

ICE CLASS PROPERTIES (PVT) LTD
versus
NMB BANK LIMITED
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 26 November, 2018 and 22 January, 2019

Opposed Application

T. E Gumbo, for the applicant
No appearance, for the 1st respondent
S. Bhebhe, for the 2nd respondent

MANGOTA J: The applicant, a legal entity, borrowed some money from the first respondent which is a financial institution. It failed to repay the loan.

With a view to settling its indebtedness, the applicant sold to the first respondent a certain piece of land which is situated in the district of Salisbury called stand 19610 Harare Township of Salisbury Township Lands (“the property”). The property is 14.9665 hectares in extent. It was held under deed of transfer No. 2272/2009 at the time of sale. The sale took place on 20 December, 2016. The terms of the agreement of sale were that:

- i. the applicant retained the option to repurchase the property from the first respondent provided it exercised the same on or before 20 December, 2017 – and
- ii. upon exercise of the buy-back option, the applicant would be liable for payment of capital gains tax together with all the related transfer costs.

On 20 December, 2017 the applicant and the first respondent executed an addendum. This extended the period of the buy-back option which the first respondent availed to the applicant from 20 December, 2017 to 28 February, 2018.

Five days before the expiration of the period of the buy-back option, the first respondent, with the consent of the applicant, sold the property to Chamber of Mines Pension Enhancement Fund (“the Fund”) for the sum of \$5 986 600. It was the understanding of the first respondent and the applicant that the latter exercised its buy-back option through the Fund.

The applicant and the first respondent agreed between them that:

- i. from the purchase price of \$5 986 600, the Fund would pay to the first respondent's conveyancers the sum of \$2 052 258.30 which they would hold in trust for the applicant and from which they would effect, among other matters, the following disbursements:
 - a) the tax amount which is due to ZIMRA in respect of capital gains tax (CGT) or value added tax (VAT) whichever is applicable – and
 - b) any other agreed amounts due to the first respondent from the applicant.
- ii. the amount of \$3 934 341.70 would immediately be released to the first respondent – and
- iii. the outstanding balance would be paid by the first respondent's conveyancers to the applicant.

Problems started to surface when the second respondent, a statutory body, which is responsible for collecting taxes did, on 29 March 2018, assess the first respondent's tax liability and demanded from it payment of both capital gains tax and value added tax. The first respondent pushed the entire burden upon the applicant. It instructed its conveyancers to pay both taxes from the sum which they held in trust for the applicant.

The conveyancers complied with the instruction of the first respondent. They paid the following sums to the second respondent:

- a) capital gains tax of \$346 548.79 - and
- b) value added tax of \$780 860.87.

The payment of both taxes from the money which the first respondent's conveyancers held in trust for the applicant constitutes the latter's cause of action. It takes exception to the payment by the first respondent of the attached value added tax. It states that the first respondent, as a financial services provider, was / is not legally liable to pay value added tax. It insists that, in terms of its agreement with the first respondent, it is only liable to pay either capital gains tax or value added tax and not both taxes. It avers that the first respondent should not have instructed its conveyancers to pay value added tax when it was aware that its status as a financial services provider exempted it from paying that tax. Its position is that the first respondent is not registered for value added tax. It moves the court to declare the levying of value added tax against the first respondent to be in violation of s 11 (a) of the Value Added Tax Act and, therefore, unlawful and to direct the first respondent to reimburse to it the sum

which the first respondent caused to be paid to the second respondent as value added tax. It couched its draft order in the following terms:

“It is hereby ordered as follows:

1. The value added tax assessment rendered by the 2nd Respondent against the 1st Respondent for value added tax be and is hereby declared unlawful.
2. The 1st Respondent be and is hereby ordered to refund the full amount of \$780 860.87 to the applicant, or alternatively the 1st and 2nd Respondents be and are hereby ordered to refund the applicant the full amount of \$780 860.87, jointly and severally, the one paying the other to be absolved.
3. The 1st Respondent shall pay the costs of suit on an attorney-client scale.”

Both respondents filed notices of opposition to the application for a declaratory order. They filed Heads which support their respective positions in respect of the application.

All the parties received notices of set down of the application on 19 November, 2018. The application was set down for 26 November 2018.

For reasons which remain unknown to the court, the first respondent did not appear at court on the mentioned date. It tendered no explanation for its non-appearance. It was, therefore, in default. Its default left the second respondent in the equation.

The second respondent’s statement is that the first respondent is registered for purposes of paying value added tax. The first respondent, it avers, applied for value added tax registration in 2007. It states that it was registered retrospectively with effect from 2005 in terms of s 23 (4) (a) of the Value Added Tax Act. the first respondent, it states, was/is, in addition to its financial services function, engaged in banc assurance business for which it receives a commission which is liable to value added tax. It avers that in September, 2017 the first respondent started the business of acquiring and disposing of stands/immovable properties which activity was/is liable to value added tax. It insists that, as a registered operator for value added tax, the first respondent is liable to account for value added tax on the disposal of the immovable property. The first respondent, according to it, is a registered operator which, apart from supplying exempt financial services, also carries out vatable banc assurance and immovable property sales business on which it has been remitting value added tax. It insists that the applicant’s motion which is to the effect that the value added tax assessment which it made and imposed on the first respondent be declared unlawful is without any merit. It moves the court to dismiss the application with costs.

