

THE TRUSTEES OF THE LACEROSE TRUST
and
LACEROSE INVESTMENT (PRIVATE) LIMITED
versus
ZIMCOR TRUSTEES (PRIVATE) LIMITED
and
FRANK BUYANGA
and
TENDAI MUPFURUTSA
and
RUTENDO MUPFURUTSA
and
JACQUELINE MUPFURUTSA
and
TENDAI ROCK-JUDD MUPFURUTSA
and
PATSON SITHOLE
and
THE REGISTRAR OF DEEDS
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 21 September 2012 and 21 August 2013

OPPOSED MATTER.

T.Mpofu, for the applicants
D.Ochieng, for the respondents.

MAKONI J: The applicants seek an order cancelling the first to seventh respondents' title in immovable properties mentioned hereunder and the reinstatement of the second applicant's title in the properties. The properties in issue are:

- (a) Stand number 90 Glen Lorne Township 8 of Lot 40A Glen Lorne

- (b) Stand number 91 Glen Lorne Township 8 of Lot 40A Glen Lorne
- (c) Stand number 92 Glen Lorne Township 8 of Lot 40A Glen Lorne.
(hereinafter referred to as the properties).

The background to the matter is that prior to May 2007 the properties were owned by the second applicant. Ownership of the second applicant was vested in the first applicant (The Trust) administered by trustees Michael Robert McNaught, John Pybus and Gona Burmeister on behalf of its beneficiaries. The directors of the first applicant are Sandra Jean Humphreys and John D. Histin Humphreys (Sandra and John). On 24 May 2007 the trustees and the beneficiaries of the Trust on one side, and the third respondent on the other side entered into and signed a Cession and Assignment Agreement (Cession Agreement). The Trustees ceded the Trust to the third respondent for a consideration of two hundred and forty thousand United States dollars (\$240 000.00) (consideration). In terms of clauses 3, 4 and 6 of the Cession Agreement the full consideration should have been paid by the 15 September 2007 on which date all the benefits arising from the Trust's assets, second applicant and the properties inclusive, would accrue to the third respondent. In turn, delivery of all Trust documents inclusive of

- (i) company documents relating to second applicant
- (ii) all the title deed, in respect of the properties,
- (iii) Trustees' resolution approving the cession and assignment of all interest and obligation in and to the Trust
- (iv) Resolution appointing the third respondent or his nominee as a Trustee or Trustees to the Trust.
- (v) Letters of resignation by all Directors secretaries and public officers of the second applicant and Trustees of the Trust would be delivered to the third respondent upon payment of the full consideration.

Third respondent breached the Cession Agreement by failing to make payments in terms of clause 3 of the agreement. He also refused to sign a re-negotiated agreement revising the payment conditions.

In the result the Trust documents were not delivered to the third respondent. Consequently, no formalities were made transferring ownership of the Trust and its assets to third respondent.

Sometime in May 2008, second applicant instructed its accountants and secretaries Combined Accounting Services, (CAS) to perform a routine inspection of second applicant's company documents at the offices of the ninth respondent. They discovered that the third respondent had, on 25 June 2007 filed a fraudulent CR 14 in respect of second applicant, in terms of which him together with third, fourth and fifth respondents were listed as directors of the company replacing Sandra and John. The CR 2 was not changed. The third respondent was listed as the company secretary replacing Sandra. The appointments were done without the knowledge and or consent of the second applicant.

Further investigations revealed that the third respondent had pledged the properties to first respondent to secure a personal debt and using the fraudulent CR 14 and fraudulent company resolutions had purportedly represented the second applicant in the transfer of the properties from second applicant to first respondent. One of the properties, stand number 90 Glen Lorne was further transferred from the first respondent to the seventh respondent. To facilitate the transfers, the third respondent fraudulently uplifted caveats registered against the properties.

The applicants then instituted these proceedings seeking the cancellation of title in respect of the properties in first and seventh respondents' names and restoring such title to the second applicant. The application was opposed by the first and second respondents and the seventh respondent. The third, fourth, fifth, sixth, eighth and ninth respondents did not file any papers in opposition.

The first and second respondents did not file Heads of Argument neither did they appear on the day of hearing. The third to sixth respondent and the eighth and the ninth respondent did again not appear on the day of hearing.

The third to sixth respondents and eighth and ninth respondent are therefore barred in terms of R 233 (3) for failing to file notices of opposition and opposing affidavits. The first and second respondents are also barred in terms of R 238 (2) for

failing to file Heads of Argument within the stipulated time. The absence of the first to sixth respondent means there is no opposition in respect of the claim for the cancellation of the title deed, in respect of stands number 91 and 92. I will therefore proceed to grant para(s) 1, 2, 4, 5 and 9. Paragraphs 7 and 8 will be granted as far as they related to stand number 91 and 92. This leaves me with the issue of stand number 90 registered in the name of the seventh respondent.

