WONDER MUNZARA
and
DELUXE MASHAVA
and
THERESA KASHAVA
and
ROSELINE MUSARINGO
versus
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 16 May & 24 August 2022

Opposed Matter

Mr *F Nyamayaro,* for the applicant
Mr *A Moyo,* for the respondent

MANGOTA J: I heard this matter on 16 May, 2022. I delivered an *ex tempore* judgment in which I granted the application as prayed.

On 23 May, 2022 the respondent wrote requesting written reasons for my decision. These are they:

The respondent, a municipality which is established in accordance with the Urban Council Act, sold to the first, second, third and fourth applicants stand numbers 1051, 1043, 1044 and 1052 (" the property/properties") respectively. It sold the first two properties to the first and second applicants on 13 November, 2019 and the last two properties to the third and fourth applicants on 26 June, 2020 and 19 May, 2020 respectively. It invited each applicant to pay to it certain sums of money which it referred to as an administration fee and a provisional intrinsic land value.

Pursuant to the respondent's invitation to make the requisite payments to it, the first and second applicants each paid to it an administration fee of $ 1500 and a provisional intrinsic land value of $ 50 000. The last two applicants each paid to it an administration fee of $ 4000 and a provisional intrinsic land value of $ 150 000. The sums were in respect of the property which each applicant purchased.

Following the payments which the applicants made, the respondent advised them that he/she would be advised of the actual land intrinsic price after completion of the valuation of the property/properties.

The issue which relates to the actual land intrinsic price for each property constitutes the applicants' cause of action. They complain that the respondent has not as yet given them the actual land intrinsic price for the properties. They remain of the view that the same should be given to them to enable them to pay and proceed to develop their respective properties. They allege that they made numerous follow-ups on the matter with the respondent without success. They claim that the respondent has ignored them or done nothing about their request. They couched their draft order in the following terms:

IT IS HEREBY ORDERED THAT:-

1. The respondent is hereby ordered to advise the applicants in writing the actual land intrinsic values in respect of stands Nos. 1051, 1043, 1044 and 1052 Mount Pleasant Township, Harare within 7 days of this order.
2. Should the respondent not comply with this order within the period aforementioned, the provisional intrinsic values already paid by the applicants shall be deemed to be the full and final payments in respect of the intrinsic values for the stands.
3. The respondent to pay costs of this application at the rate of attorney and client scale.

The applicants' case falls into the broad principles of the law of contract, that of purchase and sale in particular. Purchase and sale is, by definition, an agreement in which one person, or entity, the buyer, or purchaser, acquires property from another, the seller, in return for payment of a sum of money, the price. Its commercial purpose is clear. It is for the buyer to become the owner of the property, or holder of the right, purchased in return for payment of a price. It, in short, is a legally enforceable agreement which imposes reciprocal obligations on the contracting parties, the seller (vendor) and the purchaser (buyer) respectively: G. Bradfield. K. Lehmann, *The Principles of the Law of Sale & Lease, 3rd edition, Jut*a, page 7.

De Wet & Van Wyke 313 state that a contract of sale is a reciprocal agreement by which one person, the seller, undertakes to deliver an object (res, *res vendita, merx)* to the other, the buyer, and the buyer undertakes, in return, to pay the seller a sum of money (*pretium*) in exchange for the object. The requirements which must be met in a contract of sale, it is evident, comprise:

i) the seller who wishes to sell and deliver to;
ii) the buyer who wishes to buy and pay to the seller;
iii) a certain sum of money for;

iv) the thing purchased.

All the above-mentioned four requirements are met in the case which the parties placed before me. Each applicant purchased a property from the respondent and paid a certain sum of money for it. The respondent, according to the parties' agreement, was to give to each applicant the actual land intrinsic price for the property which he/she purchased to enable the latter to pay and proceed with his/her development of the property. Each of them expresses his/her readiness to pay. The respondent's silence on the stated issue remains a matter of serious concern to the applicants.

