

STREAMSPACE INCORPORATED (PVT) LTD

Versus

HAYES CONSTRUCTION (PVT) LTD

And

LINKGATE INVESTMENTS (PVT) LTD
T/A SEEFF ZIMBABWE

And

GRACE MUGABE FOUNDATION
(TRUSTEES FOR THE TIME BEING)

And

MAZOWE RURAL DISTRICT COUNCIL

And

PROVINCIAL TOWN PLANNING OFFICER MASHONALAND
CENTRAL PROVINCE

And

MINISTRY OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING

And

MINISTER OF LANDS, AGRICULTURE, FISHERIES, WATER
AND RURAL DEVELOPMENT

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 6 & 6 March 2024

Opposed application

T. W. Nyamakura -for applicant with him, *Ms D. Kamwenda*

B. Diza -for 1st respondent

T.R. Madzingira-for 4th respondent

No appearance by 2nd, 3rd, 5th, 6th and 7th respondents

CHILIMBE J

BACKGROUND

[1] Applicant seeks an order declaring two agreements of sale of land between itself and first respondent invalid. It also prays for the refund of purchase price in the sum of US\$220,000. The application is resisted by first and fourth respondents. The rest of the respondents elected

to stay out of the broil. I will advert to the role and relevance of the respective parties as the judgment unfolds.

THE AGREEMENTS

[2] Applicant (“Streamspace”) purchased two pieces of land from first respondent (“Hayes Construction”). It paid a total amount of US\$210,000 -being US\$100,100 for each. Though commonly referred to as stands 1374 and 1375, the exact description and location of the immovable property form subject of this dispute. The transactions were recorded under two identical agreements of sale dated 7 July 2022. The second respondent (“Seeff Estate Agents”) had advertised the land for sale and apparently brokered the transactions.

[3] It is common cause that Streamspace did not have title to the land. It only held the rights and interest under lease-with-option-to-purchase agreements with Mazowe RDC. The lease agreements were recorded as MAZ/LB/904/2021 (dated 16 August 2021) for stand 1375 and MAZ/LB/1116/2022 for stand 1374 (dated 15 June 2022). The parties incorrectly recorded and styled their agreement as a contract of sale of land.

[4] What happened in fact is that, the seller merely offloaded its interest in the land. Courts have drawn attention to the distinction between the alienation of rights reposed in title, and disposal of interest enjoyed via other arrangements. Herein, it was a matter of the latter. McNALLY JA in *Gomba v Makwarimba* 1992 (2) ZLR 26 (S) commented on this seemingly common error; -

“As so often happens, the parties have used the word “sale” to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. Compare *Majuru v Maphosa* S 172-91 (not reported). It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.”

[5] This being a mistake common to both parties, it will not affect the validity of the contracts between the parties (see *Okeke v M. Duro & Company* HH 71-06)

[6] After executing the agreements of sale, the seller and purchaser attended at Mazowe RDC the very same day 7 July 2022. Thereat, that parties signed cession agreements which completed the transfer of interest in the land from Hayes Construction to Streamspace. The cession agreements form a cornerstone of the defence tendered by both first and fourth respondents. Hayes Construction and Mazowe RDC both argued cession completed the perfection and performance of the contracts. For that reason, the relief sought by Streamspace was not competent.

[7] Streamspace says it moved to take occupation on 9 June 2022. It erected a wooden structure commonly known as a cabin, and fenced up the perimeter. It thereafter commenced grading the land. In the course of such activities a police detail (apparently) assigned to third respondent (“The Foundation) approached Streamspace`s people on the ground. The police officer allegedly informed Dr. Wushe, (a director of Streamspace and deponent of its founding affidavit) himself, that the land belonged to The Foundation.

[8] I must comment on the date “9 June 2022”. I presumed that it forms part of the dollop of needless errors which littered the parties` transaction. If Streamspace indeed moved onto the land on 9 June 2024 (and not 9 July 2024) as it claims, then surely its case must necessarily collapse! (It seeks herein discretionary relief in the form of a declaratur). I say so because its application would cease to make sense.

[9] How could it still proceed to pay funds into trust for land on 4 July 2022? When a month before, another party had laid claim to that land? In the same breath, why did it proceed to execute agreements on 7 July 2024? When the police officer had practically chased it off the land? The founding affidavit recounts the events which unfolded after the encounter on 9 June 2022. These include the investigation into the status of the land. That sequence of events related by Dr. Wushe suggests however, that the incident with the officer must have occurred after 7 July 2022.

[10] That aside, the challenge by the policeman spurred Streamspace into conducting (due diligence) investigations on the land. The findings were not comforting. Streamspace immediately developed doubts regarding the land that it had just purchased. Its exact identification, location, description and status of the piece of land were all unclear. Disturbed by its findings, Streamspace moved to have the agreements invalidated and recoup its outlay.

