EUNICE DZANGARE
and
WISH PROPERTIES (PVT) LTD
versus
CHAMPION CONSTRUCTIONS (PVT) LTD
and
ELIZABETH CHIDAVAENZI
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 23 March & 29 June 2016

Opposed Application

H Tererai, for the 1st applicant
R Dhaka with M Machiya, for the 2nd applicant
C W Gumiro, for the 1st & 2nd respondents
No appearance by the 3rd respondents

TSANGA J: In this opposed matter before me, I find the African proverb that "the best way to eat an elephant in your path is to cut him into little pieces," metaphorically apt in this instance.[1] I say this because in order to decide on the matter, at whose nub is the transfer of certain property to the applicant, I must first unpack and deal bit by bit with the story within a story that stands in the path of transfer. An equally rich African proverb that gives context to the dispute, also inspired by the elephant, is one that says "one sees all sorts of knives the day an elephant dies".

The property at the heart of the dispute is described as stand Number 1006, Remainder of Hilton Subdivision of Waterfalls of Salisbury measuring 1987 square metres

[1] I assume of course that the proverb relates to a dead elephant.

held under deed of transfer No. 7666/2001. The first applicant Eunice Dzangare (hereinafter referred to as "Dzangare"), bought this property as an undeveloped piece of land through a company called Wish Properties (hereinafter be referred to as "Wish"), then represented by its Director Biriam Wabatagore who is since deceased. This sale is not disputed by Wish. It is confirmed by the late Mr Wabatagore's widow, Audrey Wabatagore, who is now the director of Wish. At the time of the agreement of sale, and upon payment of the purchase price, Dzangare was given vacant possession by Wish in 2003. She has remained in undisturbed possession of the immovable property from that time and has since developed the property by constructing a dwelling house. The problem arises from the fact that the property was not transferred. She has tried to obtain transfer but it became necessary to join Wish to this application because the agreement with Champion was not with her but with Wish.

Wish says it had bought the immovable property from the first respondent Champion Constructors (Private) Limited, (hereinafter referred to as "Champion") under a written agreement of sale. Champion held a parent deed to a property which it was in the process of subdividing into various stands which included the one that Wish had purchased and subsequently sold to the Dzangare. The late Mr Wabatagore was also a legal practitioner. Mrs Wabatagore says that the agreement of sale between Wish and Champion unfortunately cannot be found as the document was misplaced in the takeover of her late husband's law firm. However, she draws on various annexures in support of her claim of the existence of an agreement. The annexures consist largely, though not exclusively of various correspondence between Wish and Champion's then legal practitioners, Messrs Mandizha and Partners who were handling the issue of the subdivision of the principal property into stands. What Wish seeks is that the sale to it by Champion be recognised so that it in turn can transfer the stand in question to Dzangare to whom it has since ceded the property. Wish has ceded its rights to transfer to Dzangare.

At the core of Wish's legal argument is that it has proven its case on a balance of probabilities, this being the standard required in civil proceedings. It regards the denial of the sale by Champion as an afterthought, spurred by a quest to capitalise on the fact that the agreement cannot be found. Wish points to the improbability that there was no agreement of

sale, to Dzangare's occupation of the property for over nine years at the very minimum without any challenge.

Champion's director is Elizabeth Chidavaenzi and is the second respondent in the matter. She is opposed to the transfer on the basis of Wish's failure to produce the agreement of sale. She says that Wish should be put to the strictest proof of the alleged agreement of sale and that the documents that Mr Wabatagore's widow relies on, do not prove the existence of an agreement of sale. The cases of *H & Dwitkopipen Agencies & Fourways* v *De Sousa* [2] and *U- Freight Euromar (Private) Limited* v *Emmanuel Mutebuka*[3] were cited in support of the contention that the authenticity of documents must be proven. She also argues that at the very least the first applicant would have had copies of the agreement of sale. The undisturbed occupation by Dzangare is denied on the basis that it has been subject to litigation since 2012 when instead of considering an offer to purchase, she instituted legal proceedings. It is also said that Wish failed to prove critical elements of an agreement of sale such as the purchase price and whether it was paid.

