FARAI MADONDO
versus
TRUSTEES FOR THE TIME BEING
FOR THE LASHLEY TRUST
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 23 August 2021, 30 August 2021 & 9 September 2021

Urgent chamber application

W Jiti, for the applicant
M E Motsi, for the 1st respondent

CHINAMORA J:

Background

The applicant filed an urgent chamber application seeking interim relief pending the return day, which required:

1. The 1st respondent to be compelled to grant the applicant access to the property called Stand 22 Broadmead Estate Township of Stand 2 Broadmead Estate Township, known as 22 Rubidge Close, Hoggart Hill, Harare (hereinafter referred to as "the property"), immediately or upon the granting of this order. Failing compliance, the applicant asked the court to authorize the 2nd respondent to take measures that would allow the applicant access to the property.

2. The 1st respondent to be interdicted from selling or transferring the property to any person other than the applicant.

3. That the 1st respondent be compelled to withdraw or suspend all mandates given to estate agents to sell the property.

4. The 1st respondent to pay costs of suit on an attorney and client scale.

On the return date, a final order was sought as follows:

1. The 1st respondent be and is hereby ordered to take all necessary steps and sign all the relevant documents to facilitate the transfer of the property to the applicant's name within 14 days of service of this order. In the event of non-compliance, the applicant asked the court to authorize the Sheriff to sign all necessary papers on behalf of the 1st respondent to effect transfer of the property to the applicant.

2. The 1st respondent be ordered to pay costs of suit on a legal practitioner and client scale.

When the parties appeared before me on 23 August 2021, I issued an order with directions on filing of further documents. The order, which was granted by consent, was couched thus:

"IT IS HEREBY ORDERED BY CONSENT AS FOLLOWS:

1. The hearing of this matter be and is hereby postponed to 30 August 2021 at 10.00 am.
2. Pending the hearing of the matter as aforesaid and determination thereof, the following protective order and directions are hereby given:
   (a) The 1st respondent and/or any party acting on its behalf or on its instructions be and is hereby interdicted from offering for sale or entering into any agreement of sale or transferring the property known as Stand 22 Broadmead Estate Township of 2 Broadmead Estate Township, , known as 22 Rubidge Close, Hoggart Hill, Harare.
   (b) The 1st respondent shall file and serve its opposing affidavit no later than close of business on 24 August 2021.
   (c) The applicant shall file and serve his answering affidavit and heads of argument no later than close of business on 25 August 2021.
   (d) The 1st respondent shall file and serve its heads of argument no later than close of business on 27 August 2021.
   (e) There shall be no order as to costs".

In addition, the parties agreed that, as they would have filed the founding, opposing and answering affidavits, as well as heads of argument by 30August 2021, they would argue the final relief on that day. In its heads of argument, the 1st respondent raised some points *in limine,* namely, (a) that the matter was not urgent; and (b) that there were disputes of fact which could not be determined on the papers without hearing oral evidence. I first heard argument on the preliminary points.

Preliminary points

The application lacks urgency

In respect of urgency, Mr *Motsi* argued that this application was not urgent and should not be allowed to jump the queue as the urgency was self-created. The opposing affidavit [in paragraph 9] discloses the basis of this point *in limine*. It states that the matter is not urgent since *"[the] applicant has no legal right at all to seek the relief he seeks".*

In reply Mr *Jiti* submitted that the application satisfies all the requirements of urgency. The applicant discovered that he had bought was being sold despite the 1st respondent not disputing the existence of the agreement of sale. He referred the court to Annexure "E" to the applicant's founding affidavit (on pages 24-26 of the record). The annexure shows that the property was being sold through a company called Luxury Real Estate. He contended that, because of this development, the applicant acted swiftly acted to stop the sale by filing the application *in casu*. Counsel for the applicant relied on the case of *Dodhill (Pvt) Ltd and Anor v Minister of Lands and Rural Resettlement* 2009 (1) ZLR 189 as authority for the proposition that there is no standard formula for determining what constitutes urgency. The applicant submitted that as there was an offer to sell the same property in respect of which he had an agreement of sale with the 1st respondent, he had no alternative relief other than to approach this court on an urgent basis.