The seventh respondent in his opposing affidavit opposes the application on the basis of two main grounds. He avers that he has no knowledge of the fraudulent transfers and denies any participation in any fraud. He is a bona fide purchaser.

It was contended on behalf of the applicants that the transfers from the second applicant to the third respondent were fraudulently done and are therefore void *ab initio*. The second applicant was entitled to vindicate its properties from wherever they were (innocent purchasers). It was further contended that estoppel, as pleaded by the seventh respondent does not arise. The acts done by the third respondent were not lawful in that he disposed of the whole undertaking of the second applicant (without a resolution from the shareholders) in contravening of s 183 (1) (b) of the Companies Act [*Cap 24:03*] and further the transfer to first respondent was void as the cause was a pledge.

It was contended, on behalf of the seventh respondent, in his Heads of argument and in submissions that the applicants did not adduce evidence that satisfactorily excludes third respondent's authority to represent the second applicant in the 1st transfer. There is therefore no basis for impeaching the transfer. The seventh respondent acquired the property innocently and for value. It was further contended that the inaction on the part of the applicant from the time they uncovered the fraud to the time they filed the present proceedings estops them from denying third respondent's authority to effect the transfers. It was further contended that ownership of the property lawfully passed to the seventh respondent. The applicants are restricted to pursuing a personal claim against the third respondent.

The circumstances, giving rise to the transfers as outlined by the applicants in their founding papers have not been controverted due to the absence of first to sixth respondent. These are that the third respondent did not perform in accordance with the

agreed terms of the Cession and Assignment agreement. As a consequence the Cession Agreement was canceled and no cession of rights, title, benefits, interests and obligations attached to the second applicant took place. The third respondent did not have any rights to the immovable properties at the time he transferred same to first respondent.

The absence of the first to sixth respondents put the seventh respondent in a difficult situation. He cannot stave off the allegations that the first transfer to the first respondent was void. Therefore no rights derive from that transfer and in turn the transfer to him.

However the seventh respondent advanced argument that the third respondent had authority to act on behalf of the second applicant and that by their inaction the applicants are estopped from pursuing a vindicatory claim. The records at the registrar of companies reflected the third respondent as a director. The mandatory statutory returns to the Registrar of Companies serve as notice to the world of the facts they contain. The applicant's own papers suggest that they co-operated with the third respondent in relation to the CR14. The applicants handed over the entire secretarial file to third respondent. Thereafter third respondent changed the company documents. It should therefore be held, on a balance of probabilities that there was no want of authority on the part of the third respondent in effecting the first transfer.

It was further submitted that it took the applicants four years to file the present application after uncovering the fraud. This supports the inference that the applicant's co-operated with the third respondent but it is also such as estops them from denying his authority to effect the first transfer.

Most of the facts relied upon by the seventh respondent for the above submissions were not canvassed in his opposing affidavit. They are alluded to in the Heads of Arguments and in submissions. The applicant was not given an opportunity to deal with them in the answering papers. However the point made by the applicants remain which is that what is not disputed in affidavits is taken to be admitted, ie the fact that the third respondent did not have any rights to pass transfer to first respondent and that he did not have authority to represent the second applicant.

The other point raised by the applicant is whether, even if third respondent was a director, he could lawfully do what he did, in view of the provisions of s 183 (1) (b) of the Companies Act [*Cap 24:03*].

“S 183 provides

(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in several meeting

(a) -----

(b) To dispose of the undertaking of the company or the whole or greater part of the assets of the company.”

Paragraph 16 and 17 of the founding affidavit makes it clear that the second applicant only owned the properties in issue. They are the whole undertaking of the second applicant and a director could not dispose of them without a resolution of the shareholders. Therefore even assuming the third respondent had authority, he could not dispose of the 3 properties.

It appears the seventh respondent, in his argument, abandoned the issue of a *bona fide* purchaser. This might have been for two reasons. The first one is that the seventh respondent would have conceded that the third respondent fraudulently effected the transfers. This would have been in contradiction to his argument regarding the authority of the third respondent. Secondly it might have been the fact that the law is settled. Vindication of immovable property is allowed where the transfer would have no power to pass transfer. Authority for this can be found in *Mngadi N.O v Ntuli and Ors* 1981 (3) SA 478.

In that case an executor whose appointment was held to be void had passed transfer to immovable properties belonging to the estate. It was held that the ownership of the properties remained vested in the estate of the deceased. It held further that, therefore, as a *bona fide* possessor could not by virtue of that fact alone withhold the possession of the property from the owner thereof, and as no additional factors such as a right of retention, a contractual right to possession or an estoppel which would entitle the second and third respondents to retain possession of the property had been raised, that, no valid transfer having taken place, the applicant’s right of ownership had to prevail and

that she was entitled to the relief sought by her despite the manifest hardships which would probably result to the second and third respondents. See also *Glatthear v Hussan* 1912 TPD 322 at p 327.

