

MUFAKOSE FLATS RESIDENTS ASSOCIATION
versus
THE MINISTER OF LOCAL GOVERNMENT AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 29 November 2001 and 10 April 2002

Opposed Matter

Gijima, for the applicant
S. Njerere, for the respondent

CHINHENGO J: The applicant is an association of residents of blocks of flats at Mufakose in Harare. It can sue and be sued in its own name. It represents the interests of its members (hereinafter referred to as (“the tenants”)) who occupy the flats. The flats were built and they are owned by the respondent. The applicant’s founding affidavit was deposed to by its secretary who had been duly authorised to do so.

During the period 1993 to 1994, the tenants, individually, entered into lease agreements with the respondent each in respect of a flat which he/she presently occupies. In terms of those agreements the tenants took on lease the flats at a monthly rental of \$500 per month. The agreements clearly stipulated in clause 1 thereof that the flats were owned by the National Housing Fund/Housing and Guarantee Fund of the respondent and that the rental was determined on a commercial basis. The said clause 1 also stated quite clearly that the agreements of lease were not to be construed as conferring on

the tenants the right to purchase the flats concerned.

On 15 December 1993, the tenants entered into a supplementary agreement with the respondent. That agreement is headed “Addendum A of 15 December 1993”. I shall refer to it as “the addendum”. The addendum provided in paragraph 2 to 5 as follows –

- “2. This house/flat is on a rent-to-buy.
3. The Agreement of Lease will be superceded by a Purchase Agreement which will be entered into between the Ministry of Public Construction and National Housing and the tenant when the following aspects have been established:
 - i) overall project cost and loan interest including cost of housing infrastructure (where applicable) and construction, cost of security fencing (where applicable) and cost of electrical reticulation by ZESA;
 - ii) cost of each house/flat;
 - iii) cost of serviced land and title survey (where applicable); and
 - iv) the necessary vetting has been completed and the tenant and his/her spouse do not own other residential property in any urban centre in Zimbabwe.
4. The monthly rentals paid by each tenant from date of occupation of the house/flat will go towards purchasing the house/flat.
5. Where the tenant shall not qualify to purchase the house/flat because it is discovered that he/she or his/her spouse owns other residential property in any urban centre in Zimbabwe, the cumulative amount paid as rent-to-buy instalments shall be converted into

ordinary rent.”

Every tenant signified his/her agreement to the provisions of the addendum by signing it. The addendum became a part of the agreement between each tenant and the respondent.

On 15 December 2000 the respondent advised the tenants in writing that it was now the respondent's intention to sell the flats to the tenants on a rent to buy basis. It advised that the price of each flat was \$248 500 payable in monthly instalments of \$3 204,02 over a period of twenty-five years with effect from 1 January 2001. The outstanding balance on the purchase price from time to time was to attract interest at the rate of 15 per cent per annum. It advised that other details of the sale would be contained in the agreement of sale to be signed between the tenants and the respondent. The letter of 15 December 2000 provided that the tenants were to be permitted to pay the full purchase price if they could raise the amount or to pay a deposit of whatever amount in which event the monthly instalment would be recalculated. The tenants were given twenty-one days from 15 December 2000 within which to notify the respondent that they accepted the offer to purchase the flats.

The tenants were not happy with the offer made to them. They complained through letters to the respondent that they had earlier been told by an official of the respondent that the purchase price of each flat would be about \$70 000 and not \$248 500. They complained that the flats were partially completed and that they had several structural defects such as leaking roofs, cracked walls, faulty fixtures and fittings, there were no gutters on the roofs and there were no fire extinguishers; the general infrastructure was not in place; the grounds were not levelled out, and the car park was not done. They complained that the purchase price was too high compared to the prices of similar flats in Mabelreign, Highfield and Norton which the respondent had sold or was selling for between \$49 000 and \$100 000. They complained that whereas the costs of construction of eight flats was only \$275 000 the respondent was asking them to pay \$248 500 for each flat.

The result of these complaints was that the tenants refused to indicate their willingness to purchase the flats at the price stipulated within the 21 days required of them to do so. By letter

dated 9 January 2001 the respondent explained the basis on which the purchase price was fixed at \$248 500 per flat. It stated that the sum of \$70 000 was the estimated cost of construction per flat in 1994 when the project was started but because of inflation the cost had gone up. The respondent assured the tenants that it would, at its cost, rectify any structural defects of the flats once the tenants had signed the agreements of sale. It specifically assured the tenants that the cost of rectification of any structural defects would be deducted from the cost of each flat on a case by case basis. It also undertook to complete the infrastructural works the cost of which was already incorporated into the overall cost of the flats. The tenants were of the view that they had occupied the flats on a rent-to-buy basis as from 15 December 1995 as provided in the addendum. They therefore considered that they were already paying the purchase price of the flats through the rentals which, in terms of the addendum, were to be credited to the purchase price. In its letter of 9 January 2001, the respondent explained the position as follows:

“... if the sale is implemented from the date of occupation, this will make the flats more expensive and unaffordable to the sitting tenants since arrears would be accumulating from the date of occupation. For example, a tenant who occupied the flat on 1 January 1995 at a cost of \$275 000 per flat unit with a monthly repayment of \$3 800 and was paying an interim monthly rental of only \$600 would have a monthly shortfall of \$3 200 and an annual shortfall of \$3 200 x 12 = \$38 400. After six years to the end of December 2000, the shortfall would have accumulated to \$230 400 (+) add monthly instalments of \$3 800 = \$234 200. That is what he would be required to pay before one starts to reduce the capital.

