

MUNYUKI ROBERT ARMITAGE CHIKWAVIRA
versus
JANE MARY RUDO MUTONHORA
and
GEORGE MUSAFARE MUTONHORA
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 1 March 2018 & 24 May 2018

Opposed Application

C. M Jakachira, for the applicant
N Bvekwa, for the 1st & 2nd respondents

MANGOTA J: On 23 June 2014 the applicant sued the second respondent and one James Sijabuliso Sibanda under case number HH 224/16. The suit was concluded in the applicant's favour on 30 March 2016. The court ordered the second respondent and James Sijabuliso Sibanda to pay to the applicant, jointly and severally the one paying the other to be absolved, \$176 997.60, interest *a tempora morae* and costs of suit.

On 17 October 2016 and under case number HC 6516/09, the court ordered the second respondent and James Sijabuliso Sibanda to pay to the applicant's company, Brightland Farming (Pvt) Ltd, jointly and severally the one paying the other to be absolved, \$247 142.21, accrued interest of \$33 003.88 as at 30 November 2009, interest of 5% *per annum* from 1 December 2009 to the date of final payment and costs of suit.

Brightland Farming (Pvt) Ltd, it is evident, had a business relationship with the second respondent and James Sijabuliso Sibanda prior to the dates of the court orders.

Whilst the proceedings which took place under HH 224/16 and HC 6516/09 were in progress, the second respondent donated his movable and immovable goods to the first respondent who is his wife. Amongst what he so donated to her is a piece land which is called stand 186 Mandara Township of Lot 3A Mandara which measures 4052 square metres [“the property”]. He, on 15 September 2011, transferred title in the property to the first respondent. It is now registered in the first respondent’s name who holds it under deed of transfer number 2826/11. It is noted that, prior to the donation and transfer of the property to the first respondent, the second respondent had registered a notarial deed of servitude of usufruct on the property in favour of his wife. He did so 15 February 2005.

The abovementioned conduct of the first and second respondents riled the applicant. He contended that the donation and the subsequent transfer of title in the property were a fraud. He averred that the aim of the donation was to protect the second respondent’s estate against claims of his creditors’ one of whom was the applicant himself. He submitted that the first respondent’s acquisition of the property was executed with the primary objective of defeating the execution of any judgment which he might obtain against the second respondent. He moved the court to declare that:

- i) the transfer of the property by the second, to the first, respondent is null and void *ab initio* and of no force or effect – and
- ii) the property in question be specially executable in the estate of the second respondent.

He also moved the court to cancel the notarial deed of servitude of usufruct, MA 62/2005, which had been registered over the property.

The first and second respondents opposed the application. The third did not. The assumption was that he elected to abide by the decision of the court.

The first respondent denied that he intended to frustrate the execution of any judgment that might be obtained against him when he donated the property to his wife. He insisted that he was not a fraudster as the applicant alleged. He averred that he donated and transferred the

property to his wife out of his love for her. The transfer, he said, was in good faith. He submitted that the donation was genuine. He moved the court to dismiss the application with costs.

The first respondent supported the averments of her husband. She stated that she was the owner of the property. She also moved the court to dismiss the application with costs.

Two preliminary matters characterize this application. The applicant raised them. The first relates to the bar which he said operated against the respondents. He stated in para (a) of his answering affidavit as follows:

“(a) The notices of opposition were filed one day late and this honourable court’s r 229 has not been followed. As such, the respondents are barred.”

Because the issue of the bar was raised at the answering affidavit stage, the respondents saw no option which was open to them other than to deal with the same in their heads. They made every effort to, as it were, give evidence from the bar. The impropriety of what they did when they attempted to explain the position of the matter in their heads remains inexcusable.

