

DISTRIBUTABLE (4)

GUOXING GONG  
v  
(1) MAYOR LOGISTICS (PRIVATE) LIMITED  
(2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE  
ZIYAMBI JA, BHUNU JA & UCHENA JA  
HARARE, NOVEMBER 8, 2016 & JANUARY 30, 2017

*L Uriri*, for the appellant.

*N Maphosa*, for the first respondent

**BHUNU JA:** This is an appeal against the entire judgment of the High Court sitting at Harare which directed cancellation of Deed of Transfer Number 2541/14 issued in the name of the appellant, Guoxing GONG, with costs at the punitive scale of legal practitioner and client.

The order appealed against is couched in the following terms:

“In the result I make the following order:

1. Deed of transfer No. 2541/16 in the name of Guoxing Gong be and is hereby deemed cancelled and the Registrar of Deeds be and is hereby directed to effect such cancellation.
2. The first respondent shall surrender the said Deed of Transfer to the Registrar of Deeds within 48 hrs of service of this order to enable the registrar of deeds to endorse such cancellation.
3. The first and second respondent shall bear the costs of this application on a legal practitioner and client scale.”

There is no material dispute of facts as most facts giving rise to the legal disputes on appeal are by and large common cause. The undisputed facts are that Mathonsi Family Enterprises (Pvt) Ltd who was the second respondent in the court *a quo* is the registered owner of a certain immovable piece of property commonly known as number 9 Simon Mazorodze Road being the Remainder of Subdivision B of Delft Hopely.

Mathonsi Family Enterprises wished to subdivide and sell a portion of the property but apparently lacked the financial capacity to effect the necessary subdivision and related costs to facilitate the sale and transfer of the envisaged subdivision. Eventually it negotiated and entered into a conditional verbal agreement sometime in 2010 where the first respondent would finance the whole subdivision process, payment of capital gains tax and related costs to facilitate its purchase of the resultant subdivision. The verbal agreement culminated in Mathonsi Family Enterprises (Pvt) Ltd making the following resolution on 8 December 2010:

**“RESOLVED**

1. That the company applies for the subdivision of the property commonly known as No. 9 Simon Mazorodze being the Remainder of subdivision B of Delft of Hopely into two properties.
2. THAT Mayor Logistics (Pvt) Ltd be and is hereby authorised to provide assistance and to make all such payments as may be necessary to facilitate the subdivision, all of which will be taken into account when disposing of the subdivision to it.
3. THAT once the subdivision is approved, half or the smaller of the two subdivided portions shall be sold to Mayor Logistics (Pvt) Ltd for not more than US\$ 35 000 per acre of the prime portions and at a negotiated lower price for any swampy portions in recognition of assistance in the subdivision process.
4. THAT the payment terms be discussed with Mayor Logistics (Pvt) Ltd once the subdivision is approved.

5. THAT CLIFF Mathonsi be and is hereby authorised to sign any documents and to do all such things as may be necessary on behalf of the company to facilitate the subdivision and proposed disposal to Mayor Logistics (Pvt) Ltd.”

According to the first respondent the parties eventually settled for the price of US\$50 000.00 which is yet to be paid. The sale was however subject to a suspensive condition that it would only come into effect upon the first respondent successfully facilitating the subdivision in terms of the above resolution. It is common cause that the first respondent financed and facilitated the acquisition of the necessary sub divisional permit thereby partially fulfilling its part of the bargain.

Although a draft written agreement was prepared in terms of the verbal agreement and company resolution, Cliff refused to sign the draft on behalf of Mathonsi Family Enterprises (Pvt) Ltd claiming that his father wanted more money than previously agreed. It is plain that the verbal agreement was lawful and binding. The intended reduction of the verbal agreement to writing was a mere formality not forming part of the contractual agreement. It is trite that in the absence of any prohibition or agreement to the contrary, a verbal agreement is lawful and binding. This explains why by far the majority of contractual agreements are verbal. There is no legal requirement in our jurisdiction that every contractual agreement be reduced to writing.

Despite the verbal agreement and the 1<sup>st</sup> respondent having partially fulfilled its part of the bargain, Mathonsi Family Enterprises (Pvt) Ltd resold the disputed property at a higher price to the appellant unbeknown to the first respondent on 4 April 2011.

The above facts clearly establish beyond question that Mathonsi Family (Pvt) Ltd sold the same property twice, firstly, to the first respondent and secondly to the appellant.

The court *a quo* was therefore correct in treating the matter as a double sale dispute. There is absolutely no substance in the appellant's argument to the contrary.

