OSCAR HAKUTANGWI
versus
RUSAPE TOWN COUNCIL
and
LOCADIA MWAENGA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 11 January 2024

Opposed Application

Applicant in person
B. W. Mhlanga, for 1st respondent

MUZENDA J: On 14 April 2023 applicant approached this court seeking the following declaratory relief:

> **"***IT IS HEREBY ORDERED THAT:*
>
> *(i) Applicant be and is hereby declared owner or purchaser of Stand 2762 Mabvazuva Suburb Rusape Township Lands.*
>
> *(ii) The purported repossession of Stand 2762 by first respondent be declared null and void;*
>
> *(iii) First respondent be and is hereby ordered to pay the costs of this application.*
>
> *On 15 May 1st respondent filed its opposing papers.*

Background facts

The underlying facts of this application lie in the pleadings of applicant and first respondent. Second respondent did not file any pleadings. Applicant states, and first respondent appears not to contest that on an unspecified date in March 2003 during the disastrous genesis of the free-fall of the local currency, applicant was offered Stand 2762 Mabvazuva, Rusape by first respondent. No originating document exists. No lease agreement was prepared. What parties produced during pleadings are letters from first respondent and a bundle of receipts for payments made to first respondent by applicant. Subsequent to the subject offer whose terms were not specifically spelt out by first respondent, applicant made periodic payments to first

respondent stretching from March 2003 to March 2004 making a total of $1, 500, 000.00. [1] On 8 October 2010 applicant took the plan for the house to first respondent for approval and first respondent charged an approval fee of US$25.00. Prior to 8 October 2010, applicant had commenced clearance of the ground and invited first respondent to inspect the stand. On 3 March 2010 he was charged US$20.00 and he paid. After these preliminary stages applicant dug trenches, effected footing, constructed a box, back filling and strengthened foundation by ramming the surface. When he was about to put concrete structure, he assigned his wife to go and pay requisite inspection fees to the first respondent. It was at that stage that applicant was told that the subject property had since been repossessed by first respondent and reallocated to second respondent. Applicant was shocked to learn about this unexpected development.

Applicant acknowledges that correspondences from first respondent were sent to him more particularly informing him about the requirement for him to pay $1, 500, 000.00 by a given date. However, after receiving such letters applicant went to see first respondent's council officers who granted him leave to pay after the due date. To the applicant the date was end of March 2004. He met the deadline date and fully paid the purchase price. Applicant added that the stand was not procedurally repossessed by first respondent and what first respondent communicated to applicant was an intention to repossess and never an actual repossession. The letter dated 21 August 2003 gave applicant up to December 2003 and in January 2004 applicant was given an extension to pay the whole balance by March 2004. The letter written by first respondent dated 11 February 2004 did not mention repossession and applicant adds that that letter was of no moment since the deadline date had been set for end of March 2004. Applicant directed the court's attention to the effect that the reallocation of the stand to second respondent was only done on 29 November 2010. On 3 May and 16 August 2010 first respondent physically visited the stand and inspected it. In any case applicant also attached first respondent's monthly statements for development fund, lighting, sewerage and refuse surcharges dated 2007 well after the alleged repossession. It is because of all these averments that applicant approached this court for the relief cited at the outset of this judgment. On the other hand, first respondent confirms the payments made by the applicant. It however states that applicant committed a fatal breach of the agreement by failing to pay $1,5 million by December 2003. After the breach the first respondent proceeded to reallocate the stand to a third party. First respondent refutes applicant's contention that he was granted a grace period

[1] See page 15 of the record.

to complete payment. First respondent distances itself from any action done by its employees and allege that the receipts attached by applicant to his affidavits are more of a "fraud" on his part. First respondent adds that the approval of the applicant's building plan was erroneous in 2010. To the first respondent publication of an intent to repossess a stand in the media is not to it mandatory, it has the liberty to write to the lessee directly. In its opposing papers it appears first respondent concedes that the payment deadline was moved from December 2003 to 2004 that is why there is a letter of 16 February 2004. First respondent prays for the dismissal of the application with costs.

Point in *limine* Raised by First Respondent

First respondent contends that applicant did not comply with R58 (2)(d) of this court's rules which rule demands that every written application and notice of opposition shall where it comprises more than five pages, contain an index. Applicant's papers do not have an index and as such first respondent cannot follow the sequence of the application. To the first respondent the defect is fatal to render the application a nullity. This court cannot condone such an infraction and first respondent prays for the dismissal of the application with costs.

