MEREKI (WARREN PARK) COMMUNITY TRUST
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 9 January 2025

Civil Trial

E Mubaiwa, for the plaintiff
C Kwaramba, for the defendant

CHITAPI J: The plaintiff is Mereki (Warren Park) Community Trust. The trust was formed by registered Trust Deed No 722/2015 dated 12 June, 2015. The trust was founded for the main objective of advancing the welfare and interests of Warren Park Community. Warren Park is a high density suburb located to the south west of the environs of The City of Harare.

The defendant is City of Harare, a municipality incorporated by virtue of the City of Harare (Private) Act [*Chapter 29:04*] which altered Harare's municipal status to that of a city. The operations of the defendant are provided for under the Urban Councils Act [*Chapter 29:15*] and various other legislations governing local authorities in Zimbabwe.

As at June 2016, the defendant was the owner of a piece of land within Warren Park high density suburb called stand 5153 Warren Park Township. On 3 June 2016 the defendant flighted an advertisement for sale of its various stands of land. The stand in issue was listed as zoned for a primary school. The introductory part of the advertisement read as follows:

> "**SALE OF LAND: Batch 1**
>
> The City of Harare is inviting offers to purchase the below listed stands and properties. These properties are sold on a cash basis. Payment to be made within a period of 30 days. Sitting tenants will have the right of first refusal where applicable."

The plaintiff completed an offer form dated 13 June 2016 wherein it offered seven hundred and fifty thousand dollars ($750 000.00) for stand 5153/5056. The offer form has a franked stamp

of the defendant's Valuation and Estate Division bearing the date 30 June 2016. The significance therefore will be an issue for evidence.

Dealing with the pleadings, the plaintiff in the declaration pleaded that the defendant made an offer to sell Stand No. 5153 Warren Park Township on 22 June 2016 for the sum of eight hundred and sixty two thousand dollars (ZW$ 862 500.00). The plaintiff pleaded that the defendant accepted the offer on 20 June 2016. The plaintiff averred that the defendant generated a tax invoice on 30 November 2016 for payment of the full purchase price. The plaintiff averred that the sale agreement was verbal and valid for pleaded reasons which will be dealt with in evidence. The plaintiff averred in paragraph 7.5 of the declaration that it had since paid the purchase price did not plead any further details of the payment and how and when it was paid. The plaintiff sought the following order as per its draft order in paragraph 9 of the declaration:

"WHEREFORE, plaintiff prays for

(a) An order that the defendant takes all necessary steps to pass transfer of Stand 5153 of Warren Park Township into the plaintiff's name.
(b) An order that failing compliance within fourteen (14) days with paragraph (a) above, The Sheriff for Zimbabwe be and is hereby authorized and empowered to sign all necessary documents for title for stand 5153 of Warren Park Township to be transferred into the plaintiff's name.
(c) An order that defendant pays costs of suit on the attorney and client scale."

In the plea the defendant denied that it offered the stand in dispute to the plaintiff for ZW$ 865 500.000 as alleged by the plaintiff. The defendant denied that it demanded payment of the purchase price. The defendant averred that the plaintiff did not meet the conditions of the offer which were to pay one third of the purchase price within thirty days of the offer being made resulting in the automatic revocation of the offer. In short the defendant without pleading details of a violation of section 152 of the Urban Councils Act averred that the agreement even if proved to have come into being would be invalid for violating the said section. The defendant pleaded that it had tendered a refund of the amount paid by the plaintiff.

In the replication the plaintiff averred that the defendant demanded payment of $ 862 500.00 as detailed in an invoice dated 31 October 2016. The plaintiff also pleaded that the currency was the bond note introduced the same year with a legislated exchange rate of USD$1 – to $1 bond. The plaintiff averred that the defendant could not deny the contract as the defendant conducted itself in a manner that could only be construed as consistent with acceptance of the

existence of a valid contract between the parties. The plaintiff averred that the plea by the defendant that internal procedures within the defendant were not followed was not of concern to the plaintiff nor did that affect the validity of the contract or agreement. The plaintiff persisted that it made payment in terms of the agreement. The plaintiff pleaded as follows in paragraph 5 of the replication;

> "**5 Ad para 10 – 11**
>
> This is denied. Payments were made in terms of the agreement. Payments were accepted by the defendant. Defendant issued a statement in September 2020 indicating that plaintiff was no longer owing any amount in respect of Stand 5153 Warren Park Township."

