

BINGA RURAL DISTRICT COUNCIL

Versus

ANNA MBOMBA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 AND 23 JUNE 2022

Opposed Application

E. Mlalazi, for the applicant
G. Sengweni, for the respondent

MAKONESE J: This is an application filed as a “counter-application” filed in terms of the rule 229 A of the High Court Rules, 1971. The terms of the order sought is the following terms:

“IT IS ORDERED THAT:

1. That the cancellation of the agreement of purchase of stand number 259, Binga between the applicant and the respondent be and is hereby confirmed.
2. That the respondent and all those claiming the rights and occupation of house number 259 Binga through her be and are hereby evicted and/or ejected from house number 259 Binga.
3. That the respondent pays costs of this application on an attorney and client scale.”

This application is opposed by the respondent. At the commencement of the hearing of this matter the respondent's legal practitioner indicated that he was no longer pursuing the points *in limine*. The matter was therefore heard on the merits.

Background Facts

In 1997 Binga Rural District Council resolved that applicant would sell some of its houses to employees of council who had served for a minimum of 10 years. This resolution was communicated to all employees. Respondent indicated her intention to purchase the property being stand number 259 Binga. In October 2007 the parties entered into a lease with an option to purchase agreement. The parties agreed on a purchase price of Z\$360 million. The respondent paid a deposit of Z\$100 million in two instalments during November 2007. On 31st December 2017 respondent's contract of employment was formally terminated. Applicant's employment policy allowed employees to remain in council houses for a period of at least 3 months after termination of employment. Respondent was granted permission to remain in occupation of the property up to 30th November 2018. Respondent continued to occupy the property after the 30th of November 2018. She refused to vacate the property. Initially respondent agreed to move out of the property and made a written request for a four month extension and grace period to organize alternative employment. In a sudden turn of events, respondent engaged legal practitioners indicating that she was entitled to a 3 month notice period. Respondent made further demands, indicating that she was entitled to remain in occupation on the basis of the deposit she had made towards the payment of the purchase price. It is common cause that the respondent defaulted payment in accordance with the agreement of sale. The parties re-negotiated the terms of the agreement. It was subsequently agreed that the balance outstanding would be set at US \$12 321.00. As an alternative, it was resolved that applicant could reimburse respondent the sum of US \$4 740.00. On the 10th

July 2020 applicant advised the respondent that she was taking too long to settle the balance of the purchase price and that she should make a decision on the options available to her. Respondent requested a re-evaluation of the property by the Ministry of Local Government. This was done. The property was evaluated and the price was pegged at US \$17 061.00. It was resolved that since the respondent had paid in Zimbabwean dollars the amount would be converted to the percentage of the total value of the property. This percentage after re-evaluation of the property translated to a balance of US \$12 321.00. This is the amount respondent ought, to have paid to render her obligations to the applicant extinguished.

On 20th July 2020 and out of the blue, the applicant received communication from Messrs Sengweni Legal Practitioners, with an attachment of proof of payment of the sum of Z\$12 321. Respondent cited the provisions of section 4 (1) (d) of S.I 33/2019. Respondent claimed that she had extinguished her obligations in full and could not be evicted from the property. Applicant claims that by paying the amount in Zimbabwean dollars instead of US \$12 321 or its equivalent at the prevailing bank rate, this was a clear repudiation of the contract. Applicant claims that on the 17th of December 2020, and following respondent's repudiation of the contract, Council resolved that the proposed sale of the property to the applicant be withdrawn and that she be paid back the sum of US \$4 740, representing the deposit she had paid.

SUBMISSIONS BY THE APPLICANT

The applicant avers that this application is a counter-application for the eviction of the respondent from stand number 259, Binga. This counter-application is in response to the court application filed by the respondent under case number HC 213/21. Applicant contends that following the termination of respondent's contract of employment and her repudiation of

the proposed agreement, respondent lost any residual right to remain and/or claim any right of occupation in stand number 259 Binga, beyond her contract of employment.

