THE METHODIST CHURCH OF ZIMBABWE
versus
GEORGINA MAZENDAME
(In her capacity as Executrix dative of the Estate of the late
Simeon Trusty Mateta (also known as Trust Simeon Mateta and
Simon Trust Mateta)
and
MASTER OF HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 24 March and 5 August 2015

Opposed Application

T Mpofu, for applicant
S M Hashiti, for respondent

TSANGA J :This is an application emanating from an agreement of sale from April 2000, that seeks to compel transfer of certain property described as Lot 28 Clovelly Township of Glyn Tor, (Masvingo), measuring 4283 square metres held under Deed of Transfer No. 6291/89 dated 22 June 1999. The dispute is spurred by the failure to transfer the property by the seller who is now deceased, to the purchaser in accordance with the terms of their written agreement. The dispute that has arisen is therefore primarily with the widow.

The agreement was such that an initial deposit as stipulated in the agreement of sale, would be paid directly to specified mortgage holders to offset debts owing, and the balance would be due upon transfer. The agreement was entered into when the now defunct Zimbabwean dollar was still in place. For ease of flow in narration, I shall simply refer to the applicant, the Methodist Church of Zimbabwe, as the church and to the first respondent, Georgina Mazendame (also Mateta) as the widow. The second respondent in the matter is the Master whilst the third respondent is the Registrar of Deeds. However, these respondents did not file any papers and will be bound by this decision. They were cited in their official capacity to give them an opportunity to oppose the granting of the order being sought if they were so inclined.

The facts

The facts upon which the application is based are these. Sometime in April 2000 applicant and the late Simeon Mateta entered into an agreement of sale for the above property. The purchase price was Z$600 000.00, part of which would be paid to Founders Building Society and Barclays bank to cancel mortgage bonds and uplift caveats that had been placed on the property.

An amount of Z$ 105 000.00 was paid to Barclays Bank; another Z$49 000 was paid to Founders Building Society. Clearly captured in the agreement of sale was that the money would be paid directly to these institutions. A further Z$49 760.00 was paid to *Messrs Matutu Kwirira and Associates* for conveyancing fees. It was also distinctly stated in clause 4 of agreement that the balance would be paid direct to the seller upon transfer. Following these payments the caveats and bonds were cancelled. However, for reasons that had nothing to do with the Applicant but had to do with the title deeds, the property could not be transferred immediately as envisaged in the agreement. The title deeds had apparently already been surrendered to the Sheriff in readiness for execution to pay the debts that had been owing. They now needed to be retrieved from the system, which turned out to be a grinding process.

In September 2000 pending transfer, the widow whose husband was by then still alive, wrote to the church authorities requesting for the release of more money. She intimated that her husband, Mr Mateta, was ill and that she hoped she could use some of the money due from the sale for his medication. The reply by the church official to her was that it could not advance any more money on the purchase price until it was certain that the title deeds had been given to the lawyers and were in the process of being cancelled.

Mr Mateta died in December 2000 without transfer having been effected. The church says it understood at all times that the estate would be registered and transfer would then take place. It was, however, given vacant possession of the property in December 2000 and has been in occupation since then. In February 2001, the widow addressed yet another missive to the church authorities acknowledging that balance of purchase price would only be paid on transfer but asking yet again for the money to be released. Since I consider this letter to be of factual importance to aspects of the dispute that has arisen, it is necessary to reproduce its contents below. Addressed to Reverend Zwana and dated 16-02-2001 its contents were as follows:

"Dear Reverend
I am writing this letter to kindly ask you to review the situation in which we are as regards to the sale of the house to yourselves. It is true that according to the agreement of sale, we should be paid after the change of names. It is beyond yours and my control that the process has delayed to this extent, that is nine months.
I am kindly asking you to bear with me and consider my last plea that you help by paying me. I do have some financial problems. I have lots of shortfalls for my late husband's bills, I need to pay arrears for rates for that house. The most important thing is that I need to look around for another house and things are going up every time that I may end up not being able to buy a house at all.
The house in which I live needs to be paid for in the form of rentals and everything is just getting tough. It was my husband's and my wish that we got that money before he died but unfortunately he passed on which might also happen to me and then there will be problems for my children.
I anticipate that you will bear with me and consider that I am a member of your church who is in need.

