BRENDA RUMBIDZO NYAGUZE
versus
MISHECK GWISAI
and
JOSEPH MAPOSA
and
ZVISHAVANE TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 28 February and 31 March 2022

OPPOSED MATTER

J. Mpoperi, for the Applicant
E. Mubaiwa, for the 1st Respondent
No appearance for the 2nd and 3rd Respondents

MAXWELL J

At the hearing of this matter six points *in limine* were raised for the first Respondent. They are the subject of this judgment.

Applicant approached the Court seeking the rescission of a judgment granted by consent between the first and second Respondents on 16/2/21 directing the first Respondent to cede rights and interest in stand number 1902 Eastlea, Zvishavane to the second Respondent. The stand is also known as stand number 1902 Zvishavane Township and is registered in the name of a minor child, Joseph Tapiwa Maposa, born 7th November 2013. Applicant and second Respondent are the parents of the said minor child. Applicant stated that she was advised that second Respondent owed first Respondent some money and the minor child's proprietary rights had been used as security for the debt. And further that second Respondent had signed an Agreement of Sale on 30 November 2020 purporting to sell the minor child's property to first Respondent. Applicant also stated that the order by consent dispossessed the minor child of his property rights without

following the procedure prescribed at law. She further stated that no evidence was placed before the Court to enable it to make a determination on whether or not it is in the best interest of the minor child to have the property rights disposed of.

Applicant argued that the Agreement of Sale was a nullity therefore the order by consent based on it should be set aside

In response first Respondent raised two points *in limine* in the opposing affidavit. However, at the hearing of the matter six points were raised *in limine*. They are considered below.

1. **The answering affidavit introduces new evidence which should be struck off the record.**

Mr Mubaiwa submitted that attached to the answering affidavit is an agreement of sale which Applicant says was signed by second Respondent. He further submitted that new issues cannot be raised in an answering affidavit, particularly issues that would have enlisted a response from the Respondent. He prayed that the annexure be struck off the record. In response *Mr Mpoperi* submitted that it is not fatal that new evidence has been introduced in an answering affidavit. He submitted that the answering affidavit explained the circumstances why the agreement was not attached initially. He prayed that the Court finds the explanation reasonable and accept the agreement of sale.

Applicant states in the answering affidavit that she obtained the agreement of sale from the second Respondent on 9 March 2021. She does not say why she did not get it before filing this application, especially since she acknowledges signing the agreement on 30 November 2020.I find Applicant's explanation could only be reasonable if it was showing that the agreement could not, with reasonable diligence, have been obtained when the matter was initiated. In ***Nashe Family Trust* v *Charles Chiwara*** HH-476-18 the Court stated that the basic rule is that an application stands or falls on its founding affidavit and an answering affidavit can only respond to issues raised and not raise new ones. In the same matter reference is made to the case of ***Kaskay Properties (Pvt) Ltd* v *Minister of Lands and Rural Resettlement and others*** HH 762/18 in which **MANGOTA** J stated as follows;

> "A litigant who makes a conscious decision to sue through motion, as opposed to action, proceedings is enjoined to anticipate the respondent's defence. Having anticipated such, he must include in his founding affidavit all the evidence which supports his case including

> such evidence as will rebut the respondent's defence. Where he adopts the stated line of reasoning, the court will not find him wanting when he restates his position in the answering affidavit as he will merely be confirming what he has already told the court. A litigant in other words, should not leave material facts which support his case or rebuts the respondent's case to the answering affidavit. Where he does so, he runs the risk of the court not taking into account new evidence which he places in the answering affidavit as the respondent would not have had an opportunity to make any comments on the new evidence which he includes in the answering affidavit."

Reference was also made to the case of ***Milrite Farming (Private) Limited* v *Porusingazi and others*** HH-82/10 in which HLATSHWAYO J (as he then was) stated as follows-

> "The basic rule pertaining to application procedures is that the applicant's case stands or falls on averments made in the founding affidavit and not upon subsequent pleadings. The rational for the rule is quite clear. It is to avoid the undesirable effect of litigation assuming a snowballing character, with fresh allegations being made at every turn of pleadings. Thus, the fresh allegation contained in the answering affidavit must be ignored, leaving the same cause of action and substantially the same facts in both the first and second applications*."*

The new evidence is improperly before the Court. The first point in *limine* succeeds. Accordingly the agreement of sale marked Annexure E is struck out of the record.