The 1st respondent sought to argue (in paragraph 6 of its opposing affidavit) that the advertisements by Luxury Real Estate were done before 2 February 2021 when the parties signed the agreement of sale. However, I note that the 1st respondent did not attach anything to substantiate that averment. For example, it could have provided a newspaper or advertisement with a date prior to 2 February 2021. Mr Motsi rightly conceded that, while this could have been done in order to rebut the applicant's case, it was not done. I therefore find that the 1st respondent did not controvert the assertion that the applicant was prompted to approach the court by a current offer for sale of

the property for sale through an estate agent. Nothing was placed before me to negative the averment that the need to act arose on 17 and 18 August 2021. Nor did the 1st respondent show that irreparable harm would not ensue if this court did not intervene urgently. In this connection, in *Mushore* v *Mbanga & 2 Ors* HH 381-16, this court stated that there are two factors which are crucial when considering the issue of urgency. The first is that of time and the second is the aspect of consequence. MAFUSIRE J unbundled these legal concepts as follows:

> "By 'time' was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action… By 'consequences' was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis."

On both scores I was satisfied that the matter is urgent and dismissed the preliminary point for lack of merit. The 1st respondent then made submissions vis-à-vis its next point *in limine*. Let me address the arguments proffered by the parties.

Material disputes of fact

The 1st respondent argued that the application was fraught with material disputes of fact which rendered it incapable of determination without hearing *viva voce* evidence. Counsel referred to the agreement of sale, which is Annexure "A" to the applicant's affidavit (on pages 11-16 of the record). Particular attention was drawn to clause 6 (b) of the agreement, which was left blank on the "by-back" purchase price. The 1st respondent submitted that, as the amount of buy back was not filled in, clause 6 was incomplete, and that raised a dispute of fact. I will return to this issue. Further, it was contended that the buy-back of the property had begun with an alleged repayment of $44,000-00 to the applicant. The averments are made in paragraphs 4, 10 and 11 of the opposing affidavit. This payment is strenuously denied in the answering affidavit, particularly, in paragraphs 8 and 9. It is significant to observe that, in paragraph 10 of the opposing affidavit, the 1st respondent refers to an Annexure "F" which was not attached. The annexure was meant to provide proof that the amount of $44,000-00 had been refunded to the applicant. Even at the hearing of the application the said document could not be provided. Mr *Motsi* submitted from the bar that, despite several engagements with the estate agent to whom the refund had been made, the acknowledgement could not been be provided.

A number of issues arise from the 1st respondent's submission and the failure to provide Annexure "F". Firstly, the claim that the amount of $44,000-00 was repaid was not substantiated. Secondly, the admission by Mr *Motsi* that the said amount was paid to an estate agent confirms the applicant's version that he never received the alleged refund. Thirdly, in answer to a question from the court Counsel for the 1st respondent conceded that an affidavit could have been obtained from the estate agent in question but none was obtained. I find this damning to the 1st respondent's case, and vindicates the applicant's denial of receipt of the amount of $44,000-00. In my view, the 1st respondent failed to demonstrate the existence of a dispute of fact.

Let me re-visit clause 6 of the agreement of sale in the context of the alleged dispute of fact which is incapable of resolution without resort to oral evidence. Mr Jiti drew my attention to clause 6 (a) which provides as follows:

> "The seller shall be entitled to purchase back the property after three months from the date of signature and not later than six months from the date of signature of this agreement".

In addition, clause 6 (d) places an obligation on the party wishing to buy back to "notify the purchaser in writing of its intention to buy back the property". Counsel proceeded to argue that it was not disputed that the 1st respondent did not give the applicant the requisite written notice. As such, the applicant contended that no dispute of fact could arise. I note that Clause 6 (a) is explicit that the right to buy back the property was exercisable after three months of signing the agreement, and not later than 6 months from the date of signature thereof, and that written notice of intention to exercise that right had to be given. The language in clause 6 is peremptory. In the circumstances, I was satisfied that the point *in limine* on material dispute of fact was more illusory than real, and dismissed it. Having dismissed both preliminary points I invited the parties to engage the merits of the case.

The merits of the case

In dealing with the merits of the case, I was conscious that the parties had agreed that there were arguing the question of whether or not final relief should be granted. Mr *Jiti* formulated the issue as one requiring the court to determine the applicant's right in relation to Stand 22 Broadmead Township. He asked the court to decide on the effect of the agreement of sale entered into by the parties on 2 February 2021.

