

REPORTABLE (11)

FANUEL MWAYERA
v
(1) MOLLY CHIVIZHE (2) STANLEY CHIVIZHE (3) THE
REGISTRAR OF DEEDS (4) GILBERT JONGA

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & HLATSHWAYO JA
HARARE, NOVEMBER 1 2013

T Mpofo, for the appellant

L Uriri, for the 4th respondent

No appearance for the 1st, 2nd & 3rd respondents

GOWORA JA: After reading papers filed of record and hearing counsel in this matter we allowed the appeal and issued an order as prayed for. We indicated that our detailed reasons would follow in due course. These are they.

The appellant is the registered owner of an immovable property known as Stand 671 Borrowdale Town of Sub division 4 of Lot D of Borrowdale Estate. On 30 May 2001, the appellant concluded a written agreement with the first and second respondents in terms of which he sold the said property to them. The said respondents failed to pay the purchase price as stipulated in the agreement and as a consequence the appellant cancelled the sale through his legal practitioners.

Subsequent to this, on 25 July 2001, the appellant concluded an agreement of sale with the fourth respondent in respect of the same property. The fourth respondent duly made payments in cash and also furnished the appellant with several cheques. Upon becoming aware of the developments between the appellant and the fourth respondent, the first and the second respondents approached the High Court on a certificate of urgency and in default of the appellant, obtained a provisional order interdicting transfer of the property to the fourth respondent. The fourth respondent was not cited as a party in the High Court proceedings. The provisional order was subsequently confirmed.

The appellant became aware of the order confirming the provisional order and filed an application for rescission of the judgment, which rescission was granted. Thereafter, he filed a notice of opposition and opposing affidavit to the provisional order granted in favour of the first and the second respondents. In due course, the fourth respondent got wind of the litigation and filed an application for his joinder to the litigation which was granted. He then filed his opposing papers to the application filed by the first and the second respondents.

In the meantime, alleging that some of the cheques tendered in payment of the purchase price by the fourth respondent had been unpaid and returned by the former's bankers upon presentation, the appellant cancelled the agreement on the basis that the fourth respondent was in breach of his obligations under the agreement of sale.

The first and the second respondents took no further interest in the matter thereafter. In July 2006 the fourth respondent filed heads of argument in respect of the confirmation of the provisional order obtained by the first and second respondents for the interdict against transfer of the stand by the appellant to himself. Simultaneously with the

heads of argument the fourth respondent served a notice of set down upon the appellant. Upon receipt of the notice of set down the appellant filed an application to have the automatic bar operating against him uplifted in order to enable him to file his own heads of argument. The application was opposed by the fourth respondent. In the opposing affidavit attached to his notice of opposition, the fourth respondent made reference to a counter-application for an order for specific performance against the appellant. A draft order comprising the relief sought was attached to the opposing affidavit.

The application by the appellant for the upliftment of the bar having been granted, the High Court proceeded to hear the application filed by the first and the second respondents for an interdict. The first and the second respondents who were the applicants in the applications were not before the court and the provisional order granted in their favour was discharged. The court then proceeded to deal with the counter-application and an order for specific performance was granted in favour of the fourth respondent. This appeal is directed at that order.

The first issue I deal with is whether or not the counter-application was properly before the court *a quo*.

Although the appellant did not raise this as one of his grounds of appeal, in his address, Mr *Mpofu* on behalf of the appellant, submitted that this was a point of law which is not dependent on facts for its resolution and which goes to the root of the matter. He referred to *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) as authority for this proposition. At p 157A-B this Court stated:

“Provided it is not one which is required by a definitive law to be specifically pleaded, a point of law, which goes to the root of the matter, may be raised at any time on

appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.”

In his heads of argument, Mr *Uriri* for the fourth respondent countered that the raising of the alleged defect of the counter-application at this stage of the proceedings was prejudicial to the fourth respondent. Before us however, this aspect of the argument was not persisted with, and it was clear that counsel was content to have the issue argued and determined for reasons that appear hereunder.

As submitted by counsel for both parties, this was the first time for such an issue to come before this Court. Whilst the appellant argued that the counter-application was fatally defective for want of form, the fourth respondent submitted that this Court should not allow form to prevail over substance, and the application should be found to have been properly brought before the court *a quo*.

The rules of the High Court provide for the filing of counter-applications in r 229A which provides:

“229A. Counter-applications

- (1) Where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents, a counter-application against the applicant in the form, *mutatis mutandis*, of a court application or a chamber application, whichever is appropriate.
- (2) This Order shall apply, *mutatis mutandis*, to a counter-application under subrule (1) as though it were a court application or a chamber application, as the case may be, and subject to subrule (3) and (4), it shall be dealt with at the same time as the principal application unless the court or a judge orders otherwise.
- (3) If, in any application in which the respondent files a counter-application under subrule (1), the application is stayed, discontinued or dismissed, the counter-application may nevertheless be proceeded with.
- (4) The court or a judge may for good cause shown order an application and a counter-application filed under sub rule (1) to be heard separately.”

