

CHENESO MUVANDI
versus
CITY OF MUTARE
and
MATIVENGA LLOYD MHISHI N.O
(In his official capacity as the Executor of the Estate
Late Washington Jekanyika)

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 27 January 2020

Opposed Application

H. B R Tanaya with *A. N Nyamukondiwa*, for the applicant
Ms T Gutuza, for the 1st respondent
Ms M. Mandingwa, for the 2nd respondent

MUZENDA J: The applicant made an application seeking the following order:

“IT IS HEREBY ORDERED THAT:

1. The cancellation of the Memorandum of Agreement of Sale of Stand No. 11234 Darlington Extension, Mutare Township, measuring approximately 1, 1759 hectares, entered into by the City of Mutare and Washington Jekanyika, jointly together with Cheneso Muvandi, is a nullity, of no force and effect.
2. The Memorandum of Agreement of Sale of Stand No. 11234 Darlington Extension, Mutare Township, measuring approximately 1, 1759 hectares, entered into by the City of Mutare and Washington Jekanyika, jointly together with Cheneso Muvandi, is declared valid.
3. The 1st respondent shall pay costs of suit on a higher scale of attorney and client.”

The application is opposed by the 1st respondent, the City of Mutare

BACKGROUND

On 20 July 2016 Clayhill Trading (Private Limited) entered into an agreement of sale of a piece of land, namely Stand No. 11234 Darlington Extension, Mutare Township, measuring 1, 1759 hectares, with applicant and her late husband Washington Jekanyika. The purchase price was US\$62 000-00. Clause 3 of the agreement of sale stipulated the payment plan: US\$20 000-00 was payable against the signing of the agreement, US\$20 000-00 was payable 3 weeks after the signing of cession papers. The balance of US\$22 000-00 was going

to be liquidated through monthly instalments of US\$4, 000-00 commencing 30 September 2016.

The preamble to the memorandum of agreement of sale between the seller and buyer provided that the buyers had to demand transfer from the Municipality of Mutare of such immovable property so purchased by the buyer, however the seller was responsible for the payment of all cession costs, including the city council's cession fees and capital gain tax, if any (clause 8 of the agreement of sale). During the same year, 2016, the first respondent, City of Mutare, entered into an agreement of sale with the applicant and her husband, under clause 2 of this agreement, the purchase price "was the intrinsic value paid by Clayhill (Pvt) Ltd." Clause 14 thereto stipulates that the purchasers shall demand transfer of the stand from the seller upon completion on the main building. The agreement of sale does not state any conditions for breach or grounds for cancellation of the agreement of sale.

On 24 September 2019 the City of Mutare wrote a letter to the applicant's legal practitioners indicating that the agreement of sale between itself, the applicant and her husband had been cancelled. First respondent alleged in the letter the applicant's late husband, Mr W. Jekanyika had misrepresented to the city council that he had fully paid the purchase price of the property to the developer, Clayhill and that Clayhill had since cancelled the first agreement of sale. As a result of the "fraud" committed by the purchasers, the first respondent was cancelling the agreement of sale. A lot of correspondences were exchanged between the city council's legal practitioners and the purchasers' lawyers but nothing came out of the correspondences until the applicant approached this court. Clayhill (Pvt) Ltd had since issued summons against the purchasers claiming an amount of US\$28 000-00 for arrear payments, it is important to note that there is no allegation nor prayer by Clayhill for the cancellation of the agreement of sale or a misrepresentation on the part of the applicant and her late husband.

The first respondent, in its opposing papers contends that the applicants' application should fail for failing to join Clayhill Trading (Private) Limited as a party to the proceedings. As already addressed in the foregoing above, the first respondent went on to state that applicant and her husband breached the terms of their agreement with Clayhill by failing to pay the full purchase price and that led to the cancellation of the agreement of sale by letter of 21 November 2016 written by Clayhill Property Development. Hence the agreement of sale between City of Mutare and the applicant and her husband was a nullity because at the time it was drafted, the city council did not hold any rights, interest or title in the stand, instead such rights were vested with Clayhill, and as such the cancellation of the agreement was above

board and before the cancellation of that agreement, applicant's legal practitioners were fully apprised of the whole scenario of the events. To the respondent the relief being sought by the applicant has no basis.

The second respondent is an estate of the late Washington Jekanyika. The executor had notified the registrar of the court that he will abide by the decision of this court.

Both applicant and first respondent had raised preliminary points in their respective papers and I directed the legal practitioners to holistically address the court by commencing with points *in limine* and then the main issues.

