

NYARAI HWAIRE  
versus  
MBARE DEVELOPMENT (PRIVATE) LIMITED  
and  
MACHONA FRANCIS MUGANDANI  
and  
VENAH SHUPIKAI CHIKWENA  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE, 16 and 21 July 2004

*T Bhatasara*, for the applicant  
*Mrs J Wood*, for the second and third respondents  
No appearance for the first and fourth respondents

GOWORA J: The first respondent is a property developer. On 19<sup>th</sup> January 2000, the applicant and the first respondent concluded an agreement of sale in respect of an immovable property Stand 9777 Glenview, in which the first respondent held right title and interest but the ownership of which vested in the City of Harare.

In terms of the agreement, the first respondent was to develop and service the stand and hand over occupation to the applicant upon agreement between the parties. The purchase price was \$275 000.00 which was payable as to a deposit of \$68 750 within seven days of signing the agreement and the balance was to be paid in installments thereafter.

It is common cause that occupation of the stand was given to the applicant, who however complained that the house had certain defects which required rectification. An amount representing the balance of the purchase price was as a result withheld until the defects would have been attended to. The 1<sup>st</sup> respondent unsuccessfully demanded payment of the \$82 595.00 and when applicant refused to pay, it cancelled the agreement and sold the stand to the second and third respondents who paid the purchase price in full and obtained title from the City of Harare. The second and third respondent, in

turn, then demanded that the applicant vacate the premises, but have themselves, taken no action to force her to vacate the premises.

In the meantime, the first respondent filed under Case No. HC 6080/01, a summons seeking cancellation of the contract and resultantly the eviction of the applicant from the premises and holding over damages together with interest, payment of outstanding rates and water charges during applicant's occupation and costs of suit. The applicant has pleaded to the claim and has launched these proceedings seeking the joinder of the second and third respondents as parties to the main claim.

In her founding affidavit, the applicant deposes that she wishes to have the transfer to the second and third respondents set aside. The applicant also avers that given the fact that, in concluding the agreement of sale the first second and third respondents appeared to be acting in cahoots, the relief that would be sought against all three would be based on the same or similar grounds. The issue to be determined by the court would be that of cancellation of the agreement followed by the determination of the transfer to the second and third respondents of the stand in question.

The first respondent has filed an affidavit consenting to the relief being granted, but merely opposes the order for costs. The second and third respondents on the other hand, have opposed the granting of the relief sought. The second respondent in his opposing affidavit admits that he and his wife had purchased the stand in question. He had in December 1999, approached the first respondent with an offer to purchase one of the stands that the first respondent was developing in Glen View. He was advised that the project had been sold out and he had requested that he be included on their 'short list'. Some time in February 2000, an official of the first respondent had contacted him. He had learnt from the official that a stand in the project had been repossessed. As he had visited the project and inspected the houses under construction prior to being offered the stand and was familiar with the type of houses being constructed, he therefore did not bother inspecting the stand in question. He paid the purchase price and after clearance by City of Harare as being on the house list, he was offered transfer into the names of himself and his wife. He denied that he and his wife had

acted in a clandestine manner in purchasing the stand and having the stand transferred to them, and maintained that they are innocent of any wrong doing.

The first respondent has not filed heads of argument and therefore the matter will be determined on the basis of the heads filed on behalf of the applicant and the second and third respondents.

It is not necessary, in order to determine the application before me that I resolve the dispute relating to the sale of the stand or the cancellation of the agreement between the first respondent and the applicant as those are not issues for determination before me. All that I am required to do is to determine whether or not the second and third respondents should be joined as parties to case number HC6080/03. It is important to note however, that the applicant has in addition to filing a plea, filed a counterclaim in which she seeks payment of an amount of \$1 406 000.00 from the respondent presumably as damages for rectifying certain defects that were allegedly discovered in the construction of the house. There is no counterclaim by the applicant for transfer of the property into her name.

The order being sought by the applicant appears in her heads of argument as follows:

1. Second and third respondents be joined as parties to case No HC 6080/03; and that
2. She be allowed to amend her claims in case No HC 6080/03 to include the further relief that the transfer of the property to the second and third respondents be set aside.

Mr *Bhatasara* who appeared on the applicant's behalf submitted that the application for joinder was premised on the provisions of Order 13 Rule 85. He submitted that as the applicant intended to amend her counterclaim to include a prayer to have the transfer to the second and third respondents set aside. He submitted further that the respondents should be joined to action as defendants in which event, they would have to plead to the applicant's counterclaim. He submitted further that the relief sought by the applicant against the first, second and third respondents arose out of the same or a series of the same transaction.

Order 13, Rule 85 on which Mr *Bhatasara* relied for his submissions is as follows:

“Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or reconvention where-

- a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
- b) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transaction.”

The submission by the applicant was that as the stand which the second and third respondents purchased was initially purchased by herself from the first respondent and that the dispute between the two could not be resolved without the participation of the two other respondents. It was therefore necessary that they be joined and the amended counterclaim be served on them for them to file a plea thereto. The contention by the applicant is therefore that the issues for determination are the same. In addition it would avoid the necessity for a multiplicity of actions if joinder were granted.