A number of applications were filed before the court *a quo* but for purposes of resolution of this appeal the only pertinent ones are the following, viz; HC 8068/01, HC 10464/02, HC 5426/02 and HC 192/02. The first is the urgent application filed by the first and the second respondent for an interdict against transfer of the property to the fourth respondent. The second is the application for rescission of judgment filed by the appellant. The third relates to the application for joinder brought by the fourth respondent with the last being filed by the appellant for the uplifting of an automatic bar for failure to file heads of argument relating to the application for an interdict. It is to this last mentioned application that the fourth respondent incorporated a counter-application in the notice of opposition.

A counter-application must take the form of a court application and must be in Form 29. There was no such court application filed by the fourth respondent. Instead what was filed was an affidavit. Again, contrary to the rules of court the affidavit was not in proper form. The fourth respondent filed an opposing affidavit in which reference was made to a counter-application. It was to this affidavit that a draft order was attached. The rule is clear and unambiguous. It is also peremptory in its terms and must be complied with to the letter. In *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101(H), **HLATSWAYO J** (as he then was) stated:

“Rule 230 of the High Court of Zimbabwe Rules, RGN 1047/1971 as amended prescribes in mandatory terms that a court application shall be made in Form No. 29 or where it is *ex parte*, in Form No. 29B, which latter form is generally used for chamber applications. It is common cause that the form used by the applicant for rescission of judgment is neither of the above stated forms, that is, it is in neither the court application form nor the chamber application form nor the hybrid *ex parte* court application form.

Now, Rule 4C gives the court or judge discretion to condone departures from the rules, while Rule 229C deals with a specific form of departure, viz, proceeding by way of court instead of chamber application and vice versa.

.....

Lest an impression be formed that this is a sterile dispute about forms, I have deemed it necessary to outline in a summary way what each of the two forms contains, on the one hand, and the unique features of the format used by the applicant, on the other. In Form 29 the applicant gives notice to the respondents that he or she intends to apply to the High Court for an Order in terms of an annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he or she so wishes, to file papers in opposition in a specified manner and within a specified time limit, failing which the respondent is warned that the application would be dealt with as an unopposed application. In Form 29B, an application is made for an order in terms of an annexed draft on grounds that are set out in summary as the basis of the application and affidavits and documents are tendered in support of the application. By contrast, the unique format used by the applicant consists of a heading: "Application for Rescission of Judgment" and the following terse statement: "Take notice that the Applicant, Zimbabwe Open University, hereby applies for Rescission of Judgment. The annexed affidavit is used in support thereof."

.....

Can this substantial departure from the rules be condoned under r4C? Rule 4C states as follows:

"The court or judge may, in relation to any particular case before it or him, as the case may be-

- (a) Direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
- (b) Give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

"In **Simross Vintners (Pvt) Ltd v Vermeulen, VRG Africa (Pvt) Ltd v Walters T/A Trend Litho, Consolidated Credit Corporation (Pvt) Ltd v Van der Westhuizen 1978 (1) SA 779**, (T), the applicants, in three applications for compulsory sequestration, had used the notice of motion prescribed in Form 2 of the South African Uniform Rules of Court, which was a form appropriate to *ex parte* applications. The applicant in the first application had not served the notice on the respondent, but the applicants in the other two applications had so served the notices on the respondents. It was held that in the first application the use of the Form 2 was perfectly in order as the application was brought *ex parte*. However, as to the other two applications, it was held that as they were not brought *ex parte*, the notices of motion used in these applications (i.e., the Form 2 notice) were nullities and their use could not be condoned and the applications had to be struck off the roll."

I respectfully associate myself with the comments of the learned judge above. Rule 230 espouses a peremptory norm and must be complied with. A failure to comply with the rule cannot be condoned in the absence of compliance by a litigant with any form of application. The undisputed fact is that the fourth respondent never filed any application in any form. The counter-application was, as a consequence, a non-event. The draft order attached to the opposing affidavit could not create something that never was. Consequently no relief could ensue from the same.

In addition to the above, the application for the upliftment of the bar was of a procedural nature. The relief sought therein was not substantive and was aimed at the first and second respondents principally as the applicants to the prayer for the interdict. The heads of argument were to be filed in relation to a claim for an interdict sought by the first and second respondents. The fourth respondent was seeking the same relief as the appellant; that is the discharge of the provisional order. A counter-application is one which seeks relief that is counter to the one sought in the main. In the matter before the High Court the counter-application did not seek to counter the prayer for the up-liftment of the bar. It follows therefore that it would be impermissible to file a counter-application which seeks substantive relief when the main application is for relief of a procedural nature. There was therefore no proper counter-application before the court *a quo*.