This situation was critically analysed and it was agreed that what the sitting tenants have been paying should be regarded as rental and they should start buying on the day of offer. However if the tenant was paying more than the rent stipulated in the lease agreement the surplus will be credited towards the purchase price of the flat.”

In the same letter the respondent urged the tenants to sign

the agreements of sale in the shortest possible time and warned that any delay in accepting the offers would result in the members losing out as the respondent would be required to review the prices in the following year in line with the Government's policy on the disposal of government properties.

The wrangle continued with further exchanges of letters between the parties. When these exchanges did not yield any positive result and fearing that the respondent would sell the flats to other persons as it had indicated, the applicant lodged this application.

In its affidavit, the applicant made it clear that the central issue in dispute is the price of each flat. The applicant's view was that the price of \$248 500 did not take into account the criteria set out in clause 3 of the addendum. Concerned that the respondent would sell the flats to other willing buyers if the tenants remained unable or unwilling to accept the offer as made to them and pay the purchase price, the applicant sought an interdict against the respondent in the following terms:

- “1. That the Respondent be and is hereby interdicted from selling, disposing of, or alienating applicant's members' rights, title and interest in the property known as Mufakose Flats situate in Mufakose, Harare.
2. That the Respondent be bound by the terms of the lease-to-buy agreement entered into in 1994 between the members of the applicant and the respondent;
3. That the Respondent pays the costs of this application.”

In seeking an order in these terms, the applicant considered that the tenants has some right in the flats. They laid emphasis on the clauses of the addendum which provided that the flats were allocated to the tenants on a rent-to-buy basis and that the

monthly rentals paid by each tenant from the date of occupation was going towards the purchase price. They wanted the respondent to be bound to the undertaking made in the addendum and be barred from resiling from it. They maintained that the scheme which the tenants entered into with the respondents was a rent-to-buy scheme and not, as the respondent averred, a pay-for-your-house scheme. The tenants averred that if they were evicted from the flats they would not be able to obtain alternative accommodation because their names had already been removed from the housing waiting list of the City of Harare and of Chitungwiza upon allocation of the flats to them.

The respondent opposed the application on the grounds that the applicant did not seem to appreciate that the flats were built under a pay-for-your-house scheme which was managed by the respondent. The respondent averred that the scheme was a co-operative scheme in terms of which the respondent maintained a revolving fund which enabled it to build flats or houses for other persons in the scheme. The respondent relied on clause 3 of the addendum which set out the basis on which the price of each flat would be assessed.

The respondent raised a possible dispute of fact which would require that this matter be referred to trial. It pointed out that whereas the applicant averred that the scheme under which they were allocated the flats was a rent-to-buy scheme, the respondent was of the view that the scheme was a pay-for-your house scheme. It seems to me that both parties are of the view that the schemes are different. In the heads of argument filed on behalf of the respondent it is stated in paragraph 3.1 that:

“There is also a conflict of fact as to the type of agreement between the parties. The applicants contend that the agreement was a lease to buy agreement whilst the respondent maintains that it was initially a lease agreement which was superceded by a Pay-for-Your House Scheme if the applicant met the conditions of sale as stipulated in the offer letter. The value of the properties is also in dispute.”

The papers before me do not indicate in what way these two schemes are different. Even if the two schemes are different I do not think that that is of any relevance to this application. In my view the real issue in dispute between the parties is the price of the individual flat and in particular whether the tenants and the respondent reached any agreement on it. If the dispute as to the nature of the agreement is relevant at all, its relevance would only be in relation to whether in view of that dispute an interdict may be issued. The law is clear that were there is a dispute as to the facts a final interdict cannot be granted unless the facts admitted by the applicants justify such an order - see *Stellenbosch Farmers' Winerly Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 at 235E - G. The dispute over the nature of the scheme is such that the applicant would not in any case succeed in obtaining the relief it seeks. There is no common ground between the facts stated by the respondent and those stated by the applicant which would justify the grant of the interdict sought.

The respondent's reliance on clause 3 of the addendum is, in my view, correct. The agreement entered into between the parties as recorded in the addendum is clear at least in respect of one thing - that the price of each flat had not been established as at the time of the addendum and would only be established upon signing an agreement of sale proper. Clause 3 of the addendum provided quite clearly that the cost of each flat would be established on the basis of the cost of the project as a whole and other associated costs as detailed in that clause. Whichever way the parties viewed the agreement - whether it was viewed as a rent-to-buy agreement or a pay-for-your-house agreement, the bottom line was that the price of each flat was to be established on the basis of the criteria set out in clause 3 of the addendum. To my mind this was the critical provision of the addendum. It in fact made the whole agreement conditional on the establishment of the price for which the flats were to be sold and that exercise was a unilateral act on the part of the respondent. In substance, therefore, until clause 3 of the addendum was fulfilled the tenants did not have an agreement of sale which they could enforce against the respondent. The price of the *merx*, the subject matter of the sale, is one of the most important terms of any agreement of sale. That price was not established as at the

time of signing of the addendum.

