

FUNGAI MUNYAMA

versus

VIMBAI MUPONDA

HIGH COURT OF ZIMBABWE

CHINAMORA J

HARARE. 9 June 2022 and 25 July 2023

### **Opposed application**

*J S Mandizha*, for the applicant

*J Sikhala*, for the respondent

### **CHINAMORA J:**

In his founding affidavit, the applicant describes the application before the court as one for a declarator in terms of s 14 of the High Court Act [*Chapter 7:06*]. However, I observe that the cover of the application refers to it as an application for an interdict. Notwithstanding this, the draft order on p 17 of the record asks the court to declare that the agreement between the applicant and respondent in respect of the property known as Lot 4 of Geluk Farm, Beatrice, held under Deed of Transfer Number 7756/2018, is null and void. The applicant alleges that on 7 September 2020, he entered into an agreement of sale with the respondent in respect of Lot 4 of Geluk Farm, Beatrice, aforesaid. In addition, the applicant avers that the respondent breached the agreement by failing to make payments as agreed between the parties, resulting in the applicant cancelling the agreement. She was given notice of cancellation by letter dated 27 September 2021. According to the applicant, when the respondent received the notice of cancellation, she asked for extension of time so that she could rectify the breach.

The applicant asserts in his founding affidavit that he also sought legal advice on the agreement between him and the respondent. He states that he was advised that no valid contract existed, since there was no subdivision permit as required by s 39 of the Regional, Town and

Country Planning Act [*Chapter 29:12*]. The applicant submits this as his reason for seeking the relief of a declarater, while offering to refund the amount paid by the respondent.

The respondent opposed the application, and filed a counter-application for unjust enrichment. She raised a point *in limine* that relief sought is unclear, since the application is one for a declaratory order in terms of s 14 of the High Court Act, yet the relief that he is asking for is an interdict. As such, the respondent is asking the court to strike the matter off the roll as the application is defective. I have looked at the draft order, which appears on p 15 of the record and find no basis for the respondent's attack that the relief being sought is not a declarater. On the contrary, a request that the agreement signed by the parties be declared null and void is clearly declaratory relief. There is no merit in this preliminary point, and I dismiss it.

I heard argument from the parties in respect of the preliminary point and the merits and reserved judgment. The applicant refers to (and relies on) the agreement of sale which appears on p 27 of the record marked Annexure "A". In his founding affidavit, the applicant alleges that the respondent breached the agreement by failing to pay the agreed instalments of US3 000.00 per month. The letter of cancellation dated 27 September 2021, which is on p 16 of the record and is marked Annexure "D" explains the breach and gives notice of 14 days to rectify the breach. The next document which followed the dispatch of the cancellation notice is the application *in casu* which was filed on 9 November 2021 seeking an order nullifying the agreement of sale. An allegation is made in the founding affidavit that the agreement breaches s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*]. Section 39 (1) reads, in relevant part, as follows:

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

(b) enter into any agreement –

- (i) for the change of ownership of any portion of a property; or
- (ii) ...
- (iii) ...
- (iv) ...

(c) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section forty:"

It is evident from the preamble (on p 28 of the record) that the agreement *in casu* was for the sale of a subdivided portion of Geluk Farm, Beatrice. However, at the date of conclusion of the agreement and at the time of cancellation, there was no permit granted in terms of s 40 of the

Regional, Town and Country Planning Act. The agreement was, therefore, illegal and not capable of enforcement at law. In this respect, in *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (SC) at 348F, McNALLY JA stated:

“Section 39 forbids an agreement for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited.”

It is because of this trite position of the law that the applicant seeks a declarater. If the issue was one of failure to meet the payment terms of the agreement, a declarater would not have been the appropriate relief. The problem is the breach of a statutory provision. Let me state the elementary position that courts will not recognize an agreement which is in breach of the law. For this reason, I am satisfied that the applicant has established the requirements for the relief that he seeks.

I now turn to the counter-claim by the respondent. Essentially, the claim raised by the respondent is for refund of the sum of US\$21 500, being the deposit paid in relation to the sale of the property in question. At any rate, I do not think that ordering a refund of the deposit is by any means enforcement of an unlawful agreement. Rather, the view that I take is that, the applicant wishes to obtain the payment which he made, in order to prevent an injustice or obviate a situation where the respondent is unjustly enriched at his expense. In this connection, it is apposite to note that in *Dube v Khumalo* 1986 (2) ZLR 103 (SC) GUBBAY JA (as he then was) said:

“... in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy “should properly take into account the doing of simple justice between man and man.”

The parties are agreed that the sale is a nullity by reason of breach of s 39 as read with s 40 of the Regional, Town and Country Planning Act. As I have already observed, the applicant has offered to refund the aforesaid amount. Given that there is no dispute regarding the agreement of sale, I will not award costs against any party. An order that each party bears its own costs will, in my view, be fair in the circumstances.

In the result, the order that I make is as follows:

1. The point *in limine* raised by the respondent is dismissed.
2. The application for a declarater be and is hereby granted.

3. The agreement of sale in respect of a piece of land known as Lot 4 of Geluk Farm, held under Deed of Transfer No.7756/2018, be and is hereby declared a nullity, and is set aside.
4. Consequently, the respondent is ordered to refund the sum of US\$21 500.00 to the applicant.
5. Each party shall bear its own costs.

*Mandizha & Company*, applicant's legal practitioners  
*Tendai Biti Law*, respondent's legal practitioners