TEVERAI RUSHWAYA

Versus

EMMANUEL MATIVENGA
Represented by Vimbai Mativenga

IN THE HIGH COURT OF ZIMBABWE
BERE AND TAKUVA JJ
BULAWAYO 12 MARCH 2018, 27 FEBRUARY 2020 AND 3 MARCH 2022

Civil Appeal

Advocate S. Siziba and A. Sibanda, for the appellant
Z. Tapera, for the respondent

TAKUVA J: This is an appeal against a decision of a Magistrate sitting at Kwekwe. After hearing argument we dismissed the appeal with costs. Subsequently the appellant noted an appeal and the Registrar in the process of preparing the appeal record to the Supreme Court placed a note that seemed to be a request for reasons for judgment.

These are our reasons.

FACTS

The appellant entered into an Agreement of Sale with the respondent on 13th January 2010 for the sale of 480 square metres being No. 14241 Mellenium Park Redcliff. The purchase price of the property was R13 000-00 which was paid in full. Transfer of ownership of the property was to immediately follow after payment of the full purchase price. The Agreement of Sale was witnessed by two witnesses, one for the seller and the other for the purchaser. The respondent failed to secure transfer of ownership in terms of the agreement because the appellant refused or neglected to process the requisite papers to transfer ownership of the property into respondent's name.

The respondent proceeded by way of application against the appellant for an order compelling cession of rights in the immovable property within the jurisdiction of the Director

of Housing in Redcliff. Respondent also prayed that the Messenger of Court and the Director of Housing Redcliff be empowered to effect the said transfer in the absence of cooperation from the appellant.

Appellant opposed the application through an Opposing Affidavit. Appellant challenged the authenticity of the agreement on numerous grounds. Firstly he said the agreement produced by the respondent is not the one he signed. Secondly he contended that the selling price is incorrect in that the price was US$6 000-00. Furthermore appellant said he was made to sign the last page of the agreement and the respondent never paid the purchase price at all. He therefore saw no reason to comply with a fraudulent agreement which was not even complied with by the respondent. According to him, the issue of the purchase price came up when he met respondent for the first time in 2015 and the latter paid him US$850-00. Appellant wondered why if respondent had paid in full in 2010 he was now paying the $850-00. Appellant also argued that there are disputes of facts which are incapable of resolution without leading *viva voce* evidence.

Respondent filed a replying affidavit in which he indicated that the appellant has just proferred a bare denial which is surprising because he ceded his rights in the property to the respondent at Redcliff Municipality on the 10th of January 2017 as shown in the Deed of Cession marked Annexure A. Respondent wondered why appellant would sign the cession documents if the full purchase price had not been paid since it was a specific term of the agreement that transfer would be effected upon payment of the full purchase price. Instead of cooperating, the appellant refused to sign the Revenue Form from Zimbabwe Revenue Authority for purposes of securing a Capital Gains Certificate. Appellant demanded to be paid unjustified sums of money not mentioned in the agreement.

As regards the involvement of Mr Chipadze, respondent said he was actually appellant's witness during the signing of the Agreement of Sale. Also, respondent denied paying the purchase price or any portion thereof to the appellant's brother. Instead, he insisted that payments were made to the appellant in person before he ceded rights to the property at Redcliff Municipality.

In respect of the value of the property respondent's contention was that at the time, residential stands in Mellenium Park averaged R13 000-00 since the area had not been fully

developed in terms of sewer, roads and electricity. Respondent maintained that appellant extorted US$850-00 from him on the pretext that once paid he would sign the ZIMRA documents.

The court *a quo* proceeded to determine the application in terms of Order 22 of the Magistrates' Court (Civil) Rules SI 290/1980. In adopting this procedure the court relied on a number of precedents including the following;

(a) *Room Hire Co. (Pty) Ltd* v *Jeppe STP Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)

(b) *Plascon-Evans Paint Ltd* v *Van Rie Beeck Paints (Pty) Ltd* 1984 (8) SA 623 (A)

(c) *Chiparaushe and Another* v *Triangle Ltd and Ano*. HH 196-15 and

(d) *Supa Plant Investment (Pvt) Ltd* v *Edgar Chidavaenzi* HH 92-09.

