

KNOWE RESIDENTS AND RATE PAYERS ASSOCIATION  
versus  
EDDIES PFUGARI (PRIVATE) LIMITED  
and  
EDWARD NYANYIWA  
and  
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 23 May and 13 September 2017

### **OPPOSED APPLICATION**

*F Mahere*, for applicant  
*T.W Nyamakura*, for 1<sup>st</sup> and 2<sup>nd</sup> respondents  
*R. C Muchenje*, for 3<sup>rd</sup> respondent

TAGU J: The applicant is an association composed of a group of residents of Knowe Housing Development based in the town of Norton. It comprises of individual members who bought stands from the first respondent. The first respondent is a duly registered company which is in the business of developing and selling residential, agricultural and commercial stands. The second respondent is the sole active director of the first respondent who is responsible for taking part in the administrative affairs of the first respondent. Third respondent is Norton Town Council, a council established in accordance with the Urban Councils Act [*Chapter 29.15*] and is responsible for supervising and approving all developments which are made under its jurisdiction. Its duties among others are to ensure that all infrastructural services such as roads, street lighting, water mains and sewerage disposal are done to its satisfaction and as per its specifications.

The third respondent issued subdivision permits to the first respondent for the development and selling of stands to the members of the applicant for phases 2 and phase 3 known as Knowe, being a certain piece of land situate in the Hartley district and a certain piece of land situate in the district of Chegutu, being portions of the remainder of Knowe held under Deed of Transfer Number 10764/89. The first respondent being the seller and owner of

lot 2 of Knowe Suburb entered into agreements of sale with each of the applicants' members in 1998 and 2003 respectively. The phase 2 residents duly complied with their part of the contract by paying the first respondent in full over the (thirty) 30 months as had been agreed by the parties while the phase 3 residents also duly paid the first respondent in full within the agreed (sixty) 60 months that ended on 1 February 2008. To the contrary the first respondent breached the contracts of sale.

In respect of the phase 2 residents the first respondent failed to fulfil its obligations in that the roads were not graded and tarred to the specifications approved by the third respondent to this day. The proper water reticulation system with 350mm water pipes has not been connected, no proper water drainage and sanitary system has been constructed and no street lights have been erected to this day. In respect of the phase 3 residents the first respondent breached the contract of sale in that it has failed to finance the development and develop the suburb in which the stands are located as agreed to by the parties in terms of Clause 2.1, it has failed to construct the bitumen –surfaced roads, connect water reticulation, drainage and sanitary systems, erect street lights and construct public facilities or amenities such as schools, clinics (health facilities) and a shopping complex as stipulated in the subdivision permit. As a result the applicants' members who purchased phase 3 stands from the first respondent have been unable to obtain title deeds for their properties because the first respondent has not yet fulfilled its obligations in respect of the Sub-division Permit.

It is the failure by the first respondent to fulfil its obligations in terms of the contracts of sale that brought the applicants' members to court. The applicant has thus filed this application seeking the following relief:

**“IT IS ORDERED THAT:**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be and is hereby ordered to fully service the residential areas in Phase 2 and Phase 3 of Knowe Housing Development in Norton, within ninety (90) days of this order to the 3<sup>rd</sup> Respondent's satisfaction and specifications. In particular, the 1<sup>st</sup> Respondent shall provide the following services in Phase 2 and 3:-
  - a) ensure that reticulated water supplies with 350mm water pipes are connected to all stands;
  - b) ensure that proper sanitary systems are connected;
  - c) ensure that proper drainage systems are put in place;
  - d) ensure that roads are properly graded and tarred;
  - e) ensure that street lights are erected;
2. The 3<sup>rd</sup> Respondent as the supervising authority be and is hereby ordered to ensure that the 1<sup>st</sup> Respondent's service as stipulated in paragraph 1 of the Court Order meets all its statutory requirements.

3. Alternatively, in the event that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is unable to personally attend to servicing the properties in question, the Applicant prays that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be and are hereby ordered to pay the sum of US\$192 901 995.00 to it, jointly and severally one paying the other to be absolved within thirty (30) days of this order.
4. In the event that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent fails to make payment to the Applicant within the time period specified in paragraph 3 above, the Sheriff be and is hereby authorised to attach and sale in execution the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's property in satisfaction of costs of service.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall jointly and severally one paying the other to be absolved, pay the Applicant's costs of suit on an attorney and client Scale."

The application was opposed by the first and second respondents only. The third respondent indicated that it was not contesting the application and will abide by the decision of the court.

At the hearing of the matter the first and second respondents raised three points *in limine*. The first point *in limine* was that the claim is prescribed in terms of section 15 (d) of the Prescription Act [*Chapter 8.11*] and in the event that this claim is held not to have prescribed, these proceedings should not have been brought by way of application but by way of Action Procedure. The third and last point was that the second respondent should not have been cited in his personal capacity. On the merits the first and second defendants' opposition is based on the fact that the claim has prescribed. That in the event it is found that the claim has not prescribed the claim for specific performance has been rendered impossible by facts beyond first respondent's control such as the inflation that wiped out the applicants' members' money and the introduction of the multi-currency system in February 2009 by the government which rendered the money paid by applicant's members obsolete. They argued that the applicants having paid their money in Zimbabwean dollars cannot expect performance in the United States Dollars. In any case they claimed that the first respondent performed its obligations which are feasible under the then socio economic environment prevailing in Zimbabwe.