It was submitted on behalf of the applicant that the 1st respondent had not been candid with the court both in relation to the application *in casu* and the opposing affidavit it placed before the court under HC 770/21. The 1st respondent (in paragraph 1 of its affidavit in this matter) specifically incorporated the pleadings in HC 770/21. At any rate, I would have been entitled on the authority of *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) to refer to those proceedings. The applicant argued that in HC 770/21, the 1st respondent denied ever entering into an agreement of sale with the applicant, instead, contending that the parties had a loan agreement with the agreement of sale acting as collateral security. The court's attention was directed to paragraph 4 of the opposing affidavit in which the 1st respondent admitted that "indeed an agreement of sale was signed" and that the purchase was US$266,000-00. I find it curious that the 1st respondent did not maintain the narrative that the parties had a loan, as opposed to a sale, agreement. Counsel for the applicant relied on *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (SC) *Leader Tread (Pvt) Ltd v Smith 2003* (1) ZLR 288 (H) to drive the point that the 1st respondent should not be believed in its averments *in casu* as it had lied to the court.

It was submitted that the applicant had established that he had entered into a valid agreement of sale with the 1st respondent, since the *merx* and purchase price had been agreed, and payment had been fully made. As I have noted previously, the 1st respondent failed to prove that it made a refund of $44,000-00 to the applicant. While the 1st respondent averred that the applicant did not pay the full purchase price, it did not provide any evidence of breach by the applicant. In particular, it did not show the court that arising from that breach it put the applicant in *mora*. Crucially, the agreement of sale was not cancelled by reason of breach because of failure to pay the purchase price or any other contractual cause. It also critical to note that the 1st respondent did not file a counter application (which it could have done) relating to the alleged balance on the purchase price. Accordingly, I am not satisfied that anything vitiates the agreement of sale signed by the parties on 2 February 2021. On the contrary, by making conflicting averments under oath in the present application and in HC 770/21, the 1st respondent has undermined its own case. Quite clearly, there cannot be any confusion between a loan agreement and an agreement of sale. No loan agreement has been provided to the court either in HC 770/21 or in the current proceedings. In fact, the papers before me reveal an admission by the 1st respondent that the parties signed an agreement of sale. Additionally, the dismal attempt to rely on a buy-back fell flat on its face.

In my view, the requirements for grant of an interdict were established by the applicant. As the 1st respondent could not prove that there was no agreement of sale, the applicant managed to demonstrate a clear right. In addition, the applicant managed to show that the 1st respondent had offered the property for sale, and that irreparable harm would occur if the final relief sought was not granted by this court. I now turn to consider the issue of costs of suit. I must state that, as the 1st respondent put in issue the existence (if not validity) of the agreement of sale signed on 2 February 2021, it is imperative to determine this and indicate in my order the status of the agreement. For the avoidance of doubt, my finding is that the applicant established that an agreement of sale was entered into by the parties, and that such an agreement is binding between them. On the evidence tendered by the parties in support of their respective cases, the alleged buy-back agreement has not been shown to exist. Therefore, the applicant's testimony in the papers before me that he signed an agreement of sale and fully complied with its terms has not been undermined.

Costs of litigation

The starting point is that costs are in the discretion of the court. With respect to costs, the applicant argued that this application was necessitated by the conduct of the 1st respondent. Counsel referred to the contradicting positions taken by the 1st respondent in HC 770/21 and in the application before me. The court was urged to award punitive costs at the level of attorney and client to show its displeasure. I have also observed the 1st respondent's futile effort to show that it had exercised its buy back right under clause 6 of the agreement sale. That stance should not have been taken in the face of uncontroverted evidence that the right was never exercised in terms of the agreement between the parties or at all. I say this because proof of the alleged repayment of $44,000-00 was not produced, and the mandatory requirement of clause 6 were not complied with.

Disposition

In the result I grant the following final order:

1. The agreement of sale signed by the applicant and the 1st respondent on 2 February 2021 is a valid and binding agreement in respect of the property known as Stand 22 Broadmead

Estate Township of Stand 2 Broadmead Estate Township, known as 22 Rubidge Close, Hoggart Hill, Harare, measuring 78 45 square metres ("the property").

2. (a) The 1st respondent be and is hereby ordered to take all steps and sign the relevant documents necessary to facilitate transfer of the property to the applicant within 14 days of service of this order on the applicant.

   (b) Failing compliance with paragraph 2 (a) of this order, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized and empowered to sign, on behalf (and in the place) of the 1st respondent, the relevant documents necessary to effect transfer of the property to the applicant.

3. The 1st respondent shall pay costs of suit on an attorney and client scale.

Jiti Law Chambers, applicant's legal practitioners
M E Motsi & Associates, 1st respondent's legal practitioners