

UNION HOUSING TRUST
versus
STEADY MUNYANYI

HIGH COURT OF ZIMBABWE
MABHIKWA J
HARARE 21 MARCH; 15 MAY 2018 & 8 JANUARY 2020

Opposed Application

R. G. Zhuwarara for plaintiff
D. Kanokanga for the respondent

MABHIKWA J: The applicant filed an application to this honourable court seeking the following relief that;

- “1. That the respondent be hereby directed to specifically perform his obligations as joint purchaser in terms of clause (IX) of the joint venture agreement.
2. Failure to comply with (1) above, the Sheriff takes necessary steps to register the applicant as co-owner of the property.

Alternatively

1. Payment of damages representing all costs incurred by the applicant towards the purchase of the property”.

The brief history of this matter is that on 7 February 2015 the Union Housing Trust (now applicant), entered into an agreement of sale of subdivision B of Inkubusi of Hopley situate in the District of Salisbury measuring 5,2321 hectares, with Florence Julia Farayi Sachikonye who at the same time in the said agreement also purportedly represented Edith Eva Lawrence and Clare Audrey Mutendi Sachikonye by special power of attorney. This agreement is not the subject of

the dispute and I will not dwell much on it. It is attached to the application as annexure "UH3". The housing trust was represented by Olivia Chikunichawa who is its secretary.

On 6 May 2015, the housing trust, again represented by Olivia Chikunichawa entered into a joint venture agreement (JVA) with the now respondent (Steady Munyanyi). The objective was to jointly purchase the same subdivision B of Inkubusi of Hopley for a purchase price of US\$350,000.00. The JVA is attached to the application as annexure "UH4". Pursuant to the JVA, the parties then entered into a new agreement of sale with Florence Julia Farayi Sachikonye in annexure "UH5" for the purchase of the said subdivision B of Inkubusi.

It may be noted that under the agreement marked UH3, that applicant had failed to pay as stipulated by the seller hence the decision to rope in the respondent in the JVA. It appears that under the JVA, applicant again failed to pay as stipulated leading to the parties in the joint venture agreement failing to meet their obligations in "UH5".

Applicant acknowledges and claims that sometime in 2015 the seller of the property advised the JVA parties, through a letter from legal practitioners, that the sale agreement had been cancelled. Applicant further claims that the JVA parties agreed that the agreement would remain in force but also agreed that the respondent would negotiate a fresh agreement with the seller.

I must from the onset point out, that from the above, it is clear that after the cancellation by Messrs Dube, Manikai and Hwacha Legal Practitioners for the seller of the property the applicant;

- (a) appreciated and acknowledged that the agreement had been cancelled.
- (b) that there was need, of course subject to the seller's consent, to renegotiate another sale agreement the outcome of which was unknown.

I note further that this alleged agreement above, also alluded to in paragraph 11 of the applicant's founding affidavit was not reduced to writing. Applicant complains that the respondent went behind their back and entered into another agreement of sale with the seller. That agreement

allegedly excluded the applicant and applicant was “surprised” when respondent advised therein that the piece of land had now been purchased by, and belonged to the applicant alone.

Applicant avers that as far as it is concerned, the JVA still subsists and that it had paid a total of US\$98 590,00 towards its US\$175 000,00 part of the payment in the purchase price. It is on that basis that applicant approached this court and purported to invoke clause IX of the JVA which is to the effect that in the event that one party of the JVA “fulfils” the payment of the other joint venture party, such fulfillment must be construed as payment towards more shares in the property. It is for that reason that the applicant sought specific performance specifically of clause IX of the JVA.

The application was strongly opposed by the respondent. In effect respondent acknowledges that the parties entered into a joint venture agreement. The parties also entered into an agreement with the seller which agreement was cancelled by the seller through a letter from her lawyers Messrs Dube, Manikai and Hwacha Legal Practitioners on 14 October 2015 which letter unequivocally pointed out that the JVA parties were supposed to have paid the purchase price of US\$350 000,00 on certain terms and installments between 4 May 2015 and 1 October 2015. As at the time of writing the letter on 14 October 2015, the JVA parties had not paid any of the instalments. They were advised of the immediate cancellation of the sale agreement.

Respondent avers that he too was sued by the applicant in case number 5170/16. Being unhappy with that conduct and in the light of annexure “UH6” (letter of cancellation by Messrs Dube, Manikai and Hwacha) he too cancelled the joint venture agreement on 6 June 2016 (annexure “M”). He then bought the said property alone.

