MA LORD THOTOANE MAKAYA
versus
FATIMA GWANDE
and
ANGELLA MARIVADZE
and
THE SHERIFF OF ZIMBABWE
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS NO

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 and 31, December 2014

Urgent Chamber Application

Ms *H.M. Makonese*, for the applicant
M. Mandikumba, for the respondents

MANGOTA J: The applicant and the first respondent are co-owners of a property known as Stand 349 Greencroft Township 8 of Subdivision A of subdivisions A and B of Mabelreign [the property]. The property is situated at number 14 Cavendish Road, Greencroft, Harare.

On 1 October, 2014 the first respondent obtained an order from this court against the applicant. The order which was granted in applicant's default stipulated that:

(i) the property had to be evaluated by an independent evaluator whom the fourth respondent, *in casu*, had to appoint;

(ii) the evaluator was to be appointed within fourteen(14) days which were calculated from the date of the order;

(iii) after conclusion of the evaluation, the property was to <u>be sold by private treaty</u> to best advantage and the net proceeds of the sale were to be shared equally between the applicant and the first respondent;

(iv) the applicant was to sign all documents and to do all acts which were necessary for the transfer of the property to the purchaser;

(v) where the applicant, for one reason or the other, failed to sign the documents which the court made reference to in paragraph (iv), the third respondent would act in her place and stead in that mentioned regard;

(vi) the fifth respondent should approve as well as register the property into the name of the purchaser upon presentation to him of the necessary documents in their proper form,

(vii) the applicant and all persons who were claiming right of occupation through her vacate the property within seven (7) days of service upon them of the order - and

(viii) where they failed to vacate within the stipulated period of time, the third respondent would evict them from the property without any notice to them.

The abovementioned order clothed the first respondent with the authority to:

(a) evict one Tumayi Makaya from the property - and

(b) sell the property to the second respondent. The two respondents concluded the sale agreement on 14 November, 2014.

The sale of the property prompted the applicant to file the present application on an urgent basis. She stated that, as a 50% share owner of the property, she stood to be prejudiced in a material way by the conduct of the respondents, the first respondent in particular. She said the first respondent disposed of the property without her input, knowledge and/ or consent. It was her testimony that she stood to be prejudiced of her share of the purchase price of the property because the first respondent did not request from her banking details into which she would deposit her share of the proceeds of the sale. It was her apprehension that there was no prospect that the first respondent would transmit into her account what belonged to her. It was her concern that the first respondent flouted the terms of the order which the court granted to her on 1 October, 2014. She informed the court that she applied for rescission of judgement under case number HC 9637/14 and her prospects of the order being rescinded were high. She, accordingly, prayed the court to:

(a) stay transfer of the property into the second respondent's names pending finalisation of the rescission application which she filed with the court;

(b) stay valuation of the property and sale of the same by Maxima Properties until final determination of the matter in HC 9637/14;

(c) interdict the third respondent from signing any documents in her place without proof of her refusal to sign the same;

(d) interdict the first and second respondents from effecting any further renovations on the property until the rescission application has been heard and concluded – and

(e) interdict the legal practitioners of the first respondent from disbursing the money which the second respondent deposited into their trust account as purchase price for the property pending the hearing and finalisation of the rescission application.

The first respondent raised a stiff opposition to the application. The second, fourth and fifth respondents did not appear in person or through legal representation. They did not file any papers with the court. Their attitude to the application gave the court the distinct impression that they will abide by whatever decision the court will reach of the matter. The second respondent filed his report in which he made an effort to explain to the court and the applicant that his conduct in so far as it related to the order of 1 October, 2014 was lawful and, therefore, above board.

The issue which calls for determination is whether or not the present application in urgent and, if it is, the second issue is whether or not the applicant treated the matter which she brought before the court with the urgency which such matter deserves.

Evidence filed of record showed that the applicant was aware of the court order of 1 October, 214 on 10 October, 2014. She filed her application for rescission of judgement on 31 October, 2014. She did nothing further in relation to the matter for the entire month of November, 2014 and only filed the present application with the court on 16 December, 2014. The fact that the applicant allowed the matter to remain unattended from 10 to 31 October, and from 1 November, to 15 December, 2014 speaks volumes of her carefree attitude to what she said she held and still holds dearly to herself. It cannot be said, under the stated circumstances, the present application is urgent.

The applicant attached to her application the agreement of sale which the first and the second respondent concluded on 14 November, 2014. She marked it Annexure E. A perusal of the annexure shows that the applicant did not sign the agreement as one of the sellers of the property. The third respondent signed it in her place and stead. It is this signature by the

third respondent against which the applicant complained and stated that the first respondent flouted the order of this court of 1 October, 2014.

The terms of the order were clear and unambiguous. They gave the third respondent the authority to sign the agreement of sale in the applicant's place and stead in the event that the latter failed to sign the documents which pertained to the transfer of the property from the sellers' names into the names of the purchaser. The first respondent's assertion is, therefore, correct when she stated, as she did, that the applicant's application for rescission gave her the impression that she would not sign the documents for transfer of the property into the purchaser's names. By filing an application for rescission of the order, there is no doubt that the applicant was taking issue with the order as a whole. She could not, therefore, have signed the documents to effect transfer of the property into the name(s) of the purchaser. There was, under the mentioned set of matters, no flouting of the court order at all.

