

OLIVER CHIPERESA
and
LYOBA CHIPERESA
versus
LOVEMORE TANYANYIWA MADZIKANDA
and
THE SHERIFF, HARARE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 16 May 2017 & 6 September 2017

OPPOSED APPLICATION

N P Goneso, for the applicants
T Zhuwarara, for the 1st respondent

TAGU J: At the hearing of this matter, and in his heads of argument the first respondent raised two points *in limine*. The first point *in limine* being that there is material disputes of facts which cannot be resolved on papers. He suggested that this matter could not be resolved in a motion court but by way of trial procedure. See *Chasokera & Anor v Institute of Chartered Accountants of Zimbabwe HH-82-12 and Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC) in which MC NALLY J (as he then was) (referred to the dictum of MILLER JA in *Tamarillo (Pvt) Ltd* 1982 (1) SA 398 (D) at 430 G-H) at p 234 E-

“A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril for the court in the exercise of its discretion, might decide neither to refer matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but dismiss the application,”

The first respondent submitted that the applicant was defrauded by the Estate Agent and as such ought to lodge a claim in terms of s 39 of the Estate Agents Act [*Chapter 27.17*].

The second point being that there was a material non-joinder of the Estate Agent whom he perceived had an interest in the matter. See *Henry Viljoen (Pvt) Ltd v Awerbuch Bros* 1953 (2) SA 151 and *Abrahamse and Others v Cape Town City Council* 1954 (2) SA 178 at 182-3 where it was said the failure to join a contracting party who has a direct, substantial and financial interest in the matter was held to be fatal to the success of the application concerned and resulted in the dismissal of the applicant's appeal.

The counsel for the applicant opposed the points *in limine*. He submitted that there was no dispute of facts. The matter is based on contract of sale and the case of *Masukusa* is distinguishable. He further submitted that the first respondent is making bald denials and must have shown areas where viva voce evidence was required. It was his contention that this was but just an after-thought.

As regards the second point *in limine* counsel for the applicant urged the court to dismiss it and relied on Order 13 Rule 87 (2) and said the first respondent should have sought joinder of the Estate Agent.

On the first point *in limine* the court agrees with the counsel for the applicant that there are no material disputes of facts. This case is based on the contract of sale. As regards the second point *in limine* r 87 (1) of the High Court Rules 1971 provides that-

“no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

For the above reasons the points *in limine* are dismissed.

I now turn to deal with the merits of the application.

A perusal of the applicants' founding affidavit, the Notice of Opposition by the first respondent, the answering affidavit, the attached annexures in this case and the heads of arguments show beyond doubt that the first respondent is the registered owner of a certain piece of land known as Subdivision 5 (Stand 1007) of Lot 15 of Brooke Estate held under Title Deed No. 4780/98, Harare, measuring 2025 square metres.

It is clear from the papers that the first respondent advertised the sale of the said stand through his Agent Trevor Dollar Real Estate as per Annexure “A”. The applicants saw the advertisement and were interested in purchasing the said stand. A contract of agreement of sale was concluded. The first respondent who is the seller signed the agreement of sale on 15 October 2015. The purchasers who are the applicants signed on 13 October 2015 and the seller'

Agent Mr Duncan Dollar of Trevor Dollar Real Estate signed on 20 August 2015. All this is shown on Annexure “B”.

The agreement of sale concluded was for an amount of US\$ 70 000.00. The applicants made full payment into Trevor Dollar Trust Account number 9016589014 held at CABS Bank on 16 October 2015 through the Zimbabwe Electronic Transfer and Settlement System (ZETSS) as shown on Annexure “C”.

Before the applicants could move onto the stand and start construction work, the first respondent advised the applicants sometime in July 2016 of the death of Mr Duncan Dollar. The applicants were then locked out of the stand by the first respondent who refused to transfer the stand to the applicants on the pretext that his Agent Mr Duncan Dollar had passed on without remitting the purchase price to him. The first respondent is now claiming that the applicants’ remedies are to claim their refund from the Estate Agents Compensation Fund.