In response, applicant accedes to the lack of an index. He has since cured the anomaly by preparing one. To applicant, the absence of an index does not fatally destroy his application because first respondent did not suffer any meaningful prejudice. First respondent was able to file its opposing papers indicating that it comprehended applicant's papers. Applicant also indicated that he will apply to this court to condone the infraction and moved the court to hear the matter on merits.

First respondent correctly spotted the infraction by applicant and applicant accepts his omission. He did not waste the court's time in trying to refute such a patent non-compliance of the rules. First respondent prays for the dismissal of the application as if it would have been made on merits. If the application fails to adhere to the rules then it must be struck off, so as to allow applicant to go and rectify the infraction and come back to court. However a perusal of the record shows a remarkable compliance of the rules by applicant and it is in the interests of justice that he be allowed to be heard on the merits. The point *in limine* has no merit and it is because of this that first respondent's counsel decided correctly to vacate it.

Applicant's Submissions

Applicant's legal practitioner filed renunciation of agency on 8 January 2024, three days before the date of hearing. As a result applicant appeared in person. He opted to abide by his papers filed of record inclusive of the heads. He however reiterated that he purchased the stand in 2003. He effected instalments starting March 2003 and after he got grace period from first respondent completed payments in March 2004. Applicant alludes to an agreement of sale not a lease agreement. Applicant refuted with conviction that the agreement of sale was cancelled by first respondent. He added that if the agreement of sale was cancelled there was no basis why first respondent could receive further payments in 2004, otherwise first respondent would be bound by the principle of estoppel and directed the court to the case of *Majero v Banda*[2] where the court held that a creditor who continuously accepts defective performance from the debtor loses his right of cancellation for past breaches. Applicant added that the fact that first respondent went ahead to accept further payments after December 2003 as payment in terms of the contract between it and applicant was a tacit variation of the contract. Further applicant further submitted that after he got letters from first respondent calling him for a meeting, an extension was granted and a new time frame was given and thereafter he met all his obligations as a purchaser. All receipts he attached originate from first respondent's office and up to this date he did not get any refund from first respondent. To applicant he has managed to lay bare all elements for a relief of a *declaratur.*

First Respondent's Submission

Mr *Mhlanga* submitted that applicant admits and concedes in his papers that he breached the agreement pertaining to the stand. As a result it is first respondent's view that applicant is indirectly seeking specific performance of the contract he had breached and referred the court to the matters of *Blessmore Mabvuramiti* v *Altfin Insurance Company* [3], *Savanhu* v *Marere No & ORS*[4] where the Supreme Court held:

> "*The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain…. The court will not decree specific performance where the plaintiff had himself broken the contract unless he can show that he has performed his part or is ready to do so, and therefore he cannot*

[2] HH 119/19
[3] HH 63/13 per MAFUSIRE J.
[4] 2009 (1) ZLR 320 per MALABA DCJ (as he was then)

ask for specific performance unless he has either performed his part of the contract or unless he has been prevented from doing so by the defendant."

It was first respondent's contention that the breach by applicant for failure to pay $1.5 million by December 2003 went to the root of the contract and first respondent was justified to cancel it.

First respondent disputes applicant's estoppel allegations and denies any meeting between first respondent and applicant. No one among first respondent's employees extended the payment period to 31 March 2004. First respondent added that the receipts between January and March 2004 as well as the approval of the building plan could not have been official products of first respondent but products of fraud. It is not clear as to who between applicant and first respondent's town council employees was fraudulent. First respondent's counsel was asked by the court as to whether any police report was made about the alleged fraud and he said that none was made. He was also asked to clarify whether the receipts on p 13 of the record were issued by first respondent's officials and counsel dithered and could not commit himself on that question. However no arrests were made as to the receipt of the money paid by the applicant. First respondent added that applicant did not pay $1.5 million but less. Asked by the court about the shortfall he undertook to file the figure on line. To first respondent, applicant was in breach and first respondent did well to cancel the agreement and repossessed the stand.