Clause (b), *in casu* clause (iii), of the order of 1 October 2014 authorised the sellers of the property to sell the same by private treaty to best advantage. The order, it is evident, did not envisage a situation where one party who co-owns the property with the other would buy out the other party as the applicant submitted. The court ordered that the property be sold by private treaty to the parties' best advantage.

Even if it is accepted that the applicant was desirous of having the property disposed of in the manner which she suggested, the reality of the matter is that she did not communicate her stated position to the first respondent. There is no evidence filed of record showing that she made an effort to reach out to the first respondent with the mentioned proposal. The first respondent had, therefore, no way of knowing what the applicant's intentions on the issue which pertained to an amicable disposal of the property were. The applicant became aware of the court order of 1 October, 2014 on 10 October, 2014 and she said nothing to the first respondent on the matter until the time that she filed the present application with the court.

The court finds it hard, if not impossible, to accept the position that the applicant made any effort to protect her interests in the property. She was ably legally represented at every stage of this case. She, for reasons which are known to herself, did not apply for stay of execution when the order of 1 October, 2014 was drawn to her attention on 10 October, 2014. It was within her rights to apply for rescission of the court order as well as for a stay of execution of the order pending finalisation of the rescission application.

The return of service which the third respondent attached to his report showed that the court order of 10 October, 2014 was served upon the applicant's representative Tumai Makaya, on 7 October, 2014. The representative deposed to the applicant's founding affidavit. He did so in terms of a special power of attorney which he attached to the application as Annexure A. He stated that the applicant authorised him to act in her place and stead as well as to sign all necessary documents including the founding affidavit. The special power of attorney, it is noted, relates to case number HC6706/14 and not to this application which was filed under case number HC 11186/14. It reads, in part, as follows:

> " SPECIAL POWER OF ATTORNEY
>
> I, the undersigned MA-LORD THOTOANE MAKAYA
> do hereby nominate, constitute and appoint TUMAI MAKAYA with power of substitution and in my name, place and stead to appear before the abovementioned Honourable Court or wherever else may be necessary and then as my act and deed, in legal proceedings against me by FATIMA GWANDE to pay all fee of counsel and witness; to make all any payments which may be necessary and desirable for the proper conduct of the case……" [emphasis added].

It is evident from the contents of the special power of attorney that the applicant did not confer upon Tumai Makaya the power or authority to institute legal proceedings against Fatima Gwande. The specific authority which she conferred on Tumai Makaya was for the latter to defend, as opposed to instituting, any proceedings which the first respondent may institute against the applicant.

It is trite that a special power of attorney is specific and does not depend on interpretations which the one, or the other, party may want to place upon it. *Wikipedia, the free encyclopedia*, discusses the nature and extent of this power of attorney in the following words:

> "A special power of attorney is one that is limited to a specified act or type of act."

Carrie Ferland, eHow Contributor clarifies the meaning of this type of power of attorney when they state:

> "a special or limited power of attorney restricts the agent's authority to one function. A special power of attorney may focus on financial, medical or business affairs, but a principal can expand the power as needed to fit his or her needs.
> Through a special power of attorney, the agent has the ability to act on the principal's behalf for the purposes defined by the power of attorney agreement….."

Investopedia explains "Special Power of Attorney" in the following words:

> "Unlike the broader general power of attorney, a special power of attorney gives the agent authority to act on the principal's behalf, but only under certain specified circumstances" [emphasis added]

The first respondent submitted, correctly so, that Tumai Makaya, as agent of the applicant, did not and does not, have *locus standi* to institute the present application against the first respondent and other respondents. The mandate which the applicant conferred upon him was or is to defend any action which the first respondent brings against the applicant. The situation might well have been different if the contents of the power of attorney read "…. legal proceedings between me and Fatima Gwande" or "…. in legal proceedings instituted by me against Fatima Gwande".

In casu Tumai Makaya acted *ultra vires* the mandate which his principal who is the applicant conferred upon him.

The above observed matter has the effect of rendering the entire application a nullity. The application has no leg on which it is standing. The applicant's dilatoriness was or is the author of her downfall. There was nothing which prevented her from granting to her agent a special power of attorney which was specific to this application. That matter coupled with the fact that she waited from 1 November to 15 December, 2014 to file the present application leaves the court in no doubt that the applicant did not treat her case with the urgency which it deserves.

Urgency which the rules of court contemplate beckons all the parties who are affected by it to put aside all what they are doing, or want to pursue, and attend to the same without any further ado. It, in nature, stresses that the matter cannot wait and, if it is allowed to wait, harm or prejudice of a substantial nature would result. Where a party waits for forty-five days running, as is the case *in casu*, and only jumps to its feet at the eleventh hour in an effort to assert what it says are its rights which are under an apparent threat, the court will find it hard, if not impossible, to take that party into its confidence.

There are a number of issues which the first respondent raised in her opposition to the application. Whilst those issues appeared to carry some substance, the court made up its mind not to delve into those for the simple reason that the basis upon which the application was founded had given way and there was, therefore, no need on the part of the court to, as it were, flog a dead horse, if a comparison may be favoured.

The court has considered all the circumstances of this case. It is satisfied that the applicant failed to establish, on a balance of probabilities, its case against the respondents. The application is, accordingly, dismissed with costs.

Mugwadi & Associates, applicant's legal practitioners
Chigwanda Legal Practitioners, 1st respondent's legal practitioners