

PETROS LUFELI
versus
JOCKSTAR INVESTMENTS (PVT) LTD
and
ELIZABETH VANJERU
and
NICOLE TADIWA WANJIRI CHIGONDE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 7 August, 25 September 2019

Opposed motion

S. Machingauta, for the applicants
G. Madzoka, for the respondents

MUSHORE J: This is an application for a *declaratur* in which the applicant seeks to be declared the “true and legal holder of the rights, title and interest in Stand Number 2922 [formerly stand number 2468] ZIZALISARI, Lot 4, also known as Mount Pleasant Heights” Applicant is seeking consequential relief by way of a demand that respondent issue him with a CLEARANCE CERTIFICATE for Stand Number 2922. The application is opposed.

The facts as stated by the applicant are that on the 17th December 2009, he entered into an agreement of sale with the first respondent in order to purchase Stand No 2468 Zizalisari for the agreed sum of \$15,000-00. Applicant appended the relevant receipts to his founding papers, thereby demonstrating that he had paid a purchase price for the stand in the amount of \$15,000-00. The receipts were issued by Pride Real Estate Agency. He submitted in his papers that he had also paid the required development fee to the 1st Applicant. Applicant stated in his founding affidavit that after he had paid for the stand, the 1st respondent issued him with a Clearance certificate, and that it was then that he saw that he had been allocated stand number 3027 instead of stand 2922. Applicant’s grievance thus, is that he was allocated the wrong stand number. Applicant couched the relief which he is desirous of obtaining as follows:

DRAFT ORDER

“WHEREUPON after reading documents filed of record and hearing the parties Counsel:

IT IS ORDERED THAT;

- a. An Order declaring that Applicant is the true and legal holder of the rights, title and interest in Stand No 2922 (formerly Stand 2468), ZIZAKISARI Lot 4 also known as Mount Pleasant Heights.
- b. An Order directing the first respondent to issue a Clearance certificate that bear Stand number 2922.
- c. An order for payment of costs on an attorney client scale”

This very matter came before this court originally on the 20th February 2019, with the applicant only suing the first respondent. MATHONSI J (as he was then) determined that the matter could only be fully resolved if the persons who had purchased, and had eventually been allocated Stand 2922 were joined to these proceedings, because they too had an interest in the outcome of this matter. Having applied his discretion in terms of O 13 r 87 (1) of the High Court Rules, 1971, the learned Judge ordered that the other purchasers (those being the second and third respondents here) be joined to these proceedings. The second and third respondents were served with the papers thereafter, and they have since then filed their notices of opposition; which are now part of this record.

The first respondent believes that it was bound by the terms of the agreement of sale to allocate a stand to the applicant; but that the specific stand number would only be determinable upon the Surveyor General having obtained approvals for the survey work. 1st respondent averred that the applicant ought to have appreciated that the terms of the agreement of sale made it clear that the Stand number allocation depended upon the Ministry of Local Government having issued an approval for the subdivisions. In other words what the first respondent is saying is that the stand number was not set in stone at the time that the applicant signed the agreement of sale. In furtherance of the position it had taken, first respondent referred the court to (i) a letter dated 27th September 2018 written by the first respondent’s lawyers to the applicant; and (ii) article 7 in the preamble of the agreement of sale which states that the first respondent had the right to allocate purchasers a different stand number.

In their opposing affidavits, second and third respondent stated that they had a vested interest in the stand which applicant was pursuing, as they too were genuine purchasers in the same way that the applicant was. They appended their agreement of sale with the first respondent and they also took the legal point that at the time that this application was filed; the applicant had no title or interest in Stand 2468 because the rates clearance certificate had been issued to them. Thus they formed the view that Applicant could only have his rights, title and interest in stand 2468 considered if he was the holder of a clearance certificate to stand 2468.

At the hearing of the matter before me, the second and third respondents’ counsel took a point *in limine* He submitted that the agreement of sale upon which the applicant was basing

its claim was an illegal agreement. He referred me to s 39 (1) as read with section 40 of the Regional Town and Country Planning Act [*Chapter 29:12*] which reads:-

“SUBDIVISIONS AND CONSOLIDATIONS

39 No subdivision or consolidation without permit

(1) Subject to subsection (2), no person shall —

(a) subdivide any property; or

(b) enter into any agreement—

(i) for the change of ownership of any portion of a property; or

(ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or

(iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his life time; or

(iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more;

or

(c) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section forty:

Provided that an undivided share in any property, whether or not it is coupled with an exclusive right of occupation, shall not be regarded for the purposes of this subsection as a portion of that property”

40 Application for permit

(1) An application for a permit to do anything specified in paragraph (a), (b) or (c) of subsection (1) of section thirty - nine shall be made to the local planning authority in such manner and shall contain such information as may be prescribed and shall be accompanied—

(a) by the consent in writing of the owner of the property and of every holder of a mortgage bond registered over the property; and

(b) if so required by the local planning authority, the consent in writing of the holder of any other real right registered over the property”.

