SABINAH RWATIZHA
and
TITUS VENGESAI
and
BRIGHTON MAZITI
and
TENDAI MUNEDZI
and
JACOB MANYEMHESA
and
ASIMA CHEISA
and
LOVELY CHAGONDA
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TATENDA CHAGONDA
and
EUPHIA MASOKA
and
GEORGE SILAS MAGAMBA
and
LONAH BANDA
and
NIGEL MUNYARADZI DANIEL JERE
and
CECILIA TINASHE SAMBO
and
ALLEN MAPURANGA
and
LETICIA MUTEDE
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ENIMY MUTEDE
and
ROBERT PARAFINI
and
NYARAI MUCHECHETERE
and
KUDZANAI TEMBO
and
TAKURA VENGESA
and
TAWANDA DEREK NDUDZO
and
MANAI ANTONY
and
EDINAH KASEKE
and
EMELDAR GONDO
and
CHIPO MUSARA

and
HENRY TENDENEDZAI
and
SHINGIAI RAY MANGO
and
TAPUWA MAGWERE
and
PETROS PATISANI
and
IAN MADUME
and
PRISCILLA SHUWISAI HANDIKATARE
and
VICTOR PAULINE MBAYO
and
MARSHALL TSEKE
and
TONGAI MAVUNDUSE
and
MERCY MUGWENI
and
MUSA PHIRI
and
SIMONDENI NCUBE
And
JOSHUA BIRI
and
URITA BIRI
and
ERNEST NYAMBO
and
OSWELL TAWINEYI
and
MUNYARADZI NYANGA
and
RICHMOND NYAHORE
and
RUTH NYAHORE
and
OPPAH MOYO
and
MOREBLESSINGS MUNOUYA
and
MACKENZIE EUGENE
and
NORMAN GWEZUVA
and
MUNYARADZI LAWRENCE TSUNGA
and

MUCHIMBIDZIKE FATIMA
and
MUCHIMBIDZIKE STEWART
and
LOVEJOY MURAMBIWA
and
ERASMUS NYAMUSHONYONGORA
and
COLEEN MAFIKA
and
HENRY MUVANDIRI
and
ISAIAH CHINHENGO
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NABOTH T. MAGWERE
and
ALVIN LOVEMORE MAGWERE
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LOVEMORE MAGWERE
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ALETTER MAGWERE
and
SHELLY ELIZABETH CHITSUNGO
and
JEREMIAH JANDA
and
MAXWELL NEKENDE CHITENDENI
and
CLIFFORD NKOMO
and
PRIVILEGE MUKWAIRA
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FANUEL KANGONDO
and
KILLIAN Z MASUKUSA
and
MEMORY CHIPUNGU
and
WAYNE PAMIRE
and
ZACHEO PATISANI
and
FARAI NYABEZE
and
VIVIAN S. SITHOLE
and
EDINAH DAMBUDZO MASIYIWA
and
LIVISON TIZIRAI

and
THEODORA MUTSAGO
and
LIYON CHIKOMO
and
LINDARAY TANYANYIWA
and
MARIMIROFA ADVANCE
and
LETWIN MARIMIROFA
and
LUNGISANI MAKHALIMA
and
FADZAI C. MAKHALIMA
and
FUNGAI FELISTAS GAMU
and
JOSEPHINE CHAMBALANGA
and
ELMON MANGENA
and
RUVIMBO PATRICIA NCUBE
and
JENIFER DHLIWAYO
and
PARADZAI MAZUVAMANA
and
SALLY ANN
and
SHUPAI MOSES NYAMBO
and
CHIKOMBINGO SEVERINO
and
VANESA E. SALIMU
and
ELISMORE TAVENGWA
and
NEWTON TAWANDA MURINGAGOMO
and
CALVIN CHINEKA
and
PRECIOUS MAKWINJA
and
SHAKEY MUNYUKI BARE
and
LEVISON PHIRI
and
JOSPHINE TIZORA
and

