

BARBARA COOK
versus
ALISTAIR ABRAHAMS
and
ALTON EDWARDS
and
REWAI GUTU
and
YUBIN LI
and
MASTER OF THE HIGH COURT N.O
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 16 March 2021 & 26 May 2021

Opposed Matter

D Coltart with J Ndlovu, for the applicant
Ms N. G Maphosa, for the 3rd respondent
Adv T Magwaliba, for the 4th respondent

MANGOTA J: The English phrase which reads ‘Let sleeping dogs lie’ carries a lot of meaning with it. Whoever coined the phrase as such must have done his homework. He must have applied his mind to the same. He must, in my view, have realised that, when a person calls at another’s home and finds the dogs at the residence in a sleeping mode, the risk of him being bitten by them is less where he allows them to continue to enjoy their sleep than when he does anything which disturbs their sleep. He must have realised that the moment that he disturbs their sleep, the dogs would all charge at him in a threatening manner much to his fear and/or discomfort.

The remarks which I made in the foregoing paragraph are apposite to this application wherein the applicant, a relative of one Prudence Clementine Edwards, the deceased, applied for registration of the judgment (“the judgment”) which she obtained from the High Court of Justice, the Business and Property Courts of England and Wales (“the court”) and consequential relief which she said flowed from registration of the judgment.

It is clear from the tone of the opposition which the third and fourth respondents mounted that the application for consequential relief awakened the two respondents from their

slumber. Both of them woke up and put up a spirited fight against the application for consequential relief, in the main, and, in some way, against registration of the foreign judgment. It is evident that, if the applicant had not applied for consequential relief as she did, the two respondents would not have made any serious opposition to her application for registration of the foreign judgment.

The applicant became aware, at a very late stage of the case, that she had stared the hornet's nest when she applied for consequential relief instead of applying only for registration of the foreign judgment which she obtained from the Court of England and Wales. She, without any application, sought to amend her draft order to relate only to the registration of the foreign judgment. Her attempts in the mentioned regard were seriously and properly opposed by the third and fourth responders who urged me to hear, and make a determination on, the entire application which the applicant filed.

The submissions of the two respondents on the matter which related to the amended draft order which the applicant moved me to make part of the record to these proceedings were both persuasive and cogent. I, therefore, had no difficulty in agreeing with them when they insisted that the application had to be considered as a whole and in the form that it had been filed by the applicant. I indicated, at the time that the amended draft order was intended to be produced to form part of the record, that I would avail reasons for my decision on the matter in this judgment. These are they:

- (a) the applicant sought to amend the draft order some few days before the hearing of the application;
- (b) she gave no reason for the course of action which she had taken;
- (c) she did not file any application in support of what she intended to achieve;
- (d) she did not explain why she applied for consequential relief in her application for registration of the foreign judgment;
- (e) she did not explain why she allowed the matter to remain undisturbed until the time that all the papers which related to the entire application had been filed of record in the case.

It is on the strength of the abovementioned matters that I decided, and directed, that the application would be heard as the applicant filed it. In deciding as I did, I remained alive to the fact that the applicant's papers, as filed, related to two causes of action which comprised the application for"

- (i) registration of the foreign judgment— and

(ii) consequential relief.

I observed that the applicant did not file an application to amend the pleadings which she filed so that they would remain aligned only to the first application to the total exclusion of the second one. I observed, further, that the heads which she filed related to both applications and not only to that of registration of the foreign judgment. The draft order, Annexure Z, which she moved me to make part of the record to these proceedings, I noted, hanged on nothing. It was, in my considered view, just plucked from thin air and urged to be part of the record. The applicant, I opined, did not advance any reason for its existence. It is for the mentioned reason, if for no other, that I remained of the view that, in fairness to the respondents who dealt with both applications, the two applications had to be argued and determined at one and the same time.

The respondents, it was my view, wasted a lot of time, money and energy dealing with an application which the applicant had to drop at a belated stage of the proceedings. They were, therefore, within their right to insist, as they did, that the two applications had to be heard and a determination made in respect of both of them. I agree with their reasoning in the mentioned regard.

Precedent persuaded me to subscribe to the view which I held of the matter which related to the applicant's attempt to align her main application to the contents of the annexure which she moved me to make part of the record. It states that an applicant cannot withdraw an application which has been set down. It insists that he can only withdraw his application with the consent of the respondent or through an order of court which the court grants in the exercise of its discretion after he has applied for a withdrawal: *A v B + C*, 1976 (4) SA 31 at 33 E-F.

