SABINAH RWATIZHA

and

TITUS VENGESAI

and

BRIGHTON MAZITI

and

TENDAI MUNEDZI

and

JACOB MANYEMHESA

and

ASIMA CHEISA

and

LOVELY CHAGONDA

and

TATENDA CHAGONDA

and

EUPHIA MASOKA

and

GEORGE SILAS MAGAMBA

and

LONAH BANDA

and

NIGEL MUNYARADZI DANIEL JERE

and

CECILIA TINASHE SAMBO

and

ALLEN MAPURANGA

and

LETICIA MUTEDE

and

ENIMY MUTEDE

and

ROBERT PARAFINI

and

NYARAI MUCHECHETERE

and

KUDZANAI TEMBO

and

TAKURA VENGESA

and

TAWANDA DEREK NDUDZO

and

MANAI ANTONY

and

EDINAH KASEKE

and

EMELDAR GONDO

and

CHIPO MUSARA

and

HENRY TENDENEDZAI

and

SHINGIAI RAY MANGO

and

TAPUWA MAGWERE

and

PETROS PATISANI

and

IAN MADUME

and

PRISCILLA SHUWISAI HANDIKATARE

and

VICTOR PAULINE MBAYO

and

MARSHALL TSEKE

and

TONGAI MAVUNDUSE

and

MERCY MUGWENI

and

MUSA PHIRI

and

SIMONDENI NCUBE

And

JOSHUA BIRI

and

URITA BIRI

and

ERNEST NYAMBO

and

OSWELL TAWINEYI

and

MUNYARADZI NYANGA

and

RICHMOND NYAHORE

and

RUTH NYAHORE

and

OPPAH MOYO

and

MOREBLESSINGS MUNOUYA

and

MACKENZIE EUGENE

and

NORMAN GWEZUVA

and

MUNYARADZI LAWRENCE TSUNGA

and

MUCHIMBIDZIKE FATIMA

and

MUCHIMBIDZIKE STEWART

and

LOVEJOY MURAMBIWA

and

ERASMUS NYAMUSHONYONGORA

and

COLEEN MAFIKA

and

HENRY MUVANDIRI

and

ISAIAH CHINHENGO

and

NABOTH T. MAGWERE

and

ALVIN LOVEMORE MAGWERE

and

LOVEMORE MAGWERE

and

ALETTER MAGWERE

and

SHELLY ELIZABETH CHITSUNGO

and

JEREMIAH JANDA

and

MAXWELL NEKENDE CHITENDENI

and

CLIFFORD NKOMO

and

PRIVILEGE MUKWAIRA

and

FANUEL KANGONDO

and

KILLIAN Z MASUKUSA

and

MEMORY CHIPUNGU

and

WAYNE PAMIRE

and

ZACHEO PATISANI

and

FARAI NYABEZE

and

VIVIAN S. SITHOLE

and

EDINAH DAMBUDZO MASIYIWA

and

LIVISON TIZIRAI

and

THEODORA MUTSAGO

and

LIYON CHIKOMO

and

LINDARAY TANYANYIWA

and

MARIMIROFA ADVANCE

and

LETWIN MARIMIROFA

and

LUNGISANI MAKHALIMA

and

FADZAI C. MAKHALIMA

and

FUNGAI FELISTAS GAMU

and

JOSEPHINE CHAMBALANGA

and

ELMON MANGENA

and

RUVIMBO PATRICIA NCUBE

and

JENIFER DHLIWAYO

and

PARADZAI MAZUVAMANA

and

SALLY ANN

and

SHUPAI MOSES NYAMBO

and

CHIKOMBINGO SEVERINO

and

VANESA E. SALIMU

and

ELISMORE TAVENGWA

and

NEWTON TAWANDA MURINGAGOMO

and

CALVIN CHINEKA

and

PRECIOUS MAKWINJA

and

SHAKEY MUNYUKI BARE

and

LEVISON PHIRI

and

JOSPHINE TIZORA

and

MASHMELLON TINOTENDA MAZWI

and

JOYCE TINARWO

and

MAMBINGI MAKURIRA

and

GEORGE TINASHE SARE

and

NOMATTER NIKISI

and

CONSTANCE CHIMUKA

and

GODFREE MARIMBIRE

and

KUDIWA MAZANGO

and

ABBIGAIL CHARUKA

and

GARIKAI CHIKWEKWETE

and

JOE CHAKANYUKA

and

TICHAYANA MAKOTA

and

RUTENDO BLESSING MARIZA

and

MUNYARADI G. MUSWERAKUENDA

and

JULIET CHIBANDA

and

CHARLES CHIBANDA

and

ROPAFADZO MAPOSA

and

PESEVEARANCE MUZANYA

and

KENNETH MAKAZA

and

IREEN MUZAKA

and

NICODEMUS MUBVUMBA

and

JOSEPHAT MUBVUMBA

and

NGONIDZASHE MANIKA

and

ABIGIRL MANIKA

and

MANDIPE NGWADZAYI

and

ESTHER MUTSENGI

and

ESTHER DLAMINI

and

DICKSON MAPFUTI

and

BETTY MAPFUTI

and

IAN N. MANDIHLARE

and

TANAKA CLIVE MUKAKA CHITIYO

and

ACKIM MAKINA

and

LLOYD DOMBODZVUKU

and

MARYGRACE VALERIA ZINGONI

and

ALBERT ZHANJE

and

DEBBIE MTANDABARE

and

HERBERT MUNEMO

and

JOYLINE MHASHO

and

MASON WHITE

and

JULIA WHITE

and

PATMORE MADA

and

ISRAEL CHARM SIZIBA

AND

STELLA CHIMBUMU

and

KUDZAI NEMACHA

and

TEDDY NYAJEKA

and

FAITH SHOKO

and