MASHMELLON TINOTENDA MAZWI
and
JOYCE TINARWO
and
MAMBINGI MAKURIRA
and
GEORGE TINASHE SARE
and
NOMATTER NIKISI
and
CONSTANCE CHIMUKA
and
GODFREE MARIMBIRE
and
KUDIWA MAZANGO
and
ABBIGAIL CHARUKA
and
GARIKAI CHIKWEKWETE
and
JOE CHAKANYUKA
and
TICHAYANA MAKOTA
and
RUTENDO BLESSING MARIZA
and
MUNYARADI G. MUSWERAKUENDA
and
JULIET CHIBANDA
and
CHARLES CHIBANDA
and
ROPAFADZO MAPOSA
and
PESEVEARANCE MUZANYA
and
KENNETH MAKAZA
and
IREEN MUZAKA
and
NICODEMUS MUBVUMBA
and
JOSEPHAT MUBVUMBA
and
NGONIDZASHE MANIKA
and
ABIGIRL MANIKA
and
MANDIPE NGWADZAYI

and
ESTHER MUTSENGI
and
ESTHER DLAMINI
and
DICKSON MAPFUTI
and
BETTY MAPFUTI
and
IAN N. MANDIHLARE
and
TANAKA CLIVE MUKAKA CHITIYO
and
ACKIM MAKINA
and
LLOYD DOMBODZVUKU
and
MARYGRACE VALERIA ZINGONI
and
ALBERT ZHANJE
and
DEBBIE MTANDABARE
and
HERBERT MUNEMO
and
JOYLINE MHASHO
and
MASON WHITE
and
JULIA WHITE
and
PATMORE MADA
and
ISRAEL CHARM SIZIBA
AND
STELLA CHIMBUMU
and
KUDZAI NEMACHA
and
TEDDY NYAJEKA
and
FAITH SHOKO
and
ROBERT MUCHECHETERE
and
AGATHA CHIKUKWA
and
NETSAI MATEWERE
and

SYNTHIA KATONDO
and
MODESTA TUTURU
and
JACKQELINE MUTAMBARA
and
FREDRICK KASEKE
and
NOBERT MUSAKWA
and
CECILIA MUGARIRI
and
RONWELL CHITAMBIRA
and
STANFORD BUKUTA
and
PEARSON NGULUBE
and
MERCY MUGWENI
and
IAN MANYANDE
and
VIMBAI FAITH MBERI
and
MCDAVID OSLEM MBERI
and
JULIA MUCHEMWA
and
PRISCILLA MUGOBERA
and
LINDIWE MAKONI
versus
LUNA ESTATES (PRIVATE) LIMITED.
and
DEVINE AID TRUST COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 18 & 26 May 2021

Court Application

P Kawonde, for the applicant
G R J Sithole, for the 1st respondent

MANZUNZU J: This is a court application by 163 applicants seeking a declaratory order in the following terms:

> "IT IS ORDERED AS FOLLOWS:
>
> 1. It is declared that the agreements of sale which were entered into between the applicants and the 1st respondent represented by the 2nd respondent be and are hereby held to be valid.
> 2. The 1st respondent pays costs of this application on a legal practitioner and client scale."

The background to the matter is largely common cause. The first respondent is the registered owner of a piece of land in the district of Zvimba measuring 200.72 hectares (the property). In the year 2012 the first respondent and second respondent entered into a land development agreement for the second respondent to develop the property into residential and business stands. The second respondent was also given the mandate to sell the subdivided stands on behalf of first respondent. The applicants are some of the people who bought the stands from the first respondent through the second respondent. Agreements of sale were signed between the individual applicants and the second respondent as agent of the first respondent.

The first and second respondents' contractual relationship fell sour and they went for arbitration. An arbitration award confirmed, inter alia, the cancellation of the memorandum agreement for land development between the respondents as at 20 July 2017. Despite the termination of the land development agreement, the second respondent went ahead to sign some agreements of sale purportedly as agent of the first respondent with some 21 of these applicants. It is in respect to those 21 applicants that the first respondent has resisted the order prayed for.

The first respondent concedes to the order being sought by the applicants save in respect to the 21 applicants who signed their agreements after the second respondent's mandate was terminated on 20 July 2017. The 1st respondent claims the following 21 applicants have no cause of action against it, 13th, 19th, 20th, 24th, 25th, 43rd, 44th, 57th, 58th, 70th, 99th, 101th, 102th, 103th, 112th, 113th, 114th, 123rd, 130th, 15,2nd and 160th.

The 21 applicants have maintained that the first respondent was bound by the agreements they signed with the second respondent on the basis of ostensible authority. The first respondent argues that ostensible authority cannot be sustained in the face of fraudulent acts by the second respondent.

Two issues came out for determination; whether the first respondent can be held liable on the basis of ostensible authority and secondly, whether applicants in the event of success should be awarded costs at legal practitioner and client scale.