The applicant, it has already been observed, did not apply to amend her pleadings. All she did was to request me to accept the annexure and make it part of the record. Her statement which was to the effect that she did not withdraw the application threw her case off the rails. The reality of the matter is that, in urging me to accept the contents of the annexure as the only matter which she was inviting me to deal with, she was, in effect, withdrawing her application for consequential relief. She did not say why she was withdrawing it. Nor did she explain why she included it in the application for registration of the foreign judgment in the first place. Her position in respect of her application for consequential relief remained in an as a hasty condition as she commenced, and attempted to withdraw, it. She advanced no reason to persuade me to sing along with her. She started, and left, that matter in a thoroughly confused state. The

confusion which accompanied the same persuaded me to hear both her applications with a view to making a determination on both of them.

As counsel for the fourth respondent correctly submitted, the applicant raised the issues which related to the application for consequential relief. She brought those issues to court for determination. She brought them because she was aware that there was need for consequential relief. She filed an answering affidavit in respect of those issues when the respondents addressed the same in their opposing affidavits. She, therefore, joined issues with the respondents when she adverted to them in her answering affidavit. The issues for determination were crystalized when the *litis contestatio* stage was reached by the parties.

The issues which the applicant brought to court in her application for consequential relief cannot just disappear into thin air. They must, therefore, be resolved during the hearing of the main application to which they are a part. The issues have been raised and have been responded to. They cannot, therefore, be wished away. *A fortiori* when the applicant advances no reason for their withdrawal and did not apply for leave to amend the relief which she is seeking from the court.

The applicant bit more than she could chew and swallow when she applied for consequential relief. She did not have the *locus* to apply for the relief. She could only have acquired the requisite *locus* after the foreign judgment which she obtained from the Court of England and Wales had been registered with the court. She, accordingly, put the cart before the horse when she applied as she did. Her application for consequential relief cannot, therefore, stand. It suffers a still birth. It is thoroughly misplaced. It is, therefore, completely *devoid* of merit.

When the applicant applied for consequential relief, she was aware that the third and fourth respondents were not parties to the application which she filed with the High Court of Justice, the Business and Property Courts of England and Wales. Her knowledge in the mentioned regard notwithstanding, she made every effort to seek a relief which adversely affects the rights and interests of the respondents who had not been heard. She was ably legally represented when she applied as she did.

The application for consequential relief was, no doubt, contrary to the public policy of Zimbabwe. It violated the *audi alteram partem* principle in a very unpalatable manner.

The principle is a recognized rule of natural justice. It abhors the tendency in courts and all quasi-judicial bodies of sitting in judgment over matters of persons whom they have not heard. It encourages courts, tribunals, administrative authorities and such like institutions to

hear all persons before they pass judgments on them. (See s 69 of the *Constitution of Zimbabwe* (No. 20) of 2013], *Forsyth, Private International Law*, 4 ed p 431, *Pemberton v Hughes*, (1889) 1 ch 281 at 286, *Jacobson v Franchon*, 44 TLR 103].

It is indeed contrary to the public policy of any country, Zimbabwe included, for a court to pass judgment on a person whom it has not heard. The respondents were, therefore, correct when they submitted, as they did, that the application for consequential relief was contrary to the public policy of Zimbabwe. The court of England and Wales did not hear them when the applicant filed her application for invalidation of the will. Their rights and interests in the property which they purchased from the estate of the deceased could not, therefore, be adversely affected by the application for consequential relief. Those could only properly be affected when the two respondents had been heard and not before that stage as the applicant sought to do *in casu*.

Counsel for the applicant maintained the latter's position when he addressed the court on the substance of the application. He confined his submissions only to para 1 of the applicant's draft order. He did not address me on paras 2-8 of the same. He, for some unexplained reason, did not formally withdraw the remaining part of the draft order. He, in the process, gave the district impression that the position of the applicant had confused him as to what procedure he had to adopt in the prosecution of the case of the applicant.

