

WELLINGTON MAGAYA
versus
MAZVEL INVESTMENTS (PVT) LTD
and
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 04 & 26 OCTOBER 2022

OPPOSED APPLICATION FOR A DECLARATUR

Adv. T. Zhuwarara, for the Applicant
Mr A. Moyo and H. Muromba, for the Respondents

NDLOVU J: This is an application for a declaratory order and consequential relief in the form of specific performance. The application is opposed. The order sought is in the following terms;

1. *the application is hereby granted.*
2. *It is hereby declared that:*
 - 2.1 *a valid agreement of sale entered into in 2017 exists between the Applicant and Respondent over Stand 815 Sumben of Sumben Housing Project, Mount Pleasant, Harare, measuring 2,000 square metres ('the stand' or 'property'); and*
 - 2.2 *The applicant has a contractual right to specific performance of the agreement of sale.*
3. *Respondents, jointly and severally, are hereby ordered to, within 7 days of this order;*
 - 2.1 *cause an agreement of sale to be signed by the parties embodying the terms of sale of the stand at a rate of RTGS\$30 per square metre of land.*
 - 2.2 *commence accepting instalment payments by the Applicant of the balance of the purchase price for the stand over a period of five (5) years*

at a currency rate of USD\$1=IRTGS dollar with effect from the calendar month that follows the grant of this order;

2.3 *grant the Applicant possession, and pass ownership title, of the stand to the Applicant upon his payment of the full balance of the purchase price stated in paragraph 2.2 above.*

4. *Respondents shall, jointly and severally, bear costs of suit on higher scale”*

BACKGROUND FACTS

The following are facts are common cause. Sometime in the year, 2017 the Respondents placed an advertisement in the local print media for the sale of land in Mount Pleasant, Harare under the name Sumben Mount Pleasant. The key aspects of that advertisement were that:

The residential stands were 2000m². The price was US\$30/ m². A 15% deposit needed to be paid and the balance would be payable in monthly instalments over a period of 5 years. The Applicant responded to the advertisement and contacted the 2nd Respondent's Offices and was attended to by Mr. Shadreck Mupunga. Mr. Mupunga sent the Applicant a standard email that outlined or spelled out the processes that were to take place and the requirements one had to meet before one could have the land as theirs.

The email in question reads as follows;

“Good day

Please find attached advert on the Sumben stands in Mt. Pleasant as well as Homesaver account opening form and signature card.

The first step is to open a Homesaver account and the requirements for account opening are as follows:

- *Copy ID*
- *Proof of residence*
- *2 passport photos*

The minimum deposit required is \$9,000 to enable application for the Stand. Once the deposit has been paid into the Homesaver account, you will then be given the stand application form for completion. Requirements for stand application are as follows:

- *Payslip/proof of income*
- *3 months bank statement*

Stand application will be processed within three weeks and an Agreement for sale will be done for signing. Monthly instalments will be due on the last day of the month that the Agreement of Sale is signed. The indicative monthly instalment will be \$1,084 for the 5 years.

The balance to be paid over 5 years will be insured by ZB Life to cover death or incapacitation of applicant. There will be a monthly insurance premium over and above the stand loan instalment. The rate and amount will be advised on application.

Servicing of the stands will commence in the last quarter of 2017 and will be completed within 18 months.

Please get in touch with the undersigned for any clarifications.

Regards”

The applicant duly complied with the first step in the process indicated in the email and filled out the application form and submitted it to the Respondents for process. The process however stalled until sometime in 2020 when the Respondents reverted to the Applicant. An offer was made to the Applicant by the Respondents and its terms were different from the terms in the advertisement in 2017 and from the contents of the email referenced above. The price had changed to US\$37/m² and the repayment period had been slashed to 18 months from 5 years not to mention that by implication and logic the monthly instalments had been raised tenfold. The Applicant was to make up his mind within 4 days regarding whether or not he was interested in what was now christened Phase 1 of the project or whether he wanted to wait for Phase 2 which phase was still awaiting Environmental Management Agency approval. By February 2021 the Respondents sent to the Applicant a Memorandum of Agreement of Sale and called upon him to sign or be considered to have declined the offer by a particular date.

