PRIDE SHONHIWA
versus
SILVIA MATITO
and
FAISON MATITO
and
VENGESAI ENTERPRISES (PVT) LTD
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 16 November & 21 December 2022

Opposed Matter

Mr *T Shadreck*, for the applicant
Mr *J Koto*, for the 1st respondent
No appearance for 2nd, 3rd and 4th respondents

MUCHAWA J: This is an application titled, "Court application for specific performance" in which the following draft order is sought;

"IT IS ORDERED THAT:-

1. The agreement of sale between the applicant and Emmanual Chisvo dated 20 April 2005 for stand No. 6961 Subdivision of the Remainder of Lot 5 of Tynwald South of Fountainbleau measuring 2942m2 be and is hereby declared valid.
2. The agreement between Emmanuel Chisvo and 1st and 2nd respondents signed by Emmanuel Chisvo on 4 May 2005 for stand No. 6961 Subdivision of the Remainder of Lot 5 of Tynwald South of Fountainbleau measuring 2942m2 be and is hereby declared void and set aside.
3. The 3rd respondent be and is hereby ordered to sign all the necessary documents to facilitate the transfer of stand 6961 Subdivision of the Remainder of Lot 5 of Tynwald South of Fountainbleau measuring 2942m2 into the names of the applicant failing which the Sheriff of Zimbabwe be and is hereby authorized to sign such documents to facilitate the transfer.
4. The 1st and 2nd respondents and all those claiming occupation through them be nad are hereby evicted from stand No. 6961 Subdivision of the Remainder of Lot 5 of Tynwald South of Fountainbleau measuring 2942m2 upon being served this order failing which the Sheriff of Zimbabwe be and is hereby authorized to effect the eviction of the said persons.
5. The 1st and 2nd respondents to pay costs of suit."

The brief background to this matter is that the third respondent sold stand No. 6961 Subdivision of the Remainder of Lot 5 of Tynwald South of Fountainbleau measuring 2942m2 (the stand), to Emmanuel Chisvo on 29 November 2001. The sale was done through Graham and Douglas Real Estate (Pvt) Ltd and the agreement of sale was lodged with Messrs Sawyer and Mkushi with instructions to effect transfer to Mr Emmanuel Chisvo. (Mr Chisvo).

Mr Chisvo is alleged to have given a mandate to Danai Properties (Pvt) Ltd on 11 January 2005 to sell the stand. Applicant claims to have bought the stand on 20 April 2005 and Graham and Douglas are said to have been so advised by Danai Properties (Pvt) Ltd of such sale and the need to effect transfer through Messrs Sawyer and Mukushi. In the process of such transfer, the applicant learnt of Mr Chisvo's passing on but could not get any contactable relative. It was then intended to pass transfer directly to the applicant who would pay all transfer fees. The applicant paid such fees but transfer was never effected. A request for the agreement of sale was made and applicant claims to have supplied same.

The applicant claims to have gone to inspect his stand in 2014 and he says it was only then that he discovered that the second and third respondents were in occupation of the stand. When he wrote to them to vacate, the first respondent responded by stating that she took occupation of the stand in 2005 after buying the stand from the third respondent through Graham and Douglas Real Estate (Pvt) Ltd. The agreement of sale is dated 30 April 2005 but signed by the seller Emmanuel Chisvo on 4 May 2005. None of the parties have taken transfer of the property yet.

The application is opposed and the first respondent has raised some points *in limine* as listed below;

1. That there are material disputes of fact which cannot be resolved on the papers and as the applicant was aware of their existence, the matter should be dismissed with costs
2. That there is material non joinder of the estate of the late Emmanuel Chisvo and the Master of the High Court.
3. That specific performance is impossible under the circumstances
4. That the applicant has no *locus standi* to evict the respondents

I heard the parties on the points *in limine* and reserved my ruling. This is it.

Are there material disputes of fact which cannot be resolved on the papers?