A dispute having arisen and in a bid to protect and enforce its contractual rights the 1<sup>st</sup> respondent successfully sued Mathonsi Family Enterprises for specific performance in the High Court under case number HC 218/12 in which it obtained the following default order on 5 June 2012:

**“IT IS ORDERED THAT:**

1. The defendant (*Mathonsi Family Enterprises (Pvt) Ltd*) be and is hereby directed to transfer stand 102 Grobbie Township of subdivision B of Delft of Hopely to the plaintiff (*1<sup>st</sup> respondent*) against payment of US\$50 000.00.
2. Should the defendant refuse or neglect or fail to sign the documents facilitating the said transfer the Deputy Sheriff be and is hereby authorised to sign them in defendant's stead.
3. The defendant shall pay the costs of suit on an attorney and client scale.”

Counsel for the appellant Mr *Uriri* raised the point that the above default judgment was unenforceable because it has superannuated at common law through the effluxion of time as it was issued more than 3 years ago. He however later abandoned the objection conceding that superannuation was not in issue as the first respondent was not seeking execution. In view of that concession it shall not be necessary to determine that issue.

I now turn to consider the appeal on the merits.

It is trite that save in special circumstances which do not concern us here, no appeal lies to this court against a default judgment which is normally reversed by rescission of judgment or a declaration of nullity. It therefore, follows that in the absence of special

circumstances, no valid ground of appeal can be laid at the door of this court concerning the propriety or otherwise of a default judgment. Whether or not there was non-joinder or any other irregularity pertaining to the default judgment that is a complaint to be laid at the court *a quo's* door and not this court. There being no special circumstances pleaded in this case, this court will not entertain any argument calculated to impugn the validity of the default judgment at hand.

Despite the appellant's concerted efforts to have the default order reversed, the order is still extant, valid and binding. That being the case, it is not tainted by any form of illegality or impropriety. It stands on equal footing with any other lawful court order capable of enforcement at the instance of the judgment creditor.

For that reason in a concerted effort to fortify itself against illicit transfer of the disputed property, the first respondent followed up by placing caveat No. 263/12 on the property on 20 June 2012. Notwithstanding the existence of a valid court order and a caveat barring transfer of the disputed property to any third party, the appellant in apparent connivance with Mathonsi Family (Pvt) Ltd somehow deviously managed to beat both judicial and administrative safeguards and obtained transfer of the property under Deed of transfer 2541/14.

The facts show that the applicant far from being an innocent purchaser was complicit in the irregular purchase and transfer of the property to himself under deed of transfer 2541/14. It is common cause that the appellant's then legal practitioner Mr *Tavenhave* was apprised by Mr *Tsivama* counsel for the first respondent of the existence of both the court order and caveat barring transfer of the disputed property. The appellant was

equally aware of the existence of the court order as amply articulated by the learned judge in the court *a quo* at p 3 of her cyclostyled judgment where she says:

“Furthermore the facts of this matter, which have not been disputed, point to the fact that the first respondent was aware of the order in HC 218/12 when he took transfer. On 23 May 2014, Mr *Tavenhave* for the first respondent telephoned Mr *Tsivama*, for the applicant, seeking confirmation regarding the existence of the order. Mr *Tsivama* confirmed the existence of the order. Mr *Tavenhave* then informed Mr *Tsivama* that he had been approached by the 1<sup>st</sup> respondent who produced the order and was in a state of panic since he had purchased the same property from the second respondent. He went on to advise Mr *Tsivama* that he had reassured his client not to panic as he had already obtained transfer some time back. He had retorted that it was a clear case of double sale and enquired as to the applicant’s position.

On 26 May Mr *Tsivama* conducted a deeds search which confirmed that the property was still registered in the second respondent’s name and there was caveat 263/12 in place.”

From the above summation of the undisputed facts it is plain that both the appellant and its legal practitioner Mr *Tavenhave* were patently aware of the existence of both the court order and caveat barring transfer of the property in question. Despite such knowledge they connived and deviously obtained transfer of the disputed property. Procuring transfer under such circumstances can only amount to acquiring defective title which at law is a nullity and an exercise in futility.

At this juncture, it does not seem to matter to me whether or not the appellant was the first purchaser as he alleges. What is material at this stage is that he obtained defective invalid title in defiance of a valid court order and caveat. It is an established principle of our law that anything done contrary to the law is a nullity. For that reason no fault can be ascribed to the learned judge’s finding in the court *a quo* that the conduct of the appellant and his lawyer in obtaining registration of the disputed property in the face of a

court order and caveat to the contrary was reprehensible. On the basis of such finding the appeal can only fail.

The appellant and his lawyer's unbecoming and deplorable conduct in resorting to criminality in a bid to preserve their ill-gotten gains cannot go unpunished.

It is accordingly ordered that the appeal be and is hereby dismissed with costs at the legal practitioner and client scale.

**ZIYAMBI JA:**

I agree

**UCHENA JA:**

I agree

*Messrs Tavenhave & Machingauta*, the appellant's legal practitioners

*Messrs Sawyer & Mkushi*, the 1<sup>st</sup> respondent's legal practitioners

*The Registrar of Deeds*, the 2<sup>nd</sup> respondent