ROBERT MUCHECHETERE

and

AGATHA CHIKUKWA

and

NETSAI MATEWERE

and

SYNTHIA KATONDO

and

MODESTA TUTURU

and

JACKQELINE MUTAMBARA

and

FREDRICK KASEKE

and

NOBERT MUSAKWA

and

CECILIA MUGARIRI

and

RONWELL CHITAMBIRA

and

STANFORD BUKUTA

and

PEARSON NGULUBE

and

MERCY MUGWENI

and

IAN MANYANDE

and

VIMBAI FAITH MBERI

and

MCDAVID OSLEM MBERI

and

JULIA MUCHEMWA

and

PRISCILLA MUGOBERA

and

LINDIWE MAKONI

versus

LUNA ESTATES (PRIVATE) LIMITED.

and

DEVINE AID TRUST COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MANZUNZU J

HARARE, 18 & 26 May 2021

**Court Application**

*P Kawonde*, for the applicant

*G R J Sithole*, for the 1st  respondent

MANZUNZU J: This is a court application by 163 applicants seeking a declaratory order in the following terms:

“IT IS ORDERED AS FOLLOWS:

1. It is declared that the agreements of sale which were entered into between the applicants and the 1st respondent represented by the 2nd respondent be and are hereby held to be valid.
2. The 1st respondent pays costs of this application on a legal practitioner and client scale.”

The background to the matter is largely common cause. The first respondent is the registered owner of a piece of land in the district of Zvimba measuring 200.72 hectares (the property). In the year 2012 the first respondent and second respondent entered into a land development agreement for the second respondent to develop the property into residential and business stands. The second respondent was also given the mandate to sell the subdivided stands on behalf of first respondent. The applicants are some of the people who bought the stands from the first respondent through the second respondent. Agreements of sale were signed between the individual applicants and the second respondent as agent of the first respondent.

The first and second respondents’ contractual relationship fell sour and they went for arbitration. An arbitration award confirmed, inter alia, the cancellation of the memorandum agreement for land development between the respondents as at 20 July 2017. Despite the termination of the land development agreement, the second respondent went ahead to sign some agreements of sale purportedly as agent of the first respondent with some 21 of these applicants. It is in respect to those 21 applicants that the first respondent has resisted the order prayed for.

The first respondent concedes to the order being sought by the applicants save in respect to the 21 applicants who signed their agreements after the second respondent’s mandate was terminated on 20 July 2017. The 1st respondent claims the following 21 applicants have no cause of action against it, 13th, 19th, 20th, 24th, 25th, 43rd, 44th, 57th, 58th, 70th, 99th, 101th, 102th, 103th, 112th, 113th, 114th, 123rd, 130th, 15,2nd and 160th.

The 21 applicants have maintained that the first respondent was bound by the agreements they signed with the second respondent on the basis of ostensible authority. The first respondent argues that ostensible authority cannot be sustained in the face of fraudulent acts by the second respondent.

Two issues came out for determination; whether the first respondent can be held liable on the basis of ostensible authority and secondly, whether applicants in the event of success should be awarded costs at legal practitioner and client scale.