The applicant contends that the provisions of S.I 33/2019 do not have application in this matter. Applicant avers that S.I 33/2019 dealt with assets and liabilities that were denominated and valued in United States Dollars prior to the effective date. The effective date being the 22nd of February 2019. Applicant argues that the property in dispute was never at any point before the effective date value, expressed or denominated in United States Dollars. The applicant asserts that the agreement of sale was denominated and expressed in Zimbabwean Dollars. The agreement of sale was revalued after the promulgation of S.I 33/2019. Applicant contends, therefore that payment could only been made in fulfilment of the agreement in United States Dollars or at the prevailing interbank rate of exchange. Applicant submits that the respondent failed to discharge her obligations and breached the agreement by attempting to re-negotiate the agreement unilaterally. Applicant contends that the respondent repudiated the agreement by her insistence to settle the balance of US \$12 321-00 at the rate of one to one. The applicant therefore no longer has any obligation to transfer stand number 259 Binga to the respondent. Applicant submits that it is entitled to cancel the agreement of sale and evict the respondent from the property.

SUBMISSIONS BY THE RESPONDENT

Respondent's submissions are captured in the Opposing Affidavit and the Heads of Argument. Respondent argues that during the course of her employment she was offered stand 259 Binga as part of her employment benefits. Respondent confirms that in 1997 applicant offered to sell to her the property in question. In 2007 the applicant and respondent finalized the terms of the agreement. The agreed price for the property was Z\$360 million.

Respondent paid a deposit of Z\$100 million. Respondent contends that there was a verbal agreement that the outstanding balance would be payable in instalments commencing January 2008. Respondent contends that respondent was not presented with an agreement of sale despite having paid the deposit. Respondent avers that she made a follow up on the agreement of sale with the applicant but she never got a response from the applicant. Respondent retired from employment in 2017. She continued residing in the property. In April 2019 respondent received a letter from the applicant demanding that she should vacate the property. Respondent argues that the reason she refused to vacate the property was that she had paid a deposit towards the acquisition of the property. Respondent contends that she sought a re-evaluation of the property and that this resulted in the property being valued at US\$17 061.00. Respondent was given the option of paying the balance of the purchase price or being refunded the sum of US\$4 740.00 representing the deposit she had paid.

Respondent submits that she chose the option of paying the outstanding balance of US\$12 321.00. Respondent avers that she duly paid the sum of Z\$12 321. The applicant refused to accept the money and transferred it back to the respondent's account. Respondent claims that she extinguished her obligations and that she paid the balance of the purchase price on a rate of one to one. Respondent denies that she repudiated the contract and that her payment was in accordance with the provisions of S.I 33/2019. Respondent contends that there is no legal basis for evicting her from the property.

**WHETHER THE CONTRACTUAL OBLIGATIONS BETWEEN THE
PARTIES ARE COVERED BY S.I 33/2019**

Section 4 (1) (d) of S.I 33/2019 provides that:

“For accounting and other purposes, all assets and liabilities that were immediately before the effective date valued or expressed in United States Dollars – shall on and after the effective date be valued in RTGS dollars at the rate of one to one to United States Dollars.”

The provisions of S.I 33/2019 were discussed and resolved in *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd & Anor* SC 3-20. The court laid down a three legged test under which an asset or liability is covered by the provisions of S.I 33/2019. The test is:

1. was the asset or liability in existence before the effective date of the law?
2. was the value of the asset or liability expressed in United States Dollars immediately before the effective date?
3. is the asset or liability excluded from application of this section by section 44 C (2) of the Reserve Bank Act (Chap 22:15)?

The first two questions must be answered in the affirmative and only after they are answered can one proceed to the third question which require to be answered in the negative for section 4 (1) (d) of S.I 33/2019 to kick in. Applying the test to the asset or liability in issue, the inquiry would be, was the property in dispute and/or agreement in existence before the effective date? The answer would be yes. On the second question as to whether the value or asset or liability was expressed in United States Dollars immediately before the effective date? The answer would be no. The inquiry would therefore end there. In terms of *Zambezi Gas* (supra) this means the asset is not covered by S.I 33/2019. The respondent’s argument that she was entitled to find shelter in the provisions of S.I 33/2019 is not sustainable on the facts and the law.