The applicant took all this to be a unilateral variation of the terms of a binding agreement he had with the Respondents way back in 2017 and therefore unlawful conduct and chose not to sign and instead instituted these proceedings. In a letter dated 23 February 2021, attached to the draft agreement of the sale the Respondents stated that they did what they did in coming up with those terms and conditions of the sale of the stands because there had been material changes in the market that they considered and had to ensure viability of the Project and had to deliver a finished product.

THE APPLICANT'S CASE

The Applicant has argued that in doing what the parties did in 2017, they concluded a binding agreement of sale of land in respect of stand N. 815 Sumben Township and it is that agreement that the Respondents are trying to unlawfully and unilaterally resile from. That a contract actuated on 11 August 2017 when he made a deposit into his Homesaver Account with the 2nd Respondent as required by the Respondents. To the Applicant by making a deposit of US\$9050-00 into his Homesaver account, that was payment of a deposit for the stand since the account was a means or conduit by which instalments would be paid for a period of 5 years.

Relying on *Kovi -v- Ashanti Goldfields Zimbabwe Ltd & Anor 2007(2) ZLR 354* in which at page 355B the following was sated,

“There are three essential requirements of a contract of sale. These are agreements (*consensus ad idem*) a thing sold (*merx*); and a price (*pretium*). Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance”

the Applicant argued that the processes and conduct of the parties evinced the existence of a sale. The absence of a written contract requisite in terms of *S7 the Contractual Penalties Act [Chapter 8:04]* did not and does not render the agreement void *ab initio* as he has discharged the onus on him imposed by the relevant statute to prove the existence of the contract and has done so by pleading the emails between the parties and proof of payment.

RESPONDENTS' CASE

The Respondents have argued that there was never a contract of sale between the parties concluded in 2017 as alleged and believed by the Applicant. All that the Applicant did in compliance with the advertisement was to do two steps of a process that had to be done in stages.

Stage 1 – Applicant was to open a Homesaver account and deposit US\$9000-00 into it to enable him to get an application form for the stand. He did that.

Stage 2 – He had to complete the application form. He did that too.

Stage 3 – The application form would be processed and if he qualified an Agreement of Sale would be drawn up and signed. That did not happen.

All they did was an invitation to treat. The stand was not identified and neither was it identifiable until November 2018 when they got the requisite Subdivision Permit. Since no agreement of sale was drawn and signed between the parties, there was no enforceable agreement of sale between the parties and this application must fail.

THE ISSUE

The controversy to be resolved between the Parties is whether or not in 2017 they entered into an agreement of sale of Stand No. 815 Sumben Township, Mount Pleasant, Harare.

RESOLUTION.

It is not argued by either Party that to answer that question one has to critically look at the standard email that the 2nd Respondent's Shadreck Mupunga sent to the Applicant in 2017. It is clear from the literal reading of that email what a person in the position of the Applicant was expected to do and what steps would have to occasion before he got a Stand. Of critical importance is that after making a deposit into the Homesaver account one would then be given an application form for the Stand which he was to complete and attach to it certain required information or proof thereof to enable the application to be processed. After the processing of the application and being found to meet the requisite criteria ***an agreement of sale would then be prepared and signed.***

The processing of the application meant that one could fail the vetting notwithstanding that he would have successfully complied with stage one. It would only be those who passed the screening who would be offered a Stand and a written agreement of sale would be drawn and signed to conclude a contract of sale. That the applicant made a bank deposit of US\$9000-00 into the Bank is neither here nor there as the deposit was into his personal account and not either of the Respondent's accounts. It was therefore not a deposit for any Stand. The fact that the Stand in question was not even identified in the emails of 2017, further drives the point home, that there was never a contract of sale of Stand number 815 Sumben, Mount Pleasant, Harare between the parties in this case in 2017.

Wherefore the application stands to fail and it fails.

IT IS HEREBY ORDERED THAT

1. The application be and is hereby dismissed with costs.

Ushewokunze Law Chambers, Applicant's legal Practitioners.

Kantor & Immerman, 1st and 2nd Respondents' Legal Practitioners.