ANGLOVAAL INVESTMENTS (PVT) LTD
and
PAUL MICHAEL NETON BAKER
versus
ROLF JAN PHILLIP WALRAVEN
and
EELCO ALEXIS WALRAVEN
and
FELIX CASPER WALRAVEN
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 20 June 2012 and 11 May 2015

Opposed Application

S. Mushonga, for the applicants
P. Ranchod, for the respondents

BERE J: Upon hearing this opposed application I dismissed the application with costs. I have since been asked to furnish reasons for my judgment. These are they.

It never ceases to amaze me how some litigants can unashamedly demonstrate a stout effort to mislead those who honestly and innocently care to lend them an ear, all in an effort to cloud issues in the misguided hope that they might build a case out of nothing.

This is a classic case where one finds it irresistible to borrow the often quoted remarks of the renowned British jurist Lord Denning when eloquently puts it as follows:

> "…You cannot put something on nothing and expect it to stay there. It will collapse"[1]

The background to this case can be summarised as follows:

On 22 August 2011 the two applicants issued process out of this court seeking a prohibitory interdict against the respondents couched in the following terms:

"IT IS ORDERED THAT

(a) The 1st, 2nd, 3rd and 4th respondents be and are hereby interdicted from alienating any rights, interest and title in Stand No. 8 Woodbridge Close, Glen Lorne, Harare also known as stand 761 Glen Lorne Township of 15 of Lot 41 of Glen Lorne measuring 4478 square metres held under Deed of Transfer No. 1294/80 and 9394/98 awaiting transfer until 1st, 2nd, 3rd respondents pay applicants 71720-10 Euros plus 5% interest per annum calculated from 6th November 2003 to date of full payment.

(b) The 1st, 2nd and 3rd respondents shall pay costs of suit."

According to the applicants this interdict was premised upon annexure AAI, the agreement of sale entered into by the parties on 22 May 2003 and the other subsequent developments which occurred and are intricably linked to that agreement.

In their founding affidavit the applicants maintained that at the time they brought this application to court the agreement was still in force and they accused the respondents of making new and outrageous demands on the agreement itself and sought to leverage this prohibitory interdict against the refund of their money amounting to 71 720-10 Euros plus 5% interest per annum calculated from 6 November 2003 to date of full payment.

The respondents opposed the application made by raising a preliminary point first and then denying the existence of any agreement in force with the applicants.

The first technical argument raised by Mr *Ranchhod* for the respondents was that the applicants had failed to justify the requirements of the granting of the interdict sought in their founding affidavit, the argument being that there was nothing in their founding affidavit which laid the basis for the granting of the sought interdict.

On merits, the respondents argued that the applicants were not being candid with the court by arguing that the agreement entered into by the parties in 2003 still subsisted. It was argued for the respondents that following the withdrawal of Case No. HC 1230/2004 the parties had mutually entered into a deed of settlement which had resulted in the termination of the agreement of sale.

It will be noted that the following is not in dispute. Case No. HC 1230/2004 had been instituted by the respondents against the applicants as a result of alleged breaches of the agreement of sale of 2003. It was this case which the parties mutually agreed to withdraw at pre-trial conference stage leading to the signing of a deed of settlement.

For clarity's sake there is need to reproduce the deed of settlement. The deed was signed between the applicants and the respondents in this case and it was captured as follows:

> "DEED OF SETTLEMENT BETWEEN
> ROLF JAN PHILIP WALRAVEN
> EELICO ALEXIS WALRAVEN
> FELIX CASPER WALRAVEN
> AND
> ANGLOVAL INVESTMENTS (PVT) LTD represented by Paul Michael Newton Baker
> WHEREAS proceedings have been instructed (sic) in the High Court of Zimbabwe in Case No. HC 1230/2004 between the parties and whereas the parties have agreed to settle the matter on the terms recorded herein.
>
> IT IS AGREED THAT:
> 1. The plaintiff shall refund the sum of US$22 000-00 to the Defendant.
> 2. The defendant's agents, officers, employees, guests and invitees and subtenants shall vacate plaintiff's property being Stand 761 Glen Lorne Township of 15 of Lot 41 Glen Lorne, currently called 8 Woodbridge Close, Glen Lorne, Harare against payment of the refund of US$22 000-00 and return and reinstall the satellite dish removed from the said property.
> 3. Neither the plaintiff or defendant shall have any further claim against the other.
> 4. The parties shall file a Notice of Withdrawal in respect of case No. HC 1230/04 with the High Court.
> 5. The terms of this deed shall remain confidential and shall not be disclosed except as required by law."[1]

The next notable correspondence other than the above deed was a letter from the applicant's legal practitioners Messrs Mashonga Mutsvairo and Associates on 18 February 2010.

