

AD MEDICAL SUPPLIERS (PRIVATE) LIMITED
and
ALLOWCAN INVESTMENTS (PRIVATE) LIMITED
and
TIGER DISTRIBUTION (PRIVATE) LIMITED
and
FLEMMAD INVESTMENTS (PRIVATE) LIMITED
versus
GORDON ALEXANDER MURRAY
and
STANDARD CHARTERED BANK OF ZIMBABWE
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 14 and 20 February & 9 October 2023

Special Case

Mr *S Kachere*, for the plaintiffs
Adv *T T G Musarurwa*, for the defendants

CHINAMORA J:

Factual background

On 8 November in 2016, the plaintiffs instituted proceedings in this court against the first to third defendants. The bone of contention between the parties was a property known as Lot 2 Block MM Ardbennie Township, measuring 1,8577 hectares (“the property”). When this matter first came before me, the parties agreed that it proceeds as a stated case in terms of Rule 52 of the High Court Rules. The statement of agreed facts filed by the parties is quite voluminous, but what can be gleaned from it is the following:

1. On 6 November 1954, Lot 2 Block MM Ardbennie Township, measuring 1,8577 hectares was registered in favour of under Deed of Transfer Number 4031/54 in favour of Lazarus Moses Joseph. The same property was transferred to Fidelity Life Assurance of Zimbabwe (Pvt) Ltd (“FLAZ”) on 22 November 1990, under Deed of Transfer Number 415/90.

2. Subsequently, in November 2001, a notarial deed creating eight (8) undivided shares of 12.5% of 1.8577 hectares, with an exclusive right of occupation over the property, were registered under MA 1610/2001. Then, on 22 May 2002, FLAZ listed the proposed purchasers of the 8 units/shares as follows:
 - a) Unit 1 - Motor Parts Distributors (Pvt) Ltd, represented by Vincent Patrick Kamoto.
 - b) Unit 2 - Gordon Alexander Murray (“first defendant”)
 - c) Units 3, 7 and 8 - Island Distributors, represented by Margret Anne Flemming (“Flemming”)
 - d) Unit 4 - Investments (Pvt) Ltd (“fourth plaintiff”, represented by Flemming
 - e) Unit 5 - Felix Dzumbunu
 - f) Unit 6 - Maxwell Pedzisayi Mugabe.
3. In June 2002, Flemming requested that Units 3, 4, 7 and 8 be transferred to the fourth plaintiff. The purchasers in subdivisions held under MA 1610/2001 discussed the sale of the undeveloped portions of the property to the first defendant, in order to create a ninth unit. This newly-created unit would be transferred to the first defendant. In return, the first defendant would make cash adjustments to the other purchasers. Additionally, the first defendant would transfer his property (Unit 2) to the fourth plaintiff. On 19 July 2002, Island Distributors agreed that units 3, 4, 7 and 8 be registered in favour of the fourth plaintiff.
4. Subsequently, on 25 August 2006, the first defendant and the fourth plaintiff entered into an agreement of sale, which regularized their swop transaction. In an affidavit signed in 2017, Flemming confirmed a sale of shares agreement with the first defendant. In addition, she stated that the first defendant had breached the payment terms of the agreement. One Liju Kamjirakattu purchased Lot 3 and 4 from the fourth plaintiff, and obtained transfer. In 2014, the plaintiffs wrote to the Department of Urban Planning inquiring on the feasibility of the proposed subdivision, since it seemed impossible due to the location of ZESA substation and other buildings on the property. AD Medicals then followed up on notarial deed M1610/2001 in the registrar of Deed’s office and this was never found. This led to proceedings being instituted seeking the cancellation of the deed in favor of the first defendant.

The parties agreed that the issues for determination by the court are as follows:

1. Whether the title deed registered in the first defendant's name under Deed of Transfer Number 7853/2008 is valid.
2. Whether the plaintiffs are entitled to the order they are seeking, namely, cancellation of Deed of Transfer No 7853/2008 in favour of the first defendant, Gordon Alexander Murray of stand 1772 Ardbennie Township of Ardbennie, measuring 1,1298 hectares.

The plaintiffs' case is that the first defendant fraudulently obtained title to the property under deed of transfer number 7858/2008. The plaintiffs aver that this fraudulent title deed was obtained after the first defendant had misrepresented to the Registrar of Deeds that he had purchased the property from the fourth plaintiff. The plaintiffs maintain that they did not authorize the transfer to the first defendant. In fact, they insist that they still own the property, and ask the court to cancel the disputed deed of transfer. In his defence, the first defendant argues that he bought the property and the owners of the property authorized the subdivision of the property which allowed him to obtain the title he has. Let me now examine the law which is relevant to the resolution of the dispute before me.

The applicable law

The law which regulates ownership of immovable property is settled in this jurisdiction, and presents little difficulty. Once property is registered in the Deeds Registry, the title deed is *prima facie* proof that a person enjoys real rights over the immovable property defined in the deed. In this respect, the Supreme Court asserted the law in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). At 105H-106A, MCNALLY JA had this to say:

“The registration of rights in immovable property in terms of the Deeds and Registries Act [*Chapter 139*] (now [*Chapter 20:05*]) is not a mere form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

In this respect, in the case of *Fryes (Pvt) Ltd v Ries* 1957 (3) SA 575 at 582, the court asserted the law thus:

“Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully challenge the right of ownership against a particular person whose right is duly and properly registered in the Deeds Office.” [My own emphasis]

Where a registered deed needs to be cancelled, the relevant governing provision is section 8 of the Deeds Registries Act [*Chapter 20:05*], which provides as follows:

“8. Registered deeds not to be cancelled except upon order of court

(1) Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of court”.

