

FBC BANK LIMITED
versus
REGISTRAR OF DEEDS
and
HONEYPOT INVESTMENTS (PVT) LTD
and
SUCCESS AUTO (PVT) LTD
and
DOGLAS MAKONESE
and
MERCY MAKONESE
and
KUDZAI CHIRIMA
and
MUNYARADZI MAJONI
and
PAULINA KWADZANAI MAJONI
and
CLAITOS CHIDHAKWA
and
GIRLIE KANYE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 12 & 20 July 2022.

Opposed application

Advocate T. Magwaliba for applicant.
Mr.E. Jera for 7th, 8th, 9th and 10th respondents.
No appearance for 1st, 2nd, 3rd, 4th, 5th, and 6th respondents.

CHILIMBE J

BACKGROUND

[1] Applicant seeks an order for the re-registration of mortgage bonds as well as a caveat on a piece of land described as Stand Number 80 Borrowdale Brooke Township of Subdivision H

of Borrowdale Brook Estate. This immovable property, (“Stand 80 Borrowdale Brooke”) being 5,0445 hectares in extent is held by Honeypot Investments (“Honeypot”) the second respondent hereto.

[2] The relevant facts to a rather lengthy and complex background¹ are as follows; -applicant advanced a loan of US\$300,000,00, in 2011 to second respondent Honeypot Investments. The loan was secured through two mortgage bonds 6608/10 and 2911/11 over Stand 80 of Borrowdale Brook. Fourth respondent, Douglas Makonese, who owns the entire shareholding in Honeypot, guaranteed the loan together his spouse, the fifth respondent Mercy Makonese. Third respondent, Success Auto, another entity owned by Douglas Makonese, also stood in as guarantee.

THE DEFAULT JUDGMENT, [HC 7402/13],

[3] The borrower and its guarantors defaulted on their loan obligations. Applicant successfully instituted proceedings to recover the outstanding amount under case number HC 7402/13. It obtained an order per TAKUVA J on 7 October 2013 which read as follows; -

That judgment be and is hereby entered against the 1st,2nd,3rd and 4th respondent, jointly and severally, the one paying and others being absolved, in case number HC 361/13, as follows;

1. For payment of the sum of US\$454 874-62 together with interest thereon at the rate of 35% per annum from the 1st August 2012 to date of payment.
2. For a declaration that Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5,0445 hectares in extent and held by 2nd respondent under Deed of Transfer No.6099/99 dated 30th June 1999 shall be executable, and
3. For payment of costs of suit both in respect of this matter and also in respect of case number HC 361/13 on a legal practitioner and client scale.

¹ Below are the several matters associated with this dispute whose fuller details are set out in my brother MUSITHU J’s judgment in FBC Bank v Munyaradzi Yujini Majoni and 9 Other HH 351-22.

1. HC 361/13
2. HC 2402/13
3. HC 3727/18
4. HC 3521/20 (HH 351-22)
5. HC 3860/21 (instant case)

[4] By coincidence or design, present applicant, who was the judgment debtor in HC 7402/13, purchased at the Sheriff's sale, the same property that it had successfully persuaded the court to declare specially executable. Title to Stand 80 Borrowdale Brook was thus registered in applicant's name in July 2015. It is common cause that applicant proceeded to have the mortgage bonds (which it had caused to be registered over the piece of land) cancelled following its acquisition of title. I may also state that seventh to tenth respondents contend that the proceeds of the auction sale discharged the outstanding indebtedness although applicant disputes such contention.

THE RESCISSION OF JUDGMENT HC 7402/13 BY HC 375/20]

[5] The present seventh to tenth respondent mounted an application in this court under HC 375/20 on 25 April 2015 seeking the rescission, when they became aware of it, of TAKUVA J's order of 7 October 2015 in case number HC 7402/13. The basis of their application was that HC 7402/02 had been decided in their absence despite their demonstrable interests in the matter. These applicants claimed to have purchased subdivided portions of Stand 80 Borrowdale Brook².

[6] This court, per order of NDEWERE J in HC 375/20, granted the application for rescission of judgment on 10 June 2020 in the following terms; -

Consequently, it is ordered that

1. Paragraph 2 of the order granted under case number HC 7402/13 be and is hereby rescinded.
2. The 7th respondent be and is hereby ordered to restore the 3rd respondent's title to stand 80 Borrowdale Brook Township of Subdivision H Borrowdale Brook of Borrowdale Estate as it was prior to the order of HC 7402/13, of 7 October, 2013.
3. The 1st respondent shall pay the applicant's costs of suit on an attorney and client scale.

