SITSHENGISIWE BRENDA NHLIZIO
versus
AMOS SAMBO
and
CBZ PROPERTIES (PRIVATE) LIMITED
and
CBZ BANK LIMITED
and
THE REGISTRAR OF DEEDS- HARARE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 1 June & 15 September 2021

Opposed Application

C. Damiso, for the applicant
G. H. Muzondo, for the 1st respondent
G.M. Nyangwa, for the 2nd & 3rd respondents

TAGU J: This is a court application for specific performance, declaratur and other consequential reliefs. The reliefs sought are hereunder set out in full as follows:

"IT IS ORDERED THAT:-

1. The purported cancellation, by first respondent, of the agreement of sale of the immovable property described in paragraph 2 below concluded between First respondent and applicant be and is hereby declared to be invalid, null and void.
2. The first respondent be and are hereby directed to, within seven (7) days of the date of this order, sign all documents and do all things necessary to have the transfer of a certain piece of land situate in the District of Salisbury called Stand 1467 Parktown Township of Stand 272 Parktown Township 6 of Stand 249-260 of Parktown Extension of Subdivision A of Waterfall, measuring 1 642 square metres, held under Deed of Transfer No. 3105/1986, dated 27 May, 1986 to be registered with Fourth Respondent in favour of applicant against the Letter of undertaking furnished by Homelink to Messrs Mhishi and Nkomo for payment of the balance of the purchase price of ZW$485 000.00.
3. In the event of the first respondent failing to comply with paragraph 2 above within the time period mentioned therein then the Sheriff of Zimbabwe be and is hereby authorized to sign on behalf of First Respondent all the documents necessary to facilitate the registration of transfer the immovable property mentioned in paragraph 2 above, in favour of applicant.

4. Messrs Mhishi & Nkomo Legal Practitioners be and are hereby authorized to act as the conveyancing attorneys and to attend to the registration of transfer of the above mentioned property in favour of Applicant.
5. First, second and third respondents be and are hereby directed to deliver, forthwith, to the Conveyancers, Messrs Mhishi & Nkomo Legal Practitioners the original Deed of Transfer No. 3105/1986 dated 27 Ma, 1986, the original Mortgage Bond No. 1404/2014 together with the Consent to Release the immovable property mentioned in paragraph 2 above from the operation of the said Mortgage Bond No. 1404/2014, failing which the Sheriff for Zimbabwe be and is hereby authorized to seize the same and to deliver the same to Messrs Mhishi Nkomo Legal Practitioners and to sign the Consent to Release the property from the operation of the said mortgage bond to facilitate the registration of transfer of the said immovable property in accordance with paragraph 2 above.
6. The Fourth Respondents be and are hereby authorized to register the transfer in favour of Applicant and the release of the immovable property, mentioned in paragraph 2 above from the operation of Mortgage Bond No. 1404/2014.
7. The costs of this application shall be paid by the First and Second Respondents, jointly and severally, the one paying the other to be absolved, on a legal Practitioner and client scale."

However, the facts of this matter are a bit complicated. There were twists and turns in this matter. However, I will endeavor to summarize what happened in this matter as much as possible to make the facts clearer.

On 15 November 2019 the applicant and 1st respondent concluded a sale agreement. The applicant purchased from the 1st respondent a certain piece of land situate in the District of Salisbury, called Stand 1467 Parktown Township 6, measuring 1642 square metres, "the subdivision" or "property" for a purchase price of ZW$575 000.00 payable by way of a deposit of ZW$350 000.00 on 16 December 2019 and the balance of ZW$225 000.00 by 20 January 2020. The property was hypothecated by the 1st Respondent in favour of the 3rd respondent under a Mortgage Bond No. 1404/2014 as security of the repayment of moneys loaned and advanced to the 1st respondent.