The parties closed their pleadings, effected discovery, held their pre-trial conference and the matter was set down for trial. Issues for determination were agreed and will be adverted to in due course.

On the hearing date of the matter on 9 May 2023 the parties' legal practitioners advised the court that the parties were in engagement to attempt a mutual resolution of the matter. The trial was postponed to 25 May 2023, then to 8 June 2023, then to 20 June 2023, then to 6 July 2023, then to 17 July 2023 then to 9 August 2023 when the court was advised that settlement efforts had failed. The matter in consequence proceeded to hearing. The failed negotiations were however not all in vain because the parties prepared and filed a statement of agreed facts which would shorten the trial. The parties' efforts in that regard is highly commendable. It is always commendable for counsel especially in trial causes to try and settle agreed facts. I however caution that it is not proper to do this on the date of trial. This must be done before trial. The pre-trial conference procedure as set out in r 49(2) and (3) of the High Court Rules is designed to inter-alia embrace the making of admissions. The need to curtail the duration of a trial is integral to a speedy resolution of a matter. In terms of rule 49(14) the judge may call counsel to chambers to discuss the curtailment of trial. In terms of rule 49(15) The court is required to take into account the conduct of parties in settling the pre-trial and may penalize with costs a party who will have unreasonably refused to make admissions or to reach agreement on matters listed in rule 49(2). A successful party may be penalized with costs of the pre-trial conference as punishment for unreasonably withholding admissions or scuttling agreement on matters on issue which under rule 49(2) the parties are required to navigate, discuss and agree or disagree on for good reason. The

statement of agreed facts showed the parties commitment to curtailing the trial. In consequence of the agreed facts, the plaintiff did not lead further oral evidence whilst the defendant adduced evidence from one witness.

The statement of agreed facts being agreed evidence must be copied and made part of this judgment. It reads as follows;

"STATEMENT **OF AGREED FACTS**

TAKE NOTICE THAT being agreed on facts which are resolutive of the dispute between them, and pursuant to provisions of rule 52 of the High Court Rules, 2021 the parties hereby file a written statement of the facts that are common cause between them as follows:

(i) Agreed facts

[1.1] Sometime in July 2016, defendant resolved to dispose of various pieces of land in Harare including Stand 5153 of Warren Park Township. The resolution is Exhibit 1. Amongst other things, the council resolution provided for:

(a) The need for conclusion of written agreements with buyers stating the terms and conditions of disposal: and

(b) That purchasers had pay a minimum of 30% of the purchase price upon the signing of the agreement of sale and the remaining 70% balance within the ensuing 30 days.

[1.2] A form title "Offer Form (sales applications)" which is Exhibit 2 was designed which prospective buyers were supposed to complete indicating, *inter alia,* the price they were offering.

[1.3] A suitable press advert inviting offers to purchase was press including the Sunday Mail Newspaper on or about 29 May 2016. The advert which is Exhibit 3 hereto amongst other things made it clear that:

(a) The land was being sold on a cash basis, and

(b) Payment of the purchase price was to be made within 30 days.

[1.4] A standard acceptance letter which is Exhibit 4 to be sent to all successful offerors was also designed and was used to advise all successful offerors, including plaintiff, on the acceptance of their offers. Amongst other things and consistent with the advert referred to above, this letter advised purchasers to:

(a) Pay a minimum of a third of the offered amount to the City of Harare Estates bank account given therein within seven working days;

(b) That failure to pay a third of the purchase price upon conclusion of the contract would result in an assumption being made that the purchases.

[1.5] Plaintiff was one of the respondents to the advert mentioned above and on 30 June 2016 submitted an offer form (sales application) offering to buy Stand Number 5153 of Warren Park $ 750 000.00 before Value Added Tax (VAT). The offer form is Exhibit 5.