Analysis of Facts

Most facts appear to me to be not in dispute. First respondent allocated Stand 2762 Mabvazuva Township to applicant in 2003. First respondent alludes to a written lease agreement which sets conditions of lease to a tenant Applicant from the onset speaks of an agreement of sale where he was and still a purchaser. Applicant denies that an agreement of lease relating to Stand 2762 was written. First respondent did not produce the agreement of lease though it says it exists. However at a later stage during hearing of the application virtually the first respondent submitted that not much turns on the lease of agreement since applicant did not meet the requirements set out in the letters written to him. It is incumbent upon the court to resolve this aspect of whether a lease agreement or letters is or are central to the issue in dispute. First respondent cautiously attached a lease agreement it entered with second respondent but avoided to produce a copy which it entered with applicant. First respondent is the author and custodian of the lease agreement and that document is a public document. The same document invariably spells out the pertinent terms and conditions that a lessee or buyer ought to meet for

a valid agreement. The onus to avail such a document lies with first respondent because it is the very document that first respondent sought throughout the proceedings to rely on. The first respondent did not. I am not satisfied that that lease contract was reduced into writing, I doubt given the surrounding circumstances that exist. I am fortified on this deduction given the fact first respondent on 21 August 2023 advised applicant of the actual price of the stand, that is $1,5 million. If there was a lease agreement first respondent would have made reference to it and also intimated changes in the purchase price. I am more satisfied on the available facts that the possibility of an initial oral agreement of sale was reached and later confirmed by use of letters addressed to applicant. I therefore reject first respondent's contention that an agreement of lease exists. I also reject that applicant is in breach of terms and conditions outlined in a lease agreement because the letter existed. The question for decision is therefore whether applicant breached terms of payment contained in the letter of 21 August 2023?

The letter of 21 August 2003 reads:

> "*Due to increased costs of servicing, the servicing costs for your stand is now $1.5 million inclusive of your initial deposit. You are required to pay $750 000-00 by 30 September 2003 and the remaining balance of $750 000-00 will be payable by instalments up to December 2003*"

The letter of 11 February 2004 speaks of a non-response from applicant to first respondent's letter of 21 August 2003 and that if applicant does not respond to that letter first respondent will reallocate the stand. The first respondent did not disown this letter of 11 February 2004. The letter did not speak of repossession. Pursuant to the letter of 11 February 2004, applicant visited first respondent's offices and according to applicant he was granted leave to complete his payments and was given up to 31 March 2004. He complied and effected all payments as reflected on p 13 of the record.

It is from the foregoing that I am satisfied that the deadline of December 2003 was extended to 31 March 2004 to allow applicant to finish payments. I am also satisfied that applicant in terms of the extension given by first respondent's agents applicant fully paid for the stand as at March 2004. As per the case of *Savanhu* v *Marere* (*supra*) applicant after meeting all his obligations has an outright right to claim specific performance of the contract.

The first respondent is required by law to equally meet its obligations of delivering the stand to applicant. I am not persuaded by first respondent's counsel that all payments effected by applicant are of no moment because first respondent had already cancelled the agreement. First respondent as a local authority acts through its agents who are its employees. Council ascends to decisions through Council resolutions which resolutions become public documents.

I did not see any resolution produced by first respondent repossessing Stand 2762 Mabvazuva and authorising refund of payments to applicant. I did not hear first respondent saying it has since refunded the $1.5 million to applicant. All receipts on p 13 of the record originate from first respondent's office and that money was paid to first respondent. I reject first respondent's argument that the receipts are evident of fraud. Council permitted applicant to pay these amounts for the stand and indeed I am persuaded by applicant that first respondent is estopped from seeking refuge in its own prevaricative conduct. No agreement of sale was breached by the applicant. Why would first respondent approve the plan, inspect the site and bill applicant for utilities. It is the fundamental principle of reciprocity that where a party to a contract behaves in a particular manner the innocent party is right to conclude that all point to a valid contract. Applicant took his plans to first respondent, the latter approves them. Applicant invites first respondent to inspect progress at the site, first respondent charges a fee and applicant paid. What can applicant legitimately expect and perceive in his mind, that he had purchased a stand. Members of public must have confidence in local authorities and believe that its officials perform duties transparently and with integrity. What would happen if a rate payer goes to a finance counter to pay bills and he or she is told the money was not received by the local authority? I conclude therefore that applicant properly paid the purchase price to the first respondent. Applicant has also met all requirements of a *declaratur* and he ought to succeed.

Accordingly it is ordered as follows:

1. ***Applicant be and is hereby declared the lawful purchaser of Stand 2762 Mabvazuva Suburb, Rusape Township Lands.***
2. ***The purported repossession of Stand 2762 Mabvazuva by 1st respondent is declared a nullity.***
3. ***First respondent to pay applicant's costs.***

Absolom & Shephered and Attorneys, 1st respondent's legal practitioners


HIGH COURT OF ZIMBABWE
Civil Division
ISSUED
18 Jan 2024
HCMT147/23
MUTARE
JUDICIAL SERVICE COMMISSION