JOHN TATENDA CHIKEYA
and
TABITHA CHARLENE CHIKEYA
versus
JEREMIAH MURAHWA
and
VUMBA PRODUCERS COOPERATIVE SOCIETY
and
MINISTER OF SMALL AND MEDIUM ENTERPRISES
AND COOPERATIVE DEVELOPMENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 19 and 23 June 2023

Opposed Application

Applicants in person
Mr *C Mukwena*, for the 2nd respondents

MUZENDA J: The two applicants are seeking the following relief as spelt out in the draft order sought:

"IT IS DECLARED THAT:

1. *The 1st and 2nd applicants purchased one (1) share held by the 1st respondent in the 2nd respondent's society.*
2. *1st respondent shall pay costs of suit on attorney – client scale."*

Parties

The applicants are husband and wife and second applicant is a legal practitioner. The first respondent is an 83 year old member of second respondent cooperative society situated at Howth Farm, Mutare. The second respondent is a *univesitas* regulated by by-laws which operate as its constitution. The third respondent is the Minister who regulated and monitors operational activities of second respondent.

Background facts

On 11 January 2018 at Mutare, applicants and first respondent entered into an agreement of sale for a piece of land measuring 5 (five) hectares of Howth farm occupied by the second respondent cooperative society. The purchase price was pegged at US$10 000 to be

paid in instalments. The agreement in clause 4 speaks of "the said property shall measure 5 (five) hectares in extent." If it does not meet the measurement, the seller was obliged to compensate the purchasers "by giving them the requisite deficit portion." The property was to be subdivided in future. The applicants contend that they have fully paid the purchase price, the last instalment having been paid on 2 December 2018.

The applicants contend that the second respondent confirmed the purchase and transfer of one share in the cooperative society on 15 August 2019 through a letter. After such confirmation, applicants proceeded to construct a structure, a modern house on the acquired piece of land. To the applicants, the first respondent is now reneging from the agreement and they resolved to lodge this application.

The first respondent, in opposing the application, states that both applicants are not members of the second respondent. He adds that applicants never bought any share from second respondent because no such shares exist. What applicants bought are 5 hectares of land. However such an agreement of sale does not entitle applicants to become members of second respondent nor shareholders. The first respondent is related to second respondent and because of that close relationship, second applicant persuaded first respondent to sell the piece of land to applicants. The first respondent feels cheated by the applicants. He disputes the addendum alluded to by applicants in their papers and to first respondent, he was shocked by applicants when they produced the addendum at a meeting on 22 August 2021 claiming to have bought one share of second respondent. The first respondent adds that he was supposed to append his signature on the addendum. The applicants had approached him at night and misrepresented to first respondent that they had misplaced the principal agreement. The first respondent reiterates that he could not have sold a share which he does not physically have. He also denies that applicants have fully paid the agreed price for the 5 hectares. He denies acknowledging payments of USD 4000 and USD 3000. What he received was local currency which fall short of what was agreed. What respondent sold to applicants is a portion of his residential and farming land as second respondent's member. He prays for the dismissal of the application with costs on an attorney-client scale.

The second respondent in opposing the application raises preliminary point to the effect that second respondent never dealt with applicants in relation to the agreement of sale. The applicants did not apply to second respondent to be members as provided for in second respondent's by-laws and the two do not appear on second respondent's register of members. As a result second respondent avers that there is no basis for applicants to be regarded as second

respondent's members. The second respondent denies the existence of shares and the size of land does not relate to number of shares. The second respondent prays for the upholding of the preliminary point.

On merits, second respondent acknowledged first respondent's membership of second respondent, but denies that second respondent sold any land to applicants. It adds that first respondent has no title to his portion of land since the farm is yet to be subdivided and allocated to its members. To second respondent they do not recognise applicants as members, applicants can only stand behind the first respondent and thus far. No share certificates exist and the agreement of sale is privy and private to applicants and first respondent. The second respondent denies the confirmation document. It calls it "a product of fraud". The second respondent distances itself from the confirmation. At the time applicants entered into the agreement of sale, the first respondent had not acquired ownership of the piece of land. He had no tittle deeds and could not have spoken about transfer of ownership. The second respondent adds that applicants have unnecessarily dragged it to court and pray that the application be dismissed with costs at a punitive scale of attorney-client.