[1.6] In anticipation of payment by plaintiff, and to facilitate the matching of plaintiff's payment with the relevant transaction, an account was created for and in the name of plaintiff.

[1.7] Sometime in November 2016, a tax invoice indicating a purchase price of "862 500-00" was sent to plaintiff by defendant. The tax invoice is

Exhibit 6

[1.8] In terms of the advert, those whose offers were accepted were supposed to pay the full purchase price within 30 days.

[1.9] Plaintiff made various payments to defendant commencing on 30 January 2017, all of which amount to $ 862 500.00. The receipts are Exhibit 7A to Exhibit 7 J.

(ii**) Parties Contentions**

[2.0] Plaintiff contends on these facts that once its offer was accepted an agreement binding on the parties arose and that whatever defects in payments or performance alleged by defendant, constitute possible acts of breach of contract and do not render the agreement non – existent or terminated.

[2] Defendant contends on these facts that whatever plaintiff did, it did not comply with the terms and conditions in paragraph.

[1.7] above and resulted in "automatic revocation/ termination" of the offer. It contends consequently, that no agreement ever came into existence.

(ii) **Issues for determination**

[2.2] The parties consequently ask the court to determine the following issues:

(a) Whether there was a valid acceptance of plaintiff's offer by defendant;

(b) Whether the parties entered into a valid agreement for the sale of Stand 5153 of Warren Park Township.

(c) If so, whether plaintiff compiled with its obligations under that agreement.

(d) If so, whether plaintiff is entitled to specific performance of the agreement as prayed.

(e) The question and scale of costs of suit.

(iv) **Viva voce evidence**

[2.3] The parties shall lead any additional viva voce evidence they deed necessary to the extent same shall not in any contradict, depart from or alter the contents of para [1.1] to [1.9] above.

(v) **Submissions**

[2.4] Subject to the court's directions, the parties agree to file written submissions on both the agreed facts and viva voce evidence on dates to be fixed by the court and to further appear for oral submissions should the court so require."

The defendant's witness was Monica Mutero. She is a senior valuer and was seized with the responsibility to represent the defendant in the alleged sale of the disputed stand. It was part of her duties generally to attend to the sale and lease of the defendant's properties. She testified that the advertisement for the sale of the disputed stand and several others was flighted through her office in a newspaper. She called representatives of the plaintiff to her office after receiving the plaintiff's offer. She averred that she called the plaintiff's representative intending to give them an acceptance letter which was however subject to approval by her seniors. The witness stated that she did not give the plaintiff's representative the offer letter because an objection was received from the local councilor for the area who presented a petition by residents objecting the sale of the stand since it was zoned for a school. The witness told the plaintiff's representative of the objection. The witness then wrote a letter to the plaintiffs rejecting their offer.

In relation to an invoice exhibit 6 ref AB 0422729 addressed to the plaintiff wherein a sum of $862 500.000 was reflected the witness denied that it reflected the purchase price. She referred the court to the property address to which the invoice related. The property description to which the billing related was "G/Norah A Chitubu 11037 Glen Norah". The witness stated that if the invoice had been intended for payment towards the property in issue, then the invoice should have reflected the description of the property concerned. The witness denied that the invoice reflected the purchase price due. The witness also testified that the instruction to pay the purchase price could only have been communicated by her. She testified that she would have done so upon giving the applicant the offer form which she did not do but instead wrote a letter rejecting the plaintiff's offer.

In relation to the process which should have been followed if the plaintiff's offer had been accepted, the witness stated that firstly there is an offer made followed by an acceptance letter which would be approved by council followed by an advertisement for any objections. If no objection is received a sale agreement is entered into, payment is effected and the property is delivered to the purchasers. The witness stated that in relation to payments made by the plaintiff, they were made without their offer having been accepted. The witness averred that payment terms if any were agreed would have been reflected in the sale agreement which was however not entered into.

