NELISIWE MLAMBO KARARA
versus
AROSUME PROPERTY DEVELOPMENT
and
MWANAWEVHU HOUSING COOPERATIVE
and
KUDZANAI CHIKUTU
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, ,31 May, 9 and 23 June & 30 July 2021

Opposed Application

E.T Tavenhave, for the applicant
F.Nyangani, for the 1st respondent
P.Mutukwa, for the 2nd respondent
A. Y Saunyama, for the 3rd respondent
No appearance for the 4th respondent

MUZOFA J: The applicant seeks the following order as set out in the amended draft order;

1. "The lease agreement entered between the applicant and the fourth respondent in respect of stand 294 Carrick Creagh, Borrowdale Harare be and is hereby declared valid and binding between the parties.
2. The sale agreement concluded between the first and third respondent in respect of stand no. 294 Carrick Creagh, Borrowdale Harare be and is hereby declared null and void and is set aside.
3. The allocation of stand 294 Carrick Creagh, Borrowdale Harare to third respondent by first and fourth respondents be and is hereby declared null and void and is set aside.
4. The first, second, third and fourth respondents to pay the costs of this application on a legal practitioner client scale one paying absolving others"

The 1st respondent is a registered company whose main business interests is in property development. The 2nd respondent is a duly registered housing cooperative. The 3rd respondent is the subsequent purchaser of the property in dispute. The 4th respondent is the Minister responsible for state land and properties.

The 2nd and 4th respondents entered into a partnership in terms of which the 4th respondent provided land in Carrick Creagh to the 2nd respondent to enable its members to access stands. The 1st respondent was appointed to develop the stands. The applicant was allocated stand number 294 Carrick Creagh, Borrowdale 'the property' in October 2011 by the 4th respondent in terms of a lease agreement.

According to the applicant she was in the executive of the 2nd respondent. The executive was exempted from paying development fees. On the 6th of August 2019 she visited the 4th respondent's office where she discovered a letter in her file from the 4th respondent demanding payment of $404 999.04 being outstanding development fees by 31 January 2019. She averred that although the letter was dated 18 December 2018 there was no valid service at her address of choice, as a result she had sight of the letter well after the due date. There was no valid cancellation. She fully paid for her stand in terms of the lease agreement. During the course of enquiries on the cancellation she also discovered that the property had been allocated to the 3rd respondent. Thus she seeks relief to cancel the allocation and lease agreements entered into in respect of the property with the 3rd respondent.

The 1st, 2nd and 3rd respondents opposed the application. The 4th respondent did not oppose the application.

The 1st and the 2nd respondents opposed the application and contended that the privilege not to pay development fees was later withdrawn. By not paying the development fees the applicant breached the agreement between herself and the 4th respondent. The applicant failed to demonstrate that she fully complied with the terms of the lease agreement therefore she is not entitled to the order sought.

The 3rd respondent opposed the application on the basis that she was lawfully allocated the property and fully complied with the terms of agreement. The application falls short of the requirements of a declaratory order.

The first issue for determination is the validity of the purported cancellation of the lease agreement.

The applicant said she did not see the letter which cancelled the lease agreement. It is not in dispute that the letter was not served on the applicant's address of choice. Clause 21 of the lease agreement sets out the applicant's *domiciluim citandi et executandi* as 987 Sugarloaf Road Glen Lorne.

Domicilium citandi et executandi is an address nominated by a party to a contract where legal notices may be sent; the onus usually is on the party to notify the other signatory

of any change in address, especially to be ready to receive any notice that is delivered to that address. In *Amcoal Collieries Ltd* v *Trust*[1] the Supreme Court of Appeal that:

> "It is a matter of frequent occurrence that a *domiciluim citandi et executandi* is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution (if a man *chooses domicilium citandi* the *domicilium* he chooses is taken to be his place of abode. See *Pretoria Hypotheck Maatschappi* v *Groenewald* 1915 TPD 170). It is a well-established practice (which is recognised by r 4 (10 (a) (iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service of process at such place will be good even though it be a vacant piece of ground, or the defendant is known to be resident abroad or has abandoned the property or cannot be found. (Hebstein and Van Winsen *The Civil Practice of the Superior Court of South Africa* 3rd ed at 210. See *Muller* v *Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W*)* at 331 H-333A, *Lonyan (Pvt) Ltd* v *Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847 D-F)".

The chosen address guides the other party where to send process. Once notice is delivered at the *domicilium citandi*, then there is no need for evidence of actual receipt , it is good service. The opposite may be equally true that if a party delivers a notice at any other address it must prove receipt of the notice.