Submissions by parties

The applicants submitted that the agreement of sale between the applicants and first respondent should be declared valid and enforceable at law. They added that, that agreement of sale relates to one (1) share of land known as the remainder of Howth Farm belonging to Vumba Producers Cooperative Society. The applicants further submitted that the agreement of sale and the addendum were signed by all parties and the duty of the court is to interpret the contract and judge whether it meets all the elements of such a contract, they cited the case of *Ashanti Goldfields Zimbabwe Limited* v *Lafati Mdalal* HC 5664/2007. Such an agreement ought to be upheld so as to preserve the sacrosanct nature of the contract and cited further the matter of *Shisam Consulting (Pvt) Ltd& Another* v *Energy and Information Logistics* (*Pvt*) *Ltd* (no citation was provided by applicants). The applicants went on to urge the court to consider the *caveat subscriptor* principle and submitted that where parties affixed their signatures voluntarily, they are bound. The applicants referred the court to *R. H Christe,* 1998 *Business Law in Zimbabwe, Juta & Company,* no page was provided). The applicants also cited the case of *ZFC Limited* v *Tapiwa Joel Furusa* SC 15/18. In its case, the applicants further submitted, both first and second respondents appended their signatures to the documents and should be

bound by the terms of the agreement and its ordinary meaning. As such the court has to order the confirmation of the agreement of sale.

The applicants did not file heads on the aspects of preliminary points.

The second respondent in its heads went on to raise a new preliminary point to the effect that the applicants sued the third respondent without giving the Minister a notice to sue in compliance with the State Liabilities Act [*Chapter 8:14*], Section 6 and proceeded to cite case law to that effect. (*Zim Assist (Private) Limited and Purple Divine Technology (Private) Limited* v *Minister of Primary and Secondary Education* HH 383/20) and submitted that the omission by the applicants renders the proceedings a nullity and has to be dismissed.

On merits, the second respondent submitted that it was not aware of an agreement of sale between the first respondent and the applicants. The first respondent had no right to enter into any agreement on behalf of the second respondent. The applicants did not attach copies of tittle deeds, nor did they attach the first respondent's copy of shares owned. The applicants failed to attach copy of the second respondent's minutes or resolution about the agreement of sale. The second respondent further submitted that the applicants knew that the first respondent did not have ownership of the property but still drafted the agreement of sale. At that particular moment of drafting the agreement of sale the first respondent did not have land capable of being sold for the farm was allocated to a cooperative society, second respondent. So no one can give what he or she does not have, and where such a person purports to transfer property, such transfer is a nullity. It was further submitted on behalf of the second respondent.

The second respondent further submitted that the agreement of sale between applicants and the first respondent pertaining to cooperative society land did not comply with s 50(2) of second respondent's by-laws which prohibits transfer of share held by a member to any person other than the society. Any such transfer shall be valid if such a name has been accepted and entered into the society's register of members and shares, on the direction of the management committee of the cooperative society. The second respondent drew the court's attention to the date of the agreement of sale as well as the confirmation and submitted that applicants ought to have sought confirmation first before executing the agreement of sale. The second respondent suspects the whole transaction to amount to a fraud.

The second respondent submitted further that the whole dispute is centred between applicants and the first respondent as it appears in the heads of arguments prepared by applicants. Nothing substantive in law was submitted by applicants in respect of second respondent, added second respondent's counsel. In second respondent's view the application

is spurious merely meant to harass second respondent. It prays for costs at a punitive scale of attorney –client.