**OSTENSIBLE AUTHORITY**

Several authorities have defined and considered when ostensible authority is said to exist. In *Reed NO* v *Sager’s Motors (Pvt) Ltd* 1969 (2) RLR 519 (A) Beadle CJ stated that:

“If a principal employs a servant or agent in a certain capacity, and it is generally recognized that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his “apparent” authority. The principal is bound even though he never expressly or impliedly authorized the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in this capacity) held the servant or agent out as having this authority. The agent’s authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did.”

In *casu,* the second respondent as an agent was expressly authorized to enter into agreements with prospective buyers of stands on behalf of first respondent. That is the situation obtained from 2012 to 20 July 2017 when the land development agreement was terminated. The issue of termination was not published to the world at large. It was known between first and second respondents. The question is how were the 21 applicants expected to know that first respondent had terminated its authority with the second respondent? The second respondent continued to use the first respondent’s standard agreement after 20 July 2017 as if it were expressly authorized to do so. The first respondent’s defence is that the second respondent was committing a fraud hence the applicants cannot rely on ostensible authority. This is despite the first respondent’s admission that the public were not warned that second respondent was no longer its agent. The first respondent had a duty to warn members of the public about the severance of its relationship with the second respondent.

I do not think this is a matter where first respondent can successfully wash its hands like Pontius Pilate in the face of its failure to give notice to the public and hide behind a claim for fraud to the prejudice of the applicants. There was nothing to stop the 21 applicants from believing that the second respondent was still acting within the scope of its authority with the first respondent which authority was, for a considerable period of time, so exercised.

In alleging fraud the first respondent relied on the findings of the arbitration. In fact, instead of being specific, the issue was argued in a generalized form. The court was referred to the entire arbitration award ranging from page 1054 to 1088 of the record. There was no evidence to show that the money received from the 21 applicants was not handed over to the first respondent. The issue of fraud was not proved on a balance of probabilities.

The first respondent should have realized that the acts by second respondent after 20 July 2017 would bind it unless the public were warned. This is a matter where ostensible authority must be upheld.

**COSTS**

Applicants asked for costs at legal practitioner and client scale. Costs are at the court’s discretion. The first respondent asked that each party must pay its own costs. Ordinarily costs follow the cause. There was no justification for each party to bear its own costs at the expense of a winning party. Costs were asked at a higher scale because of 1st respondent’s attitude. The history of this matter shows that this application is not the first of its own kind. In HC 6816/18 an application by 140 applicants against the respondents seeking a similar declaratory order was granted by this court on 3 December 2018. The first respondent filed an appeal with the Supreme court but the order of this court was confirmed.

The applicants through their lawyers had on 6 December 2018 written to the respondents’ lawyers to accept their agreements as valid more so in light of the order of this court of 3 December 2018. The response of 12 December 2018 by the respondents, to say the least, was arrogant coupled with a threat to invoke penalty clauses in the agreements for these applicants and those in HC 6816/18. At the time the first respondent did not differentiate the applicants according to when they signed the agreements. Despite this matter being capable of amicable resolution between the parties, the first respondent’s attitude made it impossible to take that route hence the parties found themselves embroiled in this litigation with a bulky record running into 1174 pages.

The first respondent has not shown to have any valid defence to the application from the beginning apart from its arm twist approach. The opposing affidavit also bears testimony to this in paragraph 7:1 when it states;

“This is an application that ought not to have been made at all. I content that there is absolutely no legal disputes between the applicants and the 1st respondent.”

One may then pause to ask as to why applicants proceeded with litigation. The answer in my view is simple, ‘because of the first respondent’s big brother attitude.’ The first respondent wanted to use its upper hand position in the agreement to coerce the applicants to resile from their existing agreements and create new agreements with new terms to its advantage.

Courts will ordinarily not grant punitive costs unless it is shown that the losing litigant was not genuine in pursuing litigation. See *Mahembe* v *Matambo* 2003 (1) ZLR 149 (H). In *Chizura* v *Chiweshe* HB 80/03 the court had this to say;

“In awarding costs at a higher scale the losing litigant’s attitude in the proceedings is an essential ingredient which should be taken into account as it impacts negatively in the expenses of the litigant – see *Mahomed & Son* v *Mahomed* 1959 (2) SA 688.”

This is a proper case where a successful party was unnecessarily put out of pocket by this litigation. It is just and proper that the losing party must compensate.

**Disposition**:

IT IS ORDERED THAT:

1. It is declared that the agreements of sale which were entered into between the applicants and the 1st respondent represented by the 2nd respondent be and are hereby held to be valid.
2. The 1st respondent pays costs of this application on a legal practitioner and client scale.

*Kawonde Legal Services*, applicants’ legal practitioners

*Muza and Nyapadi*, 1st respondent’s legal practitioners