Yours faithfully

Mrs G Mateta
CC Rev Nyanjaya"

The church avers that many promises thereafter were made to transfer but this never materialised. It was in a letter 11 April 2003, notably some three years later after the agreement of sale had been entered into that an entity called *Bhadala Debts* which described itself in its letter head *"registered labour and general agents"* wrote to the church seeking to cancel the agreement. It said in the letter that it had been advised by the executor of the deceased's estate to facilitate the cancellation of what it described as an "ill-conceived and highly untenable agreement of sale / purchase "entered into with the late Mateta. It intimated in that letter that the agreement had been entered into with a man who was mentally unstable at the time and who the church took advantage of. It also indicated that it would be refunding the money paid at the end of April. Thereafter, in a second letter dated 13 May 2003 they wrote to notify the church that they had refunded the sum of $175 000.00 as promised in their earlier correspondence. This was said to be for payment it made to Founders Building Society; Barclays Bank and Masvingo Municipality.

The church denies that the sale was cancelled on the basis that there was no reason for cancellation. It points to the correspondence by the widow acknowledging at all times that transfer would be effected. It further states that in any event the purported cancellation of sale was never brought to its attention. Its position regarding the payment of this refund is captured in a letter dated 6 July 2010 which is part of the record. It states therein that the account used was for a church branch and not the national office and that the widow only

informed the relevant pastor about her purported payment after some time. The account into which the payment was made was for a Gweru Branch.

Accordingly, the church seeks an order that the widow and the Master of the High Court, being the second respondent, sign all documents to effect transfer. In the event of refusal to sign by both parties, the church seeks that the Deputy Sheriff deposes to this effect. With the Zimbabwean dollar being now redundant and non-operational, the church makes an application that the balance of the purchase price, then Z$446 000.00 that was to be paid by it upon registration of the transfer, now be paid in United States dollars. The figure it seeks to pay is US$ 51 660.00, less capital gains tax and is based on the current market value of the property. This proposed amount also takes into account that a third of the value of the property had been paid by the church upon signing of the agreement leading to the cancellation of the bonds.

The widow's averments are that the sale was effected when her husband was too ill to be capable of making any rational decisions. She distances herself from the earlier correspondence arguing that she never said she was ratifying the sale. She instead claims that the agreement is totally null and void and that she was put under extreme pressure by the church at the time, who were demanding to take occupation of the house. She alleges that the occupation by the church was done forcibly. She asserts that she was subsequently advised that the church had taken advantage of her and that the agreement was void. She also makes a counterclaim for rentals from 2000.

The church, in answer, asserts that the widow is not telling the truth. It denies that the seller was sick at the time and states that sickness which took away his life developed later on. It denies that the agreement is void. It states that it had already paid a third of the price and that both parties caused a valuation of the property to be done. The property is valued at US$85 000 and US$70 000.00 respectively. It adopts a middle figure of US$77 500 and propose to deduct one third from this. It is in this context that it offers to pay US$51 660.00 and that it seeks to amend the draft order accordingly.

The legal arguments

Mr *Mpofu* argued on behalf of the church. He moved for the above amendment that the amount to be paid on transfer be in United States dollars. His contention on the counter-claim was that it is not in accordance with r 229A of the High Court Rules 1971 as the counterclaim is supposed to be in the form of a court application or a chamber application

whichever is appropriate. As such his stance was that no application in the counter claim had been filed. The case of *ZOU* v *Mazombwe* 2009 (1) ZLR 101 (H) was highlighted in aid of this argument. He accordingly argued that counter claim is not properly before the court and should be dismissed.