To avoid foreclosure proceedings which were imminent, an agreement was reached for the subdivision of the property, the sale of the subdivision to applicant through the 2nd respondent, that the net purchase price thereof would be applied, among other things, towards settlement or part settlement of 1st respondent's indebtedness to the 3rd respondent, that the subdivision would then be released from the operation of the Mortgage Bond No. 1404/2014 and transferred to the applicant's favour. It was expressly agreed that transfer of the subdivision would be registered in

the applicant's favour within thirty (30) days of the issue by the City of Harare of a certificate of compliance, payment of endowment fees as required in terms of condition 6 of the subdivision permit subject to payment by applicant of the purchase price and transfer fees.

As part of the Applicant's purchase price was being financed through a mortgage loan from Homelink payable on registration of transfer to applicant, 2nd respondent on behalf of 1st and 3rd Respondents and on its own behalf, undertook in writing that 1st respondent would comply with the conditions stated in the subdivision permit and further undertook to release Deed of Transfer No. 3105/86 to the Conveyancer to facilitate the registration of transfer of the subdivision in the Applicant's favour. On 18 December 2019 1st respondent instructed Messrs Mhishi and Nkomo Legal Practice to attend to the Conveyancing of the subdivision in applicant's favour.

However, on the 6th of February 2020 the agreement of sale was amended to indicate that the agreed purchase price of ZW$575 000.00 would be still be paid by way of a deposit of ZW$485 000.00 from Homelink and that a balance of ZW$90 000.00 would be paid by 31 March 2020. On 20 February 2020 when all conditions prescribed in the subdivision permit, for the registration of transfer in Applicant's favour had been met, 1st Respondent and Applicant further agreed to vary the purchase price of the subdivision to a sum of ZW$609 556.25 of which a deposit of ZW$90 000.00 would be paid by 24 February 2020, a sum of ZW$ 485 000.00 would still be paid from Homelink and the balance of ZW$34 556. 25 was payable by 31 March 2020. Addendum No. 2 reflecting the new developments was signed and attached as Annexure E2.
In accordance with the terms of Addendum No, 2 the Applicant paid the purchase price in full.

On 18 February 2020 the applicant advised the respondent's, the Conveyancers, and Homelink's lawyers Messrs Sinyoro and Partners of the issue of the compliance certificate, the endowment certificate and requested for the release of the title deeds to the Conveyancer for registration of transfer in her favour and the mortgage bond in favour of Homelink. Notwithstanding the agreement to the variation of the purchase price, the 1st and 2nd respondents failed to release the Title Deed to the Conveyancer and to pass transfer of the subdivision in applicant's favour to facilitate the release of the balance of the purchase price which was being paid from Homelink. As a result of the failure by the 1st, 2nd and 3rd respondents to release the title deed for the property and have transfer of the subdivision registered in the Applicant's favour, Homelink cannot release the balance of the purchase price of the subdivision.

Reacting to the Applicant's demand, the 1st and 2nd Respondents on 23 July 2020 sent to the Applicant and her legal practitioners a letter by email backdated to 17th July 2020 purporting to cancel the agreement of sale. The Applicant averred that the purported cancellation of the agreement of sale is invalid as she has discharged all her obligations under the agreement. Assuming that she was in breach, she was not placed in mora. It is on this basis that the Applicant is seeking from this Honourable Court an order for specific performance compelling 1st, 2nd and 3rd Respondents to release the title deed for the property to the Conveyancer, to release the subdivision from the operation of the said mortgage bond and sign all documents and do all things necessary to facilitate the registration of transfer of the subdivision in her favour, failing which, that the Sheriff for Zimbabwe be authorized to sign the documents on behalf of Respondent.

The 1st, 2nd and 3rd respondents filed their Notices of Opposition to the application on 19 October 2020 and 15 October 2020 respectively. I will outline in brief the material points on which the 1st respondent opposed the applicant's application. I will similarly do the same in respect of the material points on which the 2nd and 3rd respondents oppose the applicant's application since 1st respondent and 2nd and 3rd respondents filed separate Notices of Opposition. There after I will do an analysis of the whole case.

