

**REPORTABLE** (110)

**CHINHOYI MUNICIPALITY**  
**v**  
**TENDAI MUSONZA**

**SUPREME COURT OF ZIMBABWE**  
**MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA**  
**HARARE: 14 FEBRUARY 2023 & 31 OCTOBER 2023**

*E. Mubaiwa*, for the appellant

*N. Mashizha*, for the respondent

**CHIWESHE JA:** This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, handed down on 16 June 2021, dismissing the appellant's claim for an order ejecting the respondent and all those claiming occupation through him from plot 16 340 Chinhoyi (the plot), payment of holding over damages in the sum of \$300 per month for illegal occupation of the appellant's plot from 13 December 2013 to date of ejectment or vacation and interest at the prescribed rate and costs of suit.

Aggrieved by the decision of the court *a quo*, the appellant has noted this appeal to this court.

**THE PARTIES**

The appellant is a local authority established in terms of the Urban Councils Act [*Chapter 29:15*].

The respondent resides within the area under the jurisdiction of the appellant. He is a former councillor of the appellant.

### **THE FACTS**

Between 2008 and 2013 the respondent was a councillor of the appellant. The appellant alleges that at some point during his tenure as councillor the respondent created a false rates account in his name with the help of an unknown council employee and took occupation of the plot. It further alleges that the respondent never acquired the plot in question as it was reserved for a motor cross course which could not be reduced to a residential stand. The appellant states that the respondent had occupied the plot in the name of Leengate Investments (Pvt) Ltd and that the respondent never purchased the plot. On the other hand, the respondent argues that he was entitled to the plot as he had purchased it from the appellant.

After a full trial, the court *a quo* dismissed the appellant's claim with costs. The appellant appeals against that decision on the following grounds.

### **GROUND OF APPEAL**

1. The court *a quo* erred in concluding that there existed an agreement of sale between the defendant and Mr Maregere verbally and that such agreement was binding on the plaintiff contrary to the clear provisions of s 152 of the Urban Councils Act [*Chapter 29:15*].
2. The court *a quo* erred by ignoring a claim of *rei vindication* and instead placed onus on the plaintiff where onus was to be on the defendant to prove acquisition.

3. The court *a quo* erred grossly in requiring the plaintiff to prove the narrative that the defendant had no valid agreement of sale and that he did not pay for the land.
4. The court *a quo* erred by ruling that the plaintiff ought to have pleaded the law on sale of public land owned by plaintiff, which sales are all governed by s 152 of the Urban Councils Act [*Chapter 29:15*].
5. The court *a quo* exhibited bias by believing the defendant and holding him to be a credible witness contrary to the evidence placed on record.
6. The court *a quo* erred grossly by relying on plan approval process to authenticate an alleged sale where there existed no single evidence of the sale itself or the proper allocation and agreement of sale of public land.
7. The learned Judge grossly erred in arriving at a conclusion which was not in any manner supported by the facts or evidence and Law that were placed before her.”

### **RELIEF SOUGHT**

The appellant seeks the following relief:

- “1. That the appeal succeeds with costs.
2. That the judgment of the court *a quo* be and is hereby set aside and in its place the following is substituted:
  - ‘(a) Judgment be and is hereby entered for the plaintiff.
  - (b) The defendant be and is hereby ordered to vacate plot 16340 Chinhoyi within 7 days of this order, failing which the sheriff be and is hereby ordered to evict him and all those claiming occupation through him from the said property.
  - (c) The defendant is ordered to pay holding over damages to the plaintiff in the sum of US\$ 300-00 per month for illegal occupation with effect from the 13<sup>th</sup>

December to the date of ejectment or vacation of the property by the respondent.

- (d) The defendant shall pay interest thereon at the prescribed rate.
- (e) The defendant shall pay the appellant's costs of suit.”

### **THE ISSUES**

The grounds of appeal raise three issues:

- (a) Whether the respondent purchased the plot in question.
- (b) Whether the appellant is entitled to evict the respondent
- (c) Whether the respondent should pay holding over damages

### **PROCEEDINGS IN THE COURT A QUO**

The matter was referred to trial on two issues, *vis*:

- “(i) whether the defendant lawfully acquired the property called plot 16340, Chinhoyi.
- (ii) whether the defendant is liable to pay holding over damages for the unlawful occupation of plaintiff's land.”