Applications for a declaratory order are filed in terms of s 14 of the High Court Act [Chapter 7:06]. The section confers a discretion on the court to determine existing, future or contingent rights. The discretion must, in my view, be exercised judiciously.

The section reads:

“14. The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation-- notwithstanding that such person cannot claim any relief consequential upon such determination.”

In casu, the applicant which claims to have an interest in the sum of money which the first respondent instructed its conveyancers to pay to the second respondent in the form of value added tax is moving me to inquire into the lawfulness or otherwise of payment of the stated sum. It wants me to determine if the payment of the sum was or was not lawful. If it was not lawful, it wants me to make a declaration to the stated effect and to order that the first respondent, alternatively the first and the second respondents, return(s) the said sum to it.

Whether or not such a declaration as I am being moved to grant can be made does depend on the circumstances of this case as measured against the conduct of the second respondent. Where its conduct is lawful, the declaration cannot be made at all. Where the opposite of the stated matter is the case, the court will most certainly declare its conduct unlawful and the attendant consequences which attach to the same would follow.

In stating as I am doing, I am not oblivious to the fact the conduct of the second respondent is separate and distinct from that of the first respondent. Its conduct is grounded in statutory law. The conduct of the first respondent is, on the other hand, grounded in the law of contract which it concluded with the applicant. The two sets of conduct should not, therefore, be lumped together and/or confused. They speak to two different circumstances.

Annexure D which the second respondent attached to its notice of opposition shows that, on 27 March 2018, it assessed capital gains tax and value added tax which it says accrued to it from the sale of the property. The reason for assessing value added tax is evident from the contents of Annexure E which it also attached to its notice of opposition. The annexure bears evidence of the fact that the first respondent applied for value added tax registration in 2007. The first respondent's application for value added tax was approved on 27 April 2007. Reference is made in this regard to Annexure F which appears at p 61 of the record. The relevant portions of the annexure read:

“VALUE ADDED TAX REGISTRATION

You are hereby advised that your application for value added tax registration has been accepted.

Tax category C

You have been placed in Category C whose tax periods are monthly. Your effective date of registration is 01.09.2005”

Annexures G1 – G8 which the second respondent attached to its notice of opposition appear at pp 62 to 83 of the record. The annexures constitute the first respondent’s returns for remittance of value added tax to the second respondent.

Two matters stand out clearly from a reading of the above-stated set of circumstances. These are that the first respondent:

- (i) is registered for value added tax-and
- (ii) is liable to account, and has always accounted, for value added tax whenever it disposes, or disposed, of any immovable property.

In casu, the first respondent sold a piece of land to the Fund. As an entity which is registered for value added tax, it could not avoid its obligation to account for the same to the second respondent. The law demanded that it lived up to its commitments which it did.

Given the wealth of evidence which the second respondent produced as a justification for its conduct, the suggestion that it acted outside the law when it assessed value added tax in respect of the sale of the property becomes more fanciful than it is real. It was within its right to assess and demand that the first respondent should pay value added tax for the land which it sold. The law was, and is, on its side under the stated set of circumstances.

The applicant argued from the perspective of a misinformed entity when it averred that the first respondent was not registered for value added tax. The second respondent expresses the same sentiments. It states, in para 8 of its affidavit, that the applicant was not aware that the first respondent also carried out activities which attract value added tax. The first respondent confirms the statement of the second respondent. It states, in paragraph 7 (b) of its affidavit, that the applicant’s reliance on the alleged value added tax exemption is unfortunate.

The statement of the applicant as contained on para 3.2 of its answering affidavit is disingenuous. It argues that the basis of the sale of the property had its roots in the first respondent’s traditional functions as a financial services provider. It says:

“...the sale was founded on a transaction in terms of which the security against a loan was taken by the Bank *in lieu* of a cash payment. The same security was then sold with no value

addition to convert the non-liquid repayment into a liquid payment. Nevertheless it remains a loan settlement.”

Whilst it is accepted that the agreement of 20 December, 2016 has some semblance of what the applicant is claiming in the sense that the intention of the first respondent and the applicant was to allow the latter to re-purchase the property and in the further sense that no purchase price was paid for the sale of the property, the contract of 23 February, 2018 is totally different from that of 20 December, 2016. It has all the features of a purchase and sale agreement. It has the buyer, the seller and the price.

The fact that the new purchaser of the property has nothing to do with the buy-back option which the first respondent extended to the applicant in the agreement of 20 December, 2016 marks the difference of the two agreements. It cannot be suggested that the Fund which purchased the property intends to re-sell the same to the applicant. Its clear intention is to keep the property to itself for timeous immemorial. It purchased it for a specified sum of money from the first respondent who is the seller of the same.

