

FOOTBALL CLUB WINDERMERE

Versus

ASSOCIACAO DOS PORTUGUESE

And

THE CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 30 OCTOBER 2012 & 7 FEBRUARY 2013

Chamunorwa for applicant
Sengweni for 1st respondent
No appearance from 2nd respondent

Opposed Court Application

KAMOCHA J: The applicant in this matter seeks an order from this court in the following terms:

“It is hereby ordered that:-

- (1) First respondent and all persons claiming through it shall vacate premises presently known as Portuguese Club, corner Lady Stanley Avenue and Jacaranda Road, Bulawayo within 7 days of the making of this order failing which the Deputy Sheriff for Bulawayo be and is hereby authorized and directed to evict them;
- (2) The first respondent shall pay the costs of this application but only if it opposes it.”

The property at the centre of this dispute is known as stand 11752 Kenilworth, Bulawayo. The first respondent hereinafter referred to as Portuguese Club entered into a lease agreement with the City of Bulawayo in respect of the said property for a period of 25 years. The Portuguese Club has been the lease holder for a period of more than 13 years. According to the Portuguese Club that lease still subsists and is still in force.

While the lease between the Portuguese Club and the City of Bulawayo was still valid and in force the latter entered into yet another lease agreement with the applicant contending that the second lease was entered into with the blessing of the Portuguese Club which, as expected, hotly disputed that and contended that there were only some negotiations which did not come to fruition as the Portuguese Club and Football Club Windermere failed to agree on the consideration or monetary compensation in favour of the Portuguese Club.

The issues for the determination of this court were these:

- (a) Was the lease agreement between the Portuguese Club and the City of Bulawayo ever terminated? and
- (b) Was the cession agreement between Football Club Windermere and the Portuguese Club perfected?

The parties were in agreement that the above issues can be answered by going through the various letters filed of record in this matter. I propose to reproduce some of them in extenso hereunder.

On 30 May 2007 one A P Da Silva a representative of the Portuguese Club addressed a letter to Football Club Windermere in the following terms:-

“Dear Sir,

Re: Purchase of Portuguese Club

I refer to your letter dated 1st March 2007 and we have not had any further communication from you as to your meeting with Mr Magagula, Director of Housing, City of Bulawayo on the outcome of your proposal. Since March 2007 there has been a rapid decline in the Zimbabwe Dollar i.e. inflation has risen sharply since our discussion. We need to have another meeting so that by negotiations we can adjust our purchase price to meet the current inflation rates.

Please advise what your intentions are.

We await your early reply.

Yours faithfully

A.P. Da Silva”

(My emphasis)

Football Club Windermere responded to the above letter on 21 June 2007 in the following terms and the letter was marked for the attention of Mr A.P. Da Silva.

“Re: Portuguese Club

I refer to your letter dated 30th May 2007 which I received yesterday the 20th June 2007.

As per our conversation of the 20th of May 2007, I confirm that all the necessary City Council requirements have been met. All what remains is for us to agree on the

purchase price. I also confirm that the initial agreed figure of \$200 million has been eroded by inflation and therefore I propose a new figure of \$1.4 billion subject to discussion.

We will always work together with the Portuguese community and that your social practice and protocol at the club will not be interfered with.

I am looking forward to hearing from you at your earliest convenience.

Yours sincerely

Mr O. Sibanda
Managing Director”

(Emphasis added)

The first of the two letters supra established that the parties were engaged in negotiations concerning the purchase price of the Portuguese Club. A figure had been suggested which was eroded by inflation before the parties could reach a final agreement on it. Consequently it was imperative that parties meet again to negotiate and agree on a new purchase price to cater for the current inflation rates.

In the second letter Mr O. Sibanda the Managing Director of Football Club Windermere appreciated that the parties needed to agree on the purchase price. He was also alive to the fact that the figure of \$200 million discussed previously had been eroded by inflation and even proposed a figure of \$1.4 billion for discussion at the parties' next meeting.