At the heart of her legal argument is that the order sought against Champion as the respondent is not competent. Champion also premises its argument on the *rei vindicatio* doctrine, aimed at protecting ownership and based on the principle that an owner cannot be deprived of his property without his consent. *Alspite Investments (Private) Limited* v *Tendai Westerhooff*[4]*; Hwange Colliery Co.* v *Savanhu*[5]*; Hamtex Investments (Private) Limited* v *King*[6] were cited in support of the operation of this principle.

She also argued that the cession by Wish of personal rights to the property in question was irregular as it was effected after pleadings had closed and without the approval of the court. Wish on the other hand, argue that Champion's consent was not necessary to effect a valid cession. On its behalf, Mr Dhaka drew on s 11 (1) (v) of the Deeds Registries Act which provides an exception in that the court may validly effect transfer direct to a third person although s 11 (2) provides that liability for any duties still remains. He also emphasised that

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[2] *1971 (3) SA 941 TPD;*
[3] *HH 5/2013*
[4] HH 99 / 2009
[5] *2013 (1) ZLR 555 (H;*
[6] *2012 (2) ZLR 334 (H)*

in terms of s 11 (1) (a) and (b) departures of transfers of land and cessions from following the sequence of the successive transactions is permitted in exceptional circumstances.

In view of the above, the first issue to be dispensed with in order to decide whether such transfer should be effected against this backdrop of its legal permissibility is whether the explanation for the absence of the agreement is acceptable. The widow's explanation is that the document was most probably lost in the process involving the take over her husband's law firm. The circumstances that led to the misplacement of the document are believable and highly probable. Papers and documents may indeed have been moved or became inadvertently destroyed in the takeover of his practice following the death of Mr Wabatagore. Documents do sometimes get lost in lawyers' offices even without the spectre of rearrangements necessitated by death. The explanation is therefore not one that stretches the imagination. As such, secondary evidence can in my view be examined to establish whether there was an agreement. In the case of *Absa Bank* v *Zalvest Twenty (Pty) Limited & Anor*[7] it was accepted that secondary evidence can be produced of the existence of a contract where the contract had been destroyed or lost. This was explained as follows[8]:

> "In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded and the general rule is thus that the original must be adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms (see *Singh* v *Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J-617D). There are in modern law no degrees of secondary evidence (ie one does not have to adduce the 'best' secondary evidence). While a photocopy of the lost original might be better evidence than oral evidence regarding the conclusion and terms of the contract, both forms of evidence are admissible once the litigant is excused from producing the original".

Placing the burden on Mrs Wabatagore as the second applicant's director in this case to prove that there was an agreement and to recount its terms, aims at reducing the dangers of fraud. I am, however, cognisant of the fact that her late husband was the actual party to the contract and that the only other party who would have the contract is the defendant who denies the existence of the contract. I examine the evidence chronologically in terms of how it builds up the story or otherwise of the existence of an agreement.

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[7] *2014 (2) SA 119 (WCC)*
[8] At p 122 G-I

On 7 August 2003 the deceased's law firm Wabatagore and Company wrote to Messrs Mandizha & Partners, Champion's conveyancers enquiring about the transfer of three stands from Champion to Wish. One of these stands was the stand in dispute. The letter indicated therein that the stands had since been sold and sought to find out whether the stands had been fully paid for. It must be remembered that this was at the height of the hyper- inflationary environment and it was not unusual for parties to seek clarifying on top ups of what had been paid particular where payment had been in instalments and where transfers were still outstanding. It was also clearly indicated in the letter of 7 August that one of the purchasers desperately needed to start construction. This letter of 7 August was followed up with another one on 7 November 2003 expressing concern at the non-response to its enquiries and reiterating again that the stands, identified as 1021, 1006 and 1046 had been sold. The letter, like the previous one, was copied to Dzangare, one Diana Mapingure and one Mercy Moyo. Another letter written on 3 March 2004 again lamented that no response had been received to any of the above mentioned letters. Again, it demanded to know the transfer requirements for the three stands.