Regarding the validity of the sale agreement, his position was that a party is bound by his or her signature and accordingly that the widow is bound by her late husband's signature. The case of *Muchabaiwa* v *Grab Enterprises* (Pvt) Ltd 1996 (2) ZLR 691 was cited in support of this contention. His further point of argument was that if indeed the late MR Mateta was of unsound mind then such evidence is of a technical nature and the views of the relevant experts should have been sought. The case of *Morris* v *Morris & Another* 2011 (1) ZLR 334 (H) was pointed to for this position. His stance was also that the widow's story should be disregarded and adverse inferences drawn from her giving false evidence. He drew backing from the case of *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* HH 131 03 for this position. His line of reasoning was that since there never was any valid cancellation of the agreement, and the church is able and willing to carry out its part of the bargain, it has a right to demand performance. The following cases were said to be in aid of this legal contention: *Farmers Corp Society (Reg)* v *Berry* 1912 AD 343 at 350 and reaffirmed in *Que Que Municipality* 1973 (2) SA 754 (R) and *Haynes Municipality* v *King Williamstown Municipality* 1951(2) SA 371 and *Zimbabwe Express Services (Private) Limited* v *Nuanetsi Ranch (Private) Limited* SC-21-09.

The emphasis of Mr Mpofu's submissions at the hearing was that that the church cannot be required to pay a full purchase price since all it has to prove at this point is that it is entitled to transfer. He also stressed that the amounts paid went towards the upliftment of the caveats that had been placed on the property. As such, having paid the initial balance and the caveats having been lifted, he maintained that there was never a basis for cancellation of the agreement as purported to have been done by the entity called *Bhadala* at the behest of the widow. Furthermore, he underscored that the payment was clandestinely made without informing anyone. He also argued that applicant being unaware of the amount or whether it represented the true value, it had been eroded by inflation. As such the applicant's standpoint was that the payment had been made at the respondent's own peril. Moreover, as he accentuated in his argument, it was a material term of the agreement that the balance of the purchase price would be paid directly to the seller upon transfer. He underlined that the material terms of the agreement can be summarised as having been three pronged, namely: i)

the payment of a deposit; ii) transfer of the property; iii) payment of the balance of the purchase price.

Mr *Hashiti* appeared on behalf of the first respondent. At the hearing he had sought to raise points *in limine.* Having heard the points I sustained Mr *Mpofu*'s objection that they were of a factual and sought to argue the case as a whole. As such I capture herein those legal arguments he sought to make as they pertained to the case as whole.

His legal squabble on behalf of his client was that the tender of the balance of purchase price had not been made in the founding affidavit and only emerged in the answering affidavit. He also argued that the amount tendered is not in the agreement. Furthermore, the belated tender and its amount were said to be issues that have not been agreed to by the parties. The gist of his objection was that an application stands or falls on its founding affidavit. He also argued that the church should have tendered performance and that tender in the answering affidavit is ineffective. He relied on the cases of *Lasagne Investments* v *Highdon Investments* 2010 (1) ZLR 296 (H) *and Savanhu* v *Marere & Ors* 2009 (1) ZLR 320 (S).

With regards to the refund he highlighted that the church in its answering affidavit had accepted that a refund had been paid and that no attempt had been made to refund the amount paid on behalf of the widow. His attitude was that the church has not tendered the amount it says it received after the cancellation of the contract and that it seeks to proceed on the basis that this sum need not be tendered. His stance was that since the church kept the amount, it had effectively agreed to the cancellation of the agreement. As such he underscored that the church had waived their right by accepting the refund. He also argued that since the deposit was said to have been refunded, what the church ought to now pay is an initial deposit. He relied for his position on cancellation the cases of *Farai Ndemera* v *Rosalind and Murray* SC 39/06; and on *Alfred Muchini* v *Adams & Ors* SC 47/11 and *Magurenje* v *Maposa and Ors* 2005 (2) ZLR 44 on the issue of the founding affidavit. He also contended that arising from the cancellation, a new matter what was now in dispute and that this matter now relates to a deceased estate. Accordingly, the drift of his argument was that it is now necessary to comply with both s 41 and 42 of the Administration of Estates Act in terms whereof estate property only has to be sold where it is absolutely necessary. He argued that the widow needs the property and is opposed to selling it as she has nowhere to go. He also argued that the church having been refunded can make a claim for what it insists is owing.