During the trial each party called only one witness. The appellant called one Marshal Johanne who was employed by it as a revenue accountant. He told the court that he had been in the appellant's employ for 4 years, 2 years of which he was employed as a credit controller. His evidence was that the plot was owned by the appellant and that it was used for motorbike sports until 2009. The plot was then offered to a Mr Chayne. He did not take the plot citing lack of title. In June 2010, an entity called Leengate Investments applied to lease or acquire the plot. An offer to lease was extended to that company but nothing materialised as the company failed to meet the conditions stipulated by the appellant. The witness accused the respondent of having been in

cahoots with Leengate. He averred that the respondent sat in the committee that had recommended leasing the plot to Leengate, without declaring his interest. The witness stated that no agreement of sale was ever entered into between the respondent and the appellant concerning this plot. In fact, according to this witness, there are no council records confirming the alleged sale of the plot to the respondent or any other purchaser. He explained that whenever appellant intended to sell land to anyone, a resolution to that effect must first be made. When the offer is not being made to an individual, an advertisement is placed in the newspaper inviting prospective buyers to apply. Thereafter, an offer is made to the successful applicant. This is then followed by an agreement of sale or lease agreement. He denied that the respondent paid the sum of \$36 080 as there are no records to that effect. He explained that estate accounts have a unique serial number and same is created from an agreement of sale. Thus when payment is made it goes into that estate account. The witness conceded that the respondent's plans had been approved but he was unable to identify the persons who did so. He insisted that the respondent had neither the agreement of sale nor lease despite the approval of his building plans. The witness maintained that all other payments or subsequent approvals by various departments cannot stand in the absence of the source documents, that is, the agreement of sale or lease. The witness stated that his department was the custodian of all council records and his search did not yield any source documents in favour of the respondent.

The court *a quo* found this witness evasive in that he denied, for example, a document clearly marked "arrear rentals" as being what it is- a paper outlining arrear rentals. The same was observed with a document showing payment of rates. He kept referring to the relationship between Leengate and the respondent until it was pointed out to him that, in its

papers, the appellant had indicated that it later found out that there was no link between the respondent and Leengate. The court *a quo* assessed the credibility of this witness as follows:

“Rather than give his evidence in a truthful manner acknowledging where necessary that he had no knowledge of the facts, the witness struck the court as a hired gun who was bent on ensuring that the plaintiff wins at all costs.”

## ANALYSIS

### **1. Whether the respondent purchased the plot in question.**

It appears that the court *a quo* based its assessment of the credibility of this witness on peripheral matters. It however lost sight of the crux of the witness’ evidence, namely that his department is the custodian of the appellant’s records and that he had established that there was no record of any agreement of sale or lease of the plot to the respondent. For that reason, the plot remained the property of the appellant. In this regard the witness was not shaken nor did the respondent adduce evidence to contradict that position. The respondent has not produced any documents purporting to be the agreement of sale entered into by the parties. What he relies on are various inputs to do with the respondent’s departments, for example, the assessment of rates and the approval of building plans pertaining to the plot. However, it is common cause that all these processes and activities could only be embarked upon once there was a council resolution and an agreement of sale. In devoting its assessment of the witness’s credibility on peripheral issues, some of which occurred before the witness was employed by the respondent, the court *a quo* lost the essence of the inquiry that it should have embarked upon. The respondent has alleged a verbal agreement of sale entered into between him and the appellant’s employee, namely the Director of Housing. That is confirmation of the witness’s evidence that there are no records of the sale.

The appellant's position is unassailable. It did not sell the property to the respondent- there are no records to that effect. The respondent's argument is that the plot was allocated to him verbally by the appellant's director of housing. It is trite that immovable property of a municipal authority cannot be disposed of verbally without any documents. The appellant further contended that if indeed it had sold this plot to the respondent, it would have been required to comply with the mandatory provisions of s 152 (1) and (2) of the Urban Councils Act [*Chapter 29:15*] (the Act). The court *a quo* ruled that the above section did not apply because it had not been pleaded and as such the appellant was raising it as an afterthought! Firstly, litigants are generally not required to plead the law. Secondly, the contention is not an afterthought. It is the Law! In any event, it is trite that a point of law can be raised at any stage of the proceedings.

