

DENNIS TAURAYI MACHIWANA
and
REGEDZAI MACHIWANA
versus
WESTIHILL SERVICES (PVT) LTD
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18, 19 January and 7 February 2018

Civil Trial

F Zuva with R Kadanhi, for plaintiff
R Dembure, for first defendant

TAGU J: The plaintiffs who are husband and wife issued summons against the defendants claiming an order for rectification of the agreement of sale signed by the parties on 11 March 2006 such that the erroneous property description inserted therein being Lot 5 of Lot 24 of Hatfield Estate be substituted with “the Remaining Extent of Subdivision A of Lot 25 of Hatfield” being the actual property the plaintiffs bought from the first defendant. They further claim for an order that the first defendant does all such acts and signs all documents necessary for the transfer to the plaintiffs of the Remaining Extent of Subdivision A of lot 25 of Hatfield held under Deed of Transfer No. 8695/1995, failing which the Sheriff of Zimbabwe be and is hereby authorized to, on behalf of the first defendant, do all such acts and to sign all documents necessary to give effect to this order. They further claim for an order that the second defendant cancels Deed of Transfer No. 2341/2006 being the Deed of transfer for the property erroneously transferred to the plaintiffs and an order that the second defendant registers the above stated transfer and cancellation in terms of this order and lastly costs of suit on the Attorney and Client scale.

The facts giving rise to this claim are that around February 2006 the plaintiffs offered to buy the first defendant's property namely The Remaining Extent of Subdivision A of Lot 25 of Hatfield Estate which was being sold by the first defendant. After viewing the property the plaintiffs and the first defendant then agreed on the sale and the purchase price. The agreement was then reduced to writing by the first defendant and the parties signed same on the 11th March 2006. The plaintiffs duly performed all their obligations under the agreement of sale and took occupation of the property in 2006. The plaintiffs have been in occupation of the property from that time to this date. Transfer of the said property was then effected by the first defendant's legal practitioners, Scanlen & Holderness, and a Title Deed was issued in favour of the plaintiffs under Deed of Transfer No. 2341/2006.

However, sometime in 2008 the parties realized that the property sold and transferred to the plaintiffs had been erroneously described as "Lot 5 of Lot 24 of Hatfield Estate" measuring 4 047 square metres instead of "The Remaining Extent of Subdivision A of Lot 25 of Hatfield Estate" measuring 8 190 square metres in the agreement of sale. Subsequently the erroneous property had been transferred to the plaintiffs under Title Deed No. 2341/2006. To rectify the mistake the first defendant instructed its legal practitioners to prepare the necessary rectification papers for the transfer of the correct property to the plaintiffs and the simultaneous transfer of Lot 5 of Lot 24 of Hatfield Estate back into the first defendant's name. The correct property, that is The Remaining Extent of Subdivision A of Lot 25 of Hatfield Estate is registered in the name of the first defendant under Deed of Transfer No. 8695/1995. Eventually, and on the 19th March 2014 the plaintiffs signed the rectification documents prepared by Scanlen & Holderness. The first defendant has since July 2014 refused to sign these papers, despite demand, much to the plaintiffs' prejudice. The first defendant's refusal to sign the rectification papers culminated in the first defendant now demanding that the plaintiffs vacate the property in November 2014. However, since around 2008 when the error came to light the error was common cause between the parties. The error was actually acknowledged by the first defendant until the first defendant made an about turn in 2014 and alleged that there was no error. The plaintiffs claim that they have been put into unnecessary out of pocket as the plaintiffs had to fend off the eviction threats as well as institute these proceedings among other costs and for this reason claim that the first defendant is liable to pay costs at a higher scale.

In its plea the first defendant is denying that there was an error and maintained that the plaintiffs purchased Lot 5 of Lot 24 of Hatfield and not the remaining extent of subdivision A of Lot 25 of Hatfield Estate as shown on the agreement of sale and the Deed of Transfer.

