

STENHOP INVESTMENTS (PVT) LTD
16 FEBRUARY 2008
versus
BLESSING MUKOKO
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 1 February 2018 & 14 March 2018

Opposed Application

F R. S Fashi, for the applicant
C Nhemwa, for the respondent
No appearance for the 2nd respondent

DUBE J: The applicant seeks an order for placement of a caveat on a property. On 30 May 2003, the applicant entered into a trade agreement with a company known as Mukundi Plastics (Pvt) Ltd, [hereinafter referred to as the company]. The applicant offered a credit facility of \$ 120 000.00 to the company. The applicant was going to supply the company with goods. The first respondent who is a director of the company entered into a surety agreement on 30 May 2013 wherein he bound himself as a surety and co-principal debtor for repayment of all sums which the company owed from time to time to the applicant. The applicant supplied the company with products worth \$166 478.78. The first respondent pledged title deeds of stand being Stand Number 217, The Grange, and Harare, as security for the debt on 6 June 2013. The company failed to pay the debt and is now under liquidation having been initially placed under judicial management on 14 February 2014. The applicant issued summons

against the first respondent on 26 May 2017 claiming the money owed under HC 4704/17 and the matter is still pending.

The applicant submitted that it is entitled to seek payment of the debt from the first respondent since he bound himself as surety and co-principal debtor. It fears that the immovable property offered as security for the debt may be disposed of by the first respondent before an action pending against the first respondent has been determined. He seeks an order for placement of a caveat over the property. The applicant's case is that the caveat would serve to protect its interests since it has an interest in the property.

The second respondent was cited in his official capacity as an official responsible for effecting transfer of immovable property. He is not defending the application. The first respondent defends the placement of the caveat on the property. He submitted that the claim against the principal debtor has prescribed and that the liability is no longer due. He contended that when summons was issued on 26 May 2017, the debt had already prescribed. He took issue with the fact that the applicant did not deal with the issue of prescription in its answering affidavit, only to do so in its heads of argument. He submitted that the applicant has deliberately avoided pursuing the principal debtor first and that it has not been shown that the principal debtor is unable to pay the debt. He contended that the applicant ought to have pursued the principal debtor first and has not shown good reason for placement of a caveat on the property of a surety ahead of the principal debtor.

The respondent also submitted that the application is improperly before the court because of the non-joiner of Olivia Mukoko, the holder of an undivided half share in the property. He challenges the validity of a letter he wrote surrendering title deeds for the property as security or credit guarantee because of the absence of consent of the co-owner and contends that the caveat will deprive the co-owner of her rights over the property. He challenges the pledge of the title deeds on the basis that one cannot pledge immovable property. He also took issue with the fact that the order sought seeks to place a caveat on the entire property instead of only his 50 % share of the property. He argued that the applicant's fears are baseless as no facts have been placed before the court showing that the owners of the property intend and have made attempts to dispose of the property. He contended that the sale of the property by him is not possible as the

original title deeds are in the applicant's possession. He urged the court to decline to grant an order for placement of a caveat on the property.

The central issue is whether the application for a caveat is properly before the court. If the answer is in the negative, the matter ends there. If the answer is in the affirmative, the court will proceed to determine whether the applicant has shown good cause for placement of a caveat over the property.

The question of prescription was raised for the first time in the respondent's opposing papers. The respondent simply states in paragraph 6 of its answering affidavit that its claim has not prescribed and gives no further details. It then deals extensively with the issue in its heads of argument. One cannot expect the applicant to have dealt with the question of prescription in its founding affidavit before the issue was raised by its opponent. The fact of an inadequate response has a bearing on the merits of the preliminary point.

The applicant was required to bring proceedings against the respondent within 3 years after the cause of action arose as envisaged by the Prescription Act, [*Chapter 8:11*]. The trade agreement states that the debt was due 30 days from the date of delivery of the products. The trade agreement was entered into for the period 13 May 2013 up to 31 May 2014. Summons was issued on 24 May 2017. The date when the trade agreement was entered into is not the date when the cause of action arose. The cause of action would have arisen 30 days from the date of delivery of the goods when payment became due. The dates of delivery of the goods sold are not known and hence it is difficult to ascertain the date when the cause of action arose. The date when prescription began to run is therefore not known. The raising of the issue was misplaced. The issue of prescription is not for these proceedings and is best left to be fully ventilated in the pending summons matter. I am satisfied that the action against the respondent is still pending.

