

BETTY GASELA

Versus

LEONARD MALINGA

And

BULAWAYO CITY COUNCIL

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 3 AND 11 MARCH 2010

M Nzarayapenga for applicant

T Sibanda for first respondent

Opposed Court Application

KAMOCHA J: Betty Gasela was one of the directors of a company known as Bhekani Investment (Pvt) Ltd. She was cited as applicant when in fact the correct applicant was Bhekani Investment (Pvt) Ltd being represented by her. She, unfortunately passed away after she had deposed to the following affidavit. The applicant seeks the following order:-

“It is ordered that:-

1. first respondent be and is hereby ordered and directed to, within seven days of the service of this order upon him, attend at the offices of second respondent and there and then sign all papers necessary to effect transfer of stand number KN 120 Kelvin North, Bulawayo from him to applicant, failing which the Deputy Sheriff or her lawful assistant be and are hereby authorized to act on behalf of first respondent;
2. second and third respondents be and are hereby ordered and directed to take all necessary steps to facilitate transfer of stand number KN 120, Kelvin North, Bulawayo to applicant; and
3. the costs of this application shall be borne by first respondent on the scale as between legal practitioner and client.”

On 4 January 1990 the 1st respondent Leonard Malinga herein referred to as Malinga entered into an agreement of sale of stand number 14097 Kelvin North, with the City of Bulawayo. For some reason not known to the court it would seem that there is some relationship between stand number 14097 and stand number 120 Kelvin North. In the papers filed of record the parties refer to both stands as if it is one and the same property.

The stand was vacant at the time Malinga purchased it and he was expected to develop it within a certain period in accordance with the municipality building conditions. Apart from constructing a durawall around the property, Malinga did not develop it in any way for a period in excess of 10 years.

In July 2000 Malinga entered into an agreement of sale of the property with the applicant. He signed the agreement of sale on 19 July 2000. The purchase price was a cash payment of \$375 000 Zimbabwe dollars payable upon the registration of transfer of the property. It was, however, paid in full when the representative of the applicant signed the agreement of sale on 17 July 2000.

The full purchase price was paid to Malinga's agents Knight Frank who passed it over on 27 September 2000 to Lazarus and Sarif who were to transfer the property from City of Bulawayo to Malinga and thereafter from Malinga to the applicant. Lazarus and Sarif acknowledged receipt by letter dated 5 October 2000 wherein they stated that they had written to the Town Clerk's department requesting them to instruct their lawyers to attend to the registration of transfer of the said property into Malinga's name and they in turn would transfer the property into the name of the applicant.

The sale from Malinga to applicant was subject to a special condition that it had to be approved by the City of Bulawayo. It was Malinga's obligation to obtain the City of Bulawayo's approval. He failed to do so. It was his fault that such consent was not obtained from the City of Bulawayo. It was further his fault that he did not request for it from the Municipality. He had a duty to take positive steps to ensure that the consent was obtained but simply did not do so. The applicant cannot be made to suffer because of Malinga's inaction. This is a case where the doctrine of fictional fulfillment applies as was stated by INNES CJ in *Gowan v Bower* 1924 AD 550. See also *Macduff and Co. Ltd v Johannesburg Consolidated Investment Co. Ltd* 1924 AD 573 and *Ndlovu v Marandu* 1999(2) ZLR 341(H).

While the City of Bulawayo may not be bound by a contract where its consent was not granted prior to the sale of the property, the agreement is not illegal and invalid, it cannot, however, be enforced against City of Bulawayo. It is, of course, enforceable against Malinga

and this court can justifiably order him to transfer the property to the applicant since the City of Bulawayo transferred it into his name in 2003.

Having paid the purchase price in full the applicant obtained a development permit dated 14 March 2001. The development permit, which had to be implemented within 24 months was for a workshop. The applicant effected the developments in accordance with the Municipality requirements using its own resources.

Malinga alleged that the applicant breached the contract by not obtaining a development permit immediately. The allegations are without foundation as there was no clause in the agreement itself which obliged the applicant to obtain a development permit immediately. He also alleged that the applicant had failed to pay rates and rentals resulting in a “massive” sum being over due. He, however, failed to adduce evidence in support of his allegations.

The applicant on the other hand attached to its answering affidavit, receipts from the City of Bulawayo showing that it was paying rates. The applicant only stopped making payment after Malinga unlawfully diverted rentals from tenants and refused to pass transfer.

Similarly Malinga’s allegation that the cancellation of the contract between him and City of Bulawayo was due to applicant’s dilatoriness in applying for a development permit is without foundation. The more likely reason why the contract was being cancelled was that he had not effected any development on the property in a period of 11 years from 4 January 1990 until applicant developed it in 2001.

The applicant submitted that the cancellation was, in any event, erroneous. On 3 March 2001 City of Bulawayo stipulated 24 months within which applicant had to develop the stand. It, therefore, could not validly cancel the agreement on 4 July 2001 on the basis that applicant had failed to effect development within the period scheduled. The applicant in fact commenced the development of the stand on 1 April 2001 which it completed on 1 October 2001 – a period of just seven months.

It was on the strength of the developments effected by the applicant that Malinga was able to negotiate the re-instatement of the stand to him which Council granted on 12 June 2002. Further, the transfer into his name was only effected after applicant’s developments to the stand. Council would not have effected transfer without the developments.

Finally, Malinga alleged that there were disputes of fact which could be resolved on the papers even if the court adopted a robust approach. I disagree. I entertain no doubt whatsoever that the matter is easily resolved on the papers.

I would in the result grant the application in terms of the draft on page 1 supra with costs on the ordinary scale as there is no justification for awarding punitive costs.

Dube & Partners applicant's legal practitioners

James, Moyo-Majwabu and Nyoni, 1st respondent's legal practitioners