Mr *Koto* submitted that there are material disputes of fact which cannot be resolved on the papers. The applicant alleges that it concluded a contract of sale with one Emmanual Chisvo, which agreement he intends to enforce through these proceedings. The failure to cite the said Emmanual Chisvo in this matter coupled with failure to attach the said sale agreement whilst attaching on page 17 of the record, an unsigned draft generated in 2004 yet the sale agreement is alleged to be a 2005 one. It was argued that without input from a representative of the late Mr Chisvo, or anyone else to confirm the alleged sale, there is no way the matter can be decided on the papers.

Furthermore, Mr *Koto* pointed to applicant's founding affidavit in para 8 where is alleged that the applicant does not even say he bought the property from Mr Chisvo but simply says the property was sold to him and an estate agent Graham and Douglas Real Estate (Pvt) Ltd was advised.

Another gap alleged in the applicant's information in the founding affidavit is that he does not state that he paid the purchase price, how much it was and to whom it was paid. Mr *Koto* alleged too that there is no proof of payment by the applicant for the stand in the papers.

The papers are said not to disclose whether Mr Chisvo was aware of the sale to the applicant as he claims to have transacted with Danai Properties (Pvt) Ltd who were given mandate by Mr Chisvo on 11 January 2005.

Mr *Koto* even questions the mandate on page 15 of the record and alleges that it is highly suspicious as the asking price there is $100 000.00 negotiable to $90 000.00 as at 11 January 2005 and yet the first respondent bought the property for $90 000 000.00 on 5 May 2005. In an agreement of sale attached to the applicant's answering affidavit, it says the property was bought for $25 000 000.00. It was contended that without an affidavit from Danai Properties (Pvt) Ltd, it is difficult to conclude that the property was bought at $25 000 000.00 when the seller was asking for a maximum of $100 000.00 and without explaining who then got the difference.

The scanned copy of the agreement which is attached to the applicant's answering affidavit is said to be further problematic as it does not show when Emmanuel Chisvo signed the agreement. Emmanuel Chisvo is alleged not to have initialed every page of such agreement but he did not as did all the other signatories. It was averred that this calls for an explanation. In

addition, it is pointed out that no one witnessed Emmanuel Chisvo signing the agreement in relation to applicant's agreement of sale.

The attachment of the scanned copy of the agreement of sale without the original is said to be in violation of s 11 of the Civil Evidence Act, [*Chapter 8:01*].

In the light of the above, Mr *Koto* submitted that there is no way this matter can be disposed of by way of application procedure as the applicant has not adduced enough evidence for the court to decide the matter on the papers and that the applicant ought to have known of the existing shortfalls at the time of instituting the proceedings and that the matter should therefore be dismissed with costs.

Mr *Shadreck* submitted that the court can decide the matter on the record without the need for evidence from the Emmanuel Chisvo or his executor or Danai Properties (Pvt) Ltd. The purchase price was explained to have been averred as paid by reference to certain annexures D and E. Annexure D is a letter from Danai Properties instructing Graham and Douglas to effect transfer. It was argued that transfer follows payment of purchase price so it is implied that the purchase price was paid. Annexure E is the unsigned sale agreement. Further reference is made to annexure F which is yet another letter to Graham and Douglas Real Estate (Pvt) Ltd from the applicant's legal practitioners stating that he bought the property under Danai Properties and requires transfer as he long paid the purchase price.

The court was invited to take judicial notice that during the period of sale in 2005 to 2006 it was a period of hyper-inflation hence the change in the asking price which is stated in the mandate to sell. It was argued that this therefore cannot constitute a material dispute of fact particularly as the first respondent has not disproved the genuineness of the mandate to sell.

Mr *Koto* countered the applicant's submissions by stating that the annexures relied on to prove payment of the purchase price are inadequate as annexure D does not allege that the purchase price was paid at all, the amount and recipient.. Annexure F is said to be self- defeating as the applicant makes clear that he did not have sale documents. The letter is written to a different estate agent from the one which participated in the sale.