First respondent's basis of opposition *in limine* is that there are material disputes of fact in the matter which cannot be resolved on papers hence alleged that the Applicant adopted an improper procedure. The alleged dispute of fact is the question whether payment by way of a letter of undertaking is valid payment. On the merits he denied that the Applicant paid in full as the balance of ZW$485 000.00 remained outstanding. He denied accepting the letter of undertaking as a mode of payment. The 2nd and 3rd respondents similarly raised a point *in limine* that the applicant has no cause of action against them in this matter. They averred that were not parties to the agreement of sale of the subdivision between 1st respondent and applicant. On the merits they said they cannot comment on whether or not the purchase price was paid in full. They further denied that the 2nd and 3rd respondents have a legal obligation to release title deeds which are being held as security for the 1st respondent's obligations. On the contrary, they said the 3rd respondent has a right to hold on to the title deeds until payment of the debt owed to it which is secured by the 1st Respondent's property. According to them the debt owed to 3rd Respondent has not been paid and there is no basis for the title deeds to be released as claimed.

I will first dispose of the points in limine as presented before dealing with the merits. In doing so I have taken into account the case authorities and the submissions made by the parties in their detailed heads of argument.

The 1st Respondent argued in limine that there are material disputes of facts which cannot be resolved on papers. In the case of Muzanenhamo v Officer in Charge CID Law and Order and 7 Others CCZ-3 2013 the Constitutional Court had this to say:

> "As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Masukusa* v *National Foods Ltd & Another* 1983 (1) ZLR 232 (S) at 235A; *Zimbabwe Bonded Fibreglass* v *Peech* 1987 (2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co*. v *Midlands State University* 2006 (1) ZLR 531 (H) at 534E-F."

The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by Makarau JP (as she then was) in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F-G:

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence." Judgment No. CCZ 3/13 Constitutional Application No. CCZ 287/12. In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. See *Room Hire Co. (Pty) Ltd* v *Jeppe Street Mansions ((Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* S-146-86; *Boka Enterprises* v *Joowalay & Another* 1988 (1) ZLR 107 (S) at 114B-C; *Kingstons Ltd* v *L.D. Ineson* (Pvt) Ltd 2006 (1) ZLR 451 (S) at 456C-D and 458D-E."

The respondent's defence must be set out in clear and cogent detail. A bare denial of the applicant's material averments does not suffice. The opposing papers must show a bona fide dispute of fact incapable of resolution without viva voce evidence having been heard. See the Room Hire Co. case, supra, at 1165, cited with approval in *Vittareal Flats (Pvt) Ltd* v *Undenge & Others* 2005 (2) ZLR 176 (H) at 180C-D, *van Niekerk* v *van Niekerk & Others* 1999 (1) ZLR 421 (S) at 428F-G.

In the present case the alleged dispute of fact is the question whether payment by way of a letter of undertaking is valid payment. This is a point very capable of resolution without the need for viva voce evidence. It is a point of law. This point *in limine* is devoid of merit and I will dismiss it.

2nd and 3rd respondents argues *in limine* that applicant has no cause of action against them in this matter. They averred that they were not parties to the agreement of sale of the subdivision between 1st respondent and Applicant. What is not in dispute is that the 2nd respondent guaranteed in writing the release of the title deeds for the property once the conditions prescribed in the subdivision permit had been met to facilitate the registration of transfer of the subdivision in favour of the applicant. See Annexure C. 2nd respondent has limited real rights over the property. Despite this undertaking and the issue of a certificate of compliance, payment of endowment fees and payment of the purchase price, 2nd respondent did not honour its undertaking, hence the application.