The applicant has not yet amended her counterclaim to incorporate the prayer to set aside the agreement of sale between the first respondent on the one side and the second and third respondents on the other. What she is clear about is that they would be joined as defendants to the main action it was the further of Mr *Bhatasara* that the respondents would then have to plead to the counterclaim.

Firstly it is important that I note that the manner in which the applicant sought to amend the draft was not in accordance with the practice of this court, as the amendment was made in the heads of argument. On the merits, the applicant, seeks to have joined as parties to an action, where the relief being sought by the applicant against the plaintiff is materially different to that presumably sought against the second and third respondents. In the main action the first respondent seeks the cancellation of its agreement with the applicant, the ejection of the applicant from the premises and holding

over damages until date of ejectment. The applicant on other hand in her counterclaim seeks the payment of a sum of money whose specific nature has not been stated on the pleadings. The respondents have no interest in the confirmation of the cancellation of the agreement between the applicant and the first respondent, and in fact would have no locus standi to claim the same. Equally they have no interest in the claim for holding over damages being claimed by the first respondent. They could conceivably have an interest in the ejectment of the applicant from the premises as they are now the title holders.

In heads of argument filed on behalf of the applicant, it is accepted that the first issue for determination is the confirmation of the cancellation of the agreement of sale between herself and the first respondent. It is thereafter submitted that the next issue for determination is the fact of the sale and subsequent transfer of the property to the second and third respondents. As matters stand the second and third respondents were given transfer by the City of Harare which was the legal title holder of the stand. In his opposing affidavit, the second respondent stated that after paying the full purchase price to the first respondent, he was referred to the Glen View branch offices of the City of Harare where he signed an agreement with the City of Harare after which he was offered title. As the stand belonged to the latter one can only assume that what was signed was an agreement of sale between the second respondent and the City of Harare. The applicant has not sought to have the City of Harare joined as party to these proceedings which in my view would be necessary if the transfer to the second and third respondents is to be set aside. Indeed the agreement between the second and third respondents and the City of Harare would also have to be set aside.

The applicant has not stated precisely in what capacity the second and third respondents ought to be joined. The contention by the applicant that they would be required to plead to the counterclaim would result in them being joined as plaintiffs as opposed to defendants, as they would be defending the counterclaim. They cannot however be joined as plaintiffs as the only issue in the first respondents prayer that would accord with their interests is the ejectment of the applicant from the property in issue. The

issue of the confirmation of the cancellation of the agreement of sale and the consequent prayer for holding over damages is not related to their own legal claim. In the event that they were joined as defendants to the main action, the respondents do not have the same or similar claims to the applicant. The applicant would wish to remain in occupation of the stand, defend the prayer for cancellation of the agreement of sale with the first respondent and pray for judgment in the sum of \$1 406 000. The respondents on the other hand are not in conflict with the first respondent, and instead would seek to have the applicant evicted from the same.

The Rules are there in my view to provide a practical manner of dealing with issues of a legal nature. There are to act as a tool for the resolution of disputes in as uniform and fair manner as possible. They do not exist in order to provide window dressing to a dispute, but should be utilized in a practical manner. The Rules provide for the joinder of one or more parties, as parties to a dispute before the Court, either as co-plaintiffs or as co-defendants. Actions may also be joined where it is proved expedient or necessary. In *casu*, in order to give effect to the provisions of rule 85, it would be necessary in my view, that the respondents be joined as plaintiffs rather than defendants, as their dispute is with the applicant as opposed to the first respondent. In practical terms they can only plead to the counterclaim in the capacity of plaintiffs as opposed to defendants. The applicant however has not sought that they be joined to the proceedings as plaintiffs, which procedure is prescribed in rule 87 of the High Court rules.

In terms of rule 87 (2) the court may at any stage in the proceedings either on its own motion or on the application of any person order any person who ought to have been a party to the proceedings to be joined as a party where the presence of that person is necessary for all the matters in dispute to be effectively and efficiently determined. However no person may be added to proceedings as a plaintiff unless the person gives his consent to be joined as such.

Order 14 Rule 93, which is concerned with third party procedure provides:

“Where in any action a defendant who has entered appearance claims as against any person not already a party to the action (in this Order called the third party)-

- a) that he is entitled to contribution or indemnity;
- b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- c) that any question or issue arising relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant, and should properly be determined, not only as between the plaintiff and the defendant, but as between the plaintiff and the defendant and the third party, or between any or either of them”.

The defendant may make a court application to join that person as a third party in the action.

In *casu* the respondents have both refused to be joined to the proceedings, and in the absence of such consent this court cannot join them. It cannot be gainsaid that the two would be necessary in the resolution of the dispute between the applicant and the first respondent, but it would be difficult in the present case to clearly determine the issues as between the applicant and the first respondent and second and third respondents, in a situation where there is no dispute between the first respondent and the second and third respondent. It is also obvious that no progress would be made in having the transfer to the second and third respondents set aside without the City of Harare also being a party to the proceedings as the title in the stand was given to the respondents through the local authority.

The application therefore fails and it is dismissed with costs.

*Wintertons*, legal practitioners for the applicant

*Byron Venturas & Partners*, legal practitioners for the second and third

respondents.