Mr *Hashiti*'s position was also that there are disputes of facts which the church as the applicant should have been aware of. His point of emphasis was that the issue of the late husband's condition is an evidentiary one. He relied on the contention that the contract is invalid as it was tainted with undue influence and entered into by one without capacity. As such, his stance was that this is not a proper matter for the court to grant specific performance and that it should instead dismiss the application.

In response to these arguments, Mr *Mpofu*'s maintained his position that a refund should be lawful and that on the factual basis there was no ground for effecting a refund. He accentuated that foreclosure on the property was terminated because of the payment of the initial deposit by the applicant. He dismissed the averments as to any dispute of facts largely on the basis that a dispute of fact cannot arise from the failure of the widow to tell the truth to the court. He also argued that the *Ndemera* case was inapplicable as it deals with a refund that was made and accepted. Furthermore, he highlighted that the proposed figures in US dollars had come from a joint evaluation. He dismissed the proposal that the property was now estate property on the grounds that the property was sold in 2000 by the deceased that the transfer ought to have been done then well before his death in December of that year.

Analysis and disposition

From the above, the core issues that emerge for resolution relate to the following: whether the application to amend the declaration to reflect the amount to be paid in United States dollars ought to be granted. This is closely intertwined with the issue of the circumstances that gave rise to the issue being raised in the answering as opposed to the founding affidavit. Then there is the issue of the deceased's purported mental incapacity and whether the sale is indeed vitiated in light of these allegations. Also to be decided is whether the agreement was in fact effectively cancelled by the refund of the deposit and if an initial deposit should now be paid. Lastly, is the issue of the widow's counter-claim.

On the first issue of whether the order should be amended to reflect payment in US dollars, Mr *Hashiti*'s real gripe on behalf of the first respondent is that the issue of tendering payment in this form was only raised in the answering affidavit and not in the founding affidavit. As stated, he placed reliance on the case of *Alfred Muchini* v *Adams & Ors* SC 47/11 that an application must stand or fall on its affidavit. In that case the paragraph below from Herbstein & van Winsen *the Civil Practice of the Superior Courts* in South Africa 3rd Ed p 80, was cited which explains this general rule as follows.

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, **and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein**, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out"

The practice where issues are not addressed comprehensively in the founding affidavit and instead find their way in the answering affidavit is indeed eschewed in the case of *Coffee, Tea and Chocolate Co Ltd* v *Cape Trading Company* 1930 CPD 81 at p 82 which is cited with approval by our Supreme court in the case of *Magwiza* v *Ziumbe NO & Anor* 2002 (2) ZLR 489 (S) in its explanation of the unacceptability as follows:

> "A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not had an opportunity of replying. …..

In the *Magwiza* case the court refused to consider the issue of cession which had not been raised in the founding affidavit as no good reason had been given for the failure to include it in the founding affidavit. In *Magurenje* v *Maposa and Ors* 2005 (2) ZLR 44 which Mr Hashiti drew on, it was highlighted in that case that in application proceedings, the file of an answering affidavit after parties have field their heads of argument may only be done in exceptional circumstances and only with the leave of the judge. To allow a party to file an affidavit at that stage would defeat the whole purpose of filing heads of argument as set out in r 238 (1) (a) of the High Court Rules 1971. For departure from the proper sequence, the indulgence from the court or judge is necessary. An applicant should apply for condonation. Without such application the judge cannot of his own initiative allow the answering affidavit to form part of the record.