The joint pre-trial conference identified three issues for trial in this case. The first issue was whether or not the plaintiffs' claim is prescribed. The second issue was whether or not there was a common mistake by the parties in respect of the description of the property in the agreement of sale signed on 11 March 2006, and if so, whether or not the agreement of sale signed by the parties can be rectified. The last issue was if there was no common mistake, whether or not the first defendant is entitled to the eviction of the first and second plaintiffs and holding over damages and if so, in what sum?

At the commencement of the trial the first defendant abandoned the issue of prescription as well as the issue of holding over damages. The sole issues left for determination were whether there was an error and if not the plaintiffs should be evicted from the said property.

The plaintiffs gave evidence. They maintained that they purchased the Remaining Extent of Subdivision A of Lot 25 of Hatfield from the first defendant. However, at the time of signing of the agreement they had not noticed that the property had been erroneously described as Lot 5 of Lot 24 of Hatfield Estate. They only discovered the error sometime late after the property had been transferred to them. To support their version they told the court that they have been in occupation of the correct property since 2006 to date. All they are requesting is for the first defendant to sign the rectification papers. They called one Byron John Symeonoglou a conveyancer and partner in Scanlen and Holderness Legal practitioners to corroborate their story. The first defendant on the other had gave evidence through one Naison Tsanzirayi Chindanya.

ANALYSIS OF THE EVIDENCE

It is not in dispute that the plaintiffs purchased a piece of land from the first defendant some time in 2006 as shown on the agreement of sale dated 11th March 2006 produced as an exhibit. It is further not disputed that the property is described as Lot 5 of Lot 24 of Hatfield Estate measuring 4 047 square metres on the signed agreement of sale. Deed of transfer further described the said property as Lot 5 of Lot 24 of Hatfield Estate.

The sole issues for determination is whether or not the property was erroneously described in both the agreement and the Deed of Transfer. If it was erroneously described whether or not the first defendant should be ordered to sign rectification papers in favour of the plaintiff. If there was no error whether or not the plaintiffs should be evicted from the property they are currently occupying, being the Remaining Extent of Subdivision A of Lot 25 of Hatfield held under Deed of Transfer No. 8695/1995 and be moved to Lot 5 of Lot 24 of Hatfield Estate measuring 4 047 square metres held under Deed of Transfer No. 2341/2006.

To understand the metrix involved in this matter it is pertinent that I give a brief historical background to the property in question. At all material times the property in question was owned by the first defendant, Westhill Services (Private) Limited, a company duly incorporated in terms of the laws of Zimbabwe whose address for service is 5 Holmes Crescent, Hatfield, Harare. The Director of this company was one Jess Dyer, an American investor in Zimbabwe. Jess Dyer then had problems with the authorities in Zimbabwe over child pornography and child molestation in respect of the orphans he used to look after in Zimbabwe. He then migrated to the Republic of South Africa after certain allegation were levelled against him. As a result Mr Jess Dyer by power of Attorney authorized one Anthony Dereck Lamb to facilitate the sale of the said property to the plaintiffs. Mr Jess Dyer later passed on 22 May 2016. Mr Anthony Dereck Lamb also passed on sometime in November 2014. One Naison Chindanya who was all along an employee of Mr Jess Dyer and was looking after the property in question on behalf of Mr Jess Dyer and is the sole defence witness for the defendant took over the first defendant as his company with a shareholding of 99% together with his father who owns 1% in April 2014.

During his life time and at the time the alleged error in the description of the property was discovered, Mr Jess Dyer, as shown by various emails amongst the parties, was very cooperative and he directed Mr Anthony Dereck Lamb to facilitate the rectification of the error. However, further emails involving the lawyer who was to do the rectification shows that Mr Lamb and Mr Chindanya took some papers and were not cooperating to have the error rectified. This resulted in the first plaintiff contacting Mr Dyer and a meeting was held in South Africa where the first plaintiff, Mr Chindanya and Mr Dyer discussed the issue of rectification. At that meeting Mr Dyer suggested that the first plaintiff should take over the company ie the first defendant, and once he has done so after paying certain amount of money, the first defendant would automatically become

the owner of the property in question, and as a result there would be no need to do the rectification of the error. However, the first plaintiff who was also now resident in South Africa refused the offer to take the company and refused to sign the contract that had been drafted by Mr Dyer.