[7] It is common cause that following this order, the Registrar of Deeds, cited herein as first respondent proceeded in terms of section 8 of the Deeds Registries Act [Chapter 20:05] and

² For purposes of the present application, the role of Kudzai Chirima the fifth respondent in the matter is not critical. But for completeness, Kudzai Chirima once held the entire shareholding in Honeypot, the entity invested with title to Stand 80 Borrowdale Brook. Kudzai disposed of his entire shareholding in Honeypot to Doglas Makonese the present fourth respondent. Yet when Kudzai sold such shareholding, he knew that several deductions had been made to Stand 80 Borrowdale Brook, so say the seventh to tenth respondents.

cancelled applicant`s title to the immovable property concerned. First respondent then re-registered title to Stand 80 Borrowdale Brook in the name of Honeypot Investments (Private) Limited, the second respondent.

[8] Applicant was displeased with this development. It contended that restoration of title ought to have been accompanied by reinstatement of mortgage bonds 6608/10 and 2911/11. These being the same mortgage bonds whose cancellation applicant had consented to after the sale in execution.

[9] It is on that basis that applicant has approached the court under the present application. The application was opposed by seventh to tenth respondents. At the commencement of the hearing, Advocate *Magwaliba* for applicant drew attention to (a) the fact that first and sixth respondents had not filed anything at all, (b) second to fifth respondents had filed defective affidavits and that (c) they had filed no heads of argument despite being represented by legal practitioners³ and (d) that first to sixth respondents were not in attendance. These state of affairs meant that only seventh to tenth respondents were properly before the court resisting the application.

[10] Applicant`s position was that it sought nothing else besides a full and proper implementation of paragraph 2 of this court`s order in HC 375/20 per NDEWERE J. Advocate *Magwaliba* for the applicant submitted that once title reverted to Honeypot by order of court, then such title had to be accompanied by the encumbrances in favour of applicant. I am of the view that despite the factual complexities and several legal issues raised on the papers and in argument, the matter can be resolved through a simple examination of the direct and residual consequences of this court`s two orders in HC 7402/13, per TAKUVA J, and in particular, 375/20 per NDEWERE J.

THE DIRECT AND RESIDUAL CONSEQUENCES OF THE ORDERS IN HC 375/20

[11] TAKUVA J`s order in HC 7402/13 consisted of three paragraphs. (See [3] above). The first paragraph ordered the present second, third, fourth, fifth and fifth respondents to pay the

³ No notices of renunciation of agency were filed by the named parties` legal practitioners of record.

principal sum outstanding to applicant plus interest. The second paragraph declared Stand 80 Borrowdale Brook executable, whilst the last paragraph in that order dealt with costs of suit. I have already set out in [4] above the developments which flowed from the issuance of this first order.

[12] It is common cause that by the time order HC 7402/13 per TAKUVA J was rescinded by the order in HC 375/20 on 10 June 2020, a number of events had taken place. Execution had long taken place, and presumably, with the sheriff's sale having been conducted, confirmed and proceeds remitted to settle (wholly or partially) the judgment creditor's indebtedness. Whatever the fate or status of the loan obligation, it is common also cause that by the time the order by NDEWERE J was handed down in HC 375/20 on 10 June 2020, applicant had consented to the cancellation of the mortgage bonds at taken title.

[13] The series of events consequent upon TAKUVA J's order are facts that were placed before the court in HC 375/20. It is therefore necessary to ask; -how did the order of NDWERE J react to, or provide for the post 7402/13 developments? Firstly case number HC 375/20 rescinded paragraph 2 of TAKUVA J's order in HC 7402/13. Paragraph 2 of HC 7402/13 is the part of that court's order which had declared Stand 80 Borrowdale Brook as executable in satisfaction of the debt due to present applicant. NDEWERE J's order reversed that aspect and did so consciously. Secondly, the court in HC 375/20 proceeded to make a definitive pronouncement regarding title to Stand 80 Borrowdale Brook.

“2. The 7th respondent be and is hereby **ordered to restore the 3rd respondent's title** to stand 80 Borrowdale Brook Township of Subdivision H Borrowdale Brook of Borrowdale Estate **as it was prior to the order of HC 7402/13**, of 7 October, 2013.” [emphasis added]

[14] Thirdly, the court left as intact, the paragraph 1 of TAKUVA J's order which confirmed with costs, the indebtedness of present second to fourth respondents. It is therefore clear that the court, in issuing its order in HC 375/20, was both deliberate and specific in its direction of what was to take place after HC 7402/13. After all, the court was seized with an application of rescission of the order in 7402/13. In the same manner that NDEWERE J did not set aside TAKUVA J's order in its entirety, the learned Judge also selectively addressed some, but not all of the issues residual to the issuance of TAKUVA J's order. It did not address as an example,

the process of execution insofar as the resultant effects were concerned. In particular 375/20 did not, pronounce itself at all on the question applicant`s mortgage bonds.