The letter was now talking to an entirely different issue from the one captured in the deed of settlement. Not only that, but it was now written for and on behalf of a WALRAVEN AND MR & MRS ARIFANETI who were offering for the first time to buy the same property which is the subject of this application for US$100 000-00 on certain terms and conditions as will more fully appear on the letter itself[2] reproduced hereunder;

> "Dear Sirs
>
> RE: AGREEMENT OF SALE STAND 8 WOODBRIDGE CLOSE GLENLORNE HARARE: WALRAVEN AND MR AND MRS ARIFANETI

> Further to our clients visit to your offices and our previous correspondences we write to advise as follows;
>
> 1. Our mutual clients agreed to sale to each other the above property at a purchase price of US100 000-00.
> 2. Our clients tender US$31 500-00 as deposit forthwith.
> 3. Our clients offer to liquidate the balance of US$68 500-00 at the rate of US$10 000 per month with effect from 31st March 2010 and subsequent month ends.
> 4. You proceed to do the agreement of sale. Kindly accept the deposits and comply with the terms above."

The above letter was followed up by yet another letter of 8 March 2010 from the same legal practitioners which re-stated the same position and concluded by urging the respondents legal practitioners to proceed to do the agreement of sale.

The other subsequent communication initiated by the applicant's legal practitioners was further confirmation that the agreement of 2003 had been abandoned and that the focus on the offer to purchase the property in issue was for different parties. There is nowhere where it is indicated that the offer made by these new parties was accepted by the respondents so there was no new sale agreement to talk about.

If it is accepted that the agreement of 2003 had been abandoned (which must be the position) and that no new agreement was accepted by the respondents (which should irresistibly be the position), it should go without saying that the respondents must be believed when they categorically state and argue that:

> "No agreement to sell the property to either the applicants nor the Arifanetis was concluded and consequently none of those parties has any lawful right to purchase the respondents' property."[1]

There is clearly a dishonesty averment by the applicants in their founding papers and it must be the position that a litigant who approaches the court with his hands dripping with dishonesty must expect no sympathy from the court. Litigants must learn to be candid with the court.

The basis upon which the applicants' case is built is characterized by misrepresentations to the court.

More poignantly, what one sees through the exchanges of the parties back in 2003 is brazen determination to flout Exchange Control Regulations which restricted the exchange of foreign currency then. This was however conclusively dealt with by the deed of settlement earlier own alluded to.

It is equally incredible that the applicants would want to built their claim against the backdrop of that kind of conduct.

Let me at this stage deal with the preliminary point raised by the respondent concerning the interdict preferred by the applicants.

It would seem that in a proper case our law recognizes the granting of a prohibitory interdict. It is important to note that a prohibitory interdict is fundamentally different from an interdict to maintain the *status quo* or other proceedings to settle a dispute. This position finds expression by R.H Christie in *The Law of Contract in South Africa*[1] where he states as follows:

> "An interdict is the appropriate remedy to prevent a breach or threatened breach of contract and takes the form of an order of court prohibiting the defendant from doing whatever is specified in the order………… The principles governing the issue of an interdict to enforce a promise not to do something, and the issue of an interdict to maintain the status quo pending an action or other proceedings to settle a dispute are fundamentally different." This is often overlooked……."

The point that is inescapable is that a prohibitory interdict like the one desired by the applicants in this case must be premised on the existence of a contract with the respondents. The documentary exchanges commented upon above show that there was no contract to talk about between the parties where the respondents undertook to pay the applicants the 71720-10 Euros referred to in the draft order or in the applicants' founding affidavit.

More importantly the abortive attempt by the applicants' counsel to have the same property purchased by the Arifanetis is conclusive evidence of the abandonment of the Contract of Sale of 2003 between the applicants and the respondents.

It is quite incredible that the applicants would build their cause of action on an agreement that was long cancelled. The applicants argue in their supplementary heads of argument that their action is premised on the Deed of Settlement entered into by the parties but surprisingly went on to leverage this interdict application on an amount which is not even referred to in that Deed. They create a fictitious figure in their minds and throw it in this application in an effort to cloud issues and poison the mind of the court. The whole approach by the applicants strike me as a hopeless exercise in futility.

The filed application lacks merit and in my view has been motivated by the applicants desire to continue to unlawfully enjoy their occupation of the respondents' property.

It is for these reasons that I dismissed the application with costs.

Mushonga Mutsvairo & Associates, applicants' legal practitioners
Hussein, Ranchhod & Co, respondents' legal practitioners