I will deal first with the points raised *in limine*, and if I find merit in them then that will be the end of the matter. In the event that I find the points *in limine* lacking merit I will go on to deal with the matter on the merits.

### **Points Raised *in limine*.**

The first point *in limine* is that the claim is prescribed. Section 15 of the prescription Act provides for various periods of prescription of various debts. In particular s 15 (d) provides that:

“except where any enactment provides otherwise, three years, in the case of any other debt.”

Everything being equal, unless provided for in any other enactment, the claim prescribes after a period of three years. The first and second respondents submitted that the claim prescribed after three years from the date the applicant’s members paid for their stands.

The applicant in its answering affidavit denied that the claim has prescribed. The reason is that the development permits did not give the first and second respondents any time lines in which to carry out and complete the developments as per the specifications made by the third respondent. As such the obligation towards the applicant will only end once the first and second respondents have received a certificate of compliance. At the current moment the first and second respondents do not possess a certificate of compliance from the third respondent since the members duly paid. Prescription would only start to run on the day the first and second respondents obtained the certificates of compliance. In any case under the first paragraph in case Number HC 2887/05 the third respondent clearly stated that the first respondent could not proceed with the next phases, that is, Phase 2 and 3 before first respondent had finalised Phase 1. Consequently, the prescription period for Phase 2 and 3 could not have begun to run unless and until the first respondent had complied and finalised compliance with its obligation as per the relevant permit in respect of Phase 1, which it has since not complied with as well, hence the first respondent is being sued for contempt of court in case number HC 2887/05.

A perusal of the permits granted to the first respondent did not give a time limit within which the first respondent was to carry out the infrastructural development. In my view this too did not give the applicant’s members time limits within which to sue the first respondent. It is my further view that whatever was to be done was to be done within a reasonable time. The members having performed their obligations within the stipulated times, it was their legitimate expectation that the first respondent was to also perform its obligations within a reasonable time. The first respondent to date has failed to do so to date. It cannot therefore hide behind the issue of prescription to avoid its obligations. My position is fortified by the letter written by the lawyers for the first respondent dated 20<sup>th</sup> April 2015 to the deponent of the founding affidavit of the applicant one Retired Colonel TDT Ruramai wherein he said among other things that:

“We take cognizant of the fact that, in as much as the development permits do not have time frame for performance, the period that has lapsed without any activity on your part is far too long. It therefore worries us to note that years keep going by without any movement on your

side. We would appreciate if you would advise us as to when you will attend to the servicing of the Phase 2 and 3.

Kindly let us hear from you within (7) days from date of receipt of this letter.”

In response to this letter written on 12 March 2015 well after the date the respondents claim that prescription had taken effect, the counsels for the first respondent requested among others the following particulars in order to respond:

- “5. What is the period envisaged by the agreement between the parties, within which development should be on?
6. If the agreement does not state time periods as requested in paragraph (5) above, what then is the legal basis of your letter?
7. ....”

When the above particulars were given the counsel for the first respondent did not reply to this letter that requested the first respondent to comply with the terms of the Sub-division permits. They did not raise the issue that the claim had prescribed. Impliedly they were saying the development was on going and that there was no basis for the members to ask the first respondent to comply with the terms of the subdivision permits. In my view the point *in limine* that the claim is prescribed has no merit and it is dismissed.

The second point *in limine* was that the applicant should have proceeded by way of action procedure and not application procedure. This is an application for specific performance. In my view there are no material disputes of fact in this case. It is not in dispute that the parties entered into the agreement. It is not in dispute that the members of the applicant paid their dues fully to the first respondent. The first respondent failed to perform its part of the agreement. It is therefore proper for the applicant to proceed by way of application and not Action Procedure. The second point *in limine* would be summarily dismissed.

The last and third point *in limine* was that the second respondent was improperly cited in his personal capacity. In its opposing affidavit the second respondent deposed to the opposing affidavit on behalf of the first respondent as well as on his own behalf. The second respondent stated that he was the Director of the first respondent.

In its answering affidavit the applicant submitted that the citation of the second respondent is for the purposes of compliance with any order the court might grant as he is the person in charge of the administrative functions of the first respondent. In that case there was

need to pierce the corporate veil. The second respondent argued that he cannot be made to personally shoulder the obligations of the first respondent.

I was convinced that the second respondent was properly cited in his personal capacity because he is responsible for taking up the first respondent's administrative affairs. He is the sole director of the first respondent. I therefore find no merit in the third point *in limine*. The third point *in limine* is accordingly dismissed.