The confusion which accompanied counsel's submissions dealt a severe blow to the case of the applicant. He could neither pick nor choose in the maze of confusion into which the applicant had entangled him. He was lost for words, so to speak. He could move neither forwards nor backwards. He had no option but to maintain a standstill position, as it were. The agony which the applicant created for him was not difficult to see. It was, however, understandable.

The application for consequential relief stood on nothing. The applicant who moved it did not have the *locus* to do so. It was, and is, therefore, a complete nullity which Lord Denning was pleased to pronounce in the celebrated case of *Mac Foy v United Africa Company Ltd* [1961] 3 All ER 1169 wherein he remarked that:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The applicant having had no *locus* to sue the respondents for consequential relief and having had no cause of action against them until her foreign judgment had been registered with the court, embarked on, what, at best, can be described as a wild goose chase. Her act in the mentioned respect was, or is, void. It is, therefore, a nullity at law. She made an effort to put something on nothing. She expected it to stay where she had put it. But because what she put was placed on nothing, it could not remain there. It had to collapse and it indeed collapsed.

The application for consequential relief which is devoid of merit cannot, therefore, stand. It is not only bad. It is incurably bad. It is, in short, fatally defective.

The application for registration of the judgment of the court was well articulated. It met all the requirements which precedent laid down for such registration. It satisfied the requirements which *Tiiso Holdings (Private) Limited v Zimbabwe Iron and Steel Company Limited*, HH 95/2010 spelt out. These are that:

- (i) the foreign court had the requisite international jurisdiction or competence according to the law of this jurisdiction.
- (ii) the judgment was not only final but had also the effect of *res judicata* according to the law of the court in which it was pronounced;
- (iii) the judgment was not obtained by fraudulent means;
- (iv) the judgment did not entail the enforcement of a penal or revenue law of the foreign state;
- (v) it was not, in the absence of the consequential relief which had been applied for, contrary to the public policy of Zimbabwe;
- (vi) the court observed the minimum procedural standards of justice in arriving at the judgment.

The applicant's statement with which I agree was that the first and second respondents whom she sued in the court were both resident in the United Kingdom and that they acquiesced to the jurisdiction of the court. Her further uncontroverted statement was that the deceased whose estate she has an eye upon had properties in the court's jurisdiction and that the will the validity of which she was challenging was allegedly deposited with the Master of the High Court of England and Wales.

The court, no doubt, had the requisite jurisdiction to hear and make a determination on the validity or otherwise of the will of the deceased. Its jurisdiction was founded on the deceased's properties which fell under the court's area of operation. The presence of the first and second respondents in the same area as well as the purported filing of the original will with

the Master of the court by the first respondent all conferred jurisdiction on the court to hear the matter of the applicant against the first and second respondents.

That the judgment which the court delivered had the effect of *res judicata* requires little, if any, debate. Evidence which the applicant led shows that the first and second respondents made an attempt to appeal the decision of the court and that they abandoned the appeal mid-stream. The stated matter, therefore, renders the judgment of the court final in nature.

The judgment of the court, read outside the application for consequential relief, is not contrary to the public policy of Zimbabwe. It is, if anything, well *in sync* with a judgment which the applicant can register with this court.

The third and fourth respondents did not put up any meaningful fight against registration of the judgment of the court. They exerted their energies as well as time on the application for consequential relief which the applicant filed together with the application for registration of the judgment of the court.

The position which the respondents took of the matter is understandable. *A fortiori* when the applicant sought to adversely affect their rights and interests in the properties which they purchased from the estate of the deceased when they had not been heard. It is only to the stated extent, and no further, that it can be asserted that the judgment of the court, if it had been registered in its original form, would have been contrary to the public policy of Zimbabwe. Absent the stated matter, the judgment of the court is not in conflict with the public policy of Zimbabwe. It is, therefore, capable of being registered in line with para 1 of the applicant's draft order.

On a clear analysis of the circumstances of this case, therefore, I remain satisfied that the applicant proved her case, on a balance of probability, with regard to the registration of the judgment of the court. I am satisfied further that she failed to prove her case in respect of her application for consequential relief. In the result:

- (a) the application for registration of the judgment of the court succeeds – and
- (b) the application for consequential relief fails. It is, therefore, struck off the roll.
- (c) each party shall meet its own costs.

Mtewa & Nyambirai, applicant's legal practitioners
Sawyer & Mkushi, 3rd respondent's legal practitioners
Hove & Associates, 4th respondent's legal practitioners