

SIBONGILE G. PHILI
versus
GWERU INVESTMENTS LIMITED
(Represented by Frank Buyanga)
and
EDWARD NDETE
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 23 April 2015 & 16 March 2016

Civil trial

R.Harvey, for the plaintiff
T Zhuwarara, for the 2nd defendant

MATANDA-MOYO J: The plaintiff issued summons against the defendants for the following relief;

- 1) That the purported agreement of sale of stand 4713 Salisbury Township of Salisbury Township Lands measuring 949 square metres, entered into between the plaintiff and the first defendant be declared invalid.
- 2) That the above property be retransferred to the plaintiff from the first defendant's name.
- 3) That the purported resale of the above property to the second defendant be declared invalid and that the second defendant be declared not an innocent purchaser.

The plaintiff alleged that sometime in September/October 2009 she borrowed \$12 000.00 from the 1st defendant at an interest rate of 15%. Such loan was to be repaid over a period of three months.

The plaintiff managed to repay the sum of \$8 000.00. The first defendant purportedly sold the plaintiff's property without her knowledge and consent to the second defendant. She

reported the matter to the police and a docket was opened against Frank Buyanga of the first defendant CR Harare Central 268/05/10 refers. Investigations revealed that the above property had been transferred into the first defendant's name as far back as 5 October 2009. On 5 October 2009 is the same date the plaintiff received the sum of \$12 000 via her bank account.

The first defendant entered an appearance to defend on 7 November 2011. The summons for the first defendant were served at Frank Buyanga's residence at number 3 Uplands Close Highlands Harare. It is common cause that the first defendant is a company not registered in Zimbabwe. In terms of the agreement of sale in particular para 7 thereof the *domicilium citandi et excutandi* of the first defendant was given as Hamilton House 14 The Drive Hove East Sussex BN3 3JE United Kingdom.

The first defendant brought it to the plaintiff's attention in its pleadings that such service done at Frank Buyanga's residence was improper service. However the plaintiff proceeded to cause a bar to be effected against the first defendant. The court decided to deal with the issue of service on the first defendant first before proceeding with the trial.

The second defendant submitted that the plaintiff was required to properly serve the summons upon the first defendant at the address provided for in the agreement, that is the U.K. address. Any purported service in Zimbabwe is invalid. No default order can flow from such improper service.

The court is called upon to determine whether service on the first defendant at 3 Uplands Close Highlands Harare was proper. Rule 39 (2) (d) of the High Court Rules provides;

“Subject to this Order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways-

- (a)
- (b)
- (c)
- (d) in the case of process to be served on a body corporate-
 - (i) by delivery to a responsible person at the body corporate's place of business or registered office;
or
if it is not possible to serve the process in terms of subparagraph
 - (ii) by delivery to a director or to the secretary or public officer of the body corporates;”

The above rule provides for the general ways of service upon a body corporate. However where there is an agreement between the parties and such agreement provides for manner and place of service, then service would be in terms of the agreement. Paragraph 7 of the agreement between the plaintiff and the first defendant signed on 8 September 2009 provides;

“7. *DOMICILIUM*

The addresses of the parties to this Agreement for the purpose of correspondence and for the service of any notice or process shall be as set out above, which addresses the parties hereby respectively choose as their *domicilium citandi et executandi*.”

The plaintiff's address of service as per the agreement is 8 Oates Road Braeside, Harare, Zimbabwe and the first defendant's is Hamilton House 14 The Drive Hove East Sussex BN3 3JE United Kingdom. I therefore fail to understand why the plaintiff in its declaration goes on to give the first defendant's address of service as No. 8 Fernando Court, Fife Avenue Harare.

Delivery of a legal notice to the address of the *domicilium citandi et executandi* of a party to a contract is considered legally sufficient for the notice to have been received by that party. If there are any changes of the address the onus is upon that party to notify the other signatory of any changes in address.

In *Stetsios and Others v Theophilopoulos and Anor* 1974 (4) S.A. 645 W. Classen J said;

“I am of the view that all notices directly or intimately concerned with a suit may be served at the *domicilium* chosen. It certainly is the place where process is to be served,....”