Applicant's point *in limine*

The applicants on filing her affidavit raised a preliminary point to the effect that the first respondent's Town Clerk in filing the opposing affidavit was not authorised by the council. Hence the application should proceed as unopposed. The applicant amplified her argument by submitting that first respondent's notice of opposition is fatally defective for warrant of a proper opposing affidavit. The Town Clerk, Mr Maligwa, did not attach authority which he alleges to have to depose to the affidavit. Mr *Tanaya*, to advance his argument, cited s 136 (2) of the Urban Councils Act [*Chapter 29:15*] which basically provides as follows:

"Functions of town clerk

- (1) The town clerk shall be responsible for-
 - (a) the proper administration of the council; and
 - (b) managing the operations and property of the council; and
 - (c) supervising and controlling the activities of the employees of the council in the course of their employment.
- (2) For the purposes of subsection (1), the town clerk, in addition to any other duties that may be assigned to him by the council shall,
 - (a).....
 - (b) where so authorised by the council, sign orders, notices, or any document requiring authentication, or execution on behalf of the council..."

As such, applicant, contended, the town clerk was required to produce a resolution on which he relies on not depose to the opposing affidavit. To the applicant, the town clerk has no automatic authority to oppose this matter.

First respondent, in response to this point *in limine* submitted that the absence of the resolution does not prove that the town clerk did not have authority. The town clerk is the

chief executive officer of the first respondent and in charge of the entity including litigation and defending council. Ms *Gutuza* went on to cite the case of *Tian Ze Tobacco Co. (Pvt) Ltd v Muntuyedwa*¹ and also the matter of *Zimbabwe Open University v Magaramombe and Another*.²

In summary the first respondent submitted that the averment in the deponent's opposing affidavit is adequate and in its view there was no need to attach the resolution reached by the full council meeting.

Given the nature of the facts in this application more particularly the stance adopted by the first respondent towards the application the applicants' contention holds firm. It was incumbent upon the council to deliberate on the facts of this matter and consider whether there was any basis to oppose the application brought about by the applicant and also seriously outline the basis of such opposition. This analysis would be dealt with below on the aspect of costs but given the provisions of s 136 (2) I agree with the applicants' counsel, that there was need for a special resolution passed by the council mandating the town clerk to depose to an opposing affidavit on its behalf. At the same time, this court will not lose sight of the fact that there is an opposing affidavit before it which affidavit contains material documents that are going to be of a great assistance in the resolution of this application. It will be in the interests of justice that I will condone the failure to file that resolution by the first respondent and allow the first respondent to be heard on merits, applicants' point *in limine* though valid is dismissed.

First Respondent's point *in limine*

On 29 October 2019 the first respondent filed its opposing affidavit and raised a preliminary point to the effect that applicant ought to have joined Clayhill Trading (Private) Limited from whom applicant allegedly purchased the stand in dispute. According to first respondent Clayhill is still the holder of all rights, interests and title in the stand and it cancelled the agreement between it and applicant. First respondent added that given the nature of relief being sought by the applicant, the ultimate order cannot be effectively carried out, without the involvement of Clayhill. This non joinder is fatal to applicants' case.

In response to the preliminary point raised the applicant contented that there was no need for the applicant to cite Clayhill because applicant's course of action arises out of a contract between applicant, her husband and first respondent, Clayhill is not party to that

¹ HH 626/15 per Mathonsi J (as he then was)

agreement. By the doctrine of privity of contract, there is nothing that affects the company that arises from the four corners of the agreement. It is the council which is the holder of real rights on the property in question. The applicant attached copy of summons commencing action issued by Clayhill against the late Washington Jekanyika and the applicant; where Clayhill is claiming US\$28 000-00 being the balance in respect of immovable property sold by plaintiff to the defendants pursuant to the agreement of sale.

When Ms *Gutuza* was asked by the court to explain why joinder was necessary, she submitted that the city council did not want to expose itself to litigation from Clayhill. It is not in dispute that Clayhill has already chosen who and what to sue for arising out of the agreement of sale relating to stand in question. No one is left to speculate, thus the very fundamental basis relied upon by the first respondent is palpably answered by the company itself Clayhill wants to be paid \$28 000-00 by applicant not by the first respondent. In light of this positive development, there is virtually no need to have a joinder where the company has expressly shown that its interest is in the recovery of the balance of the purchase price not recovery of the stand for reallocation. The point *in limine* by the first respondent has no merit and it is dismissed.

On the merits of the application the following issues are uncontroverted in my respectful view:

- (1) Applicant and her husband, the late Washington Jekanyika purchased Stand No. 11234 Darlington Extension, Mutare for \$62 000-00, paid cash of \$20 000-00 upon signing of the agreement of sale and from the calculation between the cost price and balance being claimed on the summons alluded to above, it is clear that the applicant paid another instalment of \$14 000-00, to make a total of US\$34 000-00.
- (2) At the agreement of sale between Clayhill and the applicant another agreement of sale was concluded between City of Mutare, applicant and the late W. Jekanyika.
- (3) The applicant took occupation of the purchased stand and started to develop it.
- (4) The selling company is suing the applicant for an amount of \$28 000-00 as balance outstanding. The company (Clayhill) is not praying for the cancellation of the agreement of sale on grounds of fraudulent misrepresentation not for the cancellation of sale between the City of Mutare and the purchaser.
- (5) In terms of the agreement of sale concluded between applicant and City of Mutare (first respondent) there is virtually no clause pertaining to which conditions would justify cancellation of the contract concluded between the parties. Though not

addressed by the parties, it appears the first respondent was paid by the developer before the developer (Clayhill) was allowed to offer such stands for sale to the public.

