EXAVIER MAONEKE
versus
TRUSTEES OF MOUNT OLIVE TRUST

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 31 May and 28 June 2022

Opposed Application – Objection *in limine*

E Mubayiwa, for the applicant
T L Mapuranga, for the respondent

CHITAPI J: The applicant filed this application for an order of specific performance. The draft order reads as follows:

"**IT IS ORDERED THAT:**

1. The application be and is hereby granted.
2. The respondent be and is hereby ordered to take all the necessary steps to effect transfer of stand 14068 Salisbury Township of Salisbury Township Lands measuring 2011 square metres to the applicant within 3 days of the issuing of this order.
3. The respondent shall submit to the Zimbabwe Revenue Authority for interviews to obtain a Capital Gains Tax Certificate and shall make all such payments for the certificate as required by the law.
4. In the event that first respondent fails to comply, the Sheriff of the High Court or his lawful deputy be and is hereby ordered, authorized and directed to attend to the transfer of the property described above into the name of the applicant by attending to the ZIMRA interviews and signing any relevant documents necessary to effect the transfer of the property to the applicant.
5. The applicant in that event shall pay the amount required for capital gains tax and recover his money from respondent.
6. Alternatively, the applicant and 1st respondent be and are hereby ordered to agree on a valuator to value the property described in paragraph 1 above to ascertain its forced sale value.
7. The value determined by the valuator as per paragraph 6 above shall be the value of which applicant shall acquire the immovable property described in paragraph 1 and the respondent's indebtedness to the applicant shall be reduced by the amount determined to be the property's forced sale value.
8. Should parties fail to agree on a valuator, the Registrar of the High Court shall appoint a valuator for them.
9. Respondent shall pay all costs incidental to the appointment of the valuator and for the valuation of the property.
10. Respondent shall pay costs of suit on a legal practitioner and client scale."

The background material facts of the application may be set out as follows by reference to what the parties contend in their affidavits. The applicant is an individual adult male person

and the respondent are Trustees of Mental Olive Trust. The applicant alleged in para 4 of the founding that he learnt money to the respondent's Trust which was represented by a Trustee Cleopas Nyikadzino Mathabire. Applicant alleged that the amount of the advances were in an amount of US$75 000.00 secured by mortgage bond Reg. No. 1914/2020 dated 24 September 2020 in favour of the applicant, US$90 000.00 secured by mortgage bond Reg No. 322/2021 dated 18 March in favour of the applicant and US$120.00 secured by mortgage bond Reg No. 2025/20212 dated 18 August 2021. The three mortgages were passed over respondent's property called Stand 14d068 Salisbury Township held under deed of transfer Reg No. 1057/2016 dated 3 March 2016.

The applicant also attached to his affidavit three copies of the acknowledgement of receipts of the amounts indicated in the mortgage bonds. In addition, the applicant attached three copies of resolutions of Mount Olive Trust whose trustees are the respondents. The resolutions purport to authorize the deponent to the opposing affidavit to borrow on behalf of the Trust, the amounts secured by the mortgage bonds referred to above. The amounts to be borrowed in accordance with the resolutions are the same as reflected in the mortgage bonds aforesaid.

The applicant further attached copies of loan agreements which relate to the amounts alleged to have been advanced as per the registered mortgage bonds listed herein above. Further, the applicant attached a copy of an agreement extending the time for the respondent to pay the loaned amounts to 10 December 2021. In terms thereof, upon default by the respondent to repay the loaned amounts totalling US$285 500.00, the mortgaged property would be sold to the applicant for the sum of USD$300 000.00. The agreement further provided that failing by the applicant to repay the loan as agreed on 10 December 2021, the respondent would sign the agreement of sale of the mortgaged property on 11 December 2021. Further documents attached by the applicant included a declaration by seller, power of attorney to make transfer of both documents in the name of the seller.

The applicant averred that he ended up buying the mortgaged property for US$180 000.00 after agreeing with the respondent's representative that the US$300 000.00 previously indicated as the price at which the property would be sold was an over-valued amount as there were other properties bigger than the one in question which cost less. The applicant further averred that the respondent's representative Mr *Mathabire* signed all transfer documents and provided a copy of his national identity card to facilitate capital gains tax assessement. Mr *Mathabire* according to the applicant and upon attendance at Zimbabwe

Revenue Authority (ZIMRA) for interviews to assess the capital gains tax assessment reneged on the sale agreement. The applicant averred that he then filed case No. HC 447/22 against the respondent and ZIMRA for an order to compel the latter to assess and issue a capital gains tax assessment certificate. The applicant avers that he then withdrew case no. HC 447/22 after noting that the respondent was denying the existence of the mortgages and sale agreement. The applicant attached a copy of the respondent's opposing affidavit in case No. HC 447/22.

In the affidavit in case No. HC 447/22, the same deponent to this application on behalf of the respondent stated as follows in paragraph 3.4 and 3.5:

> "3.4. I challenge the applicant to produce a valid resolution by the respondent to sell the property in question to the applicant for the price that he purports was sold him.
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> 3.5. The respondent was given a loan by the applicant of USD25 500 (Twenty-five Thousand and Five hundred United States Dollars) and as condition of the loan to be secured, I had to sign an agreement of sale, power of attorney to pass transfer and declaration by seller."

