

MAYOR LOGISTICS (PVT) LTD
versus
GUOXING GONG
and
MATHONSI FAMILY ENTERPRISES (PVT) LTD
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 19 March 2015 and 13 January 2016

Opposed Application

Ms N G Maphosa, for the applicant
Ms B Bwanali, for the 1st respondent
Mrs C N Mapfidza, for the 2nd respondent

MAKONI J: This is an application for the cancellation of Deed of Transfer 2541/14. The deed was issued by the third respondent in favour of the first respondent after the second respondent allegedly sold the disputed property to the first respondent. Prior to Deed of Transfer 2541/14 being issued, the applicant and second respondent had been involved in a matter, HC 218/12, in which the applicant sought transfer of the disputed property from the second respondent. The applicant was awarded default judgment and the following order was made in favour of the applicant:

- “1. The Defendant (*presently the 2nd respondent*) be and is hereby directed to transfer Stand 102 Grobbie Township of Subdivision B of Delft of Hopley to the plaintiff (*presently the applicant*) against payment of the sum of US\$ 50 000-00.
2. Should the defendant refuse or neglect or fail to sign the documents facilitating the said transfer the Deputy Sheriff be and is hereby authorized to sign them in the defendant’s stead.
3. The defendant shall pay the costs of suit on an attorney client scale.”

Soon after the above order was granted the applicant wrote to the third respondent asking for a caveat to be placed on the disputed property. This caveat was to prevent

the second respondent from transferring the disputed property to a third party. Caveat No. 263/12 was placed on the Deed.

The applicant bases its application for cancellation of the deed on the existence of the abovementioned order. As their argument goes, the second respondent should not have sold and then transferred the disputed property to the first respondent as they were under a legal obligation to transfer the property to the applicant. Furthermore, the applicant contends that the first respondent knew about order HC 218/12 when they sought transfer of the disputed property into their name as such they acted in bad faith.

The first respondent contends that they did not know about the order granted in HC 218/12. The applicant and second respondent did not have a valid agreement of sale prior to order HC 218/12 being granted as such it had no right to the property. Furthermore the applicant never paid for the property so there was no sale of the disputed property to it. Lastly, the first respondent argues that they were not alerted to the existence of a caveat on the disputed property when they lodged their transfer documents.

The second respondent argues that prior to the order in HC 218/12 they never entered into an agreement of sale with the applicant and that the order granted in HC 218/12 was granted in default. This means the court did not consider the merits of the matter and the applicant is, as their argument goes, unfairly trying to capitalize on a default judgment. It is important to note that the second respondent filed an application for recession of judgment but this application was denied. The second respondent filed another challenge against the default judgment and that challenge, HC 4563/14, is yet to be finalised. As such the default judgment is still extant.

The second respondent argues that the applicant has not paid the purchase price as per the order in HC 218/12 and as such it did not have a legal obligation to transfer the property. They also argue that the order is vague in so far as it does not state when the applicant should pay the purchase price and if payment of the purchase price should come before or after transfer.

It is trite law that parties are bound to perform in terms of an order as long as that order is extant. This is true even when a judicial officer misdirects themselves in reaching their decision see *R itenote Printers (Private) Limited v A Adam And Company and The Messenger Of Court, Harare* SC 15 11 if a party feels aggrieved by a decision the proper course to take is to make an application to have the decision set aside failing which parties are bound to perform in terms of the order.

The order made in H C 218/12 is still extant. The fact that the matter is being challenged in HC 4563/14, a pending matter, does not change this fact; at least not until the matter is finalised and the order in HC 218/12 is actually set aside. Similarly, the arguments raised by the respondents to the effect that prior to default judgment being granted in HC 218/12 the applicant and second respondent did not have a valid agreement of sale are inconsequential. The reasons for their default are equally inconsequential. To quote Chatukuta J in *Joyce Madzorera v David Shava* HH 3 11:

“I am of the view that the reasons for judgment are necessary only in so far as a court is required to determine the correctness of an order arrived at. I am not being asked to consider the correctness of the order ... It is not competent for me to even consider that case given that it is an order of this court. Such consideration would amount to a review of this court’s own decision.”

As things stand, the applicant should have the property transferred in his name and the applicant should tender payment of the purchase price as per the order. The third respondent should not have allowed the property to be transferred to the first respondent. If the second respondent feels that the order is vague it should approach the court seeking clarification.

Furthermore the facts of this matter, which have not been disputed, point to the fact that the first respondent was aware of the order in HC 218/12 when he took transfer. On 23 May 2014, Mr Tavenhave for the first respondent telephoned Mr Tsivama, for the applicant, seeking confirmation regarding the existence of the order. Mr Tsivama confirmed the existence of the order. Mr Tavenhave then informed Mr Tsivama that he had been approached by the first respondent who produced the order and was in a state of panic since he had purchased the same property from the second respondent. He went on to advise Mr Tsivama that he had re-assured his client not to panic as he already obtained transfer some time back. He had retorted that it was a clear case of double sale and enquired as to the applicant’s position. Mr Tsivama advised him that the applicant would seek to enforce the order.