## **ON THE MERITS**

I will now deal with the merits. My reading of the papers clearly shows that members of the applicant performed their party in respect of the agreements. I am satisfied that the first respondent performed some part of the agreement but did not fully comply with the terms of the agreements and the permits. It conceded that it did not perform as to expectations due to inflation that eroded the money paid by the members. It claimed that some members did not pay in full. If it is so there is no evidence that the first respondent took any steps to compel the non-paying members to meet their obligations. I am therefore not satisfied that the first respondent did not perform mainly because of inflation. Since the payments were made years before inflation took effect, at least there should be some semblance of compliance with the Subdivision permits. To date most of the terms and conditions in respect of phases 2 and 3 have not been complied with.

In this case the applicant is claiming for specific performance as well as in the alternative damages for the breach of contract in an amount of US\$192 901 995.00. The law governing the grant of an order of specific performance is established under our jurisdiction and elsewhere. According to Professor Christie in *The Law of Contract in South Africa*, 6<sup>th</sup> ed (LexisNexis) at p 544, specific performance relates to an order to perform a specified act or to pay money (*ad pecuniam solvendam*) in pursuance of a contractual obligation. The learned author additionally stated at p 545 that:

“Our law is clear that a plaintiff is always entitled to claim specific performance and, assuming he makes out a case, his claim will be granted, subject only to the court's discretion.”

The *locus classicus* in this regard is the case of *Farmers' Co-Operation Society (Reg) v Berry* 1912 AD 343 at 350, it was held that:

“*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. As remarked by KOTZE CJ in *Thomson v Pullinger* (1894)

1 OR 301, 'the right of a plaintiff to specific performance where the defendant is in a position to do is beyond doubt.' It is true that courts will exercise a discretion whether or not decrees of specific performance will be made."

In Zimbabwe the factors to be taken into account in deciding whether an order of specific performance should be granted were set out in the case of *International Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) where it was held that:

"While the court retained a wide discretion to withhold the grant of specific performance, a wronged party to a contract had a right to select his remedy, and the court would enforce that right unless there were compelling circumstances to refuse the remedy and award damages only. The onus is on the party seeking to avoid specific performance to establish the facts and circumstances which the court should consider in the exercise of its discretion to refuse specific performance."

The first and second respondents raised the issue that there is supervening impossibility that exists that would preclude the first respondent from fully complying with the terms of the agreements entered with the members of the applicant. In my view any suggestion to that effect constitutes an attempt by the first respondent to eschew obligations that it voluntarily assumed and to unjustly enrich itself at the expense of the members of the applicant. With respect, the first respondent has failed to discharge the onus of establishing that performance is now impossible in the error of dollarization. For a contract that was entered into in 1998, there is no explanation whatsoever as to why between 1998 and 2009 when dollarization occurred, the first respondent failed to service the stands. This is a simple case of a litigant who failed to fulfil its contractual obligations for many years, having squandered the millions of the purchase price and now seek to suggest that inflation prevented it from doing the right thing. This is not the sort of scenario that the defence of impossibility of performance was designed for. If first respondent had performed its obligations at the time the purchase price was paid, there would be no difficulty to talk of. Any hardships that arose now is self – created and must not be accommodated by this Honourable court. In the event that the first and second respondents are unable to comply with an order for specific performance, then they must in the alternative pay damages as claimed by the applicant. Inflation and or dollarization did not only affect the respondents but the members as well.

In the result I will grant the relief sought.

**IT IS ORDERED THAT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent be and is hereby ordered to fully service the residential areas in Phase 2 and Phase 3 of Knowe Housing Development in Norton, within ninety (90) days of this order to the 3<sup>rd</sup> Respondent's satisfaction and specifications.

In particular, the 1<sup>st</sup> Respondent shall provide the following services in Phase 2 and 3:-

- a) ensure that reticulated water supplies with 350mm water pipes are connected to all stands;
  - b) ensure that proper sanitary systems are connected;
  - c) ensure that proper drainage systems are put in place;
  - d) ensure that roads are properly graded and tarred;
  - e) ensure that street lights are erected;
2. The 3<sup>rd</sup> Respondent as the supervising authority be and is hereby ordered to ensure that the 1<sup>st</sup> Respondent's service as stipulated in paragraph 1 of the Court Order meets all its statutory requirements.
  3. Alternatively, in the event that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is unable to personally attend to servicing the properties in question, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be and are hereby ordered to pay the sum of US\$ 192 901 995.00 to applicant's members jointly and severally the one paying the other to be absolved within thirty (30) days of this order.
  4. In the event that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent fails to make payment to the Applicant within the time period specified in paragraph 3 above, the Sheriff be and is hereby authorized to attach and sale in execution the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's property in satisfaction of the damages.
  5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall jointly and severally one paying the other to be absolved, pay the Applicant's cost of suit on an attorney client scale.

*Chinawa Law Chamber*, applicant's legal practitioners  
*Mtewa and Nyambirai*, 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners  
*Mbidzo, Muchadehama & Makoni*, 3<sup>rd</sup> respondent's legal practitioners