But the case before me is clearly not one where the applicant filed an answering affidavit after heads had been filed and as such I do not see how the *Magurenje* case is applicable here. There was no interference with the sequencing of affidavits as in the *Magurenje case*. The issue in my view in the case before me is whether the church's offer to pay, seeks to supplement the main affidavit in a manner which departs materially from the allegations of fact in the main affidavit. I am of the view that it is not. The delay in prosecution is explained as arising from efforts to settle the matter out of court. Indeed the record speaks lucidly to such efforts. Furthermore the church was cognisant at all times that

any settlement would require it to pay the balance of the purchase price. The initial court application is date stamped July 2003. The opposing affidavit is officially date stamped as 23 July 2003. The answering affidavit is officially date stamped 12 October 2012. This is some nine years following the filing of the initial papers in this matter. It is in this light that the answering affidavit highlights that an evaluation of the property was made and that it is the basis upon which the values in US dollar terms are now made.

Clearly, the facts show that the averments made could not have been made at the time of the founding affidavit. Efforts to settle matters out of court using alternative dispute resolution methods are not unusual among disputants. Using a consensual approach to resolving a dispute would be even less unusual where a church is concerned given that courts in such settings are often regarded as peripheral rather than core to dispute resolution. Strategies such as mediation and negotiation may be seen as less confrontational and thereby more appropriate. Courts are therefore often a strategy of last resort when other dispute resolution mechanisms have failed. Consequently, the averments that appear in the answering affidavit genuinely arose from developments that had been in play in trying to resolve the matter. If the widow as 1st Respondent deemed it necessary, it would have been proper for to seek to file a fourth affidavit. Under the circumstances it would most likely have been allowed so as not to prejudice her in any manner.

With such application not having been made and looking at the context as a whole, I see no real prejudice in allowing the amendment in the draft order to reflect payment of the balance of the purchase price in US dollars in accordance with the valuation. The legal thrust in *Kwindima Fabiola* v *Mvundura* HH 25-09 *i*s indeed that where loss suffered or to be suffered is in foreign currency there is nothing that prevents the court from granting an order in foreign currency. With the Zimbabwean dollar no longer in circulation clearly whatever remedy would have to be in the operational currency which is mainly the US$. The amendment to the draft order is accordingly granted so as not to prejudice the other party if the order as a whole is deemed appropriate.

It is argued with regard to specific performance that the church ought to have tendered performance. Indeed in the case of *Lasagne Investments (Pvt) Ltd & Others* v *Highdon Investments (Pvt) Ltd & Others* 2010 (2) ZLR 296 at 302D it was held that party who seeks an order for specific performance must first fulfil or be ready and able to fulfil his own obligations. The case of *Savanhu* v *Marere & Ors* 2009 ( ) ZLR 320 (S) equally lays out

principle that for specific performance to be claimed, the other party must have fulfilled his part of the bargain.

The agreement was clear that the balance of the purchase price would be paid on transfer. The reason why the property could not be transferred in order for the seller to get the balance had nothing to do with the applicant. The applicant has fulfilled the first part of the agreement which was to pay an initial deposit. This went towards settling the debt owing on the property which would otherwise have been foreclosed. That there were problems thereafter with the title which stood in the way of seeing the agreement to its logical conclusion had nothing to do with the buyer. The terms of the agreement remained as agreed that the balance was to be effected upon transfer. In circumstances where the buyer had already released funds and where some delays had surfaced due to know fault of its own, it would have been inane on its part to release even more funds without the other party honouring its part of the bargain. My conclusion is that this is not a new agreement. It is an application that has been brought to court to fulfil and existing agreement where the church had already performed its side of the bargain.

I turn to the argument that the agreement was cancelled by the refund of the purchase price and that since the deposit paid had been refunded, what church ought to now pay is an initial deposit. The widow's position is that the property is in fact now the subject of a deceased estate. In *Farai Ndemera* v *1) Rosalind Marie 2) Blessing Manyeche and Registrar of Deeds SC 39/06* cited as authority on cancellation the first buyer of property which turned out to have been double sold, was said to have acquiesced in the cancellation of the sale of the property to himself. This was said to be evidenced by his act of providing an account into which has refund was to be paid. The position taken by the court in that case was that he could not have arranged for a refund if he still wanted to enforce his right and entitlement to the property. It was held that the seller was entitled to cancel the agreement once the buyer had agreed to accept a refund. It is the widow's argument in the case before me that the applicant accepted the refund.