2. That Applicant does not have a cause of action

Mr Mubaiwa submitted that the Applicant seeks to vindicate property purportedly held by a minor, yet a minor cannot own property. He submitted also that Annexure B, the Cession Form from Zvishavane Town Council is non-existent at law as it was signed on 3 November 2014 when the child was one year old. In response, *Mr Mpoperi* submitted that the Cession Form is valid. That the property which is the subject of the dispute was registered in the name of the minor child cannot be disputed. Annexure A, an order by consent, confirms that the immovable property known as Stand No. 1902 Eastlea, Zvishavane is in the name of the minor child. The propriety of such registration is not the issue before this Court. I find no merit in this point in *limine*.

3. That Applicant cannot found a cause of action on her own dirty actions

Applicant conceded that she was involved in the disposal of the property subject of this matter. She however stated that after she was advised that her conduct was improper, she now

seeks to protect the best interests of the child. It is trite that whenever a matter relates to a minor child, the best interest of the child is paramount. See Section 19 of the Constitution of Zimbabwe. *Mr Mubaiwa* referred to the case of ***Standard Chartered Bank Zimbabwe Limited* v *Matsika*** 1997 (2) ZLR 389 as authority that one cannot create a cause of action from his own wrong. I am of the view that that case is distinguishable. In that case, the Applicant sought to benefit from its own misdeed. *In casu,* Applicant is not the ultimate beneficiary but the minor child. I therefore find no merit in this point *in limine* as well.

4. Non-Joinder of the current holder of the rights.

First Respondent stated in his opposing affidavit that Applicant knows very well that the property is no longer in his name and she has not bothered to join the innocent third party to this suit. Applicant's response was that she came to know of the sale of the property after she had already filed the present application. The fact remains that as at the date of hearing this matter, Applicant is aware that the property in question was sold to a third party. She has not sought to join the third party in a matter in which the third party's rights will be affected. *Mr Mpoperi* conceded that joinder had not been done **but** in his view the non-joinder was not fatal as it can be ordered by court. Indeed Rule 32 (12) (b) of this Court's rules allows the Court to ; -

> "(b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party:
> Provided that no person shall be added as a plaintiff without his or her signed written consent or in such other manner as may be authorised."

On that basis I do not find the non-joinder fatal. The point in *limine* therefore fails.

5. That the application is afflicted by a multitude of falsehoods that constitute perjury.

Mr Mubaiwa submitted that Applicant did not disclose that she participated in the transaction she is challenging. He pointed out that she had given her consent to the transaction and an affidavit to that effect is filed of record as Annexure A. In his view, the Applicant is not due an indulgence by the Court in granting the relief sought on the basis that she lied. *Mr Mpoperi* submitted that first Respondent does not have the moral standing to talk of falsehoods as a thief cannot call another thief a liar.

As stated above concerning the third point *in limine*, the indulgence sought is not for the benefit of Applicant. The Court is obliged to [proceed in the interest of the minor child who is the beneficiary of the relief sought. There is no merit in this point *in limine* as well.

6. That the relief sought in paragraph 2 of the Draft Order is incompetent.

It was submitted that Applicant is seeking an order allowing her to file a notice of opposition in a matter she is not a party when she has not sought joinder. It was submitted in response that the Court has a discretion on its own initiative or upon application to correct, rescind or vary a judgement in terms of rule 449 of the High Court Rules of 1971(now rule 29 of SI 202/21). On being challenged on whether the cited rule applied to a draft order, *Mr Mpoperi* conceded that it was not applicable but referred the Court to Rule 7(b) of the new rules which gives the Court discretion to give directions in any matter not expressly provided for in the rules.

The Draft Order complained of has four paragraphs. Only one paragraph is being impugned. That paragraph is improper. However, I did not hear *Mr Mubaiwa* to say that the relief sought in the other three paragraphs is also incompetent.

CONCLUSION

First Respondent has succeeded on issues that are not dispositive of the matter. The matter will therefore be heard on the merits. Costs will be in the cause.

Saratoga Makausi Law Chambers, Applicant's Legal Practitioners
Mbidzo, Muchadehama and Makoni, 1st Respondent's Legal Practitioners
Mutendi, Mudisi and Shumba, 2nd Respondent's Legal Practitioners