Notably Champion's key reaction to this correspondence is not a denial that Messrs Mandizha & Partners were its lawyers. Instead, the denial is premised on whether the letters were ever received at Mandizha and Partners. Champion also points out that the threat to report to the law society was not carried out. Further, Champion says that confirmatory affidavits should have been sought from Mr Mandizha to prove service of these letters. Champion also queries why Wish was still asking if it owed anything if it had paid. I have already stated there was nothing unusual about this enquiry in a hyperinflationary environment of the time. To bolster this view, on 11 May 2004, and Champion itself wrote to Mr Wabatagore advising him that the long awaited capital gains tax, presumably the cause of the long delay, had now been received from ZIMRA. The letter also outlined the amount that was outstanding, which Champion explained as owing to the accumulation of administrative costs as a result of inflationary costs for service maintenance. It asked every client on the Uplands scheme to pay a stipulated additional amount to defray unforeseen costs. In my view, this further proves that the enquiries to Messrs Mandizha had been on point.

Looked at in totality, the correspondence is convincing and the letters corroborate each other. They indicate that a sale had indeed taken place between Champion and Wish and that there was every effort to follow up on transfer. Champion's attack of the letter of May 11 2004 on the grounds that it was a general circular and that it should in any event have been addressed to Wish and not to Mr Wabatagore makes little sense since Mr Wabatagore was the Director of Wish who had represented the latter in the agreement. Furthermore, I agree with Mr *Dhaka's* argument that once Mr Wabatagore had received assurances from Champion concerning the capital gains tax and outstanding sums to be paid, there was no reason to believe that the property would not now be transferred. The letter sufficiently affirms that impediments to transfer had been addressed. The allegation that the letter is possibly fabricated is not supported by any evidence.

Champion also disputes the certificate of development as having been issued on misrepresentation but again nothing tangible is said in support of that contention. Champion's averments and challenges of these annexures are no more than vague objections. The nature and content of the letters speak far more loudly and convincingly in support of a sale to Wish than Champion's bare denials of the existence of an agreement. The inherent improbability of the sale not having taken place to Wish, is also supported by the fact that no evidence was placed before this court which shows that Champion has ever made any effort to vindicate its rights. Instead, at every turn it has been Dzangare who has persistently taken action to enforce her rights.

The more recent letter of August 2013 by Champion to the Sherriff in which it indicated that it had long since subdivided the whole property and sold all stands to individual owners most who have already developed the stands is pertinent. Champions cannot now simply wish this letter away because it suits it on the basis that was it written in respect of its stands which do not form part of this litigation. It is a self-serving denial. Given its position that there was no agreement with Wish regarding the stand in question, it could just as easily have produced cogent evidence relating to whom it sold the stand in question to and when. Champion would however have had to explain how and why Dzangare has been on the property since 2003 with no disturbance. To my mind, Champion is clearly taking advantage of the lost agreement. Cases of developers failing to pass transfer have become an

increasing headache before the courts. Where evidence supports on a balance of probabilities that the property in question was sold to a party, and the sale concluded, the court's primary concern is to ensure that justice is done between the parties.

Rather than lie about what she does not know, Mrs Wabatagore stuck to attesting to facts known to her and to producing what secondary evidence was in her possession. On a balance of probabilities the evidence averred points to an agreement between Wish and Champion. In the circumstances I conclude that the property should be transferred to Dzangare.

I grant the order as follows:

1. The application be and is hereby granted.
2. The first respondent shall sign transfer papers and take all necessary steps to pass transfer of the property called Stand 1006 of Certain Piece of Land Situate in the District of Salisbury, called remainder of Hilton of Subdivision A of Waterfall measuring 1987 square metres, held under Deed of Transfer No 7666/2001, into the first applicant's name, within 7 days of the service of this court order upon them, failing which the Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorised to sign all transfer papers on the first respondent's behalf.
3. The second respondent shall pay costs of this application on legal practitioner and client scale.

Messrs Tererai Legal Practice, 1st applicant's legal practitioners
Wilmot & Bennet, 2nd applicant's legal practitioners
Ngarava Moyo & Chikono, 1st and 2nd respondent's legal practitioners