The purported estate agent is said not to have signed the documents attached to the answering affidavit. Inviting the court to take judicial notice of inflation is alleged to be asking the court to speculate as hyper- inflation is said to have been pronounced in 2008 not 2005.

The case of *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09 aptly sets out the test to be applied in determining whether a material dispute of fact exists. Honourable MAKARAU JP (as she then was) said;

> "A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

Whereas the applicant alleges that he bought the property from Mr Chisvo, he did not attach a signed agreement of sale to his founding papers. Neither is there any proof of payment of the purchase price. The alleged agreement of sale is a 2004 draft. Interestingly the annexures sought to be relied upon to show proof of payment reveal interesting facts. Annexure D on page 16 of record though allegedly a letter written by Danai Properties (Pvt) Limited to Graham and Douglas Real Estate, is in fact signed off by one Pride Shoniwa. Does this mean that the applicant was an employee of Danai Properties (Pvt) Limited? Why does the applicant not have any receipts to prove payment for the property?

On the other hand, the first applicant has presented the case that she bought the property from a duly authorized agent and applicant did not. She has attached receipts of proof of payment and the agreement of sale which is duly executed is on record. Were the court to take a robust approach would it say Mr Chisvo engaged the services of two different estate agents for the same property? Can the court say that the applicant paid and what would be basis for such a conclusion? In the light of all these gaps and questions, why the estate of Mr. Chisvo was not cited particularly as the applicant alleges there was a double sale. Why would the applicant's legal practitioners write to Graham and Douglas Real Estate (Pvt) Ltd not attach the relevant documents pertaining to the sale?

In the result, the facts alleged by the applicant are disputed and traversed by the respondent in such a manner that I am left with no ready answer to the dispute between the parties in the absence of further evidence. There is need for evidence from the executor of Mr Chisvo's estate to explain whether he gave instructions to two agents to sell the same property resulting in a double sale. There is also need for evidence from Danai Properties to explain the

mandate to sell and also the role of the applicant in their company and who in Danai Properties represented the company in the sale to the applicant.

Consequently I find that there are indeed material disputes of fact. I was urged to take the approach taken in the case of *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (HC) in this matter. I fully associate myself with the findings therein wherein it was held as follows;

"While it would have been an easy way out simply to refer this matter to trial, I saw fit, in the exercise of my discretion, to dismiss the application with no order as to costs for the following reasons.

1. It is necessary to discourage the too-oft recurring practice whereby applicants who know or should know, as was the case with the applicant in this matter, that real and substantial disputes of fact will or are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, at the worst, they can count on the court to stand over the matter for trial.

Unless this practice is seen to be curbed, applicants will continue to believe that they have nothing to lose and, indeed, everything to gain tactically by embarking upon application proceedings notwithstanding their knowledge or belief at the time of doing so that the respondent will be able to show that genuine and serious disputes of fact exist on the papers.

In this respect, it is relevant to quote the following extract from the judgment of MCNALLY J (as he then was) in *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 234D-F:

> "The applicant's legal adviser however wrote back disputing this claim. By insisting on proceeding he brings himself within the scope of the dictum of MILLER JA in *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd* 1982 C (1) SA 398 (A) at 430G-H where the learned Judge of Appeal says:
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> '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 the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.'
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> In that case MCNALLY J, in the exercise of his discretion, declined to refer the matter to trial and, accordingly, dismissed the application with costs."

In *casu*, the applicant had written to the first and second respondents seeking that they vacate the stand and had been favoured with their agreement of sale upon which they based their right to the stand. Despite knowing that he did not have a signed agreement of sale, he still proceeded by motion proceedings. He did not cite the estate late Emmanuel Chisvo though he

was alleging that there was a double sale. This seems to have been a tactical move which was taken at his own peril.

Costs follow the cause and there is no need to consider the other points *in limine*.

I find it fit, in the exercise of my discretion to dismiss this application with an order of costs.

J Mambara & Partners, applicant's legal practitioners
Koto & Company, first respondent's legal practitioners