FARAI NIGEL CHITSINDE
and
NYASHA AMANDA CHITSINDE
versus
STANNY MUSA
and
THE REGISTRAR OF DEEDS
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE,14 September 2010 & 15 December 2010

Mr *T.M. Kanengoni,* for the applicants
Mr *E.T. Moyo,* for the first respondent

MTSHIYA J: In this application the relief sought is as follows:

"It is ordered that:

1. The applicants be and are hereby restored to full occupation of Stand Number 57 Borrowdale Township 6 of Lot 7b of Borrowdale, also known as number 9 Hunt Road Borrowdale within five (5) days of granting of this order.

2. The first respondent shall make transfer of Stand Number 57 Borrowdale Township 6 of Lot 7b of Borrowdale, also known as number 9 Hunt Road Borrowdale, into the Applicant's names within five (5) days of the granting of this order failing which the Deputy Sheriff be and is hereby empowered to sign all relevant documents in effecting the transfer.

3. The first respondent shall bear the costs of this application"

The dispute *in casu* revolves around a property known as Stand Number 57 Borrowdale Township 6 of lot 7b of Borrowdale, also known as number 9 Hunt Road, Borrowdale (the property). The property belongs to the first respondent. In September 2004 the first respondent indicated a desire to dispose of the property. A Mr Oliver Chitsinde, "father and natural guardian" of both applicants expressed an interest to buy the property in the names of the

applicants who were minors. The offer to purchase the property resulted in a transaction involving three agreements. The agreements quoted three different prices, namely $572 million, $400 million and $320 million (ie Zimbabwe dollars). The agreements were all signed on the same day i.e. 8 September 2004. It later turned out that the reason for three agreements was to enable the first respondent to reduce his liability in respect of Capital Gains Tax.

On 16 September 2005 the first respondent, through court application HC 4673/05, sought to cancel the sale agreement alleging breach by the applicants. On 28 May 2008 and as a result of that court application, this court ruled in favour of the first respondent and issued the following order.

> "1. It is declared that the sale agreement between the applicant and the respondents for the purchase and sale of stand 57 Borrowdale Township 6 of Lot 7B of Borrowdale Estate is null and void.
>
> 2. Consequent upon the declaration in para 1 above, first and second respondents and all those claiming occupation through them shall vacate the property within thirty (30) days of the date of this order.
>
> 3. There will be no order as to costs"

The applicants were duly evicted from the properly on the basis of the above order. The above order was, however, challenged by the applicants in the Supreme Court. On 26 May 2009 the Supreme Court issued the following order:

> "It is ordered that:-
>
> 1. By consent the appeal be and is hereby allowed.
> 2. The order of the Court *a quo* is amended by the deletion of para 2, with para 3 of the order becoming para 2.
>
> 3. The costs of this appeal shall be borne by the respondent"

The deletion by the Supreme Court of para 2 of the High Court order had the effect of denying the first respondent the power to evict the applicants from the property.

Prior to the finalization of the appeal in the Supreme Court the applicants had 'managed to interdict the first respondent from alienating or encumbering the property in anyway'.

The papers before me indicate that the confirmed final relief following the interdict referred to above was to the effect that the agreement of sale earlier entered into by the first respondent with a third party for the transfer of the property to that third party was cancelled. The property therefore still belongs to the first respondent and hence the relief sought herein against him.

In support of this application, the applicants contend that "where one can sever the illegal part of a transaction or agreement and retain the legal part of the agreement, capable of being put into full effect without recourse to the illegal portion, the legal portion shall be upheld and enforced and the illegal part declared void." This reasoning is borne out of the fact that in her ruling in HC 4673/05 GOWORA J, specifically declared that the agreement indicating a purchase price of $320 million fell foul of the law because it was intended to avoid paying the correct Capital Gains Tax. The agreement was therefore pronounced turpious and could not be enforced. The applicants do not dispute that position of the law but argue that the original contract involving a purchase price of $572 million had the correct/authentic market value of the property, which value had already been paid to the first respondent. The applicants argue further that the contract containing that price was not tainted with any illegality and could therefore be separated from the contract that came for determination before GOWORA J. The Judge, they argue, only made a pronouncement on the illegal contract (i.e. the contract with a purchase price of $320 million). The other two contracts, which include the one with a purchase price of $572, million, they argue, were never brought to court for determination.

The first respondent on his part raises a point *in limine*. He submits that the matter is *res judicata* i.e a final and definitive judgment has already been made on the merits by a competent court. That is in reference to the judgment of GOWORA J.