The author Silberberg and Schoemans *The Law of property* 3rd edition at p 75 makes the same point in the following words:-

“A thief cannot acquire ownership or any other real right (except a jus possessions) in the things which he had stolen and since nobody can acquire ownership in stolen goods, a third party can never acquire ownership/or other real right in property that has been obtained by fraud.” My emphasis.

What Lord DENING said in *Macfoy v United Africa Co. Limited* (1961) 3 A/D ER 1169 at p 11721 as quoted with approval in *Minister of Lands v Mkushi* 1988 (1) ZLR 209, sums it all up.

“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. 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 seventh respondent finds himself in the same position as the respondents in the *Mngadi* case *supra*. The second applicant’s right of vindication must succeed despite the hardships that the seventh respondent will face, A Silberberg *supra* puts it at p 218

“an owner who has been deprived of his property against his will is (unless he is estopped) entitled to vindicate it from any person who is in possession of it.”

I will therefore make the following order.

It is ordered that:

1. Deed of Transfer (Reg No. 1555/2009) dated the 12th of March registered in the name of Zimcor Trustees (Private) Limited, 1st Respondent, in respect of Stand No. Stand 91 Glen Lorne, Township 8 of Lot 40A Glen Lorne measuring 1,3464 hectares be and is hereby cancelled in terms of section 8 (1) of Deeds Registry Act [*Cap 20:05*]
2. Deed of Transfer (Re No. 1556/2009) dated the 12th of March 2009 registered in the name of Zimcor Trustees (Private) Limited, 1st Respondent, in respect of

- Stand No. Stand 92 Glen Lorne, Township 8 of Lot 40A Glen Lorne measuring 1,6363 hectares be and is hereby cancelled in terms of section 8 (1) of Deeds Registry [chapter 20:05]
3. Deed of Transfer Reg. No 3777/2009) dated the 7th of September 2000 registered in the name of Patson Sithole, 7th Respondent, in respect of Stand No. Stand 92 Glen Lorne, Township 8 of Lot 40A Glen Lorne measuring 1,6363 hectares be and is hereby cancelled in terms of section 8 (1) of Deeds Registry [chapter 20:05]
 4. Deed of Transfer Register No. 9154/2006 dated the 29th of December 2006 registered in the name of Lacerose Investments (Private) Limited, 2nd Applicant, Stand No. Stand 9 Glen Lorne, Township 8 of Lot 40A Glen Lorne measuring, 1,3464 hectares be and is hereby revived in terms of section 8(2) (a) of the Deeds Registry Act [Chapter 20:05]
 5. Deed of Transfer Register No. 9140/2006 dated 29th of December 2006 registered in the name of Lacerose Investments (Private) Limited, 2nd Applicant, Stand No. 92 Glen Lorne, Township 8 of Lot 40A Glen Lorne measuring 1,6363 hectares be and is hereby revived in terms of section 8 (1) of Deeds Registry [chapter 20:05]
 6. Deed of Transfer Register No. 9153/2006 dated 29th of December 2006 registered in the name of Lacerose Investments (Private) Limited, 2nd Applicant, , in respect of Stand No. Stand 92 Glen Lorne, Township 8 of Lot 40A Glen Lorne measuring 1,6363 hectares be and is hereby revived in terms of section 8 (1) of Deeds Registry [chapter 20:05]
 7. The Registrar of Deeds, 8th Respondent, be and is hereby ordered and authorized to attend to the cancellation of Deed of Transfer Nos. 1554/2009; 1555/2009; and 1556/2009 and the revival of Deed of Transfer Nos. 9140/2006; 9153/2006; and 9154/2006 in the name of Applicant and to make the appropriate endorsements on the relevant deeds and entries in the registers in terms of section 8(2) (b) of the Deeds Registry Act (Chapter 20:05]
 8. 8th Respondent be and is hereby empowered and ordered to do all acts necessary to reinstate the Applicant as the lawful owner of Stand No. 90 Glen Lorne

- Township 8 of Lot 40A Glen Lorne Measuring 1,3348; Stand No. 91 Glen Lorne Township 8 of Lot 40A Glen Lorne measuring 1,3464 hectares; and Stand No. 92 Glen Lorne Township 8 of Lot 40A Glen Lorne measuring 1,6363 hectares.
9. The Registrar of Companies, 9th Respondent, is hereby empowered and ordered to do all such acts necessary to reinstate John Dillistin Humphreys and Sandra Jean Humphreys as the Directors of Lacerose Investments (Private) Limited and Sandra Jean Humphreys as the Company Secretary of Lacerose Investments (Private) Limited.
 10. That all the costs of the Applicant be paid by Respondents save 8th and 9th Respondents on a legal practitioner/client scale jointly and severally, the one paying the others being absolved.

Linda Chipato Legal Practitioners, applicants' Legal Practitioners.
Coghlan, Welsh & Guest, respondents' Legal Practitioners