Clearly, this provision emphatically states that cancellation of title deeds can only be done through a court order. It is for this reason that I move to examine if the plaintiffs have made a proper case to warrant the setting aside of the title deed.

Analysis of the case

The plaintiffs’ cause of action is grounded in fraud, namely, that the first defendant fraudulently obtained the title deed of their property. In other words, they claim that the first defendant obtained the deed through fraudulent representations to the Registrar of Deeds. Their argument is that, even though the first defendant contends that Ms Fleming transferred the property in dispute into his name, that is not what is reflected by title deed No. 7853/2008. Their contention of the plaintiffs is that the deed bears the name of Fidelity Life Assurance Zimbabwe as the transferor of rights. The argument continues that FLAZ is not Fleming or someone authorized by Flemming. In addition, the plaintiffs state that, at that particular time FLAZ had transferred the property to Fleming and, therefore, FLAZ could not transfer rights that it no longer had in the property. Another argument by the plaintiffs is that Ms Fleming could subdivide a property that was not hers, since at the time of the subdivision it had not been sold to her. This to me seems as though the Plaintiff is now blowing hot or cold and goes against the principle of approbating and reprobating. It is a settled principle of

law that one cannot approbate and reprobate at the same time. Put differently, the plaintiff cannot take two contrary positions on the same issue. (See *S v Marutsi* 1990 (2) ZLR; *Vromolimnos and Anor v Weichbold and Anor* 1991 (2) SA 456 (SCA) para 20)

I now proceed to ascertain if the title deed was fraudulently obtained by the first defendant. Undoubtedly, the plaintiffs are making the allegation of fraud by the first respondent. It is settled law that he who alleges must prove and, in this regard, in *Astra Industries Limited v Chamburuka* SC 258-11 OMERJEE AJA stated that:

‘The position is now settled in our law that in civil proceedings a party who make a positive allegation bears the burden to prove such allegation’. The applicant did not prove the grounds or advance any evidence to prove its case. In my view there is nothing before this court that warrants an award of damages”.

The plaintiffs’ argument is that it is a fact that the representation made to the Registrar of Deeds that FLAZ was the owner of the property, and that representation induced the Registrar to register title in the name of the first defendant. The cause of action being founded in fraud, it is worth understanding what is meant by “cause of action”. In this respect, it has been stated time and again that a cause of action consists of all the facts that must be pleaded in order to establish the relief that is sought by that party. In *Patel v Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86C-E GUBBAY J (as he then was) stated that:

"In *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J, in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:

"The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.) **[My own emphasis]**.

The same point was reinstated in *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 54E-F, when the concept “cause of action” was defined by MALABA J (as he then was) to mean:

“Simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”.

See also, *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637.

In the context of this case, the plaintiffs have to establish the requirements for fraud in order to obtain the relief that they are seeking. In his book “*Theory and Principles of Pleading in Civil Actions*” 1 Beck states that: “where fraud is relied on, the circumstances which reveal the fraud must be set out. It is not sufficient merely to allege that a transaction, which in the ordinary way would be a proper one, was fraudulent.”

Still on the requirements for fraud, clarity was given in the case of *SPF and Anor v EBCCT/ALB and Anor* 2016 ZAGPPHC 378, LEQODI J stated as follows:

“A party wishing to rely on fraud must not only plead it, but also prove it clearly and distinctly. The onus is the ordinary civil onus bearing in mind that fraud is not easily inferred. The essential elements for a claim or defence based on fraud are the following: (a) There must be a representation by the other party or by that party’s agent. In the present case, K who represented the plaintiffs during the negotiations. [*Feinstein v Niggli* 1981 (2) SA 684 (A)]. Representation may consist of non-disclosure [*Stainer v Palmer – Pilgrim* 1982 (4) SA 205 (0)]; (b) It must be alleged that the fraud or misrepresentation was false and or intentional or negligent [*Rato Flour Mills (Pty) Ltd v Moriates* 1957 (3) AII SA 28 (T)]; (c) It must be alleged and proved that the representation induced the representative or innocent party to act [*Bill Harvey Investments Trust (Pty) Ltd v Oranjezicht Citrus Estate (Pty) Ltd* 1958 (2) AII SA 12 (A), 1958 (1) SA 479 (A)]; (d) If damages are claimed, it must be alleged that the representee suffered damages as a result of the fraud [*Truth and Reconciliation Commission v Mplumalanga* 2001 (3) AII SA 58 (CK)]”.

In *casu*, the facts do not show that there was a representation made by the first respondent, and that the applicants relied on it to their detriment. It is essential that, the applicant’s cause of action being based on fraud, they should prove that they were induced to act by any act of fraud on the part of the first respondent. I am inclined to accept the explanation given by Counsel for the first defendant that, while it is correct that FLAZ had sold the property, there still remained a portion of land that had not been alienated, hence, that property belonged to FLAZ, which was at liberty to dispose of it. I observe that the registered legal title in the office of the Registrar remained with FLAZ. Consequently, FLAZ had the requisite authority to act as it did. Having come to this conclusion, the important question resolved by this finding is that, there was no misrepresentation if FLAZ owned the un-apportioned piece of land. In other words, FLAZ acted lawfully. In my view. None of the requirements for fraud have been met. It is clear from the papers that Fleming’s letter set out her wishes and she does not dispute this letter. The transfer was facilitated by FLAZ and not the first respondent. The failure to demonstrate that any alleged misrepresentation was made by the first respondent seals the applicants’ case. Accordingly, I am not inclined to grant the

relief that the applicants seek. In the exercise of my discretion, costs will be awarded on the ordinary scale.

Disposition

In the result, the order that I grant is that the plaintiff's claim is dismissed with costs.

Kachere Legal Practitioners, plaintiffs' legal practitioners
Chizengeya Maeresa & Chikumba, first defendant's legal practitioner