Indeed if one were to make a finding that the matter is *res judicata,* that would dispose of it. My mandate to deal with the matter would have come to an end. That is so because I am not sitting as an appeal court. A lot of issues were raised in this matter but if I came to the conclusion that the matter is indeed *res judicata*, then all the other issues raised would automatically fall away.

In response to the issue of *res judicata*, the applicants, in their heads of argument, correctly state that:-

"The basic requisites for establishing *res judicata* are that:

- a matter between the same parties;
- in respect of the same issues as are now sought to be brought before the court;
- was brought before a court of competent jurisdiction;
- which court made its determination on that issue"

My reading of the papers before me leads me to the conclusion that the above stated requisites regarding the principle of *res judicata* are all present in this matter.

It is true that initially the cancellation of the contract bearing a price of $320 million is what was placed before GOWORA J. However, in determining the validity of that contract the turpious nature of the whole transaction surfaced before the judge. That certainly brought into focus the other two contracts which were part of the turpious transaction. A holistic reading, as opposed to a selective reading of the judgment of GOWORA J, clearly confirms that there was a single turpious transaction meant to be executed through three separate contracts signed on the same day for the purchase of the property. The use of three contracts was meant to enable the first respondent to illegally evade payment of the correct Capital Gains Tax. Hence in her judgment GOWORA J, observed as follows:-

> "In my view the applicant did not take the court into his confidence and state the true state of affairs from the outset. Had the respondents not produced the other two agreements the applicant would have carried on insisting that there had been breach on the part of the purchasers and seeking cancellation of the agreement on the basis of such alleged breach. Fortune has smiled on the applicant in the guise of the respondents who decided to come clean and reveal that there was more than one agreement signed by the parties and that the purpose for the multiple agreements was to enable the applicant to pay reduced capital gains tax. It is accepted by both parties that the structuring of the sale into three agreements was meant to evade the payment of proper dues to Zimra in respect of Capital Gains Tax. In addition upon transfer the property, is subject to stamp duty which is levied based on the value of the property which is the consideration for which the property has changed hands. The three agreements signed by the parties would also have resulted in less duty being paid on the property as a result of the fictitious price being quoted as the consideration paid for the sale of the property. It is this agreement by

the parties that has caused their agreement to fall foul of the law. The Stamp Duties Act [*Cap 23:09*] provides in s 44 thereof:

> 'Every contract, agreement or undertaking made for the purpose of evading defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to precluding objection or enquiry relative to the due stamping of any instrument shall be void'

The contention that the contract is void is made by the applicant. Having introduced the existence of two other agreements, it is difficult for the respondents to argue that the contract is not illegal and made for purposes of avoiding the proper stamping of the transfer of the property. I say this for the following reason. Section 23 of the Stamp Duties Act provides that the value on which duty shall be payable shall be the amount of consideration payable by the person who has acquired the property, or if no consideration is payable, the declared value of the property. It is not in dispute that the actual amount payable by the purchasers was $570 million. Regrettably that was not the amount on which stamp duty was calculated. The lesser amount of $420 million was found to be convenient by the parties. Clearly the agreement for the lesser amount was calculated to avoid the due payment of stamp duties due under the sale. For that reason the agreement is void as provided for in the Act. It is therefore not capable of enforcement and the application that it be cancelled is not therefore well-founded for one cancel something that does not exist. It will therefore be in order to issue a declaratur in terms of the amendment sought by counsel to the draft at the hearing the matter" (my own underlining).

Notwithstanding the precise declaration that the contract with the lowest amount was void and that the actual amount payable by the purchasers was $572 million, the multiple agreements were meant to illegally avoid the payment of the correct Capital Gains Tax. This, as the judge observed, was a single transaction for the purchase of the first respondent's property.

Given the judgment in HC 4673/05, which I have deliberately quoted at length herein, I do not see how the applicants could ever be allowed to benefit from one part of an illegal transaction.

I am satisfied that the status of the entire transaction was determined in HC 4673/05. Accordingly my finding is that the matter is *res judicata*. The applicants are therefore estopped from being heard on the same issues by this court.

In Amler's Precedents of Pleadings (5th edition 1999) it is stated at page 355:

> "A party to previous litigation is not only prevented from disputing the correctness of a judgment in the sense that he may not again rely upon the same cause of action, but he is also prevented from disputing an issue decided by the previous court. The rule is that where the decision set up as *res judicata* necessarily involved a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms"

On the basis of the foregoing, this application cannot succeed. I therefore order as follows:

The application be and in hereby dismissed with costs.

Chikumbirike & Associates, applicants' legal practitioners
C. Nhemwa & Associates, respondent's legal practitioners