The difference of the two agreements accounts for the second respondent’s silence in regard to the first contract of sale and its demand for payment of both capital gains tax and value added tax in so far as the second contract is concerned. It could not demand payment of any tax in the first contract because no money changed hands between the applicant and the first respondent. Because no money was paid in the “first sale” the probabilities are that the second respondent’s attention was not drawn to the parties’ transaction. The same cannot be said in respect of the second contract wherein the Fund paid the requisite purchase price for the property. The payment necessarily brought the second respondent into the equation. It remained alive to the fact that it had to, and did in fact, collect what was due to it in terms of the applicable laws(s) of the country.

It is on the basis of the above stated set of matters, therefore, that the submissions of the applicant remain without merit. It cannot be allowed to contract outside the law on the false premise that the contract of 23 February, 2018 falls in the ambit of a loan settlement. It does not. It is, if anything, a proper contract of purchase and sale which, as the second respondent was able to show, attracts both taxes.

The applicant does not explain what prompted it to adopt the complicated route of selling and re-purchasing what it had sold. It could easily have adopted the clear and straightforward route of passing a mortgage bond over the property in favour of the first respondent if its intention was to use the property as security for the loan which had been

advanced to it. The reason for the route which it took is, however, not difficult to discern: The applicant realized that it owed a huge debt to the first respondent. It remained alive to the fact that it could not pay off the debt. It also realized that it did not have the means to repay the debt. It, therefore, agreed to have the property sold to the Fund because it wanted to benefit from the sale.

The fact that it failed to repurchase the property during the period which extends from 20 December 2016 to 20 December 2017 necessitating the parties to execute an addendum extending the period within which it would exercise its option to repurchase the same by a further two months confirms its incapacity to pay off the debt. Its inability to pay what it owed to the first respondent left it with no option but to consent to the sale of the property to the Fund by the first respondent. The sale is, to all intents and purposes, not a loan settlement as the applicant suggests. It is a proper sale which arose out of circumstances which were beyond the control of the applicant.

It is my observation that the applicant grounded its case more in the law of contract than under the section in terms of which it filed this application. It imputes fraud on the part of the first respondent. It insists that the first respondent breached the contract which it concluded with it on 23 February, 2018. The contract, it avers, called upon it to pay either capital gains tax or value added tax and not both taxes. Its case is, therefore, more against the first respondent than it is against the second respondent.

Given that the second respondent is not privy to the contract of 23 February, 2018 one is left to wonder why the applicant dragged the second respondent into a matter which it has nothing to do with. The application is, to the stated extent, misdirected.

The applicant cannot argue competently on whether or not the transaction which forms the basis of its application attracts value added tax in addition to capital gains tax which the second respondent demanded from the first respondent.

The second respondent, as a collector of taxes, owed no duty to the applicant to explain the fact of whether or not value added tax was/is payable on the property. It owed that duty to no one else but to the first respondent from which it demanded payment of both taxes. It was, therefore, a serious misdirection for the applicant to argue in the corner of the first respondent or for it to insist, as it did, that, as a provider of financial services, the first respondent was/is not liable to pay value added tax. It was/is arguing from the air, as it were. Its argument fell to pieces when the first respondent's circumstances were revealed to it by both respondents.

It is trite that a declaratory order can only be made where the applicant establishes, on a balance of probabilities, that the respondent against whom the application is made acted outside the law. Where the respondent acted within the law, the order for a declaratur would be contrary to the public policy of Zimbabwe. The court cannot, in other words, declare a lawful conduct unlawful.

The applicant is, in my view, the author of its misfortunes. It lumped together matters which should not have been combined. It could easily have sued the first respondent in terms of the contract which it signed with it on 23 February, 2018. Its application for a declaratur against the second respondent cannot stand. It failed to show that the second respondent acted outside the law which it is enjoined to enforce.

The issue of the applicant and the first respondent falls into the area of the law of contract. The applicant's allegation is that the first respondent breached the contract which the two of them signed on 23 February, 2018. It does not say that the first respondent violated the constitution of Zimbabwe or any other statutory law. No declaration, therefore, arises out of the described set of circumstances. What appropriately arises is a suit by the applicant for breach of contract.

It follows, from the foregoing that, although the default of the first respondent entitles the applicant to have judgment entered in its favour, the same cannot be granted on the strength of the application which is before me. The first respondent might have breached its contract with the applicant, but the breach, if such exists, cannot translate into what is normally regarded as unlawful conduct. It is, as its name suggests, nothing but a breach which does not fall into the family of unlawful conduct as is stipulated in the country's constitution or in statutory legislation.

The applicant failed to establish, on a balance of probabilities, its case against both respondents. Its application is devoid of merit. It is, accordingly, dismissed with costs.

Chinawa Law Chambers, applicant's legal practitioners
Mawere Sibanda, 1st respondent's legal practitioners
Messrs Kantor & Immerman, 2nd respondent's legal practitioners