In cross – examination the witness admitted that the plaintiff was one of the offerors with highest offers for the property in question. The witness however stated that the sale was never completed because no offer was formally made to the plaintiff. The witness referred to a sample offer letter which she explained as the one that would have been given to the plaintiff had the plaintiff's offer been accepted. The sample "offer to purchase letter" refers to the property in question by description and gives directions in terms of payment of the purchase price and is generated by the finance director of the defendant. The plaintiff did not dispute this evidence of the procedures followed by the defendant in processing offer letters.

In relation to payment of various sums of money by the plaintiff into an account no. SUN 0045181, the witness stated that accounts were created for each property on sale but payment into the account for purposes of the discharging the purchase price was to be made after acceptance of the offered amount and the release to the purchaser of the offer from with instructions for payment. The witness also noted that the invoice for payment of $862 500.00 referred to a property in Glen Norah. The witness accepted that the invoice exhibit 6 was addressed to the plaintiff. In relation to the various payments, the witness explained that the payments made were done without the defendant's sanction the witness also commented that the payments did not reflect revaluations made after the introduction of united states dollars as the currency in use. The witness commented as well that the payments were made in 2017 and 2019 making the purchase an instalment sale in the absence of a sale agreement nor a basis pleaded for piece meal payments.

In its assessment of the witness and her evidence the court noted that she gave a sample narration of the circumstances surrounding the controversy on the claimed purchase of the disputed property by the plaintiff. Her evidence was easy to follow. Her demeanor was good. She was

confident in her narration and answers to questions put to her in cross – examination. In short the witness was a credible witness and her evidence was equally credible.

The parties filed closing submissions. The plaintiff's counsel submitted that there were five issued for determination as indeed they were as set out in the agreed facts. On the first issue on whether or not there was a valid acceptance of the plaintiff's offer by the defendant, the plaintiff's counsel submitted that exhibit 4 which was the standard offer letter was sent to all the offerors whose offers had been accepted. Counsel submitted that paragraph 1 – 4 of the agreed facts amounted to an admission by the defendant that it accepted the plaintiff's offer. The said paragraph 4.1 reads as follows:

> "A standard acceptance letter which is exhibit 4 to be sent to all successful offerors was also designed and was used to advise all successful offerors including plaintiff on the acceptance of their offers _ _ _"

The plaintiff's counsel submitted that the above quoted statement confirmed that the defendant had a standard form of acceptance which advised the successful offerors of the acceptance of their offers. Counsel submitted that the exhibit 4 type letter of acceptance was sent to the plaintiff. It is common cause that the plaintiff did not produce such a letter nor did it explain why although such letter was in existence, it was not produced.

The plaintiff's counsel submitted that the evidence of the defendants witness Mutero, was construed to mislead the court when she testified that no offer letter was issued by the defendant to the plaintiff. Counsel submitted that the witnesses' credibility was undermined because her evidence contracted agreed facts. It was submitted that the plaintiff had in the agreed facts made an admission that the defendant issued an offer letter in the form of exhibit 4. Counsel relying on several authorities submitted that once an admission is made on the pleadings, it is taken as fact and is treated as such unless it is withdrawn. Counsel averred that the position with admissions made in judicial proceedings was set out by the Supreme Court case of *Mining Industry Pension Fund* v *DAB Marketing (Pvt) Ltd* SC 25/12 as follows;

> "A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead evidence to prove the facts that have been admitted."

It was submitted therefore that the issue of the communication of the acceptance of the plaintiff offer by the defendant was resolved.

The defendant's counsel disagreed. He submitted that the plaintiff's offer to purchase stand 5153 was not accepted by the defendant. Counsel submitted that the acceptance of the offer could only have been made in writing since the defendant is a corporate body. It was further submitted that had the offer been accepted, the defendant would have issued a written acceptance of the offer in the format of exhibit 4. Counsel submitted that no such letter was issued. The court was urged to accept the evidence of Monica Mutero, the senior valuer who was in charge of the sale to the effect that the defendant's acceptance could only have been generated and communicated by her and her denial that she wrote a letter of acceptance of the offer. It was submitted that the plaintiff had in the summary of advise outlined that Mutero communicated with the plaintiff representative to advice of the acceptance of the offer but that when the representative went to collect the acceptance letter at 2:00pm, Mutero did not issue any documents but instead she indicated that her hands were tied.