Points *in limine* raised by the second respondent

The second respondent in its opposing papers (p 79) raised a preliminary point bordering on privity of contract and or a misjoinder to the effect that applicants did not deal with the second respondent when the agreement of sale was done. It also added that applicants are not its members and do not appear in its register. As such the consequential relief sought by the applicants is not competent. However in its heads of argument the second respondent does not pursue this preliminary point. Instead it raises lack of compliance by applicants of s 6 of the State Liabilities Act, I will assume that the preliminary point contained in the opposing papers and not addressed in second respondent's heads has been abandoned. In any case the second respondent comprehensively covered the issue on merits. I will dismiss the point *in limine*.

In as far as the State Liabilities Act is concerned, it is clear on the record that the third respondent, though served with the application does not oppose the application. The second respondent does not have instructions to represent third respondent. Its mandate is to state facts, that affects its interest and not to speak on behalf of third respondent. Maybe third respondent was served with a 60 days notice to sue and resolved not to contest. This preliminary point has no merit and it is dismissed.

Analysis of the case

The relief sought by both applicants as per draft order is "*to declare that the first and second applicants purchased one (1) share held by the first respondent in the second respondent's society*". It is apparently clear that second respondent herein does not have existing defined shares to speak of. The piece of land allegedly bought by applicants belong to the second respondent's cooperative society and it is yet to be subdivided and members still to determine the share structure allocated to members who are on the society's register. As such there is no share to talk about, it remains purely speculative. The agreement of sale captured and annexed to applicant's papers on p 45 of the record is between the first respondent and applicants. It does not involve second respondent. The preambles stretching from Clauses 1(a) – (d) speak of "*the seller being the owner of certain piece of land*", "*the seller acquired land*" and the "*seller will upon obtaining the permit*" and that "*the seller is desirous of selling to the*

purchaser" (sic) all those phrases are not legally correct. The first respondent does not "**own**" any piece of land of Vumba Producers Cooperative Society, first respondent did not acquire the land, he is just yet a member of second respondent, he does not have a certificate of tittle, cession nor a share certificate. He is just an occupant yet to get papers from the society. He is not the one to obtain a permit to subdivide but second respondent's management committee will do so in the foreseeable future. So the whole background stated in the 2018 agreement of sale is not correctly captured by the parties. What remained clearly accurate is that the first respondent rushed to alienate his proposed allocation and prematurely sold it to the applicants.

Clause 10 of the second respondent's by-laws deals with application for membership and outines the procedures to be followed. The first respondent does not have the powers to deal on behalf of the second respondent pertaining to allocation of shares or disposal of land belonging to second respondent that is the preserve of the Management Committee. I have come to the conclusion that the 2018 agreement of sale should and ought to be interpreted exclusively among the 2 applicants and first respondent. The terms specified in that document do not concern the second respondent. The confirmation letter attached by the applicants are of no help for them. Decisions of second respondent come up as a resolution of all members or their majority of second respondent at an appointed advertised meeting prescribed by its by-laws. The by-laws do not provide that a chairman or set of committee members can confirm and ratify an agreement entered upon by a member and declare the acceptability or validity of an act done well outside the auspices of second respondent. Clause 10(4) of second respondent's by-laws provides that the decision of the management committee can be accepted or rejected by the members. So the point remains that the management committee does not have the final say. Its decisions must be ratified by the registered members. I am therefore not satisfied that applicants have managed to lay adequate compelling reasons to show that they followed the spelt out procedures in second respondent's by-laws to justify a declaration that they have acquired one share in second respondent society. They have only managed to show that they bought 5 hectares of land from first respondent and not that they are now members of second respondent. They should follow the set out steps and be accepted as members and get registered as such into the second respondent's official register. The application has no merit.

As regards costs, applicants moved the court for punitive costs of attorney-client scale. This is a strange prayer, I will assume that applicants or parties meant legal practitioner-client scale. There is no reason to depart from the long established principle of these courts that the

issue of costs follow the result of the litigation. However there is no reason in my view to order costs on a punitive scale of legal practitioner-client scale.

Accordingly the following order is returned:

1. ***The application is dismissed.***
2. ***Applicants to pay costs to both respondents.***

Maunga Maanda & Associates, applicant's legal practitioners
Chibaya & Partners, 2nd respondent's legal practitioners