The facts and the documents however do not speak to any such acceptance. Materially there was no reason for the seller to seek to cancel the agreement against a party who had already performed its side of the bargain. The debts owed for the property had been paid off and the seller's property had been saved. Furthermore, it is indeed noteworthy that the attempted cancellation was made three years after the agreement and was done in the throes of a hyperinflationary period. It is common knowledge that by 2003 the Zimbabwean dollar

had all but lost its value and that the widow's payment would have by no means even remotely represented at the time, the true value of what the church had paid to have the bonds paid off and to uplift the caveats. Moreover, the cancellation said to have been effected into a general account used by litigants to deposit tithes resulted in the church remaining unaware of it during a period of hyperinflation. It would by then have been even more meaningless in terms of its value. Purporting to refund the deposit was therefore a risk that the widow took in its efforts to cancel an agreement which was for all intents and purposes valid. This is her own loss which has no bearing on the agreement that was in place.

Then there is the issue of the agreement being vitiated by lack of mental capacity at the time it was entered into by the seller. There is nothing in my view that points to the seller having been under any form of incapacity at all at the time that he entered into the agreement. Indeed the widow's own letters to the church, the second letter f which I reproduced in *toto,* do not hint even remotely at the sale having been problematic. I am in agreement with Mr *Mpofu* that the new facts she now alleges, point to the widow skirting the truth in order to bolster her own position. With Zimbabwe's inflationary stint and with house prices having gone up over the years in US dollar terms, what the courts have been increasingly faced with, are cases where individuals who genuinely entered into agreements of sale during the Zimbabwean dollar days, have simply turned coat for the love of money.

In this case the church as applicant is willing to pay the balance of the purchase price in accordance with the current market value. They should be allowed to do so as the agreement was not validly cancelled, there being no reason for doing so. I find the widow's argument regarding her husband's lack of capacity to have no merit. There is no justification whatsoever for referring the matter to trial on the basis of an imagined rather than a real dispute of fact.

Finally, I turn to the counter-claim. I am in agreement with Mr *Mpofu* on account of r 229A that the counter-claim was procedurally defective and that the case of *ZOU* v *Mazombwe* 2009 (1) ZLR 101 (H*)* is apposite. It deals with the failure to use the right form as stipulated in the rules and that the court will not grant condonation to a party the where the format used is not in compliance with any rule. With regards to counter applications rule 229A provides as follows:

> (1) Where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents, a counter application against the applicant in

the form *mutatis mutandis,* **of a court application or a chamber application, whichever is appropriate.**

The rule is clear that the format that may be used for a counter claim is a court application or a chamber application. The first respondent's counter claim is not in either form and therefore is indeed not in compliance with any rule.

For all the reasons I have considered and articulated above I accordingly come to the conclusion that the applicant's claim be and is hereby granted as follows:

1. 1st Respondent and 2nd Respondent sign all documents as may be necessary to effect transfer of certain piece of land situate in the district of Victoria being Lot 28 Clovelly Township of Glyn Tor measuring 4283 square metres held under Deed of Transfer No. 6291/89 dated 22 June 1999, to the applicant and deliver the Deed of Transfer to Applicant's Legal Practitioners.
2. In the event that 1st and /or 2nd Respondent refuse to sign such documents within 24 hours of service of this order upon them, the Deputy Sheriff be and is authorised to depose to same.
3. The balance of the purchase price namely US$51 660.00, less any Capital Gains Withholding Tax be paid by the Applicant to the 1st Respondent upon registration of transfer to be effected by *Coghlan Welsh and Guest (Incorporating Stumbles & Rowe) Legal Practitioners*.
4. 1st Respondent to pay costs of suit.

Coghlan, Welsh & Guest, Plaintiff's Legal Practitioners
Messrs Chadyiwa & Associates, 1st Respondents Legal Practitioners