**CHRISTOPHER DUBE**

**Versus**

**RUTABANGA MARKETING (PVT_ LTD**

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 26 FEBRUARY 2024 & 20 JUNE 2024

**Opposed application**

*K. Ngwenya* for the applicant
*Advocate P. Dube* for the respondent

**MANGOTA J**

The applicant is moving me to confirm cancellation of the contract of sale of an immovable property which he concluded with the respondent and to direct the latter to return to him his Deed of Transfer Number 0001864/2014. He premises his application on three agreements which he concluded with a representative of the respondent which, at the time of signing of the contracts, was yet to be born. All three contracts were signed by the parties on 1 September, 2016. He attached copies of the three agreements to his application.

The first contract which the applicant marked Annexure TC2 is an agreement for construction of seven (7) townhouses on stand number 8148, Victoria Falls Township and two (2) townhouses on stand number 1557 Victoria Falls Township. The second agreement which he marked Annexure TC3 is a contract of sale to the respondent of stand number 8148, Victoria Falls Township of Victoria Falls Township Lands held under Deed of Transfer number 30/2016 ("the property"). It is 1,292 hectares in extent. The third contract which he marked Annexure TC4 is a Deed of Cession and Assignment of Stand number 1557 Victoria Falls Township of Victoria Falls Township Lands ("the stand"). It is 5,195 square metres in extent. The annexures appear at pages 18, 20 and 27 of the record respectively.

The respondent opposes the application. It, however, admits that it entered into three contracts which are stipulated in the application with the applicant. Its bone of contention relates to the sum of USD 150 000 which it alleges it paid to the applicant in pursuance of performance by it of the contracts. It insists that the applicant should return the said sum to it.

It alleges that the introduction into the country of the RTGS dollars as a mode of payment made it difficult, if not impossible, for it to perform its side of the contracts. It claims that it tendered the sum of $600 000 to the applicant *in lieu* of construction of the seven (7) town-houses on the property and the latter refused to accept the tendered sum. It states that it cannot construct the seven (7) town-houses within a period of fourteen (14) days which the applicant stipulated in his letter of 16 July, 2022 to it. It moves me to dismiss the application with costs.

The preliminary points which the respondent raises are not worthy mentioning let alone considering. They appear to have been raised just for the sake of it. They do not dispose of the case. Nor are they of any meaningful substance. The only thing I can mention in respect of them is that it raised them and no more than that.

The respondent's defence which is to the effect that it failed to perform owing to the introduction into Zimbabwe of the RTGS dollar as a mode of payment is totally without merit. If the contracts of the parties were not tainted with illegality, as they are, I would have had no hesitation in throwing the same through the window with little, if any, difficulty. It could easily have built the town-houses before the coming into existence of the RTGS dollar. The construction was to be completed within two years which are reckoned from the date that the parties signed the contracts. The lifespan of each contract was/is two years. The respondent should have completed the construction of the town-houses on or before 1 September, 2018. This was some five (5) or so months before the introduction of the RTGS dollar behind which the respondent seems to want to hide.

It makes little, if any, sense for the respondent to agree to build seven (7) town-houses for the applicant on a property which it purchased from him. It also makes little, if any, logic for the respondent to agree to build two (2) town-houses for the applicant on the stand which the latter ceded to it. The observed matters, as gleaned from the agreements of the parties, convey an apparently confused impression in the mind of the reader of the contract of sale as well as that of cession and assignment.

On a close analysis of the three contracts as read with Clause 4 of the agreement for the construction of town-houses, however, the apparently confused set of circumstances which surround the same becomes as clear as night follows day. The agreements of the parties are to the effect that:

a) the respondent would build seven (7) town-houses for the applicant on the property and two (2) town-houses for the applicant on the stand;
b) the applicant would subdivide the property and the stand with a view to retaining for himself the portions of the property and the stand on which the nine (9) town-houses were to be constructed.
c) he further agreed to sell to the respondent the remaining portion of the property as well as to cede and assign to it the remaining portion of the stand.

In so far as the sale to the respondent of the remaining portion of the property is concerned, therefore, the parties were *ad idem* as regards to the *merx* and the price of the same. The remaining portion of the property would, according to the agreement, sell at US$233 000. The respondent would pay a deposit of US$150 000 and the balance of US$83 000 in equal monthly instalments of US$3, 500 for a period of twenty-four (24) consecutive months. It was, however, not to pay any money for the remaining portion of the stand which portion would be ceded as well as assigned to it, so it appears.