In his evidence Mr Chindanya suggested that in fact the first plaintiff was asked to pay a certain extra amount of money to the tune of \$65 000.00 so that he would take over the property in question since he had purchased the lesser stand. This was strongly disputed by the first plaintiff who maintained that the contract was crafted so that he takes over the company and automatically take over the property in question since it was registered in the name of the company.

However, in my view the evidence of Mr Byron John Symeonoglou put the matter to rest as his evidence was clear that an error had been made when the agreement and the Title Deeds were prepared by a colleague in his law firm in respect of the property the plaintiffs were to take over. His oral evidence as amplified by his written summary of evidence was to the effect that-

“Thereafter in 2007 the conveyancing department received information that the wrong stand had been transferred to the Machuwana’s and draft exchange/rectification conveyancing documents were prepared for remedying the situation. Apparently the Machuwana’s should not have taken transfer of Lot 5 of Lot 24 of Hatfield Estate but should have taken transfer of the Remaining Extent of Subdivision A of Lot 25 of Hatfield Estate which they were given possession of. Both Westhill Services and the Machuwana’s indicated that they did not want to pay the costs of such rectification. On the 1st of August 2007 Dennis Machuwana had indicated in a telephone conversation that he would chase up and speak to Mr Lamb and Naison Chndanya of Westhill Services about speeding up the process of the rectification.”

Subsequently in 2009 and thereafter direct, telephone and email communication were made with Mr Lamb, Naison Chindanya and Jesse Dye of Westhill Services in order to make progress on the matter culminating in Mr Lamb attending on the offices at Scanlen and Holderness on the 19th February 2014 when he signed an affidavit, a Weshill Services company resolution form and a declaration in pursuance of the rectification. The company resolution authorized Naison Chndanya to sign a Power of Attorney to pass transfer of the Remaining Extent of SubdivisionA of Lot 25 of Hatfield Estate measuring 8 190 square metres to the Machuwana’s.

In exchange for Lot 5 of Lot 24 of Hatfield Estate in order to rectify the error that had been made.

The power of Attorney to pass transfer was never signed by Naison Chindanya and hence the rectification transfer could not be effected. In fact Naison Chindanya in a letter to Scanlen and Holderness on the 22nd July stated that he could not sign the document as it contained inaccurate information. In his letter he said he had communicated with Jesse Dye who was the founder of Westhill Services and that he had come to the conclusion that the Machuwana’s had bought and taken transfer of the correct property that was currently registered in their names and that they had taken possession of the wrong property.

From thereon no progress has been made on the matter. Scanlen and Holderness holds the title deeds to both properties, namely Lot 5 of Lot 24 of Hatfield Estate registered in the name of the Machuwana's and the Remaining Extent of Subdivision of A of Lot 25 of Hatfield Estate registered in the name of Westhill Services. Although attempts have been made by the parties for the release of the title deed to both properties I have been unwilling to do so until the outcome of the court case that is pending and a court order is made concerning such release. The title deeds had come into the possession of Scanlen and Holderness in the early stages of the attempted rectification from the parties concerned."