The respondent therefore accepts that the agreement of sale, power of attorney to transfer and declaration by seller are authentic documents albeit it is submitted that the documents were executed to enable the loan disbursement but were otherwise not telling the truth of what they contained.

The respondent objects to this application being heard on the basis that there are material disputes of fact which cannot be resolved on the papers. Mr *Mapuranga* for the respondent submitted what he considered to be disputed facts not capable of resolution. These were submitte3d to be:

(a) The respondent denied that there was a sale agreement because the agreement sought to be enforced herein was in fact a disguised loan agreement.

(b) Whilst the applicant averred that there was a problem with obtaining a capital gains clearance certificate because the respondent disowned the agreement, the respondent averred that there was never an intention by the parties to transfer the property because there was no sale which took place.

(c) The applicant did not have a resolution of the respondent to authorize the sale of the property to the applicant. The submission was also made that there was no resolution for the sale price of US$300 000.00 nor indeed for the reduced price of US$180 000.00.

It was submitted that all material facts were denied by the respondent. Overally, the respondent's counsel submitted that the agreements were nothing more than disguised loans. Counsel referred to the case of *Mzilikazi and Anor vs Marume and 2 Ors* SC 39/2016 to advance the argument that the sale agreement in issue herein was a *pactum commissorium* and a sham, being a loan agreement disguised as a sale agreement and therefore was *void ab initio*. The submission is in my view one that touches on the merits of the matter after consideration of the parties' positions.

For the applicant Mr *Mubayiwa* submitted that the facts of the matter did not involve a loan agreement disguised as a sale because the agreement *in casu* was a loan advanced and mortgage bonds were registered to secure the loan. Counsel submitted that the issue that fell for determination was not whether there was an agreement of sale because it was there. The issue was whether performance of the agreement had been made. It was submitted that the *caveat subscriptur* rule in terms of which a party is bound by his or her signature whether or not the party has read and understood the contract would aptly apply. Counsel submitted that the respondents had not applied for rectification, cancellation or for a declaration of invalidity of the agreement it sought to impugn.

In reply Mr *Mapuranga* submitted that the inconsistencies which were not resoluble were several. He submitted that allegations inconsistent with the founding affidavit were such that the disputes could not be resolved on the papers. He pointed out to the dispute on the amount allegedly loaned to the respondent. He also submitted that repayments made had to be factored in and were not agreed. Counsel admitted that the respondent had not explained the registration of mortgate bonds and why they must the impugned.

The law and approach of courts in dealing with the question whether or not a dispute of fact which is not capable of resolution arises from the application is an area well-trodden in application procedure jurisprudence. The case of *Muzanenhamo* v *Officer-In-Charge C.I.D. law and Order and 6 Ors* CCZ 3/13. PATEL JA (as then he was) stated as follows on p 4 of the cyclostyled judgment when extrapolating the subject of material dispute of facts:

> "As a general rule in motion proceedings, the courts are enjoined to take a robust and common-sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Masukusa v National Foods Ltd & Anor* 1983(1) ZLR 232(S) at 235A; *Zimbabwe Bonded Fibreglass* v *Peech* 1987(2) ZLR 338(S) at 339C-D; *Ex-Combatants Security Co.* v *Midlands State University* 2006(1) ZLR 531(H) at 534E-F.

> 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 this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. See *Room Hire Co (Pty) Ltd* v *Karoi Farmtech (Pvt) Ltd* SC 146/86; *Boka Enterprises v Joowalay & Anor* 1988(1) ZLR 107(S) at 114B-C, *Kingstons Ltd* v *L.D Ineson (Pvt) Ltd* 2006(1) ZLR 451 (S) at 456C.D and 458D-E. The respondents' defence must be set out in clear and cogent detail. A bare denial of the applicant's material averments does not suffice. The opposing papers must show a bona fide dispute of fact incapable of resolution without *viva voce* evidence having been heard. See the *Room Hire Co. case, supra,* at 1165, cited with approval in *Viltareal Flats (Pvt) Ltd* v *Undenge & Ors* 2005 (2) ZLR 176(H) at 180C-D; *Van Niekerk & Ors* 1999(1) ZRL 421(S) at 428F-G."

The court's approach is amply demonstrated as above *in casu.* Without prejudicing the veracity of facts alleged by the respondent or holding that the issues raised by the respondent are not established, I will at this stage hold that I am not persuaded that the facts alleged as being in dispute are not capable of resolution on the papers. The documents annexed to the application by both parties present a series of events which can be said to show logicality in terms of sequence. I am not persuaded that the court cannot robustly deal with the alleged points of pleaded disputes of fact and resolve these points.

Under the circumstances, I am not persuaded that the facts alleged by the respondent in raising the objection can be said to have detracted from the facts alleged by the applicant to such extent that a ready answer to the dispute cannot be reached without the aid of oral evidence. I say this fully aware that in dealing with this objection the court must be careful to deal only with the possibility or impossibility of reconciling disputed facts. There is a risk that in doing so, the court may express itself in a manner that suggest a pre-judgment on the matter of the disputed facts alleged to be incapable of resolution.

Accordingly, it is determined that the point *in limine* is dismissed.

Koto & Company, applicant's legal practitioners
Rubaya & Chatambudza, respondent's legal practitioners