The addendum also contains provisions which clearly indicate that it was not the intention of the parties, at least not the intention of the respondent, that once the tenants took the flats on lease and an indication was made to them that the flats were allocated on a rent-to-buy basis, then the tenants automatically acquired a right to purchase the flats or that they *ipso facto* became entitled to purchase the flats. A tenant was liable to disqualification if it was ascertained that he or she owned another residential property in any urban centre of Zimbabwe in which case the “cumulative amount paid as rent to buy instalments shall be converted to ordinary rent” see clause 5 of the addendum. Another possible disqualification arising from clause 3 of the addendum was the inability of the tenants or their unwillingness to pay the price advised to them in terms of that clause. Quite obviously if a tenant was unable to pay the purchase price, he would not be able to proceed with the whole arrangement and become a purchaser of the flat. In that event, it stands to reason, whatever he had paid by way of instalments would be converted to ordinary rent. In my view therefore the sale of the flats to the tenants was quite clearly conditional upon the establishment of the purchase price and upon the tenant being otherwise not disqualified from purchasing the flat.

The applicant sought an order to interdict the respondent from “selling, disposing of, or alienating the applicant’s members’ rights, title and interest” in the flats. This relief is permanent in character. It would be a final interdict which would bar the respondent from selling the flats to any other person whether or not the tenants were able to raise or pay the purchase price and whether or not they were otherwise disqualified from purchasing the flat.

A final interdict is granted if the applicant can show that he has a clear right and that he has suffered an actual injury or reasonably apprehends that he will suffer such injury. He must also show that there is no other ordinary remedy by which he can be protected with the same result – see *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Flame Lily Haverstment Co. (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd. & Anor* 1980 ZLR 378 at 383B – C and *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S).

It is necessary to consider whether the tenants have shown that they have a clear right and that they fulfil the other requirements for the grant of the interdict. The tenants are not the owners of

the flats. The flats are owned by the respondent. There is however an arrangement between the tenants and the respondent in terms of which the tenants may buy the flats. That arrangement at most confers on the tenants a reasonable expectation that they will be afforded the opportunity to purchase the flats. They have been given that opportunity but they have refused to accept the purchase price stipulated by the respondent and so the arrangement between the parties has hit a snag. A price for each flat has been given to them. That price is, from all indications based on the criteria set out in clause 3 of the addendum and it is also a price which, as I have already stated, must be determined unilaterally by the respondent subject to the criteria in clause 3 of the addendum. Whilst therefore the tenants may contest the basis upon which the price for each flat has been determined and in particular whether that price has been determined on the basis of clause 3 of the addendum, it is quite another thing for the tenants to seek to bar the respondent from dealing with its property if the tenants are unable or unwilling to pay the price correctly determined on the basis of clause 3 of the addendum. The applicant has not shown in what respects the price of \$248 500 does not accord with the criteria in clause 3 of the addendum. It is not sufficient for the applicant to allege baldly that the price is high without showing that it was not calculated on the terms agreed upon. The tenants should in my view have negotiated with the respondent the basis on which the price of each flat was assessed so as to ascertain that that basis accorded with clause 3 of the addendum. And if they were of the view that the price did not so accord.

From the foregoing it must be apparent that the tenants have not established a clear right to entitle them to the interdict sought. Their interest, and legitimate right it may be said, is limited to being offered to purchase the flats at a price stipulated by the respondent, and once that price has been so stipulated, the tenants must either accept it or if they refuse they lose their interest to purchase the flats and become tenants who, subject only to their rights as lessees, have no right to bar the owner of the flats from selling them to other persons. The tenants were given 21 days within which to indicate their willingness to purchase the flats at the price stipulated by the respondent and enter into agreements of sale. They refused to indicate such willingness. In my view the tenants may have become mere lessees of the flats and the respondent may have become

entitled to sell the flats to other persons. This however is not an issue for me to decide. The applicant has failed to establish a clear right on its part which would entitle the tenants or itself to the interdict sought.

I may reiterate that I think that the applicant has sought the wrong remedy in this case. Its concern, and the concern of the tenants, was or should have been, whether the respondent had calculated the price of each flat in terms of clause 3 of the addendum. And for it or them to get satisfaction they should have challenged the respondent on this score alone and not seek to bar the respondent from disposing of the flats at all. At the very best the applicant should have sought a temporary interdict to hold until the dispute over the price was resolved. They did not do so.

It is unnecessary for me to consider other requirements for the grant of an interdict because the applicant's case fails on the first huddle: the applicant failed to establish a clear right on its part. Accordingly the application is dismissed with costs.

F.G. Gijima & Associates, applicant's legal practitioners.
Civil Division of the Attorney General's Office, respondent's legal practitioners.