Further, it is not in dispute that the 3rd respondent by virtue of the mortgage bond registered over the property have a limited real right over the property from the subdivision is being deducted from. Further, 3rd respondent agreed to the subdivision of the property, the sale of the subdivision to applicant, the release of the subdivision from the operation of their mortgage bond to facilitate the registration of transfer of the subdivision in favour of applicant and the release of the title deed for the property. Accordingly, once the subdivision had been sold to applicant, the letter of undertaking for the payment from Homelink issued and demand made to them, 3rd respondent was obliged to sign a consent to release the subdivision from the operation of the mortgage bond and to release the title deed to the conveyancers in line with the parties' intention and agreement but did not do so, hence the application.

It is therefore clear that applicant has a valid cause of action against 2nd and 3rd respondents. The point *in limine* raised by the 2nd and 3rd respondents is therefore devoid of merit and I will dismiss it.

On the merit the applicant seeks an order declaring the purported cancellation of the agreement of sale to be invalid, null and void. It is competent for this Honourable Court to grant the relief sought. In *Johnson* v *Agricultural Finance Cooperation* SC 17/1995 GUBBAY CJ (as he then was) held that:

> "A declaratory order under s 14 of the High Court of Zimbabwe Act, requires a two prong enquiry:
>
> (a) Is applicant an interested party.
> (b) Is this a proper case for the exercise of the court's discretion?"

This case is also authority that a declaratory order ought to be granted on one aspect if it will solve that part of the dispute. See *Tagarirora* v *Nhedziwe High School Development Committee* HMT23/2020. It is clear that Applicant is an interested party as the agreement of sale in question

was concluded between 1st respondent and herself and as such she has rights emanating therefrom which she seeks to protect or enforce herein. Furthermore, this is a proper case for the exercise of this Honourable Court's discretion in favour of Applicant in that the basis 1st respondent seeks to rely upon in purporting to cancel the agreement of sale are invalid, null and void. 1st respondent's position is that the Letter of Undertaking provided by Homelink is not payment of the sum of ZW$485 000.00 and that the balance of ZW$34 556.25 was paid late hence he purportedly cancelled the agreement of sale summarily. He had an oversight of what Clause 12 of the agreement provides. It provides for the circumstances under which the agreement of sale may be cancelled and the manner in which the cancellation should be done. In particular, Clause 12.1 provides as follows:

> "12.1…..in the event of the Purchaser failing to pay any sum owing under this agreement by the due date, or breaching any condition of this agreement, such failure or breach not being remedied within thirty (30) days of written notice to the Purchaser to make such payment and or remedy such breach….The Seller shall be entitled to:
>
> 12.1.1 cancel and terminate this agreement of sale forthwith…"

Accordingly, before 1st respondent can seek to cancel the agreement of sale, Applicant must have firstly, either have failed to make a payment by the due date or breached any term of the agreement and secondly, failed to make the payment or remedy the breach within 30 days of written notice by 1st respondent. In casu, applicant paid the Purchase price as highlighted in paragraph 15 of the Founding Affidavit. As such she was not in breach of the agreement. The 1st respondent back dated the letter placing the applicant in mora after the applicant had demanded specific performance. It was the applicant who had actually put the 1st respondent in mora first.

Further, it was always the intention and agreement of the parties that a sum of ZW$485 000.00 would be paid by Homelink. Homelink provided a Letter of undertaking or a bank guarantee, undertaking to release the said payment upon registration of transfer of the subdivision in favour of applicant and registration of a mortgage bond in its favour over the subdivision. This is consistent with normal banking and conveyancing practice. To hold otherwise in this matter would simply serve to create an absurdity. Most importantly it was consistent with the parties' intention and agreement as captured in Annexure "C", wherein respondents stated the following to Homelink:

"…..We recommend that you proceed to register a mortgage bond as per the loan agreements."