The applicants are now claiming that the first respondent is in breach of the agreement and are now seeking specific performance. They further claim that the first respondent through his project surveyor availed to them a revised site plan which showed that the stand had now been reduced in size from 2025 square metres to 1982 square metres. They now claim back the value of 43 square metres valued at US\$ 1 486.00 under the *actio quanti minoris*. On the other hand the first respondent claims that the 43 square metres are insignificant and that piece of land was consumed by the construction of the road on the stand.

After hearing the submissions by the counsels, reading the heads of arguments, the court is of the view that the applicants performed their part of the agreement. The first respondent by refusing to transfer the stand in question to the applicants and refunding them the value of the 43 square metres of the land is in breach of the contract of sale which he concluded through his Agent.

The law on this issue is well settled. In the case of *Eddie Ncube v Laina Mpofo & 2 Others* HB-69-06 it was held that by making payment to the Estate Agent chosen and appointed by the seller, the buyer discharged his obligations in terms of the contract. As such the seller was consequently obliged to pass transfer to the purchaser. Payment to an agent expressly authorised to receive payment, discharged the obligation to make payment. The Honourable Justice NDOU had this to say-

“In casu payment was made to the second respondent at the behest of the first respondent and such payment was therefore effectively paid to the seller. Thus applicant fulfilled his obligation in forma specifica...The role of the agent was to receive the purchase price on

behalf of the seller pending transfer and indeed, second respondent received the full purchase price from applicant who by so advancing discharged his obligations, under the contract.”

In the present matter the applicants paid full purchase price through the first respondent’s Agent Trevor Dollar Real Estates. By paying through the first respondent’s authorised and chosen agent, they discharged their obligations. I can add to what NDOU J said that the mere fact that the seller’s agent (Duncan Dollar) passed on before he remitted the full purchase price to the seller is not a bar for the seller to refuse to transfer the stand. It is neither here nor there. Hence first respondent cannot raise death of his agent and failure to remit the purchase price to him as a basis for avoiding his contractual obligations. The applicants are therefore entitled to specific performance. Further, when the applicants paid the US\$70 000.00 it was for 2025 square metres. Now that the stand has been reduced by 43 square metres, to 1982 square metres, insignificant as it may be, the applicants are entitled to a refund of US\$1 486.00 under the *actio quanti minoris*.

In the result the application succeeds and the following orders are made.

IT IS ORDERED THAT-

- a) The first respondent shall, upon service of this order, immediately and unconditionally restore applicants’ access and occupation of Subdivision 5 (stand 1007), of Lot 15 of Brooke Estate, Harare.
- b) The first respondent be and is hereby ordered to perform such acts as are necessary to expedite and complete the servicing of the land on which subdivision 5 of Lot 15 of Brooke Estate is situated and comply with other prerequisites or conditions necessary to facilitate transfer of rights, title and interests as mentioned on the subdivision permit, within sixty (60) days from date of this order.
- c) The first respondent be and is hereby ordered to take all necessary steps as are necessary to tender transfer of all rights, title and interest in subdivision 5 (stand 1007), of Lot 15 of Brooke Estate held under Title Deed no. 4780/98, to the Applicants, within 10 days after compliance with paragraph (b) above and not later than ninety (90) days after service of this order, provided the Applicants shall pay the necessary transfer fees upon invoice being issued by the first respondent’s appointed conveyancer.
- d) In the event that the first respondent fails to comply with paragraph (c) above within the period stipulated therein, the Sheriff (second respondent herein) be and is hereby

authorised to sign such documents and perform such other acts as are necessary, in first respondent's place and stead, to give effect to the transfer.

- e) The third respondent shall effect transfer of rights, title and interest in respect of the property in question in terms of this order.
- f) The first respondent shall pay to the applicants the sum of US\$1 486.00, together with interest at the prescribed rate, from the date of judgment up to date of payment.
- g) In the event that the applicants are unable to take occupation of or commence construction on subdivision 5 of Lot 15 of Brooke Estate due to any failure or neglect by the first respondent to give effect to any of the terms of this order, the applicants be and are hereby granted leave to institute proceedings against the first respondent for the recovery of damages for loss of rental income and any other damages or costs as the applicants may prove.
- h) The first respondent shall pay the applicants' costs of suit on a legal practitioner and client scale.

Goneso and Associates, applicants' legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners