the other 3 blocks of flats. Having burnt his fingers, the second respondent is said to be now a fugitive and is on the run leaving his wife to fight his battles trying to hold on to the property. She unsuccessfully made an application in HC 4652/13, an application she brought in collaboration with the first respondent in terms of r 348A of this court's rules, seeking to postpone the sale of the property in execution at the

instance of the present fourth respondent. She claimed that the entire property was a dwelling occupied by herself and her family.

The circumstances giving rise to the present application may be said to be of the applicant's own making. Although he held joint title to the property together with the second respondent from 2006 through the medium of a company, the first respondent, the applicant does not appear to have bothered himself about being involved in the management of that investment vehicle at all until recently. By the time he got involved the damage had already been done. His co-director and shareholder, the second respondent and his wife, the third respondent, had used the company as a guarantor when securing a banking facility from the fourth respondent in favour of their own company known as Joymart Enterprises (Pvt) Ltd in the sum of $200 000-00. As security for the debt, they gave the property in which the applicant had a beneficial interest.

The fourth respondent registered mortgage bond number 5648/10 on deed of transfer number, 3282/85. For this to be possible the second respondent had masterminded the removal of the applicant from the directorship of the company and submitted to the fifth respondent a new CR 14 on 1 August 2006 in which the applicant is reflected as having resigned on that date along with 3 other directors with the second and third respondents having been appointed on that date. The CR 14 in question still enjoys pride of space at the Companies Registry. That way the fourth respondent accepted the company's official records as reflected in the Registry and not only extended the banking facility I have mentioned but also succeeded in registering a mortgage bond on the title deed by which the company holds the property. It is not disputed that all this occurred without the knowledge and consent of the applicant and that he never resigned as a director and did not dispose of his 25% shareholding in the company. The papers before me do not show what the second and third respondents did could have possibly affected the applicant's shareholding and from the woeful manner in which the company has been run, it is unlikely they did anything.

The applicant says that he only awakened from his slumber 6 years later in 2012 when he intended to sell his shareholding in the company to Chinhoyi University of Technology. That discovery did not come about as a result of the applicant doing anything resembling regularisation of the company records but it was information obtained from the University which revealed to him that the second respondent was in fact trying to sell the entire 100% shareholding to the same institution. With alarm bells ringing, it is then that he conducted a Companies Office search and, lo and behold, he discovered he was officially no longer a

director having resigned on 1 August 2006, at least according to the CR 14 Form containing the list of directors.

The applicant asserts that the CR 14 is a forgery. He never resigned as a director and did not relinquish his 25% shareholding. In addition the second respondent illegally hypothecated the property without a resolution of the genuine directors and as such the mortgage bond in favour of the fourth respondent is illegal and should be cancelled. He should be reinstated as a director and shareholder of the company.

The fourth respondent has opposed the application stating that the mortgage bond was lawfully registered after being authorised by directors of the company. Indeed the second respondent, as a 75% shareholder, was entitled in 2006 to be a director which he was. What I am required to decide therefore is whether the removal of the applicant as director was valid and whether the hypothecation of the property in favour of the fourth respondent should be set aside.

Mr *Makumbera* for the applicant submitted that the relief sought by the applicant does not prejudice the fourth respondent at all because it has recourse against the second respondent who remains a 75% shareholder. That is strange indeed because the applicant in fact craves for the cancellation of security held by the fourth respondent in the form of an undivided immovable property. The prejudice is there for all to see. Mr *Makumbera* further submitted that the removal of the applicant as director is a legal nullity and by the same token the absence of a valid company resolution authorising the hypothecation of the company's property in favour of the fourth respondent means that the mortgage bond cannot stand.

In advancing the argument that the first respondent cannot possibly be bound by the mortgage bond registered on the basis of a forgery Mr *Makumbera* relied on the authority of *Victoria Falls Steam Train Co (Pvt) Ltd* v *Wankie Colliery Co Ltd* 2004 (1) ZLR 7 (H) at 10C-E where MAKARAU J (as she was then), dealt with the Turquand Rule and remarked:

> "It is settled law that the rule does not apply in cases where there has been a forgery (See *Ruben & Anor* v *Great Fingall Consolidated* (1906] AC 439 (HL) and *Uxbridge Permanent Benefit Building Society* v *Pickland* [1939] 2 KB 248). It would appear to me the correct view to hold that the position where the transaction sought to be enforced has been concluded in deliberate violation of the internal procedures of the corporation is similar or analogous to one where there has been a forgery. I have, however, been unable to find any authority to support this view."

Mr *Makumbera* suggested that, to the extent that the CR14 in which the applicant was removed from directorship was forged, the first respondent company cannot be tied to the terms

of the mortgage bond which was registered following the advancement of a loan motivated by that forgery. I tend to agree with Mr *Girach* for the fourth respondent that it is in fact a misnomer to refer to the CR14 in question as a forgery as it constitutes a misrepresentation to the fifth respondent that the applicant had resigned which he had not.

