VENGANAI MUSEVENZO
versus
SYLVESTER NDEBELE BEJI
and
THE CITY OF MASVINGO

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 1 July 2013&4 September 2013

**Opposed application**

*W. Muchengeti,* for applicant
*M.M. Ndebele,* for respondent

MAFUSIRE J**:** This is an application for an order of specific performance. The applicant claimed that in February 2001 he had bought the first respondent's rights, title and interest in the property known as Stand 2851/9 Mutobwe Street, Masvingo [hereafter referred to as **the property**] for the sum of ZW$250 000-00 which he claimed to have paid in full. The applicant had obtained vacant occupation of the property immediately afterwards. He was still in occupation 12 years later when the matter came up for determination. It being the second respondent's property, the actual relief sought by the applicant was an order directing the first respondent to cede and transfer to him his rights and interest in the property. The second respondent had consented to the sale. In October 2006 it had written to the applicant to pay the cession fee and to come and sign the relevant cession forms. The applicant had complied.

The respondent admitted the sale. He admitted being paid by the applicant for the property. However, he opposed the relief sought on the basis that what the applicant had paid him was only half the purchase price and that the other half had remained outstanding. The Zimbabwean currency having become dysfunctional the first respondent estimated that the balance of the purchase price was US$7 000-00. He said if he was paid this amount he would sign the cession forms.

At the hearing the applicant asked for a default judgment on the basis that the first respondent had been automatically barred for failure to file Heads of Argument timeously. In terms of Order 32 r 238(2b) as read with sub-rules (2) and (2a) of the High Court of

Zimbabwe Rules [**the Rules**] a respondent who is to be represented by a legal practitioner at the hearing of an opposed application matter is required to file Heads of Argument within 10 days after the applicant has filed his or hers or else the respondent becomes barred. In this matter first respondent's Heads had been filed in June 2013. That was slightly more than a year out of time. Mr *Ndebele*, for the first respondent, applied for condonation. Mr *Muchengeti*, for the applicant, opposed the application. The condonation application was based on the claim that after the Heads had been drafted they had been sent by courier to the first respondent for his verification, but that the first respondent had moved residence and had therefore not received them. However, it was not clear whether or not the first respondent had eventually received the Heads before they were finally filed more than a year later.

I opted to hear argument on the merits of the main application after which I would give my ruling on both the interlocutory application for condonation and the main application for specific performance. At the end of the hearing I granted condonation but granted the main application on the merits in terms of the draft. I gave an outline of my reasons *ex tempore* and indicated that the full reasons would be made available only on request in writing. That was on 1 July 2013. On 24 July 2013 first respondent's legal practitioners wrote to request a full judgment in the matter. Below is the judgment.

At the end of the hearing I was satisfied that the applicant's version of events was more consonant with the probabilities in the case. Attached to the applicant's papers was a copy of a hand written letter by the first respondent to the second respondent stating unequivocally that he had paid off for the property and wanted to cede his rights to the applicant. In that letter the first respondent had implored the second respondent to accept the change of ownership. The material portion of the letter read as follows:

> "Re = Cession STD No 2851/9 Mutobwe ST
> I fully paid off the above House. I therefore want to cede my rights over this property to Musevenzo Venganai ID No 04-099102 V 04. Can you please accept the change of ownership.
>
> Yours faithfully
> Silvesta Beji."

In the notice of opposition the first respondent claimed that the above letter had not been attached to the application. However, if it was his set of papers that did not have the

attachment first respondent could have simply asked for one to be furnished. At any rate, the applicant had attached a second copy of the same letter to his answering affidavit. Nowhere, except in his Heads of argument filed more than a year out of time, did first respondent challenge the authenticity of that letter.

First respondent admitted that the applicant had paid for the property but claimed that the payment had amounted to only half the purchase price. He admitted to have visited the offices of the second respondent with the applicant but claimed that the visit was only for the purpose of advising the second respondent that he had sold his rights in the property to the applicant and that he would sign the cession forms only upon being paid the balance of the purchase price. Applicant had averred that the purpose of that visit was to advise the second respondent of the agreement.

To the aforesaid letter from the second respondent to the applicant in 2006 in which second respondent invited the applicant to come and pay the cession fees and to sign the cession forms the first respondent said he was raising no issue.

In February 2012 the applicant's legal practitioner had written to the first respondent *inter alia* narrating the agreement of sale, the payment by the applicant of the cession fees and demanding that the first respondent should attend to the signing of the cession forms. The applicant averred that the first respondent had received the letter but that he had refused to sign for it. In response to that the first respondent admitted receipt of the letter and only denied that he had refused to sign for it.

The first respondent claimed that there was a dispute of fact that was incapable of resolution on the papers. In his Heads of Argument it was denied that the first respondent had been the author of the handwritten letter referred to above. However, this denial had no foundation in fact. The second respondent had made no such denial himself.