It is not disputed that the respondent is a surety and co- principal debtor to the company debt. *Christie's Law of Contract in South Africa, 7th Ed*, p 150 defines a suretyship and says the following of a surety's liability,

"Suretyship is an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor) that the principal debtor, who remains bound will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, the surety will perform it, or, failing that, indemnify the creditor."

Put differently, a creditor is entitled to pursue a surety and co-principal debtor where the principal debtor has failed to meet its obligations to the creditor. A creditor cannot pursue the surety first before he pursues the principal debtor. The applicant is required to show that the company has failed to pay the debt in order for it to be able to pursue the respondent who stood surety for the debt. The company was placed under judicial management. This was on the understanding that it was unable to pay its own debts which include the debt owed to the applicant. The applicant averred in its answering affidavit that the company failed to meet its obligations and that proceeds realized from the liquidation failed to set off the creditor's claims. It is clear that the company has not been able to pay its debts. A company that has been placed under judicial management is a company that is unable to pay its own debts. The company is at law deemed incapable of paying its own debts. Once a company is placed under judicial management, a creditor is entitled to pursue the surety for the recovery of the company's debts. The applicant has decided to pursue the respondent for the recovery of the debt and has shown good reason for pursuing the surety ahead of the principal debtor.

Order 13 r 87 provides for non-joinder of parties and reads as follows,

“87. Misjoinder or non-joinder of parties

(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter”

Whilst Olivia Mukoko has an interest in the property concerned, she has not been joined to these proceedings. The court is entitled, in terms of r 87, to determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. The non-joinder of the co-owner to the proceedings is not fatal. I am satisfied that the application is properly before the court.

The term ‘caveat’ is a Latin term which means ‘let a person beware’ It is a notice or warning that is registered over a property by a person who claims to have some interest in the property concerned. The purpose of a caveat is to preserve and protect the rights of a person who seeks to have a caveat placed on a property, known as a caveator. The effect of a caveat on a property is that the property cannot be sold or disposed of without giving effect to the caveator's interest. Once a caveat is placed over a property, the said property cannot be transferred, mortgaged or disposed of without the caveator's consent. No further dealings over the property

are allowed unless the caveator consents to the upliftment of the caveat, it lapses, is cancelled, withdrawn or removed. Any person who deals with the property does so at his own risk. The law does not permit a person to lodge a caveat over another's property without good cause. An applicant who applies to place a caveat over a property must show that he has an interest in the property concerned. The interest claimed must exist at the time the caveat is lodged and should not be an interest that arises in the future. The caveator must show that his claim arises from some dealing with the registered property. It is only those interests that are connected to the land that can be subject of a caveat. The interest must attach to the property, thus, a person seeking to place a caveat over a property is required to show that he has a caveatable interest to lodge the caveat. A caveator does not have to show that the other party is about to dispose of the property. The applicant has to show that he has a matter pending that concerns the property. The moment that the pending matter is determined, the caveat lapses by operation of law. The caveat cannot continue in perpetuity. The interest claimed by the caveator may be challenged by the owner of the property. It is the duty of the court to determine the validity and correctness of the application for a caveat.