That the applicants complied with the respondent's requirements requires little, if any, debate. The annexures which each of them attached to the application in support of his/her case are clear evidence of the applicants' performance of their own side of the contract. The first applicant, for instance, attached to his application annexures A and B. The first annexure which the respondent wrote to him on 13 November, 2019 advises him of the respondent's offer to him of Stand number 1051, Mount Pleasant Township, Harare. It invites him to pay to it an administration fee of $1 500 and an intrinsic land price of $ 50 000. Annexure B shows the payments which the applicant made.

Annexures C, D, and E relate to the second applicant. The first is the letter which the respondent wrote to him on 13 November, 2019 advising him of its offer to him of Stand number 1043, Mount Pleasant Township, Harare. It invites him to pay to it an administration fee of $ 1 500 and a provisional deposit for intrinsic land price of $ 50 000. Reference is made in the mentioned regard to Annexure D which the respondent wrote to the applicant on 14 December, 2019. Annexure E is the payment which the applicant made.

Annexure F is the letter which the respondent wrote to the third applicant on 26 June, 2020. It advises her of its offer to her of Stand number 1044, Mount Pleasant Township, Harare and its invitation to her to pay to it an administration fee of $ 4000 and a provisional deposit for intrinsic land price of $ 150 000. Annexure G are the payments which the applicant made.

Annexure H is the letter which the respondent wrote to the fourth applicant on 19 May, 2020. It advises her of its offer to her of Stand number 1052 Mount Pleasant Township, Harare and of its invitation to her to pay to it an administration fee of $ 4000 and a provisional deposit

for intrinsic land price of $ 150 000. Annexure I shows the payments which the fourth applicant made.

It is on the strength of the above-observed set of matters that the applicants are moving me to direct the respondent to honour its own side of the contract which it concluded with them in 2019 and 2020. They are, in short, moving for the remedy of specific performance. The remedy is available to the plaintiff or applicant who has either performed, or is ready to perform, his own side of the contract. Every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party…a performance of his undertaking in terms of the contract: *Farmers Co-operative Society (Reg)* v *Berry*, 1912 AD 343 at 350; *Smith & Ors* v *ZESA*, 3003 (1) ZLR 158.

The applicants have shown that they complied with all what the respondent required of them in fulfillment of their contract with it. They expressed the intention to pay for the intrinsic land price for their respective properties. All they require in the mentioned regard is for the respondent to give to each one of them the information which relates to the stated matter. Their motion for specific performance is therefore not misplaced. It is with merit. The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain: *Savanhu* v *Marere N.O. & Ors*, 2009 (1) ZLR 320 (S).

That the views of the applicants are *in sync* with the contents of the above-cited case authority requires no debate at all. A reading of paragraphs 11, 12 and 14 of their founding papers is relevant. These read:

> "11. After payment of the Administrative charges and the provisional figures for the land intrinsic value, the respondent should have valued the land and thereafter advised the beneficiaries of the actual intrinsic values to enable them to pay and proceed with the development of their properties.
>
> 12. Ever since the respondent allocated the applicants the stands in question in 2019 and 2020, it has not advised the applicants of the actual intrinsic value of their stands.
>
> 13…….
>
> 14. The time taken by the respondent without furnishing the applicants with the intrinsic values has become grossly unreasonable. The applicants have suffered prejudice as they cannot proceed with developments of their stands before payment of the full intrinsic value for the stands".

The above-cited statements confirm the observation that the applicants are not only willing but are also ready and able to pay the actual land intrinsic price for their respective properties. Their justified complaint is that the respondent is, as it were, holding them to ransom for no apparent reason. This therefore justifies their motion which constitutes the raison *de"etre* for their application.