A dispute of fact must be real and not fanciful. In *Zimbabwe Bonded Fibreglass [Pvt] Ltd v Peech* 1987 [2] ZLR 338 [SC] GUBBAY JA, as he then was, stated at page 339:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. See *Room Hire Co [Pty] Ltd v Jeppe Street Mansions [Pty] Ltd* 1949 [3] SA 1155 [T] at 1165; *Soffiantini v Mould* 1956 [4] SA 150 [E] 154; *Joosab & Ors v Shah* 1972 [1] RLR 137G at 138G – H;

*Lalla v Spafford NO &Ors*1973 [2] RLR 241; *Masukusa v National Foods Ltd & Anor* 1983 [1] ZLR 232 [HC]"

Where there is a genuine dispute of fact on the papers the court can proceed in one of several ways:

[1] The court can take a robust view of the facts and resolve the dispute on the papers; see *Masukusa v National Foods Ltd & Anor* 1983 [1] ZLR 232 [H]; *Zimbabwe Bonded Fibreglass [Pvt] Ltd v Peech [supra]*; *Van Niekerk v Van Niekerk&Ors*1999 [1] ZLR 421 [SC] and *Room Hire Co [Pty] Ltd v Jeppe Street Mansions [Pty] Ltd [supra]*

[2] The court can permit or require any person to give oral evidence in terms of r 229B of the Rules if it is in the interests of justice to hear such evidence;

[3] The court can refer the matter to trial with the application standing as the summons or the papers already filed of record standing as pleadings; see *Masukusa's* case above,

[4] The court can dismiss the application altogether if the applicant should have realised the dispute when launching the application; see *Masukusa's* case above; *Savanhu v Marere NO &Ors*2009 [1] ZLR 320 [S]; *Plascon- Evans Paints Ltd v van Riebeeck Paints [Pty] Ltd* 1984 [3] SA 623 [A].

In motion proceedings where real disputes of facts emerge, relief can be granted if the facts stated by the applicant together with the admitted facts in the respondent's affidavit justify such an order. In the aforesaid South African case of *Plascon-Evans* above CORBETT JA stated as follows at pages 634H – 635B of the judgment:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact [see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 – 5; *Da Matta v Otto NO* 1972 (3) SA 858 (A) at 882 D – H]. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court [cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164] and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it

> may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks [see e.g. *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E – F]"

The approach in *Plascon-Evans* was followed by our Supreme Court in *Savanhu's* case above. At page 324D – E MALABA D C.J said:

> "The appellant chose to proceed by way of court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact, the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order: *Plascon-Evans Paints Ltd v van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635B"

In the present case there were no genuine disputes of facts. It was not even a situation where the court would be called upon to adopt a robust approach in order to resolve a dispute of facts apparent on the papers. The first respondent admitted all the essential facts. I was convinced that the respondent's claim that what the applicant had paid him in respect of the cession was just but half of what he wanted was plainly an afterthought. He provided no evidence of this. Such a claim does not accord with the probabilities. It is not probable that without having been paid in full the respondent could have written to the second respondent not only confirming the sale but also giving instructions for the cession. Furthermore, he would not have given vacant occupation of the property to the first respondent and for 12 years have done nothing about claiming what had allegedly remained outstanding on the purchase price. He would not have accompanied the applicant to the second respondent's offices to inform it of the sale if he was still owed half the agreed amount. That the second respondent would have asked for and received payment of the cession fees from the applicant only confirmed the agreement that the parties had reached and that such agreement had been endorsed by the second respondent as the responsible authority and actual owner of the property .

In the founding affidavit the applicant claimed that the first respondent was withholding signing the cession forms because not only was he demanding more money but also that he was holding the applicant to ransom for the damages allegedly caused to the respondent by certain of the applicant's relatives. The respondent's claim that he wanted

US$7000-00 as the balance of the purchase price neatly dovetails with what the applicant alleged. That is unacceptable.

The first respondent had no defence. Opposition to the relief sought by the applicant was demonstrably spiteful. At the end of the hearing I granted an order in terms of the draft. The order was as follows:

IT IS ORDERED THAT:

1. The first respondent be and is hereby ordered to sign all the cession forms necessary to cede his right, title and interest in Stand No. 2851/9 Mutobwe Street, Masvingo, to the applicant within 7 days of the date of this order.

2. The deputy sheriff, Masvingo, be and is hereby authorised to sign the necessary forms should the 1st respondent fail to comply with paragraph 1 above.

3. The first respondent shall pay the costs of suit.

*Matimba & Muchengeti,* legal practitioners for applicant

*Chadyiwa & Associates,* legal practitioners for respondent