On 26 May 2014, Mr Tsivama conducted a Deeds search at the Deeds Office which confirmed that the property was still registered in the second respondent’s name and there was caveat No 263/12 in place.

Mr Tsivama then telephoned Mr Tavenhave who insisted that the property had been transferred to the first respondent. Mr Tsivama queried how it could have been done with the caveat in place. Mr Tavenhave promised to revert back to him and he did not.

Mr Tsivama again phoned Mr Tavenhave the following day. Mr Tavenhave asked him to hold while he looked for the file. Mr Tavenhave advised Mr Tsivama that he had been mistaken. The property had not been transferred to the first respondent. He had confused matters. Mr Tsivama then re-confirmed the existence of the caveat and that they were in the process of transferring the property.

On 5 June 2014, Mr Tsivama's office was served with an application, filed by the second respondent, seeking variation of the order obtained in HC 218/12 .This prompted Mr Tsivama to write to Mr Tavenhave confirming their various telephone conversations. The letter was received at Messrs Tavenhave and Machingauta Legal Practitioners on the same day. It did not receive the courtesy of a response. Instead they were served with an Answering Affidavit for the second respondent to which was attached the Deed of Transfer obtained by the first respondent on 5 June 2014.

Clearly both respondents were aware of the existence of the court order before the transfer of the property by the second respondent to the first respondent. The first respondent therefore falls outside the bracket of an innocent third party. Considerations of special circumstances such as balance of convenience will not be necessary.

In any event, the transfer took place when there was a caveat in place. This is confirmed in the letter dated 11 July 2014 from the Registrar of Deeds. The position in our law regarding such transfers was set out in *Mwayipaida Family Trust v Madoroba and Others* 2004 (1) ZLR 439 (S) at p 443 where it was stated:

“... even though the appellant was ignorant of the respondents' prior claim to the property at the time transfer into its name was effected, such ignorance was due solely to the oversight – if not incompetence – of a public official in the Deeds Office. The official failed to register the caveat in circumstances where such registration would have warned the appellant that the property in question was not available for transfer to it. It would not be fair and just, in my view, to rule that the failure by the Deeds Office to register a caveat in question had the effect of nullifying the respondents' prior claim to the property. Indeed, the general approach of the courts is to give preference, except in special circumstances, to the first contract. The approach is derived from the policy of the law in upholding the sanctity of contracts. McDonald J (as he then was) elaborated on this policy as follows in *BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd and Another* [1964 RLR 7 (G) at 11 H – 1 or 1964 (2) SA 21 at 25 G-H]

‘... In my view, the policy of the law to uphold sanctity of contracts will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view of Professor McKerron that save in special circumstances, the first purchaser is to be preferred.’”

In *casu*, unlike in the above case, the caveat was actually registered on the Deed but due to inefficiency in the public official in the Deed Office, the transfer were through.

In view of the above the transfer effected in favour of the first respondent cannot stand as it might make a mockery of the justice delivery system and court orders in particular.

The applicant prayed for costs on an attorney-client scale, in view of the conduct of the first and second respondent in this matter. They both were aware of the existence of the order compelling the second respondent to transfer the property to the applicant. The respondents were made aware of the applicant's position and the law on the matter in HC 4563/14 but they still persisted with their opposition. If the respondents were relying on the advice of their legal practitioners then the legal practitioners must personally meet the applicant's costs *de bonis propriis* and on an attorney and client scale. In the submissions, Ms Maphosa also prayed for costs against the Registrar of Deeds on the basis that there are loopholes in their system which result in mistakes such as the one in the present matter.

The issue of costs *de bonis propriis* was not persisted with after it had been pointed out that Mr Tavenhave was not present to defend himself. I would not have hesitated to make such an order. Mr Tavenhave's conduct in this matter is reprehensible. His office attended to the transfer of the property when he very well knew that there is a court order compelling transfer to the applicant. The only solace is that the matter was brought to attention of the Law Society and it is one's hope that it will take appropriate action.

The respondents cannot escape punitive costs. This is because they went ahead with the transfer with the full knowledge of an extant order in favour of the applicant. The applicant has been put out of pocket by approaching the court to enforce his right which he obtained through an order of this court. He is entitled to recover the costs in full. Costs against the Registrar of Deed were only prayed for in the submissions and not in the founding papers. The Registrar did not get an opportunity to respond. I will therefore not grant the prayer.

In the result I make the following order:

1. Deed of Transfer No. 2541/14 in the name of Guoxing Gong be and is hereby deemed cancelled and the Registrar of Deeds be and is hereby directed to effect such cancellation.
2. The first respondent shall surrender the said Deed of Transfer to the Registrar of Deeds within 48hrs of service of this order to enable the Registrar of Deeds to endorse such cancellation.
3. The first and second respondent shall bear the costs of this application on a legal practitioner and client scale.

Sawyer and Mkushi, applicant's legal practitioners

Messrs Tavenhave & Machingauta, 1st respondent's legal practitioners

Messrs Dzoro & Partners, 2nd respondent's legal practitioners