Heads of argument are not prepared by a party to proceedings. They are prepared, and presented to the court, by a legal practitioner who is representing a party. Reference is made in this regard to r 238 (1) and (2) of the High Court Rules, 1971. It reads:

“238 HEADS OF ARGUMENT

- (1) If, at the hearing of an application, exception or application to strike out, the applicant or excipient, as the case may be, is to be represented by a legal practitioner–
 - (a) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument, clearly outlining the submissions he intends to rely on and setting out authorities, if any, which he intends to cite; and...
 - (b) ...;
 - (1a) ...
- (2) Where an application, exception or application to strike out has been set down for hearing in terms of subrule (2) of r 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with subrule (2a), heads of argument clearly outlining the submissions relied upon by him and setting out the authorities, if any, which he intends to cite...” (emphasis added).

It is evident, from the foregoing, that heads of argument are not the business of the parties. They are the business of the legal practitioners who represent such parties. Where the legal practitioners give evidence in the heads and in furthermore of their client’s case, therefore, the court will not only frown upon such conduct. It will also disregard evidence which is introduced into the record through the back door.

The respondents' legal practitioners are guilty of the observed impropriety. What they stated as having been the statement of the respondents on the matter cannot be accepted. It is not their clients' evidence. It is, therefore, expunged from the record.

It follows, from the foregoing that, if the applicant was correct in what he alleged, he would most certainly have carried the day. The applicant did not make the certificate of service of the application on the respondents part of the record. He alleged and left the matter at that. His allegation, therefore, remains unsubstantiated. He, at any rate, did not pursue the issue of the alleged bar during the hearing of the application. His reasons for refraining from pursuing the same remain unknown. The result was that the issue of the alleged bar was allowed to die a natural death.

The applicant's second *in limine* matter relates to the servitude of usufruct which the second respondent registered on the property in favour of his wife. He moved the court to have that servitude cancelled. Reference is made in this regard to para (3) of his draft order.

It is pertinent to mention that para (3) of the draft order is no longer necessary. It is superfluous. Once it is accepted, as it should, that the second respondent transferred title in the property from him to his wife, cancellation of the notarial deed of servitude of usufruct no longer serves any purpose. That is so because the first respondent no longer has limited rights in the property. She has real rights in the same. She holds such to the exclusion of the whole world.

On the merits, I must confess that I read the application over and over again and I failed to define the applicant's cause of action. He said the second respondent was a fraudster. That connotes that the second respondent defrauded him.

The application, as it stands, does not show any fraud-civil or criminal – having been perpetrated against the applicant by the second respondent. In fraud, the fraudster makes a misrepresentation which he intends his victim to act upon to the latter's actual, or potential, prejudice. (See Innocent Maja *The Law of Contract in Zimbabwe*, p 98; Jonathan Burchell, *Principles of Criminal Law*, 5 ed p 742)

The application does not show that the second respondent made any misrepresentation at all to the applicant. Misrepresentation is an essential element for the delict of fraud. Its absence in the conduct of the second respondent towards the applicant establishes the fact that the former is not a fraudster as the latter would have the court believe.

In the last sentence of para 8 of his founding affidavit, the applicant state as follows:

“I am legally advised that 1st Respondent’s conduct is akin to what is known as, ‘throwing away the shield,’ in our criminal law”. That is my cause of action.”

He did not explain the meaning and import of the phrase *throwing away the shield*. He simply made mention of it and left the matter at that. He says the phrase exists in the country’s criminal law. The suit was a civil matter. It was not under the criminal law branch of the country’s laws. He avers that the phrase constitutes his cause of action. He does not explain how the phrase translates into his cause of action. Nor does he explain what his cause of action really is. *A fortiori* when he alleges that his cause of action was against the first, and not the second, respondent.

I reiterate that no cause of action arises from a meaningless statement. What the applicant stated in the abovementioned paragraph of his affidavit was totally devoid of meaning. Nothing could be founded upon it. He did not explain what the first respondent did which he said was akin to what is known as “*throwing away the shield in our criminal law*.” He, in short, did not state his statement of claim in a clear and concise manner. He remained vague and completely embarrassing, so to speak.

The applicant stated in the last sentence of paragraph (10) of his affidavit as follows:

“... it is my contention that 1st Respondent acquired the property in a transaction which was executed with the primary objective of defeating the execution of any judgment which I might obtain against 2nd Respondent.”