In concluding that there is no dispute of fact *in casu,* the court *a quo* reasoned thus;

"There is an agreement whose terms are that the parties agreed to enter into an Agreement of Sale involving a certain immovable property to wit a residential property. The existence of this agreement is not being disputed. The respondent agrees that he signed an agreement in respect of the sale of the property in question. He admits his signature as it is appearing on the agreement filed with applicant's founding papers. His position is that the last page where he signed must have been plucked off the real agreement and appended to a manufactured agreement whose terms are different from the one the parties had initially signed for. Respondent further avers that the value of ZAR 13000-00 is not the appropriate value of the said property and he could not have entered into such a ridiculous agreement. What is being missed here is that the sale was purportedly entered in 2010 and not in 2017. For a currency that is a victim of inflation, the value cannot be looked at its worthy today but at the time of the agreement. Where a person of full maturity and in his sober and sound state enters into a bad deal, its mere badness would never be a ground for its rescission any way. It would have been a real dispute had the respondent appended any copy of such alleged real agreement he holds if any. Even if evidence was to be called respondent's denial of the authenticity of the contract could not go beyond his mere word. A written contract cannot be defeated by mere words. Clearly the respondent has adopted a merely quarrelsome attitude squarely falling outside the realm of real dispute of fact as envisaged by the law."

The court *a quo* went further on page 7 of its judgment to state;

"One important fact is that a person cannot distance himself by his mere word from a contract to which his signature is not being disputed. There is no sound basis upon which the contract of the parties can be said to be a fraud. The negotiations and entering into a contract concerning the property by the same parties is being admitted. Upon a finding that 1st respondent must stand by this agreement means the dreaded "*caveat subscripto*" rule binds him."

Further on page 8 the court *a quo* expressed itself thus;

"This to me is a clear case where Order 22 is an appropriate procedure and the relief sought is premised on a clear and indisputable valid contract between the parties. The quarrel raised is not enough to amount to a material dispute befitting to call for oral evidence….."

The court *a quo* then granted the following order;

"1. The 1st respondent be and is hereby ordered to take all necessary steps within 14 days of the date of service of this order to effect cession of house number 14241 Mellenium Park, Redcliff into Emmanuel Mukaro's name.

2. If the 1st respondent fails within the aforesaid period to take necessary steps to effect transfer, the 2nd respondent, the Messenger of Court Kwekwe be and is hereby authorised to take such steps on behalf of the 1st respondent.

3. The 3rd respondent the Director of Housing Redcliff be and is hereby ordered to effect cession of house number 14241, Mellenium Park Redcliff in to Emmanuel Mukaro's name."

Aggrieved by this order, appellant noted an appeal in this court on the following grounds;

"1. The court *a quo* erred in failing to appreciate that the agreement between the parties was in dispute.

2. The court *a quo* erred in concluding that the price of the property could be ascertained on the papers.

3. The court *a quo* erred in ignoring the fact that there were two conflicting versions of what had happened at the alleged agreement.

4. The court *a quo* erred in ignoring the fact that the agreement was entered into in 2010 and the cession is being sought in 2017 thus making the court deal with a prescribed claim.

5. The court *a quo* erred in relying on a cession document that was produced in a replying affidavit when the appellant could no longer comment on the same.

6. The court *a quo* erred in failing to recognise that the application was for specific performance without an alternative of damages. Thus the court *a quo* erred in exercising jurisdiction where it has none.

7. The court *a quo* erred in handling issues pertaining to a property that is way beyond its jurisdiction which is limited to $10 000-00.

8. The court *a quo* failed to appreciate what a dispute of fact means and made a decision based on untested allegations.

9. The court *a quo* missed the point that the United States dollar has remained at the same levels as in 2010. As such the values of properties have not changed much since dollarization.

10. The court *a quo* erred in rejecting the appellant's version that the agent for the respondent had committed a fraud without testing such evidence by cross examination."

Appellant's prayer was for the following relief;

1. That the appeal succeeds with costs.

2. The decision of the court *a quo* be set aside and substituted with an order that the application for cession is dismissed with costs.

3. The respondent pays costs of suit both in the court *a quo* and in this court."

I now turn to the grounds of appeal. In so doing, I will combine grounds of appeal No. 1, 3 and 8 as they raise the same issue. The court *a quo* appreciated that there were factual disputes but concluded rightly that these were not real material disputes of facts. In *Room Hire Co. (Pty) Ltd* v *Jeppe supra*, the court summarised the law as follows;

> "Except in interlocutory matters, it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits. Where no real dispute of fact exists there is no reason for the incurring of the delay and expense involved in a trial action and motion proceedings are generally recognised as permissible. Where a dispute of fact is shown to exist the Court has a discretion as to the future course of the proceedings; if the dispute of fact cannot properly be determined by *viva voce* evidence under Rule 9 and the calling of evidence under this Rule rests with the Court or Judge regardless of whether the parties request it – the parties may be sent to trial in the

ordinary way (either on the affidavits as constituting the pleadings or with a direction that pleadings be filed or the application may be dismissed with costs."