In the statement of agreed facts the parties agreed to lead viva voce evidence at their election provided that the evidence did not contradict, depart from or alter the facts outlined in paragraphs (1.1) to (1.9) of the agreed facts. Whether or not the evidence of Mutero contradicted the agreed facts is a matter that the parties legal practitioners would have dealt with during the giving of evidence by Mutero. When Mutero gave evidence at no stage did the plaintiff's counsel object to the evidence on any of the grounds alluded to. The court must accept the evidence of Mutero to the extent that she was allowed to lead it. Its relevance and credibility is something different. If as counsel for the plaintiff argued that the witness' evidence contradicted the agreed facts, the evidence even if it does "contradict alter or depart" from the agreed facts and should be rejected, the answer is that where evidence has been allowed by the parties to be led and the witness who gives such evidence is cross – examined and re – examined and no objection is raised when the evidence is led and in cross examination, the evidence will have been property placed on record. The court must in this instance consider the evidence together with the agreed facts and resolve any contradictions.

It is a fact that the parties did not give any details about the alleged letter of acceptance. There was no evidence in the agreed facts to indicate the details of the letter, the date that it was

sent, who prepared and signed it and indeed how it was delivered and who received it. The argument by the plaintiff's counsel that paragraph 1.4 of the agreed facts confirms that an acceptance letter was therefore issued is ingenious but unsupported by the agreed statement itself or any other evidence including Mutero's denial. In the consideration of all the evidence in this case, it is clear that what paragraph 1.4 implies is that exhibit 4 was a sample offer acceptance letter which would be sent to successful offerors, the plaintiff included as the method of communication of any acceptance. Exhibit 4 as a sample embodied an offer acceptance pertaining to a different transaction not connected with this case. The agreed facts in para 1.4 do not state nor is it stated anywhere else in the agreed facts that the defendant accepted the plaintiff's offer. It is noted in any event that if it was common cause that the offer acceptance letter had been issued as plaintiff's counsel argued, the parties would not have noted issue number 1; stated as follows:

> "whether there was a valid acceptance of the plaintiff's offer by defendant."

In the determination of this issue, the court must consider the relevance and impact of exhibit 6 which is a tax invoice. Paragraph 1.6 of the agreed facts indicated that an account in the name of the plaintiff was created to match the anticipated payment. The plaintiff counsel that submitted the invoice "indicated a purchase price of $862 500.00. In paragraph 1.8 of the agreed facts, it was indicated that offerors whose offers were accepted were supposed to pay the purchase price within thirty (30) days. The agreed facts without relating to whether the purchase price was paid indicated that payment commenced on 30 January 2017 with several payments being made over time until the sum of $862 500.00 was paid up. This way in which the fact was settled simply shows how counsel can scuttle around a problem fact. The totality of paragraphs 1.8 and 1.9 when compressed was simply that (a) the purchase price in full was to be paid within 30 days of the acceptance of the sale and (b) the plaintiff did not pay the purchase price within thirty days. The problem encountered arose from the fact that the letter of acceptance was not produced and there were no details of it adduced in evidence.

The evidence of Mutero on the issue was adduced without objection. The witness was categoric that no offer acceptance letter was issued to the plaintiff and that she instead issued a letter rejecting the plaintiff's offer, That evidence was not disputed in cross examination. Exhibit 6 itself referred to a billing for a different property as clearly this appears upon perusal of the invoice which shows the property to which the invoice relates as stand 11037 Chitubu, Glen Norah.

It was further noted that the invoice showed a billing date of 31 October 2016 with the amount due thereon being due within 30 days by 30 November 2016. The amount of $862 500.00 was indicated as a balance brought forward. The plaintiff's address is reflected as the postal address for bills relating to stand 11037 Glen Norah. There is nothing on exhibit 6 to bear a relationship between it and the sale of the disputed property in this suit. The evidence of Mutero that the purchase price could only be paid after the plaintiff had been issued with the offer acceptance letter would in my opinion be consistent with the paper trail of the disputed sale. This is because the exhibit 4 sample shows that it *inter alia* names the property under purchase and directs the account in which to deposit the money and details of the amount and payment terms if any.

