

ELIJAH TAPATAPA
versus
RYDALE RIDGE PARK PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 June & 15 September 2021

Opposed application

Mr A *Chimhofu*, for the applicant
Mr K *Gama*, for respondent

TSANGA J: The applicant seeks a declaratur to the effect that he paid the full purchase price in terms of an agreement of sale between the parties dated 20 October 2016. The order sought is also to the effect that the payments of the deposit plus monthly instalments, from December 2017 to August 2020 by the applicant to the respondent's bank account, were in accordance with the agreed terms of sale agreement between the parties. Ancillary relief is also sought in that the applicant seeks that the respondent be ordered to sign all necessary documents to effect transfer of ownership to him within seven (7) days of the order sought. Failing which, the applicant's prayer is that the Sheriff or his Deputy be ordered to sign the necessary documents for transfer of title within ten (10) days of the respondent having been informed and failing to comply. Applicant seeks costs on a higher scale.

The factual context

In October 2016, the respondent sold the applicant stand 1730 Rydale Ridge Park measuring 300 square metres. The purchase price was US\$15 500.00 of which US\$3 500.00 was to be paid as the deposit and thereafter sixty (60) monthly instalments of US\$200.00 were to be paid. It is applicant's averment that he paid the deposit on 21 of October 2016, and, that thereafter between December 2016 and December 2019 a sum of \$7 400.00 was paid. From January to August 2020 he then made eight instalments of ZW\$8 000.00. The deductions for these payments made from his salary in total amounted to ZW\$18 900.00 at the time of this application.

Following the seismic currency shifts between 2018 and 2019 when the country moved from the US dollar to the local dollar, his averment is that he did not receive an alleged notice sent

out to all purchasers in May 2019 advising those with outstanding balances these balances were to be liquidated in United States dollars at the rate of US\$100.00 per month. He also queries the conversions made into US dollars at the going rate by the respondent, of the sums deducted in Zimbabwean dollars from his salary. As a result the amount paid by the applicant is said by the respondent to amount to the equivalent of US\$9 424.00 thus far.

He says he wrote to the respondent requesting transfer in September 2020 but was never dignified with a response to his letter. He insists that his payments were at a rate of 1:1 and in accordance with the law and that he has therefore more than discharged his obligations in terms of the sum that was payable in total. The sum total of applicant's claim is therefore that he has overpaid yet deductions continue to be made from his salary by his employer, the University of Zimbabwe, in service of the instalments. According to him, he is thus being prejudiced.

Given that the quest for a declaratur emanates from an agreement of sale, the applicant also avers that he is an interested party as envisaged by s 14 of the High Court [*Chapter 7:06*] in terms of who can seek a declaratur.

The respondent is opposed to the declaratur sought on the basis that what applicant is actually in quest of is a declaration of facts as opposed to a declaration of rights since whether the purchase price was paid in full or not and in accordance with the agreement is said to be a purely factual matter. Respondent disputes that the monies paid were paid in accordance with what the parties had agreed. The respondent also points to clause (a) of the agreement which specifically stated that payments would be in cash to Rydale Park. The applicant is said to have breached the agreement by paying electronically against an agreement that required him to pay cash. The amount paid as deposit is also factually disputed.

According to the respondent, clause 8 of the agreement further provided that no indulgence granted, whether express or implied by conduct, of any breach by the purchaser of any of his obligations, would constitute waiver by the seller. It would not prejudice the seller of any rights to cancel the agreement. In essence, the respondent says the sums paid by the applicant by way of electronic transfer were not acceptable unless converted to cash. Respondent maintains that it is incompetent to ask the court to declare the existence of a fact rather than a right. Furthermore, it is asserted that the applicant cannot seek specific performance by way of a declaratur.

The respondent also denies the claim by the applicant that he never received the notice that payments were to be made in cash in the reduced sum of US\$100.00 following the fiscal alterations introduced by Government. He is averred to have refused to sign for such notice. Moreover, respondent says the rate of 1.1 was applicable to any payments that were due before 1 February 2019 when the currency changes were ushered in by S.I. 33 of 2019. It is also argued by the respondent that the effect of the law that required contractual obligations to be settled in a currency different from that agreed upon by the parties was to terminate the agreement.