In *Plascon-Evans*' case *supra* it was held that;

"Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers ……. A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed……."

See also *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi* HH 92-09 at page 4 where MAKARAU J (as she then was) stated;

"A material dispute of facts 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."

In casu, the court *a quo* in our view adopted the proper approach where the papers reveal a dispute of facts. The court *a quo* made a finding that there is no real, genuine and *bona fide* dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. This court had a ready answer. On the evidence on papers, the court *a quo* found that;

(i) The Agreement of Sale is valid and therefore binding on the parties. This finding was based on the fact that the appellant admitted signing the agreement. Therefore appellant is bound by the caveat *subscripto* rule.

(ii) The appellant failed to produce the so-called "correct" Agreement of Sale.

(iii) In his affidavit appellant did not indicate how the US$ 6000-00 purchase price was to be paid by the respondent.

(iv) Appellant's explanation of why he signed the agreement if he had not been paid a cent of the purchase price is incredible. Put differently, appellant remained silent on whether or not in the "correct" agreement the purchase price was to be paid upon signing the agreement. If they were terms, the appellant did not traverse those terms in his papers. What he says about "initialising" every page does not make sense at all.

The following factors also show that the appellant's version is improbable and false;

(i) The appellant does not explain why five (5) years down the line he would receive a paltry US$850-00 if what he needed was US$6 000-00 (which had been long overdue).

(ii) During the seven (7) year period, appellant witnessed the stand being developed from ground to a fully fledged seven (7) roomed house. If appellant believed he was a victim of fraud, it defies logic that appellant remained silent for 7 years without reporting the matter to the relevant authorities especially the Police.

(iii) Appellant only complained about fraud when respondent made his claim for cession after realising that the appellant was dodgy on the cession.

(iv) For appellant to give respondent vacant possession without having received a cent of the purchase price is preposterous. In any event, appellant had the right in terms of clause 5.1 of the agreement to cancel the agreement upon respondent's failure to pay the purchase price or to sue the purchaser for the payment of the purchase price. These proved facts show clearly that the disputes of fact raised by the appellant are not *bona fide*. Litigants approaching the courts must do so in utmost good faith – see *Fedelis Mhashu and Another* v *Alfred Mamvura* HC 1714/13.

Appellant argued that the following disputes of fact could not be resolved on the affidavits or papers before the court *a quo*;

(a) the agreed price and currency,

(b) Whether or not respondent paid the purchase price to the appellant,

(c) Whether or not the Cession Form was fraudulent.

(d) The role played by Mr Chipadze.

(e) Whether the appellant had been paid a sum of US$850-00 by the respondent and the purpose of such payment.

There is no *bona fide* dispute on the purchase price, currency or whether it was paid, in that these issues are adequately covered in the Agreement of Sale. Further the appellant's conduct subsequent to the signing of the agreement is consistent with the agreement's terms and conditions. On the evidence, the appellant's version is highly improbable, totally illogical

and unconvincing to say the least. Quite clearly, the agreed purchase price was paid, this is the reason why appellant gave respondent vacant possession. In our view, the so called real dispute is fake and lacks *bona fides* in that it has not been fully and accurately reflected.

As regards the Cession Form, the respondent only produced it after appellant had denied the terms of the agreement in his opposing affidavit. Respondent's argument is that appellant cannot deny selling his house to the respondent at that price and terms when he ceded his rights at Redcliff Municipality in terms of the Memorandum of Agreement of Sale of the same house. Respondent got worried when appellant refused to sign the "Revenue Form" from the Zimbabwe Revenue Authority for purposes of obtaining a Tax Clearance Certificate. According to the respondent this is the reason why this application has been made. The appellant as the "seller" was required to pay Capital Gains Tax before the issuance of a Tax Clearance Certificate. We are convinced that on the evidence the court *a quo's* finding that "there is no sound basis upon which the contract of the parties can be said to be a fraud." is unassailable. The Cession Form flows from the Agreement of Sale between the parties.

Mr Chipadze's role is known by the appellant. He is the one who introduced him in his papers. Appellant's version of Chipadze's role does not convince us. If Chipadze was acting as respondent's "representative" then he should have shown the appellant a Power of Attorney. He is silent on that and it is not clear why he believed Chipadze's mere *ipsi dixit*. Assuming Chipadze has relevant evidence surrounding the signing of the agreement, the appellant should have presented that evidence in a supporting affidavit before the court *a quo*. Respondent gave a simple answer regarding Chipadze's role and that he was appellant's "witness." Respondent was represented by his wife Vimbai Mativenga by virtue of Special Power of Attorney. Accordingly, Chipadze's role is not a real, genuine and *bona fide* dispute in the circumstances.