Further even if a finding were to be made for argument purposes that the plaintiff's offer was accepted, then it becomes necessary to consider the nature of the contract. It was conditional on payment of the purchase price being made within thirty days of the acceptance of the offer. The condition was not fulfilled. Even if the invoice exhibit 6 for argument purposes is accepted to be part of the transaction in issue and reflected the purchase price to be paid, the invoice was due for payment by 30 November 2016. The plaintiff did not fulfil the conditions but instead made part payments which commenced with payment of $40 000.00 on 9 February 2020 almost four years after the impugned sale of the disputed property took place Several small payments were initially made thereafter into the same account no. SUN 0045181 by the applicant

From a consideration of the evidence of the defendant's witness and the agreed facts, it is clear that there was no acceptance of the plaintiff's offer. It is noted that the plaintiff appears to adopt a mutually irreconcilable position wherein on one hand it argues that there was an acceptance of its offer by the defendant by issue of a written acceptance and on the other hand the plaintiff relies on a verbal acceptance. The two positions cannot co-exist. Even if the court was to consider the alleged sale agreement as having been a verbal one, the plaintiff did not lead any evidence of the verbal agreement. The agreed facts did not speak to details of such contract. A verbal contract must be supported by evidence that establishes proof of the contract. The elements of a contract of sale must be verbally proved in as much as the situation is the same where reliance is placed upon a tacit agreement.

Thus having found that there was no valid acceptance of the plaintiff's offer by the defendant, I do not find it necessary to determine the rest of the issues save for costs. In the case

of *Gwaradzimba N.O* v *CJ Petron & Company (Proprietary) Limited* SC 12/2016, GARWE JA (as then he was) stated at paragraph's 23 and 24 regarding the need for the court to determine all issues issued by the parties;

> "[23] The position is well settled S that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, "unless the issue so determined can put the whole matter to rest. *Longman Zimbabwe (Pvt) Limited* v *Midzi & Ors* 2008 (1) ZLR 198, 203D (S).
> [24] The position is also settled that where there is a dispute on some question of law or fact there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial. – *Charles* …… v *Revesai Dzinoruma* HH 106/2006; *Muchapondwa* v *Modake & Ors* 2006 (1) ZLR 196 D-G 201 – A; *GMB* v *Muchero* 2008 (1) ZLR 216 221 C – D (5)."

In this matter the decision not to deal with issues (b). (c) and (d) is informed by the fact that the determination of issue (a) in the negative puts paid to issues (b), (c) and (d). The negative determination of issue (a) essentially means that no contract came into being between the plaintiff and the defendant whether expressed or tacit. The issue of its validity does not arise since validity does not rise from nothing. Equally no obligations arise from a nothing and no specific performance arises from a nothing.

It is elementary and trite that offer and acceptance constitute the cornerstone of a valid contract. See *Bwakura & Another* v *Hamilton Property Holdings (Private) Limited and Ors* HH 190/22 a case quote by plaintiff's counsel in the closing submission. It is stated by MUZOFA J as follows:

> "A valid contract is created where there is an offer and acceptance between persons with legal capacity to contract. The concept of offer and acceptance must be understood in light of the underlying intention of the parties to create a common intention to bind themselves by a legally enforceable contract. There must be a meeting of the minds a consensus ad *idem* "

In the light of the above principles and the court's findings that the plaintiff failed to prove that there was a valid acceptance of the plaintiff's offer; the plaintiff's claim has not been proved and must be dismissed.

On the issue of costs they must follow the event and will be awarded to the defendant on the ordinary scale. There is no justification to grant costs on the punitive scale. The litigation was

not a vexatious one. The applicant did not claim for a refund of the amounts it paid and I leave it at that.

Accordingly,

IT IS ORDRED THAT;

1. The plaintiff's claim be and it is hereby dismissed with costs.

CHITAPI J: ……

Samukange Hungwe Attorney, plaintiff's legal practitioners
Mbidzo, Muchadehama and Makoni, defendant's legal practitioners