In answer, the applicant insists that what he still owed as the balance became payable in RTGS on a 1.1 basis as clearly stipulated in the relevant statutory instrument at the time and as later incorporated as an amendment into the Finance Act. He further highlights that the amount was being paid by way of electronic transfer because the respondent issued its banking details and a stop order was affected. He therefore insists that he paid in excess of his principal debt.

The legal arguments

The essence of applicant's argument in his heads of argument and at the hearing was that he has discharged his obligations and that the respondent is the one who has not been forthcoming in honouring his obligations. He insisted that he is entitled to a declaration of right on full payment and that his employer be directed to stop deductions. He also argued that he is entitled to a declaration that a transfer of the stand be effected.

The main argument by the respondent was that the court should not allow itself to be turned into an accounting or bookkeeping session and that there is not right to be declared by the court in this instance. The relief sought being that the applicant paid the full purchase price in terms of the agreement of sale, respondent emphasized this as being a factual enquiry and not an inquiry into a right. At the core of this argument was that whether or not his payments were in accordance with the agreed terms of the sale agreement between the parties is a factual issue. Reliance was placed on the cases of *Electrical Contractors Association (South Africa) & Anor v Building Industry Federation* 1980 (2) SA 516 (T) as well as *The Government of the Self Governing Territory of Kwazulu v Mahlangu* 1994 () SA 626 T at 634BC for the principle that a party must set forth what the alleged right is and that its nature and scope must be enquired into. In the absence of proof of such a right, the court is said to have no jurisdiction.

Mr *Gama* for the respondent also emphasized at the hearing that what constitutes an asset is an instalment that was due and not those that were due in the future. He stated that an instalment due in three (3) years could not rightly be regarded as an asset as was sought herein. His argument was that a future payment was not an amount affected by S.I. 33 of 2019.

He emphasized that there were disputes of fact as to what was paid, highlighting too that the schedule of what was paid had been prepared by the applicant's employer without also placing any concrete evidence before the court to prove that the amounts deducted were indeed transferred to the respondent's bank account. He also argued that in so far as the law passed made payments impossible as per agreement, then the agreement itself was effectively discharged due to impossibility. In response, Mr *Chimhofu* for the applicant argued that an instalment sale of land is not discharged unless pronounced upon by the court.

Analysis

The question of balances owing that were in United States dollars being converted to RTGS dollars by the then S.I. 33/19 has been authoritatively dealt with and explained fully by the Supreme Court in the case of *Zambezi Gas Zimbabwe (Private) Limited v (1) N.R. Barber (Private) Limited & Anor* SC 3/ 2020. Such balances were deemed to be opening balances in RTGS dollars at par with the United States dollar. Granted the *Zambezi Gas* case was not factually addressing an instalment sale but the principle is effectively the same since even an instalment sale would have had a balance owing based on the initial sum agreed. Whether parties were free thereafter to enter into new agreements with their own specific arrangements is not before this court and in any event the applicant says he refused to accept any altered arrangements.

What is before me is that applicant seeks a declaratur that he has effectively paid what he owed to the respondent in accordance with the agreement. The respondent alleged breach of the contract on the part of the applicant from the time the agreement was entered into in terms of sums paid and forms of payment made even before S.I. 33 of 19. There are dispute of facts as to whether the applicant's conduct amounted to breach. To the extent that the applicant is alleged not to have stuck to the agreement in terms of what the parties agreed right at the onset, I am inclined to agree with the respondent that whether or not the payments made were in accordance with the agreement between the parties is a factual issue as opposed to one of a right. The meaning of a contract made in the context of business operations is always a question of fact and before any rights can be

pronounced such questions of fact must be determined. Respondent has also drawn attention to the clause in the agreement that stipulated unequivocally that any deviation or accommodation of the purchaser away from the agreement would not deviate from its rights.

In light of the material dispute of facts which cannot be resolved on paper as to whether the contract was breached from the onset, this court therefore cannot grant the applicant the declaratur as prayed.

Accordingly, the application for a declaratur is dismissed with costs.

Access to Justice Law Clinic, applicant's legal practitioners
Gama & Partners, respondent's legal practitioners