[11] Streamspace claimed in the founding affidavit that made the following discoveries about the land it had purportedly purchased; -

- i. That the two stands 1374 and 1375 it had purportedly purchased from Hayes Construction did not exist. The Surveyor General's office itself so confirmed.
- ii. That seventh's respondent, ("The Ministry of Lands") disclosed that Smithfield Farm, where the two stands were located, had been acquired by the President of Zimbabwe (under the Land Reform Programme) through a General notice in the Government Gazette G.N 98 A of 2002.
- iii. That Smithfield Farm was subsequently offered by the Ministry of Lands to the Grace Mugabe Foundation.
- iv. That fifth respondent (the "Provincial Planning Officer") indicated that (a) the layout on which the two stands 1374 and 1375 appeared were "mere drafts" and that (b) in any event, the land was zoned for establishment of a boarding house and not for commercial and industrial use.
- v. That Mazowe RDC itself appeared unclear as to the exact status of the land.

[12] Mr *Nyamakura*, for Streamspace submitted that for purposes of the dispute, land was a legal phenomenon ahead of all else. He drew attention on that point, to a letter dated 7 February 2023 addressed by Mazowe RDC to Streamspace. In that letter, Mazowe RDC was at pains to explain the exact status of the two pieces of land 1374 and 1375. Mazowe RDC confirmed as follows; -

"We have no record for the lease of stand 1374; however we confirm that we had made an application to the Ministry of Local Government and Public Works for

pegging and site plan for the two stands as a proposed Boarding House and Training Centre. Unfortunately, the Ministry could not proceed as per our request without an instruction from the Ministry of Lands, Agriculture, Fisheries, Water and Rural Development. We have also requested for the handover of the land as advised by the Department of Physical Planning.”

THE CLAIM

[13] Streamspace bases its claim on rights issuing from the contracts it concluded with Hayes Construction. It alleges that the contracts in question were void on the grounds that the either seller disposed of non-existent property, or property not belonging to it. Which meant that there was no valid contract of sale. Firstly, there was no *merx* to the transaction. Secondly, (implied from the first argument) the parties were not of one mind as regards the existence of the *merx* concerned.

[14] I say implied because Streamspace did not plead the reason for lack of *consensus ad idem*. To understand this point further, I refer to the learned author J.T. R Gibson in his Wille’s Principles of South African Law (7th Edition). He gives the following commentary on *consensus ad idem* at pages 312-313; -

“The parties must have a consensus ad idem, that is, they must be of the same mind or understanding as to the essential or material factors of their agreement. If both parties are not of the same mind, one of them at least must be labouring under a mistake or error, i.e. a wrong impression of the actual facts. If both parties labour under the same mistake, the mistake is said to be ‘common’; if each party is under a different impression, the mistake is said to be ‘unilateral’. Whether common or unilateral, however, the rule is that mistake, if essential or material, renders a contract void.”

[15] The learned author then proceeds to examine various types of mistake and their effect on a contract. This aspect is important. Given the failure of both parties to plead or argue the question of mistake, my task is reduced to establishing if indeed the *merx* existed or not. For

that reason, I restate the backbone of the claim herein as set out in paragraphs 33 to 36 of Streamspace`s founding affidavit; -

“33. The local authority highlighted that stand 1374 does not exist in its records. Meaning the 1st Respondent together with the 2nd Respondent were purporting to sale something which they do not have.

34. From the above findings it goes to show that whatever agreement that the Applicant has is a nullity and as such motivates for the granting of a declaratory order.

35. I aver that the land in question is State land. I further aver that as such the State has not transferred any rights to the 4th or 1st Respondent but has only recognized the 3rd Respondent to take occupation of the land.

36. I am advised agreements which the Applicant and the 1st respondent entered into are patently unlawful and a nullity at law.”

[16] The responses by Hayes Construction and Mazowe RDC to the application were mutually supportive. They both averred that the *merx* was perfect. The two pieces of land in question were in existence as at the time of the agreements. And they existed now-to the credit of Streamspace`s proprietary benefit. They were definable, identifiable demarcations then and now.

[17] Hayes Construction had also legally transferrable rights in the land concerned It drew its rights from Mazowe RD. And the rights and interest were properly alienated via the agreements of sale. And the agreements led to the cession of rights and interests from Hayes Construction to Streamspace. The contracts were perfected, and performed. There was no legal basis to reverse their effect. The prayer for declaratory relief was not sustainable. As stated, the answer lies in whether or not there was a *merx* and I now proceed to answer that question.