It is therefore quite safe to state that no agreement of sale of the Portuguese Club had been reached between the parties that far. There would be no basis to suggest that the cession agreement between the parties was perfected when discussions relating to the purchase price had not yet been finalized. Mr O. Sibanda the director of the applicant deposed to the applicant's founding affidavit and had this to say in paragraph 8 of the affidavit:-

“From annexures “B” and “C” it will be evident that even on the question of compensation we went as far to agree (sic) on a figure and also subsequently agree that such figure had been eroded by inflation and it should be reviewed. Unfortunately, these negotiations over the level of compensation have never been concluded. Applicant however, places it on record that it is still committed to paying first respondent fair compensation in respect of the improvements and in such amount as the parties may agree or as may be fixed for them by a third party chosen by them or determinated by the Honourable court at the request of either party. First respondent is now refusing to negotiate on the issue of compensation.” (Emphasis added)

The above clearly shows that there was simply no valid agreement between the parties. Further there is nowhere in papers filed of record where such an agreement on the purchase price was recorded. There is no record of it because it does not exist. In the result this court makes a specific finding that no agreement whatsoever of sale of the Portuguese Club was concluded between the parties.

I now turn to examine the issue of whether the lease agreement between the Portuguese Club and the City of Bulawayo was ever terminated. The applicant and the City of Bulawayo contend that the lease was terminated. They averred that Portuguese Club through Ben Baron and Partners its erstwhile legal practitioners actually requested the City of Bulawayo to terminate the lease between them and the lease was terminated accordingly.

The Portuguese Club, on the other hand contended that it still had a valid lease with the City of Bulawayo and vehemently denied that it was terminated. It went on to deny that there was a letter from Ben Baron and Partners to Council requesting it to cede its right, title and interests to the applicant, and averred that all there was were negotiations between it and the applicant. The applicant and City of Bulawayo were requested to produce the letter allegedly written by Ben Baron and Partners on no less than four occasions but nothing came out of those requests. Council failed to produce the document which authorized it to terminate its lease agreement with the Portuguese Club. It is difficult to believe that the erstwhile legal practitioners of the Portuguese Club would verbally instruct Council to cede and transfer the right, title and interest of the Portuguese Club to Football Club Windermere. Request of that nature are not done verbally.

It is doubtful that a written request was ever made to council. On 12 July, 2007 Council addressed a letter to the Portuguese Club wherein the Director of Housing and Community Services had this to say:-

“I am pleased to advise that Council (06/06/2007) resolved that your club be granted permission to cede and transfer its rights, title and interest to Football Club Windermere.

Your attention is drawn to the fact that the said permission is specific to Football Club Windermere and as such cannot be extended to other parties without prior consent by the Municipality.

Yours faithfully

Director of Housing and Community Services”

The above letter does not in any way refer to the letter of request from the Portuguese Club. If there had been such a letter of request the Director of Housing and Community Services would for instance have said “I refer to your letter of request for permission to cede

and transfer your right, title and interest dated such and such date or simply your letter of such and such date refers.”

Pursuant to its resolution of 6 June 2007 Council purported to enter into another 25 year lease agreement with Football Club Windermere in respect of the same property stand 11752 Kenilworth on 10 September 2007. On 18 September 2007 Council wrote to the Portuguese Club advising it that its lease would officially terminate on 30 September 2007 and that of Football Club Windermere would commence on 1 October 2007. City of Bulawayo claimed that it terminated its lease with the Portuguese Club on its instructions without substantiating the claim by producing a document wherein such instructions are embodied.

The Portuguese Club persisted from the onset that it was unaware of such instructions to Council. It asserted that the termination of the lease by Council was not by mutual consent. Council unilaterally terminated the lease as there is no evidence on the papers filed of record to suggest otherwise.

In the result this court finds that the lease agreement between Council and the Portuguese Club was never validly terminated and that the purported unilaterally termination of the lease was of no legal force or effect.

Similarly, the purported lease agreement between Council and Football Club Windermere suffers the same fate. It has no legal force or effect.

In the result, I would dismiss this application with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
D.W. Mhiribidi & Company, 1st respondent's legal practitioners