- (6) City of Mutare remained the title holder both for purposes of cession or transfer that is why the second agreement of sale between applicant and the first respondent had to be drafted. Transfer of ownership between City of Mutare and applicant would only be processed after the property had been fully developed.

All these aspects are common cause and this court asked the first respondent its basis for opposing the application. If Clayhill is fully paid the balance, it means the matter between it and applicant would have been resolved, and by necessary implication the subject stand has to remain with the applicant and the estate of her husband. After going through the opposing papers filed on behalf of the first respondent, it is apparent that the first respondent, *mero motu* proceeded to cancel the agreement of sale it had entered into with the purchaser without having heard from them. That was not proper³. As long as the administrative authority is involved in making such decisions, it is required to comply with the dictates of administrative justice, that requirement applies even when the first respondent was acting in terms of a contract⁴. The first respondent was duty bound to hear the applicant and her husband first and even ask them to reduce their response in writing. No such evidence was produced by the first respondent. Hence cancellation of the agreement was arbitrary and cannot be allowed to stand.

The first respondent also contended that what prompted her to cancel the agreement was that the late Washington Jekanyika fraudulently did not disclose that he had not fully paid the purchase price to Clayhill. This court will not dwell much on this issue simply because the first respondent stated that it learnt this from Clayhill and as already covered hereinabove the summons issued by Clayhill do not allude to any fraud on the part of W. Jekanyika what Clayhill needs is its payment of the balance of \$28 000-00. In any case fraud should not only be pleaded but must be established by way of tangible evidence.

I am hence satisfied that the first respondent failed to justify its cancellation of the agreement of sale with applicant and her husband on a balance of probabilities, there is no condition which could have been relied upon in the agreement of sale, which f breached by the purchasers could have justified the cancellation of such a contract.⁵

³ See *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) per Makarau JP (as she then was

⁴ *U-Yow Trailers (supra)* on p 268 A-B

⁵ *Muzondo and Others v Usayiwevanhu and Ohters* HH 107/12.

Costs

The applicant prayed for costs on a punitive scale of attorney-client. A lot of correspondence between the first respondent's office and applicant's legal practitioners exchanged hands, including documents pertaining to the matter more particularly the summons issued by the developer Clayhill where it was claiming \$28 000-00 from the purchasers. Surely at that stage of proceedings and letter written by applicants' lawyers to first respondent about that, should have caused the first respondent to reconsider its stance about the application. It did not. Even after heads of argument were filed and served on the first respondent it persisted with the opposition of the application. The court is aware that any order of costs adversely affect the rate payer but the aptitude of the first respondent's action clerk exhibits a nonchalant attitude bordering on recklessness and abuse of court process all done in the name of public entity whose resources should better be ploughed towards service delivery than defending indefensible, unilateral and unjust conduct by its officials. This judgment must be brought to the attention of the Mayor and councillors to censure in strongest terms the behaviour of the town clerk.⁶

In future legal costs of this type should be met by the city official personally, however in this case the first respondent stated that he was authorised to oppose the matter by the council so the council/public entity will be ordered to pay applicant's wasted legal costs.

As a result the following order is granted:

1. The cancellation of the Memorandum of Agreement of Sale of Stand 11234 Darlington Extension, Mutare Township, measuring 1, 1759 hectares, entered into by City of Mutre and Washington Jekanyika jointly together with Cheneso Muvandi is a nullity, on no force.
2. The Memorandum of Agreement of Sale of Stand No. 11234 Darlington Extension, Mutare Township, measuring approximately 1, 1759 hectares, entered into by the City of Mutare and Washington Jekanyika, jointly together with Cheneso Muvandi, is declared valid.

SPF & Ano v LBCCT/ALB & Ano 26492/13 [2016] ZAG PPHC 378
Chikwanira v Mutonhora & Anor HH 224/16
Mkandla & Ano v Ncube & Ano HB 93/14

⁶ See Binza v Acting Director of Works & Anor 1998 (2) ZLR 364 (H)

3. The 1st respondent to pay respondent's costs on attorney - client scale.

Tanaya Law Firm, applicant's legal practitioners

Bere Brothers, 1st respondent's legal practitioners

Mativenga Nkomo Legal Practice, 2nd respondent's legal practitioners