The appellant is a creature of the Urban Councils Act. Its land sales are strictly controlled by that Act.

Section 152 of the Act provides as follows:

“Subject to any rights which have been acquired by a miner, a council may subject to section one hundred and fifty-three, sell, exchange, lease, donate or otherwise dispose of or permit the use of any land owned by the council after compliance has been made with the section.

Before selling, exchanging, leasing or donating or otherwise disposing of or permitting the use of any land owned by it, the council shall by notice published in two issues of the newspaper and at the office of the council give notice:

- (a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donations, disposition or grant of permission of use; and
- (b) that copy of the proposal is open for inspection during office hours at the office for a period of twenty –one days from the date of the last publication of the notice in a newspaper; and

(c) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in para (b)”

Section 152 of the Act sets out the procedure to be followed by the appellant when disposing of land belonging to council. These provisions are mandatory. As long as same are not complied with no valid sale or transfer of council land can occur. Thus, even assuming that the respondent had a valid agreement of sale, such would not prevail in the absence of proof that the provisions of s 152 were complied with. Failure to comply with the mandatory provisions of s 152 renders the agreement null and void.

In *casu* the court *a quo* sanctioned a nullity. Its order cannot stand. See *Mcfoy v United Africa Co* 1961 (3) ALL ER 1169 (PC) at 1172.

**2. Whether the appellant is entitled to evict the respondent.**

There was no valid agreement of sale between the parties.

Accordingly, no rights accrue to the respondent with regards the plot. The appellant has the right to vindicate its property. It may evict the respondent therefrom.

**3. Whether the respondent should pay holding over damages.**

The appellant did not, in the court *a quo*, seek to prove the *quantum* of the holding over damages it seeks. The claim for arrear rentals is defective in that the figure of US\$300 per month seems to have been plucked from the air. No evidence was led to prove that the figure sought is in line with rentals generally charged and paid in the relevant locality for similar properties. The claim cannot be granted



## **DISPOSITION**

The court *a quo* grossly misdirected itself in accepting, as it did, that the respondent had proved that he had bought the plot from the appellant, in the absence of any document proving such sale. It surprisingly came to the conclusion that council land could be alienated on the basis of a verbal agreement as alleged by the respondent. The facts as presented clearly show that there were no records at the appellant's offices to prove the alleged sale. More importantly, the respondent did not produce such documentary evidence. In any event, he was not in a position to do so, having alleged that a verbal agreement between him and appellant's Director of Housing was all that had happened.

It is doubtful if a mere employee of the appellant, such as the Director of Housing, had the authority to sell council land in the absence of council resolution to that effect. The respondent, being a councillor at the time, would have been aware of the need to obtain council resolution and to invoke the provisions of s 152 of the Act. He did not subject this verbal agreement to these procedures. Further, the respondent did not produce evidence to show that he had paid for the plot. It is for these reasons that the appellant alleges dishonest conduct on the part of the respondent.

The court *a quo* grossly misdirected itself by ignoring the clear provisions of s 152 of the Act. These provisions are mandatory. Failure to comply with these provisions nullifies the alleged sale of the plot. In the circumstances the respondent has no leg to stand on. He cannot resist the claim to evict him from the appellant's property.

The appellant did not prove its claim for holding over damages.

Accordingly, the appeal must succeed only in part. Costs shall follow the result.

In the result it is ordered as follows:

1. The appeal succeeds in part.
2. The respondent shall pay the costs of the appeal.
3. The order of the court *a quo* be and is hereby set aside and in its place substituted the following:

“(a) The application succeeds in part.

(b) The respondent be and is hereby ordered to vacate plot 16340, Chinhoyi within 7 days of service of this order upon him, failing which, the sheriff be and is hereby ordered to evict him and all those claiming occupation through him from the said property.

(c) The claim for holding over damages is dismissed.

(d) The respondent shall pay the costs of suit.”

**MAVANGIRA JA** : I agree

**MUSAKWA JA** : I agree

*Warara & Associates*, appellant’s legal practitioners

*Nelson Mashizha Legal Practitioners*, respondent’s legal practitioners