What was listed as the last dispute of fact by the appellant is whether or not appellant was paid US$850-00 by the respondent. This is baffling in that appellant himself admits having been paid this amount by the respondent. There is therefore no dispute of fact. As regards the purpose, the appellant says it was part of the purchase price. The respondent says appellant extorted that amount from him so that he signs the Revenue Form. To argue that such a dispute is incapable of resolution on papers displays a lack of seriousness associated with *malafides*. What additional evidence can the parties possibly lead in view of the fact that when the transaction involving the US$850-00 was effected, there were no witnesses.

Coming back to the 2nd ground of appeal namely that the court *a quo* erred in concluding that the price of the property could be ascertained on the papers, we disagree because the agreement sets out the amount and its currency in clear and unequivocal terms. The appellant presented a bare denial. It is unsubstantiated. As the court *a quo* properly found "Even if evidence was to be called, respondent's denial of the authenticity of the contract could not go beyond his mere word……" (my emphasis)

We accordingly find that this ground lacks merit. It is hereby dismissed.

The 4th ground is that respondent's claim had prescribed. In terms of the Prescription Act (Chapter 8:11) section 6 (1) (a), "prescription is delayed if the person in favour of whom the prescription is running is outside Zimbabwe." It is common cause that respondent is permanently based in Namibia. During the little time that he has been in Zimbabwe, appellant has been playing hide and seek with him evading him. Also common cause that the parties last met in January 2017 when the further US$850-00 was paid. Appellant assured the respondent that he was going to sign the ZIMRA forms but he disappeared knowing fully well that respondent's days in Zimbabwe were numbered.

In the circumstances, the defence of prescription lacks merit and is hereby dismissed.

The 5th ground relates to the so called error by the court *a quo* in relying on a "Cession Document" produced in an answering affidavit when appellant would no longer comment on the same. The question becomes whether or not such documents are admissible? The rules make provision for the filing of a replying affidavit. Surely an applicant is permitted to file documents together with the replying affidavit. Where the respondent feels that there is a need to comment on such documents he has to apply for leave to file any further documents. Appellant did not do so.

The 6th and 7th grounds of appeal are hereby consolidated as they relate to the same issue, namely the jurisdiction of the court *a quo*. The contention is that since the jurisdiction of the court *a quo* is limited to $10 000-00, it erred in handling issues pertaining to a property whose value is way beyond its jurisdiction. What is note worthy is that both parties consented to jurisdiction as in terms of clause 5.3 of the Agreement of Sale in the following specific terms;

> "the parties hereby consent to the jurisdiction of the Magistrates Court Kwekwe …". Also, in terms of the Magistrates Court Act (Chapter 7:10) section 11 (c) the

> Magistrates Court shall have jurisdiction, "if both parties agree by a memorandum signed by them or their respective legal practitioners that the court named in such memorandum shall have power to try such action, such court shall have jurisdiction to try the same therein." (my emphasis)

Accordingly, the court *a quo* had jurisdiction to entertain the matter. We find these grounds to be meritless.

The 9th ground is that the court *a quo* erred by holding that the values of property have not changed much since dollarization because the US dollar has remained at the same levels since 2010. The court *a quo* never made such a finding. What it said is;

> "Respondent further avers that the value of ZAR13 000 is not the appropriate value of the said property and he could not have entered into such a ridiculous agreement. What is being missed here is that the sale was purportedly entered in 2010 and not in 2017. For a currency that is a victim of inflation, the value cannot be looked at its worthy today but at the time of the agreement. Where a person of full maturity and in his sound and sober state enters into a bad deal, its mere badness would never be a ground for its rescission any way."

Quite clearly this ground is based on a misreading of the court *a quo's* judgment or it is an attempt to mislead the court. Whichever way it is, this ground lacks merit and is hereby dismissed.

The 10th and final ground of appeal is that the court erred by rejecting the evidence that Chipadze had committed fraud without testing such evidence by cross-examination. It is not a misdirection in motion proceedings to fail to call witnesses. In every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of evidence; if this is not done, a respondent against whom the clear relief is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of an applicant. On the credible evidence on affidavits, there is no basis for holding firstly that Chipadze was respondent's agent and secondly that he committed fraud against anybody.

In the result this ground of appeal is unmeritorious and is hereby dismissed.

Accordingly, the appeal is dismissed with costs.

Bere J…….. I agree
(No longer in service)

Mhaka Attorneys c/o Majoko & Majoko, appellant's legal practitioners
Magodora and Partners, respondent's legal practitioners