OSTENSIBLE AUTHORITY

Several authorities have defined and considered when ostensible authority is said to exist. In *Reed NO* v *Sager's Motors (Pvt) Ltd* 1969 (2) RLR 519 (A) BEADLE CJ stated that:

> "If a principal employs a servant or agent in a certain capacity, and it is generally recognized that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his "apparent" authority. The principal is bound even though he never expressly or impliedly authorized the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in this capacity) held the servant or agent out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did."

In *casu,* the second respondent as an agent was expressly authorized to enter into agreements with prospective buyers of stands on behalf of first respondent. That is the situation obtained from 2012 to 20 July 2017 when the land development agreement was terminated. The issue of termination was not published to the world at large. It was known between first and second respondents. The question is how were the 21 applicants expected to know that first respondent had terminated its authority with the second respondent? The second respondent continued to use the first respondent's standard agreement after 20 July 2017 as if it were expressly authorized to do so. The first respondent's defence is that the second respondent was committing a fraud hence the applicants cannot rely on ostensible authority. This is despite the first respondent's admission that the public were not warned that second respondent was no longer its agent. The first respondent had a duty to warn members of the public about the severance of its relationship with the second respondent.

I do not think this is a matter where first respondent can successfully wash its hands like Pontius Pilate in the face of its failure to give notice to the public and hide behind a claim for fraud to the prejudice of the applicants. There was nothing to stop the 21 applicants from believing that the second respondent was still acting within the scope of its authority with the first respondent which authority was, for a considerable period of time, so exercised.

In alleging fraud the first respondent relied on the findings of the arbitration. In fact, instead of being specific, the issue was argued in a generalized form. The court was referred to the entire arbitration award ranging from page 1054 to 1088 of the record. There was no

evidence to show that the money received from the 21 applicants was not handed over to the first respondent. The issue of fraud was not proved on a balance of probabilities.

The first respondent should have realized that the acts by second respondent after 20 July 2017 would bind it unless the public were warned. This is a matter where ostensible authority must be upheld.

COSTS

Applicants asked for costs at legal practitioner and client scale. Costs are at the court's discretion. The first respondent asked that each party must pay its own costs. Ordinarily costs follow the cause. There was no justification for each party to bear its own costs at the expense of a winning party. Costs were asked at a higher scale because of 1st respondent's attitude. The history of this matter shows that this application is not the first of its own kind. In HC 6816/18 an application by 140 applicants against the respondents seeking a similar declaratory order was granted by this court on 3 December 2018. The first respondent filed an appeal with the Supreme court but the order of this court was confirmed.

The applicants through their lawyers had on 6 December 2018 written to the respondents' lawyers to accept their agreements as valid more so in light of the order of this court of 3 December 2018. The response of 12 December 2018 by the respondents, to say the least, was arrogant coupled with a threat to invoke penalty clauses in the agreements for these applicants and those in HC 6816/18. At the time the first respondent did not differentiate the applicants according to when they signed the agreements. Despite this matter being capable of amicable resolution between the parties, the first respondent's attitude made it impossible to take that route hence the parties found themselves embroiled in this litigation with a bulky record running into 1174 pages.

The first respondent has not shown to have any valid defence to the application from the beginning apart from its arm twist approach. The opposing affidavit also bears testimony to this in paragraph 7:1 when it states;

> "This is an application that ought not to have been made at all. I content that there is absolutely no legal disputes between the applicants and the 1st respondent."

One may then pause to ask as to why applicants proceeded with litigation. The answer in my view is simple, 'because of the first respondent's big brother attitude.' The first respondent wanted to use its upper hand position in the agreement to coerce the applicants to resile from their existing agreements and create new agreements with new terms to its advantage.

Courts will ordinarily not grant punitive costs unless it is shown that the losing litigant was not genuine in pursuing litigation. See *Mahembe* v *Matambo* 2003 (1) ZLR 149 (H). In *Chizura* v *Chiweshe* HB 80/03 the court had this to say;

> "In awarding costs at a higher scale the losing litigant's attitude in the proceedings is an essential ingredient which should be taken into account as it impacts negatively in the expenses of the litigant – see *Mahomed & Son* v *Mahomed* 1959 (2) SA 688."

This is a proper case where a successful party was unnecessarily put out of pocket by this litigation. It is just and proper that the losing party must compensate.

Disposition:

IT IS ORDERED THAT:

1. It is declared that the agreements of sale which were entered into between the applicants and the 1st respondent represented by the 2nd respondent be and are hereby held to be valid.
2. The 1st respondent pays costs of this application on a legal practitioner and client scale.

Kawonde Legal Services, applicants' legal practitioners
Muza and Nyapadi, 1st respondent's legal practitioners