It follows that for Homelink to release the payment, a mortgage bond must have been registered over the subdivision in favour of Homelink. For this mortgage bond to be registered, the transfer of the subdivision in favour of Applicant must have been registered. In the normal course of conveyancing processes, these transactions can be done simultaneously as sought herein. In commercial practice, a Letter of undertaking issued by a bank or financial institution is as good as cash. It is also noteworthy that when the Letters of undertaking in Annexures "F2" and ''F3" were issued, they were all accepted as none of the respondents ever disputed the same. This was because they were consistent with the parties' intention and agreement. In any case the balance of ZW$556.25 was also paid in full before the applicant was purportedly placed in mora and before 1st respondent purported to cancel the agreement of sale. Accordingly, the purchase price was paid and secured in full. Applicant was therefore not in breach of the agreement. As such 1st Respondent had no legal basis to cancel the agreement.

However, in the event that applicant was in breach, which breach is denied, 1st respondent was obliged in terms of clause 12.1 of the agreement to issue a note in writing calling upon applicant to remedy the breach within 30 days. This the 1st respondent did not do and cannot purport to cancel the agreement without placing applicant in mora. Any purported cancellation outside the provisions of clause 12.2 was therefore invalid, null and void. In any case, section 8 (1) (b) of the Contractual Penalties Act [*Chapter 8.04*] makes it illegal for a Seller to cancel an instalment sale without giving thirty (30) days written notice to a Purchaser to remedy any breach. On this basis, the purported cancellation of the agreement of sale by the 1st respondent is a nullity and cannot be allowed to stand. On this basis, applicant is entitled to the declaratur sought in paragraph 1 of the draft order.

I will now deal with the claim for specific performance. It is trite that once the purported cancellation of the agreement of sale has been set aside, as *in casu*, it follows that the agreement of sale between 1st Respondent and Applicant remains valid and binding on the parties. Applicant will thus be entitled to her claim for specific performance.

In *Mwayera* v *Chivizhe & Others* SC 16/2016 the Supreme Court on page 8 of the judgment had this to say:

> "Once the contract was terminated by the appellant, the entitlement to specific performance by the fourth respondent terminated. In order to obtain specific performance under the cancelled contract,

> it behooved the fourth respondent to first seek an order setting aside the cancellation as a basis for the order prayed for. This he failed to do. The court in effect gave relief under an agreement that was no longer in existence for the performance of bilateral obligations."

The above explains why the relief for specific performance being sought by applicant in her draft order is percussed with an order declaring the purported cancellation of the agreement of sale to be invalid, null and void. In *casu*, the claim for specific performance is therefore proper. In *Pasipamire* v *Television International and another* HH-144/2013 at page 5 to 6 of the judgment, this Honourable Court reiterated the law on specific performance and remarked as follows:

> "The oral agreement in this matter is a valid agreement. In *Farmers' Cooperative Society* v *Ben* 1912 AD 343 at 350 INNES JA stated with regard to the law on specific performance as follows-
>
> "*Prima facie* 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, so far as it is possible, a performance of his undertaking in terms of the contract."

That right has been reaffirmed in a multiple of case including *International Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (HC) and *Crundall Brothers (Pvt) Ltd* v *Lazarus N.O & Anor* 1992 (2) SA 423 (ZS).

In *casu* the plaintiff carried out his obligation under the contract. The authorities are also clear that because there is a recognized right of the wrong party, the law provides that the defendant bear the burden of alleging and adducing evidence in support of facts or circumstances upon which they ask the court to exercise its discretion against an order for specific performance - *Tamarillo (Pvt) Ltd* v *BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A); *Intercontinental Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd* (*supra*).

As has been shown above, Applicant is not only ready to carry out her obligations under the agreement of sale but has in fact performed in terms of the agreement of sale by paying and securing payment of the purchase price in full in accordance with the parties' intention and agreement. In *casu* the Applicant paid the purchase price in full as follows:

1. Sum of ZW$90 000.00 to 1st respondent on 19 February 2020- Annexure "F1";
2. Provided Letters of Undertaking from Homelink for payment of a sum of ZW$485 000.00 upon the registration of transfer and a mortgage bond in favour of Homelink- Annexures "F2", "F3" and "F4", and

3. The balance of ZW$34 556.25 was paid in three instalments between March and 21 May 2020- Annexures "F5 (a)" to "F7".
4. Paid the transfer fees and bond registration fees on being called upon to do so- Annexures "11" and "12" to the application.