I agree with applicant's contention that respondent's argument that the asset or property was covered by S.I 33/2019 is without any merit.

WHETHER THE RESPONDENT REPUDIATED THE CONTRACT OF SALE

The respondent's insistence on paying the sum of US\$12 321.00 at the rate of one to one to the United States Dollar as captured in the letter of 20th of July 2020 is a clear sign that respondent had no intention of paying the US\$12 321 as agreed between the parties or at the rate equivalent at the inter-bank rate of exchange. In that letter respondent's Legal Practitioners wrote in part as follows:

- “1. That our client grudgingly accepted...*
- 2. That the liability of US\$12 321 has been outstanding since our client made her last payment to you in 2007.*
- 3. That in terms of section 4 (1) (d) of the Presidential Powers (Temporary Measures) Amendment of the Reserve Bank Act all assets and liabilities that were immediately before the effective date valued and expressed in United States Dollars shall on and after the effective date be deemed to be valued in RTGS dollars at the rate of one-to-one to the United States Dollar.....*
- 4. The effective date of the Regulations referred to in paragraph (3) above was 22 February 2019.*
- 5. That our client has paid off what she owes Binga Rural District Council and we attach hereto proof of such payment ...”*

The notion of repudiation has been discussed in several cases in this jurisdiction. The Oxford Dictionary defines the word “repudiate” as; “to refuse to accept or obey something or

to reject". Repudiation of a contract essentially means the refusal to perform a contract obligation. Before a court comes to the conclusion that a party has repudiated the contract there must be clear indication that a party is unwilling to perform a contract obligation. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pvt) Ltd & Anor* SC 43-19, the court stated as follows:

"It is correct that in determining whether a party has repudiated a contract, the test to be applied is whether the party has acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. It is also correct that repudiation is a species of anticipatory breach. See: Chinyerere v Fraser N.O 1994 (2) ZLR 234 (H). Repudiation may manifest itself in a variety of ways ..."

The respondent in this matter breached the agreement and failed to pay the balance of the purchase price. The respondent demanded re-evaluation of the value of the property. Instead of paying the balance due she refused to do so. Respondent sought to re-write the contract and argued that she was entitled to pay the balance of the purchase price of US\$12 321.00 at a rate of her own choosing. Respondent clearly did not intend to pay the balance and tried every trick in the book to pay an account she perceived would remedy her breach. She was not entitled to do so.

WHETHER APPLICANT IS ENTITLED TO EVICT THE RESPONDENT FROM THE PROPERTY

The applicant has shown on the papers that the respondent breached the agreement. Respondent pleaded to remain in the property after her contract of employment was terminated. Respondent requested for grace period to pay off the balance of the purchase

price. Respondent failed to do so. Initially, the respondent pretended that she was genuinely intending to pay the balance. She asked for a re-evaluation of the price of the property. The evaluation was done. Respondent was required to pay a sum of US\$12 321 in order for her to extinguish her liability. Instead of negotiating the terms and mode of payment, respondent sought to pay the balance of the purchase price on a rate of one-to-one. This payment was rejected and transferred back to the respondent's account. Respondent repudiated the contract and therefore has no right to remain in the property. She is no longer an employee of Council. She has lost all rights in the property. In any event, the respondent breached the agreement and failed to remedy the breach.

DISPOSITION

I am satisfied that the applicant has established that it is entitled to the order sought in the Draft Order. The application is merited. In the result, and accordingly the following order is made:

1. The cancellation of the agreement of sale between applicant and respondent in respect of stand 259 Binga, be and is hereby confirmed.
2. The respondent and all those claiming rights of occupation of the property being house number 259 Binga through her, be and are hereby evicted from the said property.
3. The respondent is ordered to pay the costs of suit.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Messrs Sengweni Legal Practice, respondent's legal practitioners