Additionally, the relief sought therein was in respect of an application in which the applicants were the first and second respondents. That said it begs the question

how the fourth respondent could logically seek relief from a counter-application against a litigant who was cited as a respondent in the said proceedings.

The obvious defects adverted to above should dispose of the dispute as the appeal is aimed at an order that is based on proceedings that in essence are a nullity. A determination of the appeal on a technical basis may not serve the interests of the parties to the dispute surrounding the purchase of the immovable property. This is because the court *a quo* proceeded to deal with the substance of the application and made findings of fact as to the parties' respective rights and obligations under the agreement of sale. It seems to me in the circumstances necessary to delve into the merits as set out in the pleadings filed of record.

As to the merits of the appeal, the first issue for consideration is whether or not the court erred in granting specific performance in respect of a cancelled contract without a prayer for the setting aside of such cancellation. It is trite that cancellation is a unilateral act which takes effect as at the time of its communication to the other party to the contract. It requires no concurrence from the party receiving notification of the same. The effect of the cancellation was to put an end to the primary obligations between the parties. Primary obligations are those related to the performances due by the respective parties under the contract. In the instant case, once the contract was terminated by the appellant, the entitlement to specific performance by the fourth respondent terminated. In order to obtain specific performance under the cancelled contract, it behoved the fourth respondent to first seek an order setting aside the cancellation as a basis for the order prayed for. This he failed to do. The court in effect gave relief under an agreement that was no longer in existence for the performance of bilateral obligations.

The appellant has also attacked the judgment on the basis that the learned judge in the court *a quo* granted an order for specific performance in favour of a litigant who was a party in a synallagmatic contract under circumstances where such party had himself not pre-stated. The position of the law governing such contracts was stated by **PATEL J** (as he then was) to be:

“It is a fundamental premise of every contract that both parties will duly carry out their respective obligations. See *Green v Lutz* 1966 RLR 633; *ESE Financial Services (Pty) Ltd v Cramer* 1975(2)SA 805(C) at 808-809. As is explained by Christie; *Business Law in Zimbabwe* at pp 106 & 119;

‘There is a presumption that in every bilateral or synallagmatic contract, i.e. one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations.....Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach....’¹

It was contended on behalf of the appellant that the live issue for determination was whether the fourth respondent had paid the appellant’s creditors in accordance with the terms of the contract of sale. It was argued that the court *a quo* erred in resolving the dispute on an erroneous acceptance by the appellant in other proceedings to the effect that payment in respect of the purchase price for the immovable property had been made in full.

It is fair to state that the papers filed in the court *a quo* by both parties are the cause of the confusion which bedevilled the learned judge who had to deal with this matter. Due to the multiplicity of actions and the extended period over which such actions were dealt with the parties thereto had to make statements on oath as to their respective positions. For this reason in seeking to defeat the application by the first and the second respondents for an interdict against transfer to the fourth respondent, the appellant stated that having cancelled

¹ *Blumo Trading (Pvt) Ltd v Nelmah Milling Co (Pvt) Ltd & Anor* 2011 (1) ZLR 196 at 201F-H

his agreement with them he had concluded another with the fourth respondent whom he said had fully complied with his obligations under the second agreement. The affidavit in question was deposed to on 6 November 2002. On 16 October 2008, the appellant, in the affidavit in support of his application for the upliftment of the automatic bar, averred that the fourth respondent had furnished him with cheques which were returned unpaid by his bankers.

A statement produced by the appellant tends to show that a cheque in the sum of Z\$2 697 236.53 deposited into the appellant's account with Intermarket Building Society on three occasions was returned unpaid each time. The amount in question was never credited to the appellant's account.

Although the court *a quo* found as a fact that a cheque in the said sum was presented and paid on 14 December 2001, the statement from the appellant which was not challenged by the fourth respondent paints a different picture. In August 2005 Intermarket Building Society advertised the immovable property for sale in execution. In my view these two factors tend to negate the fourth respondent's claim that he had settled all of the appellant's debts and that all his cheques were met on presentation.

There exists a clear dispute of fact on the manner of payment of the purchase price on the part of the fourth respondent. Those disputes of facts are not capable of resolution on the papers and for this reason the order for specific performance in the circumstances would not be merited.

In my view the court *a quo* misdirected itself in several aspects as detailed above. In the premises the appeal has merit. It was for these reasons that the court allowed the appeal and issued the following order.

IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is hereby set aside and substituted with the following:-

“The counter-application be and is hereby struck off the roll with costs.”

GWAUNZA JA: I agree

HLATSHWAYO JA: I agree

Kantor & Immerman, appellant’s legal practitioners

Mandizha & Company, respondent’s legal practitioners