The defendants contend that the service of the summons at No 3 Uplands Clause was defective because it was not the first defendant's chosen *domicilium citandi et executandi*. The defendants contend there was no proper service of summons on the first defendant.

In the case of *Amcoal Collieries Ltd v Trust* 1990 (1) SIA (1) A. at 5J-6 the Supreme Court of Appeal stated:

“It is a matter of frequent occurrence that a *domicilium citandi et executandi* is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution (if a man chooses *domicilium citandi* the *domicilium* he chooses is taken to be his place of abode. See *Pretoria Hypotheek Maatschappij v Groenewald* 1915 TPD 170). It is a well-established practice (which is recognised by r 4 (10) (a) (iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service of process at such place will be good even though it be a vacant piece of ground, or the defendant is known to be resident abroad or has abandoned the property or

cannot be found. (Hebstein and Van Winsen *The Civil Practice of the Superior Court of South Africa* 3rd ed at 210. See *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) at 331 H-333A, *Lonyan (Pvt) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847 D-F)".

In the case of *Muller v Mulbarton Gardens (supra)* @ 331 H – 332G the court had this to say:

"Our courts adopt the view that normally where a person chooses a *domicilium citandi et executandi*, the *domicilium* so chosen must be taken to be his place of abode within the meaning of the rule of the Rules of Court which deals with the service of a summons *Downey v Downey* 16 SC 475".

Service *domicilium* relieves the party effecting service of the need to prove actual receipt. It is clear from the papers herein that service was not done at the first defendant's *domicilium citandi*.

The plaintiff submitted that she is guided by s 330 (6) of the Companies Act [*Chapter 24:03*] which gives her a right to serve a foreign registered company process either at the address of its principal or at its place of business. The plaintiff argued that since the first defendant had left its place of business she properly served the summons at the address of Frank Buyanga its recognised representative here. Section 330 (3) (b) provides:

"No foreign company shall establish a place of business within Zimbabwe unless it is registered and for such purpose shall lodge with the Registrar (b) a notice in the prescribed form of the name and residential address of the person responsible for the management of its business in Zimbabwe, being a person who shall accept on its behalf service of process and any notice required to be served on it."

I understood plaintiff to be saying the first defendant is not registered in Zimbabwe. If that is correct then the notice as prescribed by s 330 (3) (b) has also not been lodged. Frank Buyanga is not a person so described in the above section and has not been proved to be the person responsible for the management of the first defendant's business in Zimbabwe. What cannot be disputed is that Frank Buyanga represented the first defendant in the agreement with the plaintiff. Service of summons upon Frank Buyanga was not in accordance with s 330 (3) (b) of the Companies Act.

I am also aware of the decision by the Supreme Court in the case of *Govere v Ordeco (Pvt) Ltd and Another* S 24-14 where the court held that;

"There could be no doubt that the appellant represented or held himself out as a director of the company and its trading subsidiaries at the relevant time. Consequently third parties dealing with him were entitled to rely upon that representation for the purposes of legal liability in

terms of s 12 of the Companies Act. Even if it were to be accepted that the appellant was not a director of the company, this would not absolve him from personal responsibility for the company's debts and liabilities under s 318 (1) of the Act, because that provision extends personal liability not only to "the past and present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of [the company's] business" recklessly or with gross negligence or with intend to defraud."

The above is distinguishable from this case in that the plaintiff has not proceeded against Frank Buyanga but against the company whose registered office and *domicilium citandi* is in the U.K. So the law remains that service should be on the company not on a representative of the company. A company remains a separate legal persona from other persons.

I am of the view that the service at number 3 Uplands Close, Highlands was not proper service. The plaintiff should properly serve the first defendant at its *domicilium citandi* as provided for in the agreement provided for in the agreement by the parties.

Once service is defective it follows that any further proceedings become invalid. Default judgment can therefore not be entered in favour of the plaintiff against the first defendant.

Accordingly the application for default judgment against the first defendant fails and is dismissed with costs.

Granger & Harvey legal practitioners, plaintiff's legal practitioners
Mupindu legal practitioners, 2nd defendant's legal practitioners