In this case it is not in dispute that the letter was sent to a postal address. *Ms Saunyama* argued that the 4th respondent has always communicated with the applicant using the postal address which is not the *domicilium citandi* and the applicant has seen such communication. I was referred to the delivery of the lease agreement letter and the applicant's receipts where the postal address was used. It may be correct that such communication existed however it was not argued that such waived the applicant's *domicilium citandi* in the lease agreement. The chosen address could only be changed by the applicant upon notice to the 4th respondent. No such evidence was placed before me. In the absence of evidence that the applicant received the letter from the 4th respondent there can be no valid service to talk of. My finding is that there was no effective service of the letter on the applicant.

My finding on the validity of service means the purported cancellation of the lease agreement falls away.

Even if l am wrong in my finding, there was no valid cancellation of the lease agreement in this case.

Where a contract lays down the procedure for cancellation, that procedure must be followed otherwise a purported cancellation may be ineffectual. Two clauses relate to termination of the lease agreement. Clause 15 provides for the cancellation of the lease agreement as follows;

[1] 1990 (1) SA (1) A. @ 5J-6

> 'That if the lessee shall fail to pay the said rent, or any part thereof on the date when it is due and payable …, **the lessor shall be at liberty forthwith to declare this agreement terminated and to take possession of the stand/stands and to eject** the lessee therefrom, but without prejudice to any claim which the Lessor may have for unpaid rent, or for damages in lieu thereof, nor shall the lessee be entitled to the refund of any rental paid by him in terms of the lease' (my emphasis)

Clause 22 which was said to be a forfeiture clause provides for summary cancellation of the lease agreement in the event of a breach. It was submitted for the 3rd respondent that the letter was a notice to remedy the breach, when the applicant failed to remedy the breach the 4th respondent could automatically cancel.

The correct position of the law was articulated that a forfeiture clause giving the innocent party the right to cancel for failure to perform after a specified period does not require him to give that notice before cancelling for repudiation[2].However the 4th respondent's conduct did not confirm the cancellation. The letter gave the applicant until 31 January 2019 to remedy the breach failure of which the 'offer will be withdrawn'. The effective cancellation or withdrawal was never made. As a general rule cancellation must be communicated to the other party – *Swart* v *Vosloo*[3] and *Phone-a-Worldwide Copy Ltd* v *Orkinand Anor*. It is also a principle of our law that if cancellation has not been previously communicated, it takes effect from service of summons or notice of motion/application .See *Middelburgse Stadsraad* v *Trans-Natal Steenkool Korporasie Bpk*[4].

If the letter was a notice then in terms of the parties' agreement the 4th respondent was required to notify the applicant of the cancellation. As matters stand none of the respondents can put a date when the lease agreement was cancelled. I am not inclined to rely on the general law on forfeiture clauses where the parties specifically agreed on how the cancellation must be made. It is trite that forfeiture clauses are valid and enforceable strictly according to their terms[5] . Clause 15 required that the 4th respondent to declare the lease agreement terminated. There was no such declaration. The notice letter provided that failure to remedy the breach will result in a withdrawal of the offer. The effective withdrawal was never served on the applicant. There was neither a valid notification of cancellation nor summons served to signal termination as per *Middelburgse Stadsraad* v *Trans-Natal Steenkool Korporasie Bpk* (supra).In July 2019 the 4th respondent accepted rental payments from the applicant, some five months after the notice

[2] Christie's Law of Contract in South Africa , 7th Ed,LexisNexis
[3] 1965 (1) SA 100 (A) @ 105G, 1986(1) SA 729(A) @ 751A-G
[4] 1987 (2) SA 244 (T) @ 249A-G.
[5] Christie's Law of Contract @ p 599

to remedy the breach was issued. It can be inferred that the 4th respondent waived its rights to cancel based on the letter.

Thus from the two perspectives there was no valid cancellation of the lease agreement.

The next issue for determination is the appropriate relief. The applicant requires that the lease agreement be reinstated and the agreement between the 4th and 3rd respondents be cancelled so that she may retain the property. In essence the applicant wants specific performance.

Specific performance is a discretionary remedy vested in the courts. The court's discretion must be exercised judicially upon a consideration of all the relevant facts of the case. Generally every party to a binding agreement who is ready to carry out his obligation under it has a right to demand the other party, so far is possible to perform its undertaking in terms of the contract. See *Hativagone &Anor v CAG Farms (Pvt) Limited & Others*[6].There are circumstances where a court may decline to grant an order for specific performance for in instance a litigant cannot seek specific performance where it has not performed its part of the bargain. The learned author Christie[7] sets outs instances in which specific performance may not be granted. Subject to the court's discretion it cannot be granted where (i) it will result in undue hardship on the defendant, an injustice or inequitable in the circumstances (ii) where compliance will be impossible (iii) in contracts for personal services and (iv) in circumstances where the obligations are imprecise.

