HOWARD MUZULU
versus
REBECCA KATIYO
and
DIRECTOR OF HOUSING N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 06 and 14 October 2015

Opposed application

Ms *R. Muchenje*, for the applicant
1st respondent in default

MATHONSI J: In this application, the applicant, who claims to have bought from the first respondent, stand 14190 Kuwadzana Extension Harare (the property) in 2001, seeks an order compelling the first respondent to sign all necessary documents to cede rights, title and interest in that property to himself and authorising the Sheriff to sign in the first respondent's stead in the event of the latter's failure to comply. He would also like the second defendant, who is cited only as a "Director of Housing" to effect the cession.

But then the difficulty with this application is that at best it is replete with very serious disputes of fact and at worst it does not even begin to prove the applicant's case at all. In his founding affidavit, the applicant states that when the sale agreement was concluded 14 years ago, there was a mortgage bond registered on the property in the sum of Z$56 938.00 in favour of Zimbabwe Building Society. The purchase price was Z$246 000.00 due by him as the purchaser to the seller.

In para(s) 7 and 8 of that affidavit he states:

> "7. The parties agreed to a purchase price of Z$246 000.00 for the property which was payable as follows:
> (i) The applicant would pay off the mortgage bond attached to the property after which the rights in the property would be ceded to him.
>
> (ii) Upon payment of the bond the rentals realised from the property would start accruing to applicant because at the time of the agreement the property was being leased out.

(iii) The parties agreed that those rental(s) would become due to the purchaser whereupon they would be used to pay up the outstanding purchase price of Z$190 000.00.

8. I paid the total sum of Z$60 000.00 as follows:
   (i) Z$56 000.00 on 9 April 2001
   (ii) Z$4 000.00 on 28 May 2001."

For an oral agreement, with no written memorial upon which one could refer in order to establish the real intention of the parties, the above passage, if it is meant to establish an entitlement to a cession of the property, instead discloses a profoundly muddled thinking. If the purchase price was Z$246 000.00 and the balance on the mortgage bond was $56 938.00, then how could the purchaser be entitled to a cession of the property merely upon settlement of only the mortgage bond balance of $56 938.00? What then would happen to the balance of the purchase price, which by simple arithmetic is Z$189 062.00 and not Z$190 000.00 as alleged by the applicant?

The applicant goes on to make the startling assertion that not only was he entitled to cession before paying the bigger chunk of the purchase price, he was also entitled, without more, to appropriate the rentals realised from leasing out the house, which he would then use to pay off the outstanding balance of the purchase price. How would this be possible? A buyer who has not paid the full purchase price but merely 23% of it would assume ownership and then appropriate rentals which he would use to pay off the remaining balance of the purchase price. It simply does not make sense and begs the question: What was in it for the seller? If she was already renting out the property and receiving monthly rentals, why then would she not utilise the rentals to pay off the mortgage bond and forget about the applicant?

Significantly, the first respondent has produced a mortgage payment deposit slip from Zimbabwe Building Society showing that she is the one who deposited a sum of Z$72 533.00 on 17 October 2003, 2 years after the alleged sale and after the applicant allegedly paid off the bond, presumably to clear off the bond. In addition, she has also produced a letter from that bank dated 29 August 2003 in which it informed her of the balance and another dated 1 December 2003 in which the bank stated that the "mortgage account has been paid off prior to the registration of our mortgage bond." So no bond was registered on the property and therefore there was not even a risk of foreclosure in 2001.

Even the affidavit allegedly deposed to by the seller on 13 July 2001, which the applicant relies upon, does not support his case. In that affidavit, the first respondent states:

> "I Ms Rebecca Katiyo ID Number 48-031905R48 CIT F residing at 6469 Unit J, Seke Chitungwiza do hereby solemnly and sincerely swear/declare the following:

> I, the seller agree selling my property (House number 14190 Kuwadzana 4 Extension, Harare) to Mugonesiwashe Orr Muzulu ID number 63-2187755C CIT M at a gross total of Z$246 000.00. I agree sale of house number 14190, Kuwadzana 4 Extension, Harare to Mugonesiwashe with net total value of Z$190 000.00 payable to me while Z$56 000.00.set aside pending Zimbabwe Building Society (ZBS) monthly mortgage repayment closing balance due, taken as 31 March 2001.
>
> …….
>
> I received Z$60 000.00 (Z$56 000.00 on 9/04/01; Z$4 000.00 on 28/05/01) initial house deposit in cash from Mugonesiwashe and outstanding net total balance of Z$130 000.00 to be paid here-after."