FIRSTLY-WHAT DO THE UNDERLYING CONTRACTS SAY ABOUT THE *MERX*?

[18] This dispute emanates from a contractual relationship. This court, per MAKARAU JP (as she then was) in *Rix Upholstery (Pvt) Ltd v Buddulphs (Pvt) Ltd* HH 91-08, perhaps unwittingly shared a truism unfailingly useful in resolving contractual disputes in general; -

“To determine the dispute before me, it appears to me that I must be clear as to the nature of the contract that the parties entered into, the obligations that the defendant assumed under the contract and whether or not he breached such obligations as pleaded.”

[19] I also refer to the further guidance of the Supreme Court in *Ashanti Goldfields Zimbabwe Limited v Jafati Mdala* SC 60-17 which fortify that issued in *Rix Upholstery*. GUVAVA JA held as follows in *Ashanti* (citing with approval *Kundai Magodora & Ors v Care International Zimbabwe* SC 24-14) at page 4; -

“It is an accepted principle of our law that courts are not at liberty to create contracts on behalf of parties, neither can they purport to extend or create obligations, whether mandatory or prohibitory, from contracts that come before them. The role of the court is to interpret the contracts and uphold the intentions of the parties when they entered into their agreements provided always that the agreement meets all the elements of a valid contract.”

[20] Guided by these compass points I turn to the two agreements of sale. The question is; - did they meet the requirements of a contract of sale? In answering that question, I commence with the purchaser. Streamspace described itself as a property developer. It ventured forth to purchase “free unoccupied land for development purposes”.¹ The obvious presumption being that Streamspace was alive to the due diligence required prior to concluding an agreement for the purchase of land.

[21] It engaged second respondent (“Seeff”), a firm of estate agents, to assist in the search. Seeff acquainted Streamspace with an opportunity to buy a piece of land situate in Mazowe. The details of Seeff’s specific mandate in the transaction were not stipulated. But that it played

¹ Paragraph 17 of the founding affidavit.

an intermediary or facilitatory role is not in dispute. It received the written offer from Streamspace. The two agreements for stands 1374 and 1375 both bear the stamp of Seeff. It is not clear if Seeff drafted them. Seeff also received, receipted and retained the purchase price in trust.

[22] The agreements are titled “Agreement of Sale”. Both documents betray the obvious mark (and curse) of copy and paste. They also refer to Hayes Construction as the seller and Streamspace as the buyer. They also confirm that the transaction was a sale of land. The preamble in each agreement indicates that Hayes Construction had been “awarded” stands in Mazowe Township. The nature of the award, the date thereof, the purpose or objects as well as the awarding party were not described. The stands that were so awarded are also not specified. This aspect is critical given the subsequent multi-faceted dispute over the identity of the *merx*.

[23] The agreements give following description of the property (*merx*) forming subject of the contracts; -

- i. The property subdivision known as stand 1374 Harare measuring 26000 square metres situate in Mazowe Township.
- ii. The property subdivision known as stand 1375 Harare measuring 26000 square metres situate in Mazowe Township.

[24] The underlined wording renders the property description obviously incongruent. In addition, clause 9 carrying the sub-heading “Condition of property” stated that; -

“The property, together with all fixtures and fittings, is sold “VOETSTOETS” and as it stands, nor for any error in description or deficiency in area. The property is sold as described in the existing Title [gap] Deed and is subject to all laws and regulations, lease or leases, or rent or rent orders to which it is subject, and or ordinances attaching thereto, expressly or implied, and the Purchaser agrees to be bound accordingly. The Purchaser acknowledges acquaintance with the property while the Seller acknowledges that he has not ceded any material information

regarding the defects in the property or in the title thereof known to him at the time of the sale.”

[25] That agreements betray a marked failure to properly identify and describe the *merx*. The description therein was inadequate, inaccurate and incorrect. Streamspace, like the proverbial carrier blocks of salt, only remembered the location of the cave well after the downpour. It conducted the due diligence after execution of the agreements.

[26] Hayes Construction and Mazowe RDC fared no better. Especially the latter who happened to be the administrative authority. Unsurprisingly, each of the three contesting parties (Streamspace, Hayes Construction and Mazoe RDC) battles considerably in the papers before to rectify that failure in the agreements.

[27] Which means that Streamspace had little idea of what exactly it was purchasing. If it did, it would not have signed agreement describing non-existent stands. Hayes Construction appear to confirm this fact in paragraph 13 of its opposing affidavit and states that; -

“It is disputed that the stands fall within Smithfield Farm. Attached hereto as Annexure A is a copy of the map showing he location of the stands. The part which is duly shaded in yellow is the part on which the stands fall. The whole action is premised on wrong information by the Applicant.”