The respondent's *in limine* matter which is to the effect that the relief which the applicants are seeking is *ultra-vires* my jurisdiction is misplaced. The applicants, it is observed, are moving me to grant to them the remedy of specific performance. That remedy is within my jurisdiction. It cannot therefore be suggested to be outside the jurisdiction of the court. As the applicants correctly state, their main prayer offers the respondent the opportunity to perform its own side of the contract. It is only when it fails to comply with the applicants' main prayer that the latter move me to put into effect the second paragraph of the draft order.

The respondent's statement which is to the effect that I can only interfere with administrative duties of administrative bodies if there is illegality, irrationality or unprocedural action on the part of those bodies is well-made. It requires no qualification at all. It cannot, as in *casu*, be suggested that the respondent acted with rationality when it failed to deal with the applicants' request for a stretch of two consecutive years. Whilst I cannot compel the respondent to carry out its mandate, I have the power to compel it to carry out its functions where it, for no apparent reason, acts in a dilatory manner. Section 68 (1) of the Constitution of Zimbabwe supports the view which I hold of the matter which is under consideration. It states that every person has the right to administrative conduct which is lawful, *prompt*, *efficient*, reasonable, proportionate, impartial and substantively as well as procedurally fair. It cannot, by any stretch of imagination, be suggested that the respondent acted *promptly* and *efficiently* when it failed to act for two years running. This is *a fortiori* the case when regard is had to the fact that it did not advise the applicants of the reasons for its inaction even when they wrote to it on the subject-matter as far back as February, 2021. The respondent's deafening silence is not only a cause for concern to the applicants but is also unwarranted in a business-like set up. It remains thoroughly prejudicial to the applicants who made statements to an equal effect. The respondent's *in limine* matter which is without merit is therefore dismissed.

The respondent's defence as contained in its notice of opposition leaves a lot to be desired. It states, in some part, that stands 1043, 1044, 1051 and 1052 do not exist in its records. It asserts, in paragraph 2.1.4, of its notice that the same stands exist in its records. It even proceeds to give the sizes of the four stands which are respectively 9237, 2231, 3599 and 4274 square meters in extent each. One is therefore, left to wonder on the respondent's correct position of the matter which relates to the existence or otherwise of the four stands. The confusion arises from the fact that it is approbating and reprobating on one and the same matter.

The respondent's assertion which is to the effect that there is no evidence which shows that due process was followed in the creation of the stands is neither here nor there. Equally meaningless is its statement which is to the effect that, if the stands were procedurally created, the applicants would not have been requested to pay provisional deposit for intrinsic value but would have been requested to pay the actual intrinsic value. Its allegation which is to the effect that the transactions were fraudulent cannot assist its case either.

Such matters as the respondent raises relate to its internal procedures which the applicants have nothing to do with. They are not privy to the same and cannot therefore be prejudiced by the conduct of the respondent which gave out to them that it was selling the properties. The applicants committed no wrong when they responded positively to the representations which the respondent, through its very senior officials- the Town Clerk and the Director of Housing and Community Services-made to them. The respondent is, under the stated set of circumstances, estopped from denying that it sold the stands to the applicants each of whom it instructed to pay to it the initial sums of money at its Agribank account number 0440001809, Kopje Branch, Harare. When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed and accepted by him *bona fide* in that sense, then that is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant: *Usher* v *A.W.G. Louw Elektriese Kontrakteurs*, 1979 (2) SA 1059.

The case which I cited in the foregoing paragraph stands firmly in the corner of the applicants who remain with the justification for specific performance against the respondent following the contract which the two of them, as parties, concluded between themselves in 2019 and 2020. The case of the applicants remain unassailable in respect of what they placed before

me. The respondent's effort to hide behind the finger, as it were, is unwarranted. It simply has no defence to the applicants' claim.

The applicants proved their application on a balance of probabilities. The application is, accordingly, granted as prayed.

F Nyamayaro Law Chambers, applicant's legal practitioners
Gambe Law Group, respondents' legal practitioner