The tone of the above statement places his case into the criminal law topic of defeating or obstructing the course of justice. Jonathan Burchille’s *Principles of Criminal Law* 5 ed states, at p 851 that the crime of defeating of obstructing the course of justice consists in:

“unlawfully doing an act which is intended to defeat or obstruct the due administration of justice.”

What the respondents did was not unlawful. No law prohibited them from making a donation to each other. If what they did was a crime, the applicant would have reported them to the police so that the law is allowed to take its course. The fact that he did not press charges against them supports the view which I hold of this matter. The learned author states at p 862 of his legal text book that:

“The judicial administration of justice is completed upon the pronouncement by a court of its judgment and anything which delays or obstructs the execution of judgment is not proper subject matter for a criminal charge of defeating or obstructing the course of justice.” (emphasis added)

Applying the principle which was laid down in the above underlined words, it is not an offence for the respondents to have acted as they did. Whilst they delayed or obstructed the execution of the applicant’s judgment against the second respondent, they do not in any way, qualify to be charged under the offence of defeating or obstructing the course of justice. Nor can they be properly sued for the same. *A fortiori* when the donation which they made to each other pre-existed the applicant’s judgment under HH 224/16 or the applicant’s company’s judgment under HC 6516/09.

The tone of application shows that the applicant is not challenging the validity of the donation. He, indeed, cannot challenge that in the face of Annexure K and L which the first and the second respondents executed on 8 August 2008. The donation is valid and so is the transfer of the property into the name of the first, by the second, respondent.

What the applicant appears to challenge is the motive of the donation. He is, in effect, challenging the intention of the respondents. He is saying the second respondent engaged in a fraudulent act when he donated the property to his wife and later, passed title in the same to her.

I reiterate that the conduct of the respondents does not fall into the realms of the delict of fraud. Further, the unchallenged statement of the second respondent is that there was no litigation against him when he donated the property to his wife. What he stated is the unvanishing truth. The property was not encumbered at all when the donation took place. The only encumbrance which then existed was the servitude of usufruct which he registered in favour of his wife in 2005. That encumbrance did not operate in favour of the applicant. It operated in favour of the first respondent.

The applicant had every right to protect his interest in the property. He must have realised that the second respondent was moving to outwit him when the servitude of usufruct was registered. He could easily have registered a caveat against the property as a way of securing his interests in the same. He did not do so. He advanced no reason at all for his inaction.

He has no one else to blame but himself. The *dictum* which SANDURA JA laid down in *Beitbridge Rural District Council v Russell Construction Co.* 1998 (2) ZLR 190 (S) 193 G remains appropriate to his situation. It reads:

“the law will help the vigilant and not the sluggard.”

The applicant was not vigilant. He was sluggard in the manner that he dealt with his case. His explanation for not placing a caveat on the property leaves a lot to be desired.

The conduct of the applicant is akin to that of a stable keeper who closes the stable when the horses have already bolted. It is an effort in vain. It is not rewarding at all.

The law allows couples to donate properties to each other. There is nothing wrong with that. This is what the respondents did. They violated no law at all.

The applicant's stated cause of action was all sorts of things. He alleged fraud and he failed to prove it. He alleged some meaningless phrase. He failed to elaborate what he intended to convey by it. He alleged that the respondents defeated the course of justice. He did not say how they defeated or obstructed the course of justice. *A fortiori* when all what they did – servitude of usufruct, donation and transfer of property – preceded the judgments which his company and him obtained against the second respondent.

The second respondent cannot be held liable for having outwitted him. He moved faster than the applicant was able to do. It was, therefore, for the mentioned reason that the applicant groped for words which he hoped would constitute his cause of action. He, unfortunately for himself, stated none.

The applicant failed to prove his case on a balance of probabilities. His application cannot stand. It is, accordingly, dismissed with costs.

Jakachira & Company, applicant's legal practitioners
Messrs Bvekwa Legal Practice, 1st & 2nd respondents' legal practitioners