With this the court is satisfied that the applicant completed all her obligations under the agreement of sale and is therefore entitled to the relief sought herein. Issues raised by the 3rd respondent regarding payment of the mortgage loan are in this matter, issues to be governed by the usual conveyancing practice and laws. Once the Conveyancer calls upon the release of the title deed, the mortgage bond and a consent to release the subdivision from the operation of their mortgage bond, 3rd respondent will request for a guarantee to be given to them undertaking to pay the net purchase price to them, that is if they are not satisfied with the Guarantee issued by Homelink. Payment from Homelink will thus be released upon the registration of the mortgage bond in favour of Homelink as per the letter by 2nd Respondent, being Annexure "C" to the application. Therefore, the relief sought against 3rd Respondent is primarily a consequence of the grant of an order for specific performance against 1st Respondent in addition to their own obligations having consented to the subdivision of the property, and the sale of the subdivision to applicant. Order as prayed for has to be granted.

IT IS ORDERED THAT

1. The purported cancellation, by 1st Respondent, of the agreement of sale of the immovable property described in paragraph 2 below concluded between 1st Respondent and Applicant be and is hereby declared to be invalid, null and void.
2. The 1st respondent be and are hereby directed to, within seven (7) days of the date of this order, sign all documents and do all things necessary to have the transfer of a certain piece of land situate in the District of Salisbury called Stand 1467 Parktown Township of Stand 272 Parktown 6 of Stand 249-260 of Parktown Extension of Subdivision A of Waterfall, measuring 1 642 square metres, held under Deed of Transfer No. 3105/1986, dated 27th May, 1986 to be registered with Fourth Respondent in favor of Applicant against the Letter of undertaking furnished by Homelink to Messrs Mhishi and Nkomo for payment of the balance of the purchase price of ZW$485 000.00.

3. In the event of the 1st respondent failing to comply with paragraph 2 above within the time period mentioned therein then the Sheriff of Zimbabwe be and is hereby authorized to sign on behalf of 1st respondent all the documents necessary to facilitate the registration of transfer the of the immovable property mentioned in paragraph 2 above, in favour of applicant.
4. Messrs Mhishi & Nkomo Legal Practitioners be and are hereby authorized to act as the conveyancing attorneys and to attend to the registration of transfer of the above mentioned property in favour of applicant.
5. 1st, 2nd and 3rd respondents be and are hereby directed to deliver, forthwith, to the Conveyancers, Messrs Mhishi & Nkomo Legal Practitioners the original Deed of Transfer No. 3105/1986 dated 27 May, 1986, the original Mortgage Bond No. 1404/2014 together with the Consent to release the immovable property mentioned in paragraph 2 above from the operation of the said Mortgage Bond No. 1404/2014 , failing which the Sheriff for Zimbabwe be and is hereby authorized to seize the same and to deliver the same to Messrs Mhishi Nkomo Legal Practitioners and to sign the Consent to Release the property from the operation of the said mortgage bond to facilitate the registration of transfer of the said immovable property in accordance with paragraph 2 above.
6. The 4th respondent be and are hereby authorized to register the transfer in favour of applicant and the release of the immovable property, mentioned in paragraph 2 above from the operation of Mortgage Bond No. 1404/2014.
7. The costs of this application shall be paid by the 1st and 2nd respondents, jointly and severally, the one paying the other to be absolved, on a legal Practitioner and client scale.

Mangezi, Nleya and Partners, applicant's legal practitioners
G.H. Muzondo & Partners, 1st respondent's legal practitioners
Mawere Sibanda, 2nd and 3rd respondents' legal practitioners