

**STEVENI MONDI NYONI**

**Versus**

**NELSON KHAWULANI MASUKU**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 24 MARCH 2006 AND 14 JUNE 2007

*L Mcijo*, for the applicant

*Ms D Vundla*, for the respondent

Opposed Application

**NDOU J:** The parties entered into an agreement of sale of Plot 4 Fairstar, Bulawayo in terms of which the applicant sold the said property to the respondent on 25 October 2003. The purchase price was \$40 000 000,00 which the respondent was to pay first by transferring stand No 1955 Emakhandeni to the applicant, which stand was valued at \$21 500 000,00. In addition to that, the respondent was supposed to pay \$1 500 000,00 to bring the initial deposit to \$23 000 000,00 leaving a balance of \$17 000 000,00. Both parties took immediate occupation of “their” respective properties. It is applicant’s contention that the agreement was reduced into writing on 25 October 2003 and he attached a copy of the alleged agreement. In terms of the attached agreement, the respondent was obliged to pay the balance of the purchase price in the sum of \$17 000 000,00 before January 2004. This is disputed by the respondent. First, the respondent disputes that the agreement of sale was ever reduced to writing. Second, he avers that there was no specific date as to when transfer of the houses would be effected into the parties name. Third, he avers that there was no deadline for the payment of the \$17 000 000,00. Fourth, that \$17 000 000,00 was to be paid on surrender of the title deeds by the applicant. There is a dispute between the parties on whether in the interim, the respondent effected useful improvements on the

property [i.e. Plot 4 Fairstar] to the tune of \$250 000 000,00. The balance of the purchase price has not been paid by the respondent. The applicant’s case is that he did request the respondent

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to pay the balance of the purchase price on many occasions and that he always gave various excuses until the applicant cancelled the contract and ordered the respondent to vacate. The respondent refused to vacate the premises claiming that he has made improvements to the tune of \$250 000 000,00. This resulted in the issuance of summons in this court by the applicant claiming the following against the respondent:

- (a) cancellation of the agreement of sale;
- (b) eviction of the respondent and all those claiming through him from stand 4 Fairstar, Bulawayo; and
- (c) Costs of suit.

The respondent filed an appearance to defend the action followed by his plea. In consequence thereof, the applicant filed the current application for summary judgment as he opined that the respondent has no *bona fide* defence to the claim. It is trite that “summary judgment is a drastic remedy in which the plaintiff whose belief it is that the defence is not *bona fide* and entered solely for dilatory purposes should be granted immediate relief without expenses and delay of a trial. Where there are issues in dispute the matter should be referred to trial” – *Majoni v Min of Local Government and National Housing* 2001(1) ZLR 143 (S); *Christmar (Pvt) Ltd v Stuchbury & Anor* 1973(1) RLR 272(G); *Shangadia v Shangadia* 1966 RLR 285(G); *Reid v Gore* 1987 (2) ZLR 130(HC); *G D Haulage (Pvt) Ltd v Mumurgwi Bus Svs (Pvt) Ltd* 1979 RLR 447 (A) and *Rex v Rhodian Invstms Trust (Pvt) Ltd* 1975(4) SA 631 (SR).

The suit against the respondent is premised primarily on the agreement of sale annexed as Annexure “C”. As alluded to above, the respondent vehemently disputes that the agreement of sale was in writing. His case is that it was verbal. He avers that Annexure “C” is a forgery and that the signature thereon does not belong to him. Further, he avers that identity numbers endorsed thereon do not belong to him or his late wife. This in essence throws the whole case into a series of factual disputes which cannot be resolved on paper without a proper trial. All

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these are plausible triable issues which cannot be dismissed out of hand as suggested by the applicant. The respondent also raised two arguable questions of law.

First, he contends that he did not breach the agreement of sale. Second, he is claiming an improvement lien over the property. He argues that these improvements were useful and enhanced the value of the property in disputes – *Haies v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235(H); *Kommissaris van Binnelandse Inkomste v Anglo-American (OFS) Housing Co* 1960 (3) SA 42(A) and *Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd* 1985 (2) 575 (Z).

There is a possibility of success, and a plausible case or triable issue as is the case here, there is a reasonable possibility that an injustice may be done if summary judgment may be granted.

The application for summary judgment is misplaced.

Accordingly, the application for summary judgment is dismissed with costs.

*Lazarus & Sarif*, applicant's legal practitioners

*Dube and Partners*, respondent's legal practitioners