In my view I found that the witness for the defendant was not a credible witness. He denied the issue of the error and the need to rectify the same when documentary evidence showed beyond doubt that he was aware of the error and the attempts to have it rectified. I was not impressed by him when he denied correspondences that exchanged hands between the parties and his erstwhile legal practitioner. What Mr Machingura did was to take advantage of the fact that Mr Dyer and Mr Lamb are now late and that he has assumed ownership and control of the company hence by taking over the company he wants to automatically take over the property in question. He became the obstacle in the rectification process for his selfish needs. His allegation that the Machuwanas were allowed to occupy the property in question temporarily while they renovate the other house is unbelievable given the fact that they had disposed of their Mainway Meadows house they had recently built according to their specifications. The house they had disposed of to raise capital to buy the house in question consisted of three bedrooms, one ensuite, a kitchen, dining and living area, borehole, walled and gated with various plants planted by them. They denied being shown number 5 which they later realized had a small structure which they termed a servant's quarters. They consisted having been shown no. 29 which was loftier. Even if his assertions are accepted what boggles one's mind is why were the Machuwanas allowed to stay on this property since 2006 to date and no action was ever taken against them. No action was even taken to make sure that they renovate the house they were supposed to renovate.

Mr Byron John Symeonoglou is a senior counsel and an officer of this court. I found him a credible witness. He was not biased in any manner.

For these reasons I was convinced that an error was made in the drafting of the agreement and the Title deeds. The witness for the defendant wants to take advantage of this error to

dispossess the Machuwana. Initially all parties were cooperating on the issue of rectification until a time when the defendant's witness took over the company and decided to change his mind.

THE LAW

In their closing submissions both counsel agreed in principle as to the law applicable in a case of this nature. The starting point is that the standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities. It is therefore trite law that the party seeking rectification of a mistake must show that:

1. The parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
2. There was an outward expression of accord;
3. The intention continued at the time of the execution of the instrument sought to be rectified;
4. By mistake the instrument did not reflect that common intention. See *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EGLR 71,74 para 33, *Chartbrook Ltd v Pensimmon Homes Ltd & Ors* [2009] 4 ER 677. See also *City of Gweru v Mbaluka* HH -93-14.

In *casu* the plaintiffs have managed to prove their case on a balance of probabilities. If one compares the evidence given by the plaintiffs and Mr Symeonoglou versus that of the first defendant, the plaintiffs presented a more probable version that the parties' actual intention was to agree on No.29, however, the agreement of sale erroneously recorded their intentions. It is highly unlikely from the evidence established by the plaintiffs that the first defendant was not aware of the error in the sale agreement and that it did not make efforts to address this error by instructing its conveyancers to rectify all documents. In this case the mistake that happened is what has been referred to by authorities as a common essential mistake. According to Innocent Maja in **The Law of Contract in Zimbabwe, 2015 at 108** a common essential mistake is a form of mistake where both parties make the same mistake and the mistake is casual for them both. In such an instance the courts usually attempt to give effect to the parties' true subjective intention by rectifying the contract so that it reflects the true parties' intention. In my view this is not the kind of mistake that vitiates a contract. There is no reason why an order for the plaintiffs' eviction should be made. In the result I will grant the following orders:

IT IS ORDERED THAT

1. Rectification of the agreement of sale signed by the parties on the 11 March 2006 be and is hereby ordered such that the erroneous property description inserted therein, being Lot

5 of Lot 24 of Hatfield Estate be substituted with “The Remaining Extent of Subdivision A of Lot 25 of Hatfield” held under Deed of Transfer No. 8695/1995, failing which the Sheriff of Zimbabwe be and is hereby authorized to, on behalf of the 1st Defendant, do all such acts and to sign all documents necessary to give effect to this order.

2. That the 2nd Defendant cancels Deed of Transfer No. 2341/2006 being the Deed of Transfer for the property erroneously transferred to the Plaintiffs.
3. That the 2nd Defendant registers the above stated transfer and cancellation in terms of this order,
4. That the application for the eviction of the plaintiffs from Subdivision A of Lot 25 of Hatfield held under Deed of Transfer No. 8695/1995 be and is hereby dismissed, and
5. The 1st Defendant pays costs of suit on the Attorney and client scale.

Bruce Tokwe Commercial Law Chambers, plaintiffs’ legal practitioners
Mabulala & Dembure, 1st defendant’s legal practitioners