

SAFE DRIVE MOTORS (PRIVATE) LIMITED
versus
CITY OF HARARE
and
THE DEPUTY SHERIFF FOR ZIMBABWE
and
TENDAI MACGERALD MADZIWANYIKA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 31 May 2022 & 31 January 2023

COURT APPLICATION

F M Bwanya, for the applicant
R Zinhema, for the 1st respondent
A Masango, for the 3rd respondent.

MANZUNZU J: On 31 May 2022, after hearing oral submissions by counsels, I dismissed the applicant's application with costs on a higher scale in an extempore judgment. The applicant has asked for written reasons following the noting of an appeal. The following are the reasons.

The applicant sought an order in the following terms;

“IT IS HEREBY ORDERED THAT:

- 1. The agreement entered into between the applicant and 1st respondent remains valid and force and effect.*
- 2. The 1st respondent is hereby ordered to sign all such documents as are necessary to effect transfer title and rights of stand 910 Greystone Township of Greystone A, situate in the District of Salisbury, measuring in extent 3267 SQM, into the name of the applicant within five (5) days from the date of service of this order.*
- 3. In the event of the 1st respondent refusing, neglecting and/or failing to sign such documents, in terms of paragraph 1 above, the Deputy Sheriff be and is hereby directed to sign all necessary papers to effect transfer of the property known as stand 910 Greystone Township of Greystone A situate in the District of Salisbury.*
- 4. The 1st respondent is hereby ordered to record this transaction of change of ownership.*

5. *The 1st respondent shall bear the costs of suit on the scale of legal practitioner and own client to the extent that such costs are permitted in proviso (iii) to by-law 70 (2) only if it opposes the matter.”*

BACKGROUND

On 16 July 2020 the applicant instituted these proceedings for a compelling order as against the 1st and 2nd respondents. On 2 September 2020 the application was granted in default of appearance by the respondents which was later on rescinded by consent on 15 September 2020. On 23 September 2020 the 3rd respondent was joined as a party to these proceedings. On 24 June 2021 the application was dismissed in default of appearance by the applicant. The default order was however rescinded by order of this court on 18 January 2022. The application was subsequently set down for 31 May 2022 when I heard full argument by counsels.

The applicant's case is that, on 26 August 2016 the applicant and 1st respondent entered into an agreement for the sale of stand 910 Greystone Township of Greystone A, situate in the District of Salisbury measuring 3267 square metres (the property). The applicant says it has performed its part of the agreement hence the relief sought against the 1st respondent to effect transfer of the property to the applicant.

The position taken by the 1st and 3rd respondents is that there is no agreement of sale between the applicant and 1st respondent. In the premise, they argued, the issue of specific performance does not arise.

The key issue for determination is whether or not there is an agreement of sale between the applicant and 1st respondent in respect of the property. If it is found that there was an agreement, then the requirements for specific performance will be considered. In the event the court finds that there was no agreement then that will be the end of the applicant's case.

The duty to prove the existence of the agreement of sale rests with the applicant on a balance of probabilities. In that respect the applicant is expected to lead evidence as to what are the material terms of the agreement. Not only that, but to show that it has performed its own part of the agreement and that the 1st respondent has failed to do its own part for which the court must issue a compelling order. This is why it is important for an applicant seeking specific performance to clearly spell out the terms of the agreement.

The applicant has in a two page founding affidavit relied on an offer letter which is on page 9 of the record to say that there exists an agreement between the parties. The letter dated 26 August 2016, while it says it accepts the applicant's offer is actually a counter offer because it set conditions of acceptance. The letter reads in part;

“We write to advise that your offer has been successful. You are kindly being asked to proceed with your payment of US\$80 000 in words eighty thousand US Dollars only into the City of Harare BANC ABC Account number 12326945602029 or contact the Finance Director through the Valuation & Estates office, 1st floor R. Martin Building for assistance. Please be advised that you are being given seven working days from date of receipt of this letter to pay at least one third of the quoted value of the stand being offered to you being the deposit thereof.”

The applicant did not show that it accepted the offer by complying with the terms set out in the offer letter by the City of Harare. In fact, there is an attempt to produce a record of payment way out of the period set out by the 1st respondent. There is no agreement of sale signed between the applicant and City of Harare. To the contrary the 3rd respondent produced an agreement of sale with the City of Harare signed in June 2018. He has also shown proof of payment for the purchase price. The applicant attempts to sanitise a non-existent agreement by saying it paid the purchase price in 2019 and 2020 way out of the offer period and after the property had already been sold to the 3rd respondent.

It is out of mischief that the applicant persisted with this application which is unmeritorious. The duty lies with the applicant on a balance of probabilities to show that there exists an agreement of sale. No such agreement was produced neither were the material terms spelt out. The applicant could not say which term of the agreement was it complying with when it purportedly said it made some payments. Litigation is not a game of chance. An application succeeds or fails on its founding affidavit. This is a proper case to order the applicant to pay costs at a higher scale.

It is for these reasons that I dismissed the application with costs on a legal practitioner and client scale. These reasons are present in my extempore ruling which is part of the record the presence of which made it unnecessary for the applicant's lawyer to ask for this separate judgment for the purposes of appeal.

Mlotshwa and Maguwudze, applicant's legal practitioners
Gambe Law Group, 1st respondent's legal practitioners
Muronda Malinga Masango, 3rd respondent's legal practitioners