The question of illegality of the contract in terms of those sections was discussed by MATHONSI J in the earlier judgment in this matter in which as I have stated the learned Judge did not make a final determination in this matter, but instead ordered that second and third respondents be joined before the matter could be finally determined. I find MATHONSI J’s *obiter* comments to be of good guidance. In his judgment the learned Judge cited the Supreme Court case of *X- Trend-A-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348 (SC) in which McNALLY JA stated that:

“The agreement with which we are concerned is clearly an agreement for the change of ownership of the individual portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing, or later on an agreed date, or when the suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited. The evil which that statute is designed to prevent is clear. Development planning is the function and duty of planning authorities and it is undesirable that such authorities should have their hands forced by developers who say; but I have already entered into the conditional agreements; major developments have already taken place; large sums of money have already been spent. You cannot possibly now refuse to confirm my unofficial subdivision of the property”

I understand McNALLY JA to be saying that a developer should not be allowed to force town planning authorities to be bound to a contract for the sale or purchase of land in circumstances where the subdivision has not been made official by the town planning authorities. Therefore where a subdivision remains unofficial by virtue of a lack of confirmation by the authorities, then the agreement of sale could be prohibited.

In the present matter, the authorities confirmed the subdivision sometime **after** the agreements of sale had been executed. Taking the above-cited case into consideration coupled with the fact that in the present matter the agreements of sale were signed **before** the subdivisions were approved; it seems clear that the applicant is estopped from insisting upon a declaration of rights because clause 7 of the preamble to the agreement of sale clearly placed first respondent in a position that he could not guarantee the applicant the stand number referred to in the agreement of sale. As far as I see matters, the applicant is entitled to insist only upon the provision of a stand; but not upon the specifics of its **number**, size or shape.

Clause 7 of the preamble to the agreement of sale reads:-

“7. AND WHEREAS the purchaser accepts that the Surveyor General and other relevant authorities may modify or change the number or size or shape of the stands on approval”

Clearly by signing the agreements of sale the purchasers were or ought to have been aware that there could be changes in the **number** (as in **the quantity** of stands to be sold) as opposed to the *numbering* of the stands as has been suggested by the applicant. It is my view that the 1st respondent did not represent to the applicant that the numbering would remain the same upon signing of the agreement of sale.

DECLARATION OF RIGHTS

Applicant is desirous of a declaration of his rights to stand number 2468. Applicant has approached this court based upon this court’s powers to order a *declaratur* in terms of section 14 of the High Court Act [*Chapter 9:07*] which reads:

“14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”

See: *Munn Publishing (Private) Limited v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 (ZS).

From the wording of the agreement itself, the applicant accepted that there could be a change to the stand dependent upon the authorities granting the subdivision applied for. The

right to stand 2468 is contested by second and third respondents who have been issued a clearance certificate for stand 2468. Because the second and third respondents have presented a clearance certificate for stand 2468, the present matter is classified as a double sale case. Thus it is not only the applicant's rights which I must consider but also those of the other respondents' in resolving the conundrum between the conflicting claims. In this matter, the applicant's plea for a *declaratur* has been clouded by the claims made by the second and third respondents. It is therefore necessary for me to determine the matter without ignoring the second and third respondent's claim to the stand.

SPECIFIC PERFORMANCE.

The consequential relief sought by the applicant is essentially an order for specific performance. Applicant is asking first respondent to issue him with a Clearance Certificate to Stand 2468.

In *Intercontinental Trading Private Limited v Nestle Zimbabwe Private Limited* 1993 (1) ZLR 21 (HC) ROBINSON J at page 27 dealt at length with the common law approach to the granting or otherwise of orders *in forma specifica*. At page 27 of his judgment ROBINSON J referred to comments made by INNES CJ in *Farmers' Co-Operative Society v Berry* 1912 AD 343 at page 350:

“A party's right to specific performance is a matter for the discretion of the court in which the claim for specific performance is made. The discretion is to be exercised judiciously upon a consideration of all the relevant facts, and must not operate unduly harshly on a defendant. Furthermore, where performance has become impossible, the court will not decree specific performance”.

Per ROBINSON J at page 27:

Thus, the court must not ignore the consequences that may be brought to bear on a defendant/respondent when decreeing specific performance. In *Crundall Brothers (Pvt) Ltd v Lazarus 7 Anor* 1992 (2) SA 423 (SC) at page 430 [C-D]:

“The discretion is to be exercised judiciously, upon all the relevant facts”

It is common cause that the second and third respondents have made developments on the stand. It is also common cause that they hold a clearance certificate which on the face of it gives them rights in the stand. It is also common cause that the stand 3007 for which the applicant holds a clearance certificate is the exact same size as stand 2468 that being 2000 square metres. The second and third respondents have developed the property. It is simple to understand that granting the applicant the decree of specific performance would be unduly

harsh to the second and third respondents as they have invested in the property and developed it. Reversing the process would involve claims for compensation, unnecessary uprootment from the property and relocation expenses. Which brings me to question why the applicant did not cite the second and third respondents when he brought the application to court the first time. I suspect that applicant would have been aware; or at least suspected that his ability to obtain a *declaratur* could be met with lawful resistance by the second and third respondents. The present matter is one such that specific performance in the manner applicant expects is impossible to order.

That being the case, the applicant has failed to meet the required standard for a declaration of rights.

Taking all the above into account, it is my conclusion that the application for a *declaratur* and the consequential relief must fail.

Accordingly, I order as follows:

“Application is dismissed with costs”.

Tavenhave and Machingauta, applicant’s legal practitioners
Zimudzi and Associates, respondents’ legal practitioners