

NETSAI NHEMWA
versus
FIDELITY ASSURANCE ZIMBABWE PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 7 February and 23 February 2022

Application for a Declaratur

Mr Shamu, for the applicant
N.M Phiri, for the respondent

MHURI J: This is an application for a declaratur by applicant in terms of section 14 of the High Court Act [*Chapter 7:06*]. The initial Draft Order filed together with the application on 19 July 2021 has since been abandoned by applicant and replaced by another whose terms are as follows:

1. That the instant application be and is hereby granted
2. That applicant having effected payment of Two Thousand One Hundred and Forty Five Zimbabwean Dollars and Eighty- One cents [ZWL2145-81] has fully discharged her obligation towards the payment of the purchase price of the immovable property being stand number 3884 of Fidelity Southview Park.
3. The respondent be and is hereby ordered to effect transfer of a certain piece of land called stand number 3884 of Fidelity Southview Park into the applicant's name within six months from the date of this order.
4. Each party to bear its own costs.

The brief background is that:

on 20 July 2015 applicant and respondent entered into an agreement of sale of a certain piece of land known as stand No 3884 Fidelity Southview Park.

The purchase price was US14 400-00(Fourteen Thousand four hundred United States Dollars) which was to be paid as follows:

1. “a deposit of US\$3750-00 payable within 5(five) days of signing the agreement.
2. the balance of the purchase shall be paid over a period of up to 60(sixty) months by monthly instalments of US\$226-00 (Two Hundred and Twenty Six United States Dollars)
3. a variable monthly average interest rate will be charged by the seller on the remaining balance based on the market rates prevailing from time to time”.

In compliance with the terms of the agreement, applicant subsequently made payments towards the purchase price. According to applicant, by 3 July 2020 she had fully paid the purchase price plus interest. She had paid a total sum of US\$ 15 096 -28.

According to applicant in March 2021 she got a vernal demand from respondent for the payment of US\$ 885-29 as accrued interest upon failure of payment the sale would be cancelled pursuant to clause 17.1.1 of the agreement.

As a result, parties engaged each other on the issue to no avail until 19 July 2021 when applicant filed this application.

Respondent opposed the application raising a point *in limine* to the effect that there is no cause of action warranting the application and the relief sought, as respondent had not disputed the currency in which the outstanding purchase price is to be paid and has even gone further to invite applicant to make payment of the same. The outstanding amount according to respondent is ZWL 2026-91 upon payment of which respondent wished to settle the matter. To that end therefore the application was voidable as respondent had indicated its willingness to settle the matter.

On the first date of hearing 21 January 2022, the parties agreed that each party bears its own costs.

On the second date of hearing 7 February 2022 the parties had agreed that the outstanding purchase price had been paid, and paragraph 1 of the Draft Order was no longer in issue.

The only paragraph that remained in dispute was paragraph 3, which reads;

“ the respondent be and is hereby ordered to effect transfer of a certain piece of land called stand number 3884 of Fidelity Southview Park into the applicant’s name within six months from the date of this order”.

The issue for determination therefore is whether the court should order respondent to effect transfer of the property to applicant as prayed for by applicant.

Respondent’s stance is that it is not possible to pass transfer because it is subject to fulfilment of certain conditions which are beyond it, namely, approval of the project by the City of Harare and also that Covid restrictions can also delay the transfer.

Clause 3 of the agreement states:-

“The seller shall tender transfer of the property to the Purchaser within a reasonable period after full payment of the purchase price and all other sums payable in terms of this agreement or made arrangements to the satisfaction of the seller securing the payment thereof. The Purchaser shall within fourteen days (14) after written notice from the seller notifying the Purchaser of its intention to transfer the property, provide the seller’s conveyancers with the following:-

- Full costs of transfer
- Value added tax on the purchase price
- All such data, information and documents (duly completed) as may be requested of him

Clause 3.2 states;

“Please note: Transfer may take time due to stipulated conditions of approval of the project by the City of Harare.”

Clause 4 states;

“Occupation and possession of the property shall be given to the Purchaser upon the registration of transfer from the seller to the Purchaser, provided the seller may in his absolute discretion give occupation and possession prior to transfer as long as the certificate of compliance is obtained from the City of Harare.”

I have quoted the above clauses as the Parties’ Counsel have specifically referred to them in their oral submissions. As stated earlier, applicants paid the full purchase price by July 2021. In terms of clause 3 of the agreement afore mentioned, respondent was obliged to pass transfer within a reasonable time. Respondent is to give applicant written notice of its intention to transfer after which the applicant within 14 days is to provide the conveyancer with the full costs of transfer, value added tax and all such data, information and documents as may be requested.

It is clear from the above clause that respondent is obliged to pass transfer. The question is what is, within a reasonable time? Is six months as submitted by applicant not a reasonable period within which to effect transfer. Covid restrictions have been relaxed, this is common cause hence 6 (six) months in my view, is a reasonably long enough period for respondent to obtain the City of Harare approval for the project and pass transfer. The excuses being given by respondent especially in view of the fact that it has always been desirous to have the matter settled are just meant to frustrate and prejudice applicant. Respondent cannot be allowed to do so.

I will therefore grant the application and order as follows:-

- 1) that the application be and is granted
- 2) that applicant having effected payment, has fully discharged her obligations towards the payment of the purchase price of the immovable property being stand number 3884 of Fidelity Southview Park

- 3) that respondent immediately puts in motion all the processes required to effect transfer AND effect transfer of a certain piece of land called stand number 3884 Fidelity Southview Park into applicants' name within 6 (six) months of the date of this Order.
- 4) each party is to bear its own costs

C Nhemwa and Associates, Applicant's Legal Practitioners
Mvingi and Mugadza, Respondent's Legal Practitioners