At the commencement of the hearing of this matter, the respondent raised a point *in limine* that Olivia Chikunichawa was not properly authorized to represent the Union Housing Trust. It was contended that the resolution dated 3 May 2016, authorising Olivia Chikunichawa to represent the trust was in fact in reference to a different ARE wherein the trust was suing Florence Julia F. Sachikonye, Steady Munyanyi and the Registrar of Deeds in case number HC 5170/16. It was contended therefore, that the resolution filed and relied upon by Olivia was for use in HC 5170/16

only and there was no resolution to represent the applicant in the present application. It was contended also that for that reason, there was no valid application before the court.

I then directed, with the consent of the parties, that the parties make their submissions on both the preliminary point as well as the merits of the full application so that the court would also make the ruling and judgment at once depending on whether or not the point *in limine* succeeds. On the point *in limine* the applicant argued that the failure to obtain a fresh mandate was not one that would lead to a dismissal of the whole application. Applicant contended also that had the respondent raised the objection earlier, it would have been granted a fresh mandate. Finally, it was contended by applicant that ultimately, applicant fundamentally satisfied the rules of court and that what validates an affidavit, are two (2) things;

- (a) That the deponent must have personal knowledge of the facts deposed to;
- (b) That the deponent must be acting in the interests of the party he purports to represent and not on a frolic of his own.

To support the above assertion, the applicant cited the cases of *CABS vs Magodo* HH-331-15 and *Coffee Tea & Chocolate Co. vs Cape Trading Co.* 1930 CPD 8 at p82 among other cases. After reading case authorities relating to authorization in general as well as cases relating to affidavits and deponents thereto, I am satisfied that the applicant substantially complied with the court rules on authorization and that from the documents on record she has always represented the company in her capacity as its secretary. She has, better than anyone else, sufficient and personal knowledge of the facts deposed to. See also *Total Zimbabwe (Pvt) Ltd vs Pioneer Coach Express (Pvt) Ltd* 2010 (2) ZLR 1 (H).

I then dismissed the point in limine that there was no valid application before the court.

I then proceed to deal with the merits of the application.

The issue to be decided therefore in my view is threefold.

- (1) Is the joint venture agreement between the parties still in existence?

- (2) When the respondent entered into a sole agreement with the seller and purchased the property in issue, did he do so for and on behalf of the JVA?
- (3) Is the relief sought *in casu*, competent?

It appears to me that the above issues are determinable from the chronology of events in this matter. It is common cause that because of the applicant's failure to pay in its 1st agreement due to what it termed "harsh economic climate" it roped in the respondent and the parties entered into their own agreement, the JVA. The two agreements are annexures "UH3" and "UH4" respectively. The 1st agreement (UH3) which applicant seems to refer to as the "main agreement", was between the applicant and the seller only. The JVA (UH4) was between the applicant and the respondent only. From the applicant's argument in court and indeed from the definition section in annexure "UH4", applicant implied and argues that the two agreements were meant to operate as one.

Pursuant to objectives of annexures UH3 and UH4, the parties then entered into an agreement with the seller (annexure "UH5" on 4 May 2015. It is this agreement which was cancelled by letter from Messrs Dube, Manikai and Hwacha legal practitioners on 14 October 2015 (annexure 'UH6').

As already observed and as pointed above applicant did not challenge the cancellation. If anything, applicant appears to have acknowledged the cancellation, acquiesced and even saw the need to negotiate a fresh agreement with the seller as shown in paragraph 11 of Julia's founding affidavit. This is precisely where the applicant finds itself into challenges almost insurmountable.

Firstly, when annexure UH6 cancelled annexure UH5 that action necessarily rendered annexures UH3 and UH4 worthless and practically non-existent. Secondly, as stated elsewhere above, the alleged agreement to be negotiated by the respondent as claimed in paragraph 11, was a "shot in the dark" whose outcome, if any, was unknown. Thirdly, it would not thus be said that any negotiated agreement, if it did succeed would be in terms of or pursuant to annexure UH3 and UH4 because at that time, the said two agreements had ceased to exist, together with the much liked clause IX relied upon by applicant.

Fourthly and as already stated elsewhere above, the alleged agreement, that annexure UH4 (incorporating UH3) would remain in force and that respondent would negotiate a fresh agreement with the seller to make it a “threesome agreement”, even with its seeming importance and complexity, was not reduced to writing. In any event if one follows the applicant’s agreement to its logical conclusion, such agreement and action would be null and void by reason of its non-compliance with clauses 21 and 22 of annexure UH3 which states that;

- “21. WHOLE AGREEMENT: This agreement constitutes the entire contract between the parties hereto and no warranty, representation promise or undertaking has been given or made by either party to the other except as recorded in this agreement.
22. VARIATION OF AGREEMENT: No variation in this agreement shall be valid unless reduced to in writing and signed by or on behalf of the parties hereto.”