In *Silberberg and Schoeman's The Law of Property 5 Ed* p 13 the authors state as follows with regards the interest of co-owner in a property,

“Every co-owner has the right freely without reference to co-owners to alienate his or her share, or even part of his or her share..... It is this right which is probably the most important characteristic which distinguishes a co-owner *per ser* from other forms of co-ownership such as partnerships and associates. It is clear that the exercise of this right may lead to friction in that it enables one co-owner to force the others into a legal relationship with a party or parties which do not desire. “See *Linda Mudawadzuri v Kingdom Bank*. HH 95/15”

In the *Mudawadzuri case*, the court endorsed the sale of a half share of a debtor's property without the consent of a co-owner. These authorities are authority for the proposition that a co-owner can alienate his undivided share in an immovable property without the consent or reference to the other co-owner. This is so as far as he does not seek to dispose of rights belonging to the other co-owner. The effect of this is that the co-owner is thrust into a relationship with persons he does not know and a relationship he does not know. I see no reason why this proposition should not apply equally to a person who wishes to place a caveat on a property that is co-owned in circumstances where the co-owner had no dealings or a relationship

with the co-owner's creditor. A caveat is a temporary measure to secure another's interest in a property. It has no effect of disposing of the rights of a co-owner. The co-owner stands to suffer no actual prejudice as he still retains his rights and interest in his share of the property. The caveat will not deprive a co-owner of his rights as his share will not be alienated. This is specially so where the other co-owner, who owes the debt, has no present interest in disposing of the property. There is no bar to the caveat being placed over the entire property. The law does not hinder an applicant from registering a caveat over the entire property including a co-owner's half share. I find therefore that it is permissible to place a caveat on a property belonging to a co-owner.

A pledge involves the surrender of a property as security for the fulfillment of a contract or payment of a debt. The thing given may be liable to forfeiture in the event of the debtor failing to meet its obligations. Only property capable of delivery as in movables is capable of being pledged. Documents of title to property may be pledged. A pledge of title deeds of a property is as effective as a pledge of any other thing. A lender who has a pledge, may enforce his security following a default. The pledge of the title deeds is documented in the credit security guarantee document. A closer look at the credit security guarantee document reveals that the respondent lodged the title deeds of the property as security for payment for goods supplied to the respondent. The pledge of the title deeds was properly made. There was no legal requirement on the part of the respondent to seek the consent of the co-owner of the property before the pledge was made. If a co-owner can sell his half share in a property without the consent of a co-owner, it follows that a co-owner is capable of pledging his own half share of the property without the consent of a co-owner.

By seeking to enforce the pledge the applicant seeks to make the security perfecta. In *PG Industries Zimbabwe Ltd v Jonas Holdings (Pvt) Ltd* HH 336/15 the court said the following about protection of a party's rights.

“A party who wants to secure protection against claims by third parties to the collateral must secure their interest. For a creditor to have maximum legal rights, the security agreement must not only be created but that it must be perfected. The parties must intend that the security of interest be created by the agreement in question. But a security agreement will not create security of interests unless it is perfected. Perfection can generally be through possession depending on the nature of the collateral or execution of specific documents. Once such security is created and perfected then it is enforceable against third parties.”

This case emphasizes the need to secure protection against claims by third parties where a creditor has a security agreement which he must perfect. Perfection, relates to steps that a creditor may take in relation to a security interest to make it effective against third parties in the event of default by a debtor. A caveat is one such mode of protecting an individual's interest in a property. Once a caveat is placed on a property, it has the effect of security protection against claims by third parties.

Turning to the facts of this case, the applicant has demonstrated that he has a direct interest in the property. He holds title deeds of the property that were pledged over the debt as security. The pledge gives the applicant an interest in the property which is connected to the property. He has a pending matter where the dispute between the parties will be resolved. The caveat will not have the effect of depriving the co-owner of her rights over the property. The effect of the caveat is not to dispose of the property but simply to afford protection to the caveator by securing the property. The applicant is entitled to place a caveat over the entire property. An applicant applying for a caveat does not have to show that the property is about to be disposed of. The applicant has shown that he has a caveatable interest in the property concerned. He is entitled to the order sought.

In the result it is ordered as follows;

1. The application for placement of a caveat on a certain piece of land being stand 217, The Grange, Harare held under deed of transfer number 5244/96 measuring 4000 square metres be and is hereby granted.
2. The second respondent be and is hereby directed to register a caveat on the property referred to in paragraph 1 above within 48 hours of receipt of this order.
3. The first respondent be and is hereby ordered to pay the costs of this application.

Nyamapfene Law Practice, applicant's legal practitioners
C Nhemwa and Associates, respondent's legal practitioners