[28] Mazowe RDC also express similar sentiments exemplified by paragraph 14.2 of its opposing affidavit; -

“Applicant`s clear lack of appreciation of the land on which it was investigating is manifest when all along they were inquiring on Smithfield and hereon switched to Iron Mask, yet the actual land as planned where the properties lie is shown on our annexure F, being the remainder of Iron Mask Estate.”

[29] What emerges from the papers suggests that the creation or confirmation of the identity of the stands is an ongoing matter. Even after proceedings were instituted. Both Mazowe RDC

confirm that the records of the former were not always accurate and up to date.² Further, Mazowe RDC tenders the following explanation (in paraphrase) regarding the citation of the stands between paragraphs 12.6 and 12.8 of the opposing affidavit; -

- i. The two pieces of land formed part of a subdivision layout (obviously created by it).
- ii. The Surveyor-General's reference was given as 167-82,
- iii. The current deed number was 1543-94
- iv. The title holder of the land concerned was Romney Farms (Pvt) Ltd
- v. The layout comprised of two big stands 266 and 267
- vi. The stands under consideration 1374 and 1375 were demarcated from the two big stands.

[30] A number of questions are generated by this summary. Why was this information not inserted into the agreements? Especially clause 9 thereof? If the title is registered under Romney Farms (Pvt) Ltd, why did Mazowe RDC transfer rights in the land therein from the seller to the purchaser? Why was the layout showing the two stands 1374 and 1375 not shown? At the base of it all, it is uncontested that even as late as 7 February 2023, (proceedings were filed on 26 January 2023), Mazowe RDC were still pursuing subdivision and land use approvals.

MATERIAL DISPUTE OF FACT

[31] My conclusion from the foregoing is that there exists herein a material dispute of fact. Such dispute is irreconcilable on the papers. The parties each argued to their strengths to assert the what, which, where and who the *merx* was. But there is no authoritative evidence before me to indisputably confirm the status of stands 1374 and 1375. Mazowe RDC attempted to do so as the competent statutory authority. But not only were its hands stained by the blood of battle, its testimony was neither surefooted nor sanctified by a neutral party.

² See paragraph 18 of first respondent's opposing affidavit and paragraph 15 of fourth respondent's opposing affidavit.

[32] The existence of a material dispute of fact is, from a general precept, Ann indictment on the applicant. Rule 7 entreats litigants to pay careful regard to the matters they need to bring before the court. That reflection should guide parties on whether to proceed by way of motion or action. Each method or platform caters for specific litigant or case needs and stands best placed to address them. Rule 7 provides that; -

7 Determination of nature of proceedings

(1) Proceedings—

(a) in which the sole or principal question at issue is or is likely to be one of the interpretation of any law or of any instrument made under any law, or of any deed, contract or other document, or some other questions of law, shall be instituted by way of application;

(b) in which there is likely to be a substantial dispute of fact or for any other reason a person considers that the proceedings may not appropriately be instituted by way of an application, shall be instituted by way of a summons commencing action.

[33] These directions derive from age-old principles. In *Unitime Investments (Pvt) Ltd v Assetfin (Pvt) Ltd & 7 Ors* HH 137-23, this court conduct a survey of the authorities on material dispute of fact³. The court essentially observed that where motion proceedings hit the bedrock of irreconcilable dispute of fact, the court may take one of two options.

[34] Firstly, the court may chastise the applicant and dismiss its claim for failure to anticipate that obstacle. Secondly, the court may extend a reprieve in the interests of justice. It may order various interventions-including referral to trial. The interests of justice under such circumstances are heavily influence by the convenience or what has been commonly known as “a robust approach”.

[35] Herein, I believe a robust approach will meet the justice of the case. I say so for the following reasons. The stubborn heart of this dispute relates to the identification of two pieces of land. The parties are granted another opportunity to ventilate fully the evidence on status of

³ Commencing dutifully with the timeless dictum in *Supa Plant Investments (Pvt) Limited v Edgar Chidavaenzi* HH 92/09

stands 1374 and 1375. Further, the relief sought herein is discretionary. It will assist the process for the court to be invested with the accurate facts regarding the status of the contested *merx*.

DISPOSITION

It is hereby ordered that; -

1. The present application be and is hereby referred to trial for resolution
2. The founding and opposing papers will constitute the summons, plea, replication, bundles and summaries respectively.
3. The parties here from, progress the matter in terms of the rules
4. The question of costs be reserved for resolution in the main matter.

[CHILIMBE J ____5/3/24]

Wilmot and Bennet-applicant`s legal practitioners
Diza Attorneys -first respondent`s legal practitioners
Madzingira and Nhokwara-fourth respondent`s legal practitioners