More importantly it occurs to me that the case of *Victoria Falls Steam Train Co (Pvt) Ltd, supra*, does not support the applicant's case, is distinguishable from the present case, and in fact is in favour of the fourth respondent's case. The facts of that matter are briefly that the applicant in that matter had made an offer for a locomotive to the general manager (operations) for the respondent who accepted the offer 5 days after he had proceeded on leave pending retirement. Although payment for the locomotive was tendered and receipted it was later returned to the applicant when the respondent refused to tender delivery. The respondent contested liability to deliver on the ground that the purported sale was highly irregular in that the normal procedures for the disposal of excess assets institutionalised by the public company were not followed. In fact the respondent's official had shown favour to the applicant to the prejudice of the respondent company, purporting to sell the locomotive at a price below its true value.

Although the facts a in stark contrast with the present case where the alleged forgery resided in the company's official directorship documents filed at the Companies Registry it seems to me that the following passage in the judgment of MAKARAU J (as she then was) at 10A-C is apposite:

> "It does appear to me from a reading of the cases in which the rule (turquand) has been applied and from texts on the subject, the contracting party must itself be acting in good faith and that the entire transaction must have been carried out in good faith. It must be a genuine transaction in all other aspects save the internal formalities necessary to clothe it with the authority laid down in the statutes of the company. The third party must have been a genuine outsider to be afforded protection by the rule. My understanding of the application of the rule is that the transaction must be within the powers of the corporation and must be legitimate but simply lacking completeness in terms of internal arrangements. The corporation is then stopped or estopped from raising the incomplete internal arrangements to avoid liability on the contract. Where however, the transaction is tainted by *mala fides* the rule does not apply to the prejudice of the corporation, to bind it to a transaction that it would not have authorized in the first place."

It has not been suggested on behalf of the applicant that the fourth respondent was *mala fide* in transacting with the first respondent. Neither has it been disputed that the fourth respondent genuinely relied on the first respondent's company records as were kept by the first respondent which records showed that both the second and third respondents had been

registered by the fifth respondent as the directors for the time being of the first respondent. Which then brings me to the submissions made by Mr *Girach* for the fourth respondent.

Mr *Girach* anchored his submissions on the provisions of s12 of the Companies Act [*Chapter 24:03*] on the presumption of regularity. It reads:

> "Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions and the company and anyone deriving title from it shall be estopped from denying their truth:
> (a) that the company's internal regulations have been duly complied with;
> (b) that every person described in the company's register of directors and secretaries or in any return delivered to the Registrar by the company in terms of section one hundred and eighty seven, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary as the case may be, of a company carrying on business of the kind carried on by the company;
> (c) …….
> (d) …….
> (e) …….
> Provided that: (i) a person shall not be entitled to make such assumptions if he has knowledge of the contrary or if he ought reasonably to know the contrary;
>
> (ii) a person shall not be entitled to assume that any one or more of the directors of the company have been appointed to act as a committee of the board of directors or that an officer or agent of the company has the company's authority merely because the company's articles provide that the authority to act in the matter may be delegated to a committee or to an officer or agent."

Mr *Girach* submitted that by his own admission the applicant was removed as a director in 2006. At the time the mortgage bond was registered in 2010 the applicant was not reflected as a director. For that reason the presumption of regularity of the register of directors, apply in favour of the fourth respondent. That the rule as expressed in the seminal case of *Royal British Bank* v *Turguand* (1856) 6 E & B 327, 119 ER 886 is codified in our law in s12 of our Companies Act requires no further analysis. That leading case was embraced in our jurisdiction in the case of *Walenn Holdings (Pvt) Ltd* v *Intergrated Construction Engineers (Pvt) Ltd & Anor* 1998(1) ZLR 333(H). I agree with Mr *Girach* that the whole essence of the rule is that the presumption of regularity is irrefutable to such an extent that a third party transacting with the corporation in good faith has an entitlement to assume that the internal formalities have been complied with. See *Registrar General* v *Northside Development (Pvt) Ltd* (1988) 14 ACLR 543 (SC, NSW) at 547.

In my view all the exceptions set out in s 12 and to the Turquand Rules as expressed by the authorities do not apply to the fourth respondent which was entitled to rely on the company

register as had been kept by the fifth respondent for 4 years at the time that it dealt with the first respondent. It is therefore entitled to shelter under the protection accorded to it by both s 12 and the rule. The claim for cancellation of the mortgage bond must therefore fail.

The applicant's claim for reinstatement as director of the first respondent and related relief has not been opposed. I have no reason to doubt that it is the second and third respondents who perpetrated the evil deed and as such should bear the costs of the applicant.

In the result it is ordered that:

1. The purported resignation and removal of the applicant as a director in Form CR14 dated 1 August 2006 and filed with the fifth respondent on 16 September 2011 is hereby declared to be null and void and accordingly set aside
2. The lawful directors of the first respondent are the applicant and the second respondent and the third respondent's registration as one of the directors is set aside.
3. The applicant is declared to be the holder of a 25 per cent shareholding while the second respondent is declared to be the holder of a 75 per cent shareholding in the first respondent company.
4. The second and third respondents shall bear the costs of this application on a legal practitioner and client scale.
5. The applicant's claim for cancellation of mortgage bond number 5648/2010 in favour of the fourth respondent is hereby dismissed.
6. The applicant shall bear the costs only of the fourth respondent.

Muchineripi and Associates, applicant's legal practitioners
Scanlen & Holderness, 4th respondent's legal practitioners