That affidavit is also significant for what it does not say. It does not say that the buyer was exonerated from paying the balance of the purchase price after paying the initial deposit of Z$60 000.00. The balance of the purchase price was still due by him. A reading of it also makes it clear that he was to appropriate the monthly rentals after paying the purchase price in full, which makes sense. Unfortunately there is nothing to suggest that he did pay the balance.

The applicant then seeks to rely on documents allegedly written by the first respondent on 26 July 2013 in which she gives notice of cancellation of the sale agreement, 12 years later, and another dated 3 October 2013 in which she allegedly reinstates the sale agreement. It reads in part:

> "I now commit myself to pay off Mr Muzulu by February 28 2014. If I fail then he should go ahead and pay off the outstanding balance."

So even by those documents, which the first respondent has disowned, there was an acceptance that the purchase price was still outstanding years on. There is also an agreement of sale allegedly signed by the parties on 7 October 2013 which gives the purchase price in clause 2 as US$25 000.00 but goes on to say that the seller acknowledges that she has received from the purchaser US$25 250.00 on 7 October 2013 as purchase price. So what was the purchase price?

Predictably the first respondent has denied signing that agreement. She insists that her signature was forged. Clearly therefore there are disputes of fact. Where an applicant has taken a wrong turn and proceeded by application procedure where there are disputes of fact when he should have proceeded by summons action, the court has a discretion either to refer the matter to trial for *viva voce* evidence to be led or to dismiss the application. The court would opt to dismiss the application where at the time the application was made the applicant

was aware of the disputes of fact bur proceeded that notwithstanding: *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) 236 C-D.

There is however another course of action availabale to the court. It is to take a robust view of the facts and resolve the dispute: *Room Hire Co (Pty)* v *Jeppe Street Mansions (Pvt) Ltd* 1949 (3) SA 1155; *Fernandes & Sons* v *Mudzingwa & Ors* HH 22/14; *Vimbiso* v *Dairiboard Employees Share Ownership Trust* HH 235/15.

I intend to resolve the dispute because the papers placed before me, to a large extent speak for themselves. In order to succeed the applicant must establish the existence of a valid sale agreement and must show that not only did the parties conclude the sale but also that all the requirements for enforcement have been satisfied. According to the learned author R.H. Christie, *Business Law in Zimbabwe* 2nd ed, Juta & Co Ltd at p 141:

> "A sale in Roman – Dutch law has been defined (by De Villiers CJ, approved by the Privy Council, in *Hutton* v *Lippert* (1883) 3 App, Cas 309) as:
>
> > 'a contract in which one person promises to deliver a thing to another, who on his part promises to pay a certain price.'
>
> This may be paraphrased as the exchange of property for a price or, because the equivalent Latin words are often found in the judgements, the exchange of a *merx* for a *pretium.* Unlike English law, which draws a sharp distinction between sales of land and sales of goods, our law treats sales of movable and immovable property on the same basis, subject only to certain special rules resulting from the differences between the two classes of property."

In order for a sale to exist, there must be an agreement to exchange property for a price. If either of these 2 constituents is lacking there is no sale. The learned author goes on at p 146 to state categorically that:

> "No matter how emphatically they agree to do so, buyer and seller cannot, under Roman-Dutch law, pass the ownership of the property from one to another by their mere agreement. English law proceeds on different principles."

The first requirement for the passing of ownership is delivery, to place the buyer in effective control. The second is an agreement for the payment of the purchase price whether the sale is for cash or credit. In a cash sale, it may be expressly or impliedly agreed that ownership shall pass on delivery, whether or not the price has been paid, but normally it is not intended to and does not pass until payment of the price. *Ericksen Motors (Welkom) Ltd* v *Protea Motors Warrenton* 1973 (3) SA 685(A).

The applicant has not shown that the purchase price was paid. It would have been easy for him to produce proof of such payment if indeed it was paid. He has however spent a lot of time on controversial documents allegedly signed by the seller, which are not invoices

or receipts but agreements allegedly signed more than a decade after the sale was concluded, which do not prove payment.

What the papers show is that the applicant paid a deposit of Z$60 000.00 towards the purchase price of Z$246 000.00. He did not pay the balance. He did not take over the mortgage repayments. As such without paying the purchase price, he is not entitled to cession of the property. At best, depending on all the permutations (we are not told what transpired between 2001 and 2014), the applicant may be entitled to a refund of the equivalent of Z$60 000.00 which he paid in 2001, because even if he was afforded credit, he has not shown that he paid the price in full.

I conclude therefore that the applicant has failed dismally to show that he is entitled to the relief that he seeks.

Accordingly, the application is hereby dismissed with costs.

Ratisai Nyamapfene Law Practice, applicant's legal practitioners