[15] Further, the court in HC 375/20 specifically ordered restoration of title in Stand 80 Borrowdale Brook to Honeypot “*as it was prior to the order of HC 7402/13.*” Advocate *Magwaliba* submitted that the words “*restore...title...as it was prior to the order...*” meant restoration of title as it was immediately before the court handed down its order in HC 7402/13. If such interpretation was adopted, it would mean that title was conditionally restored, together with the encumbrances of mortgage bonds. Mortgage bonds formed, by prescription of the law, an intrinsic aspect of title⁴. I do note however, that the court in HC 375/20 did not use the word immediately in its order.

[16] The question arises as to whether the only inference which can be drawn from the court`s order and its wording is that it meant immediately before HC 7402/13 was issued and not title as it existed at any other point in the timeline of events? I am not convinced that the “immediately” inference excludes all others in the circumstances. The following are my reasons. The court in HC 375/20 retraced the history of the matter. It examined the parties` respective conduct and events from commencement rather than just the circumstances prevailing immediately prior to the granting of the order.

[17] A reading of the court`s judgment in HC 375/20 (distributed as *Munyaradzi Yujini Majoni and 3 Others v FBC Bank and 6 Others distributed as HH 375-20*) confirms this historical analysis. The court noted as a fact, that the present seventh to tenth respondents were purchasers of portions of Stand 80 Borrowdale Brook, notwithstanding the legalities around their purchases. The court stated thus at page 11 of its judgment; -

“With all this knowledge, first respondent approached the court in HC 7402/13 by way of a chamber application. It deliberately omitted alerting the claimants on the land about the course of action it was taking despite earlier correspondence and exchange between its representatives and the first applicant. Not only did it not alert the applicants about this development; it also did

⁴ Standard Bank of South Africa Limited v Rudinger Marshall Saunderson and Two Others 2006 (2) SA 264 (SCA); Priscilla Meda v Homelink and Another HB 195-11; Electroforce Wholesalers (Pvt) Ltd and Another v FBC Bank HH 14-15.

not reveal to the court about these other persons on the land claiming to have rights on the same and it wanted declared specially executed. So the judge proceeded to grant the order sought in terms of the draft order.”

It does not appear that such views would be consistent with a court which intended to restore the borrower`s encumbrances the property.

[18] Applicant`s argument is that a reading of NDWERE J`s order must lead to one logical conclusion; - that cancellation of applicant`s title to Stand 80 Borrowdale Brook necessarily implied reinstatement of the mortgage bonds. In that respect, applicant urged the court to interpret the order of NDEWERE J in a manner that would give effect to sense and pragmatism consistent with the facts before it.

[19] In the instant case, I am faced with an order which explicitly pronounced itself on the matters disposed of by the court. That order creates no room for presumptions nor secondary interpretations. I am satisfied that the order of NDEWERE J did not address the issue of reinstatement of the mortgage bonds and that such omission was deliberate. This being an extant order of court, I am thus unable to interfere with it beyond the interpretations that I have given to it.

THE EFFECT OF AN ORDER RESCINDING A DEFAULT JUDGMENT

[20] I am further fortified in the conclusion that the order of NDEWERE J cannot be interpreted to have conferred more rights beyond those which it pronounced directly because the learned Judge issued an interlocutory order. The effect of an interlocutory order rescinding a judgment was described as follows by MATHONSI J in *Patience Mafu v Freeman Biba Ncube and Another HB 4-16* at page 5; -

“What a rescission of judgment does is to re-start the whole process of litigation by allowing, in the interim, the parties to go back and plough through the dispute on the merits in order to resolve it. It takes away the advantage given to one party in default and places both parties on par, as it were. For that reason, it is interlocutory in nature as it does not decide the rights of the parties or have the effect of disposing of the whole or a portion of the relief claimed by one of them. It is merely a procedural ruling paving the way for a determination of the dispute. See *Jesse v Chioza*

1996 (1) ZLR 341 (S) 344G; *Dobrock Holdings (Pvt) Ltd v Turner and Sons (Pvt) Ltd and another* 2008 (2) ZLR 153 (S).”

THE MORTGAGE BONDS SHOULD BE REINSTATED ON THE GROUNDS THAT THE LOAN AMOUNT REMAINS UNPAID.

[21] Counsel for applicant raised a second argument in support of the claim for re-registration of the mortgage bonds. It was argued on applicant`s behalf that the loan obligations on the part of the debtors (second to fifth respondents in the present application) remained outstanding. That indebtedness founded sufficient basis for the court to order a reinstatement of the mortgage bonds. This position represents a clear shift from the position pleaded in the papers. Applicant did not unequivocally declare, in the founding affidavit, that it required the re-registration of the mortgage bonds because the loan obligation remained outstanding.