Further, if applicant’s argument is to be taken, then it would mean that applicant would have come to the wrong forum for the dispute resolution. In terms of clause 29, of annexure UH3, any dispute resolution shall be determined by arbitration. The parties therein irrevocably agreed that the decision of an arbitrator, either chosen by the parties in agreement, or appointed by the head for the time being of the Commercial Arbitration Centre in Harare shall be final.

It is the finding of this court that, in fact for all intents and purposes, there was no longer any agreement between the parties nor obligations as claimed by the applicant. In *Ncube vs Mpofu and Ors* 2006 (2) ZLR 41 (A) it was held that a contract is performed, and an order for specific performance is founded where a party has done all that he is obliged to do under the contract. *In casu*, applicant failed to pay as required under UH3 before roping in the respondent. Applicant also failed to pay under UH4, the (JVA). In fact according to the cancellation letter (UH6), nothing was paid towards the purchase price and applicant did not challenge that position by the seller’s letter of cancellation. Most importantly, applicant had not shown that it paid anything towards the final sale agreement negotiated by respondent alone and became successful.

In *Mufakose Housing Co-operative Society vs Magodzore* 2007 (1) ZLR 175 (H) it was held that the court had a discretion whether or not to order specific performance. In that case the court refused to grant specific performance in circumstances wherein the effect of the order would

be to compel one person to associate with another against his will. As correctly argued in my view by counsel for the respondent, my sister MATANDA-MOYO J held in the case of *Chareli vs Bouma Investment (Pvt) Ltd t/a Bouma Safaris, Travel & Tour* HH-678-15 that;

“Specific performance is an extraordinary equitable remedy that compels a party to execute a contract in terms of the precise terms agreed upon. It is an order which grants the applicant what he organised for in the contract. A valid contract must exist between the parties and the party seeking specific performance must have substantially fulfilled his obligation in terms of the contract.”

In *Benson vs SA Mutual Life Insurance Society* 1986 (1) SA 776 (A), HEFER JA the court’s discretion to grant or not to grant specific performance was again discussed. It was held that the discretion is aimed at preventing an injustice and cases do arise where justice demands that a plaintiff be denied specific performance. The basic principle is that the order which the court makes should not produce an unjust result. Further, the remedy of specific performance should always be granted or withheld in accordance with legal and public policy. The court will also refuse to impose specific performance where such performance has become impossible. *In casu*, it has already been shown above that after cancellation of the agreement in annexure UH5 by the seller, on 14 October 2015, UH3 and UH4 became non-existent and particularly therefore performance of the same became impossible. Applicant in fact is not even privy to the terms and conditions of the agreement negotiated between the seller and respondent.

It is also the finding of this court that applicant is not being candid with the court. The facts, and the balance of convenience suggest that respondent negotiated and purchased the property on his own as he alleges.

Finally, I come to the issue of the competence of the order sought. I agree with respondent that applicant cannot, in the circumstances seek to be registered as co-owner when firstly, the JVA meant to make him a co-purchaser was cancelled on 14 October 2015. Secondly the property in question is not registered in respondent’s name but the seller, who is not a party to these proceedings.

Firstly, I note with concern that in the application referred to extensively in these proceedings (case number HC 5170/16) and attached as annexure “N”, applicant sued the now respondent as the 1st respondent, the seller Florence Julia F. Sachikonye as 2nd respondent and the Registrar of Deeds as 3rd respondent. The remedy sought therein was in effect just the same as the current one. My sister Honourable MUSHORE J, dismissed the application with costs of suit on 4 November 2016 (annexure ‘O’). What the applicant now seeks to do is to ask the honourable court to revisit and review its own previously made decision. It is not permissible as the order there from would be incompetent. Courts have always warned, as shown by a plethora of decided cases that such applications are not permissible. The application in effect seeks a second bite of the cherry, a review of the order of 4 November 2016 by MAKONESE J.

The applicant has not made a case at all for the relief sought in the alternative prayer despite having filed some copies of receipts showing certain payments. Applicant did not, in the application and in argument, go further to show exactly under which agreement and under what circumstances the attached receipts were paid. In any event the receipts themselves clearly show that payment was not made to the respondent but the purchaser, who again is not a party to these proceedings. Respondent has rightly argued that such payments, if they were made, are recoverable by the applicant from the seller, not the respondent.

Accordingly, I order as follows;

1. That the application be and is hereby dismissed.
2. That the applicant pays the costs of suit.

G. Sithole Law Chambers, applicant’s legal practitioners
Messrs Kanokanga & Partners, respondent’s legal practitioners