In this case the applicant's cause of action is based on the letter delivered to her by postal address. I reproduce the relevant part of the letter for ease of reference,

> **"RE: Outstanding Development Fees and rental payment for stand 294 Carrick Creagh Township**
>
> Please be advised that in terms of Clause 14 and 15 of our lease agreement with yourselves, the two clauses have not been complied with. In addition 5.2 and 5.4 of the Tripartite Agreement entered into between the three parties, you should have remitted development fees to the sum of $404 999.04 to the land developers of the project.
>
> Please remit the above mentioned sum and failure to comply with the above before 31 January 2019, shall assume that you are no longer interested in the stand, hence the offer will be withdrawn.'

The notice to cancel by the 4th respondent was based on a breach of clauses 14 and 15 of the lease agreement and non-payment of development fees. Clause 14 and 15 sets out the

[6] SC 42/15@16
[7] IBID @620-626

consequences for non-payment of rent within the stipulated dates, failure to exercise her option to purchase the property in terms of the agreement, failure to commence or erect buildings as required. In its offer letter dated 13 October 2011 the 4th respondent specifically drew the applicant's attention to the material terms of the agreement that is clause 3 for payment of annual rentals, clause 5 for plans to be approved and buildings commenced on the property on or before the 1st of July 2011 and clause 4 that buildings worth $200 000-00 be erected on or before 31 October 2014.

In her founding affidavit the applicant's claim only addresses one component of the breach that is the development fees. The applicant does not deny that she did not exercise the option to purchase within the stipulated time. The applicant did not dispute that she did not erect the buildings as required by the terms of the lease agreement. There was evidence that even the rental payments were eventually settled in July 2019.They were not paid in terms of the agreement. It is trite that which is not denied is taken as admitted. She did not tender compliance with the terms of the agreement. In addition, even though the 3rd respondent specifically highlighted the breaches in her answering affidavit the applicant neither addressed the issue whether she exercised her right to purchase nor commenced any building. Even the oral submissions did not address the issue. In essence the applicant did not perform her part of the bargain neither did she tender performance.

It is common cause that the property in dispute has since been allocated to the 3rd respondent. It was alleged that the 1st respondent entered into a contract with the 3rd respondent for the allocation of the property. The court was not favoured with the agreement. Even if the allocation of the stand is not denied by the 3rd respondent it would have been prudent for the applicant to place the agreement before the court for a proper assessment of the agreement. Similarly the applicant argued that the 1st respondent had no right to allocate and enter into the agreement with the 3rd respondent. The applicant did not favour the court with the Tripartite Agreement entered into by the 1st, 2nd and 4th respondents setting out the parties' rights and obligations in respect of the properties that were subject to the lease agreement. The applicant attached a project implementation report generated by the 1st respondent. It was argued that the 1st respondent's obligations were in paragraph 4 of the report. The submission was not persuasive. This was only a report, it is not an agreement. A report can only address its terms of reference. I was not referred to such. As such the court is not clear if paragraph 4 exhaustively sets out the 1st respondent's rights and obligations in terms of the partnership agreement. The paucity of evidence placed before the court in respect of the agreement between

the 1st and 3rd respondent disables the court from making an informed decision. In other words the applicant has failed to prove its case on a balance of probabilities.

From the circumstances of this case, I am of the firm view that this is an appropriate case for the court to exercise its discretion against the applicant. The applicant seeks a declaratory order which in essence is specific performance yet she did not comply with the terms of the agreement neither did she tender performance in her pleadings. A court cannot come to the aid of a litigant who intends to hold another party accountable yet she herself has not been true to the agreement. Secondly the property has been allocated to the 3rd respondent. Although there was no information on the extent of improvements made by the 3rd respondent it would seem that the 3rd respondent has taken occupation and effected some improvements .In view of my finding in respect of the cancellation of the agreement between the 1st and 3rd respondent it would then be impossible to grant the applicant's claim.

In the final l address an ancillary issue raised by the applicant. It was argued that the 4th respondent must have proceeded in terms of the Contractual Penalties Act (Chapter 8:04)[8].I agree with *Ms Saunyama's* submissions that the Act is inapplicable .The Act is applicable to instalment sales of land. The agreement between the applicant and the 4th respondent was a phased agreement. The initial stage was the ordinary lease agreement, after fulfilment of certain conditions like exercising the right to purchase the agreement graduated into a sale of land agreement. This could be a sale of land agreement subject to suspensive conditions. The applicant did not fulfil the conditions precedent. There was therefore no agreement of sale of land *instrictu*.

Costs always follow the cause. I was not given any reason to depart from the general principle.

From the foregoing the following order is made,

The application is dismissed with costs.

Tavenhave and Machingauta, applicant's legal practitioners
Nyangani Legal Practice, 1st respondent' legal practitioners
Mashizha and Associates, 2nd respondent's legal practitioners
Chikwangwari Tapi Attorneys, 3rd Respondent's legal practitioners

[8] Section 8