[22] Neither the founding nor answering affidavit deposed to by applicant`s company secretary Tichavona Mabeza made any reference whatsoever to the outstanding indebtedness. There was no account placed before the court to show how much was realised from the sheriff`s sale, how such proceeds were applied and their effect on the total indebtedness. In simple terms, how much then was owing on the loan account as at the time applicant filed the present proceedings? Surely such facts and in particular, such amount would be quite relevant to guide the court in deciding whether to re-impose the mortgage bonds over the property.

[23] Some evidence did emerge in the papers suggesting that the debt had been settled. These averments were strenuously contested and effectively denied by applicant. That denial by applicant strengthens the fact that applicant ought to have unequivocally dealt with the second to fifth respondents` indebtedness to put such indebtedness beyond issue. The applicant did not set out any of the efforts it made post 2015, to pursue the outstanding amount.

[24] One may conclude that applicant`s real quest under these proceedings is not so much a recovery of the loan but to assert its interest as owner of Stand 80 Borrowdale Brook. The mainstay of applicant`s argument remained predicated on its position as owner or claimant to

title in the immovable property. The founding and answering papers convey the primary interests of an owner rather than the demands of a secured creditor.

[25] The third ground advanced by applicant is seeking re-registration of the bonds was that first respondent, the Registrar of Deeds, acted improperly when it implementing the order in HC 375/20. The Registrar had effectively, according to applicant, acted on the instructions of second respondent to the applicant`s prejudice. I find no basis to impugn the first respondent`s conduct. What first respondent merely did was to confine its actions to the guidance prescribed by the court order in HC 375/20. It then matters not so much (for purposes of this dispute), that in doing so, first respondent was actively urged on by, and or engaged with the original debtors to the exclusion of applicant.

THE PRAYER FOR REGISTRATION OF A CAVEAT

[26] I now turn to the second prayer in applicant`s draft order that a caveat be noted over the immovable property at the heart of the parties` disputes. Does applicant qualify for this relief? DUBE J (as she then was) set out the requirements for placement of a caveat as follows at page 5 in her decision *Stenhop Investments (Pvt) Ltd versus Blessing Mukoko and Registrar of Deeds HH 132-18*; -

“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.”

[27] The above approach has generally been followed in this court. (See *The Cold Chain Zambia Ltd v Kurai Jesina Kingsley (Nee Nehonde) & 4 Ors* HH 379/20; *Xie Chonghui versus Elephanta Investments (Pvt) Ltd and Rekhakumari Patel* HH 215-21.) In *The Cold Chain* case, MANGOTA J developed the following ten-point test; -

- (a) the caveat preserves and protects the rights of the caveator;
- (b) it bars the owner of the caveated property from disposing of the same without the caveator's consent;
- (c) only the caveator can, in general terms, consent to the upliftment of the caveat;
- (d) a caveat can, in some instances, be cancelled or removed from the caveated property;
- (e) the caveator's interest must be in existence at the time the caveat is lodged;
- (f) the caveator must show that his claim arises from some dealing which he had with the owner of the caveated property;
- (g) the caveator's interest must attach to the property
- (h) the caveator must show that he has a matter pending which relates to the property;
- (i) when the pending matter is decided, the caveat lapses– and
- (j) a caveat can only be placed on another's property where the caveator has shown good cause for the same, like an interest in the property.

[28] Applying the above tests (as guidance rather than a checklist applied *in seriatim*), to the facts in the instant matter, I am satisfied that applicant does qualify for the relief sought. The applicant's interest in the land in question commenced with the registration of mortgage bonds. The bonds led to title which applicant enjoyed until an order of court decreed that substantive interests of competing claims be adjudicated to finality. As matters stand, applicant has taken steps to challenge, in the Supreme Court, this court's order (HC 375/20) which divested it of title to Stand 80 Borrowdale Brook. In addition to the Supreme Court sojourn, applicant is also a key participant to the main proceedings HC 7402/13 in which the contests to title over Stand 80 Borrowdale Brook awaits substantive resolution. I am satisfied that the relief prayed for in paragraph 3 of applicant's draft order is warranted.

COSTS

[29] Consistent with the common approach by many litigants these days, each side to the dispute asked for an order of costs against the other on an attorney client scale. I see nothing to justify a punitive order of costs given that there are two sides each seeking to prosecute or defend what they perceive to be their legal rights. The clash of interests in this matter are pointedly complex if not tortious. If anything, I believe the fairest approach would be to depart from the norm and let each side carry its own cross.

DISPOSITION

Accordingly, it is hereby ordered that; -

1. The First Respondent be and is hereby directed to register a caveat over Stand Number 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook Estate held by the 2nd Respondent`s name under Deed of Transfer Number 6066/99 within forty-eight (48) hours from the date of receipt of the judgment.
2. Each party to bear its/his/her own costs.

Messrs Dube Manikai and Hwacha-applicant`s legal practitioners,
Messrs Moyo & Jera -7th to 10th respondent`s legal practitioners.