The issue of the stand, the evidence shows, fell out of the equation. It did so on account of the fact that the applicant did not own the stand when he ceded and assigned the same to the respondent. The stand belonged to the Municipality of Victoria Falls. This appears to have offered to sell the stand to the applicant who, out of uncalculated excitement, purported to give to the respondent a right which he did not have.

But for the illegality of the contract of purchase and sale of a portion of the property which occurred before the sub-division of the same, the contract would have been a clear and unambiguous one. It would have been enforceable at law without any further ado.

The above-analysed set of circumstances shows, in categorical terms, that the agreement of sale of a portion of the property and that of cession and assignment of a portion of the stand are in clear violation of the law. They violate Section 39 (1) of the Regional, Town and Country Planning Act (Chapter 29:12) ("the Act"). They are therefore illegal contracts from which nothing flows. No rights nor obligations arise from them. They are both invalid and therefore unenforceable at law.

It is pertinent for me to state, for the avoidance of doubt, the meaning and import of section 39(1) of the Act. It reads, in the relevant part, as follows:

"(1) Subject to subsection (2), no person shall-

(a) …; or

(b) enter into any agreement –

i) for the change of ownership of any portion of a property; or

ii) …; or

iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or

iv) …; or

(c) …

except in accordance with a permit granted in terms of subsection *forty*."

It is evident, from a reading of the section, that the parties agreed to sell to each other as well as to cede and assign to each other pieces of land which had not yet been subdivided in terms of the above-mentioned section of the Act. The case of the applicant and the respondent is on all fours with that of *X-Trent -A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd*, 2000 (2) ZLR 348 (S) wherein McNally JA, referring to section 39 (1) of the Act which forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under section 40 of the Act which allows for a sub-division, remarked that:

> "The agreement is clearly an agreement for the change of ownership of the undivided portion of the stand. …Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited."

There can be no doubt therefore that the agreements to sell the property and to cede and assign the stand to the respondent were/ are unlawful. Because the sale and the cession are illegal, there is no valid basis for the applicant to move me to cancel the contract or to order that the title deed be returned to him. He cannot move me, as a court, to take part in the illegality which he and the respondent entered into consciously or unconsciously.

My views in the above-mentioned regard find support from what Joubert states in his *General Principles of the Law of Contract*. The learned author states at page 151 of the same that:

> "The basic rule is that agreements which are contrary to the law are invalid. This means that no obligation arises from such agreements and that no action on any contract can be maintained. No party can claim performance of what has been promised to him. If the unlawful agreement is the causa for another agreement, then the lawfulness of the other agreement can be attacked".

The views of Joubert are *in sync* with those of Van Der Merwe, Van Huyssteen, Reinecke and Lube who state, in their *Contract: General Principles*, 4th edition, page 173, that:

> "Illegal agreements are void (or invalid) in the sense that they are not contracts and do not create obligations. No claim can therefore be brought to enforce what was promised in the agreement- *ex turpi vel iniusta causa non oritur actio*. This maximum has been said to be inflexible and to admit of no exception. It applies even where the parties are not aware of the illegality of the agreement. The court should, in fact, take cognizance *mero motu* of the illegality of the agreement if it is not raised by one of the parties but appears from the transaction itself or from the evidence before the court. Where illegality leads to invalidity, a claim for damages for breach of contract will clearly not be available to the parties."

It is on the strength of the above-cited work of the learned authors that I was quick to observe the illegality of the two contracts and raised the same *mero motu* without the applicant or the respondent drawing my attention to the same. Once it is established, as it has been, that the contract of sale of the property which is the subject of this application is invalid and therefore void on account of illegality, there is nothing for me to confirm cancellation of. Because the applicant gave his title deed to the respondent in pursuance of these illegal contracts, I cannot assist him to recover the same. I cannot, in short, be a party to the illegal contracts which he concluded with the respondent.

The applicant failed to prove his case on a preponderance of probabilities. The application is, in the result, dismissed with costs.

*T. J. Mabhikwa & Partners* applicant's legal practitioners
*Whatman & Stewart Legal Practitioners* respondent's legal practitioners