

MISHECK MAWEMA
versus
ELSHADAI HOUSING COOPERATIVE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 16 July 2024 19 February 2025

Court Application For A Declaratur

H S Sarah, for the applicant
R Kapanga, for the respondent

TAKUVA J: This is an application for a declaratur in terms of s 14 of the High Court Act, [Chapter 7:06].

Background Facts

The applicants were offered stand No. 1211 Medium Density, Woodbroke North Bindura by the respondent on 17 November 2011. The full purchase price on the offer letter was in the sum of USD1500.00 which applicants paid in full upon acceptance of the offer. The respondent proceeded to allocate the stand to the applicants and deferred the signing of the Agreement of sale to a later and unspecified date pending servicing of the stand. The respondent has decided to ignore and distance itself from the offer and has issued the applicants with an agreement of sale in respect of the same stand with a new purchase price different from the terms of the initial offer letter. The new agreement did not consider the payments made by the applicants and is silent about same.

Disturbed by this sudden development, applicant has approached this court for a Declaratory Order and Consequential Relief. The application is opposed by the respondent.

From the notice of opposition, the following appear to be the issues;

(a) Whether or not applicants have a direct and substantial interest in the subject matter

- (b) Whether or not the November 2011 offer created a legally valid contract between the parties
- (c) If the answer to (b) above is in the affirmative, whether or not respondent is in breach of its contractual obligations
- (d) Whether or not respondent is legally bound and liable for the transactions contracted on its behalf by its employee and the applicants
- (e) If the answer so (d) above is in the affirmative, whether or not applicants are entitled to the consequential relief being sought herein.

In *Johnson v AFC* 1995(1) ZLR 65, it was held that the condition precedent to bringing an application for a declaratory order is that the applicant must be an interested person having substantial and direct interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated there to.

Clearly, applicants as buyers of the stand have a substantial and direct interest in the matter.

THE VALIDITY OF THE CONTRACT

Respondent content that the contract is unlawful and invalid because it was signed by one of its employees who acted fraudulently without the respondents knowledge. A valid contract has the following elements;

- (a) An agreement by at least two persons with contractual capacity
- (b) A serious intention to contract
- (c) Must be physically capable of performance
- (d) Serious intention to be bound See Christie R H Law of Contractin South Africa 7th edition.

As regards specific performance, every party to a binding agreement who is ready to carry out his own obligation under it has the right to demand from the other party, so far as it is possible, performance of undertaking in terms of the contract-See *Smith and Ors v ZESA* HH 22/03 where the court said that plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he bound himself to do or to claim damages for the breach. The court has a discretion to refuse to decree specific performance.

In *casu*, the relief of specific performance is available to the applicants as the stand in question is still available and applicants are already in occupation of same.

Respondent also argued that its is not vicariously liable because its former employee was on a frolic of his own when he offered the stand to the applicants. The doctrine of vicarious liability is to the effect that an employer is vicariously liable for all delicts committed by his or her employees who are not independent contractors when they are acting in the course of and within the scope of their employment at the time the delicts were committed. There is a compelling social policy behind the concept of vicarious liability. Corporations or large employers carry out extensive operations through employees. Thus, employer must in an appropriate case answer for the faults of his or her employees, as long as they are committed in the course and within the scope of their employment-See *Gwatiringa v Jaravaza and anor* 2001(1) ZLR 383(H).

Respondents' employee one Gallant Sibanda, it is common cause was at all material times employed by the respondent and worked within respondent's premises executing respondent's duties and using respondent's stationery. Therefore, respondent can not escape vicarious liability on the actions of this employee.

Further, respondent's claim that the offer letter was fraudulently obtained is an afterthought. Sanctity of contract demands that those who enter into contracts are required to fulfil their contractual obligations.

As regards unjust enrichment, the doctrine allows a plaintiff to recover from the defendant without the benefit of an enforceable contractual obligation, where defendant has unfairly benefited from plaintiff's efforts without compensation -See *Dendairy (Pvt) Ltd v Zimbabwe Electricity Transmission and Distribution Co. (Pvt) Ltd* SC 813/18.

The issue of disputes of fact does, not arise because on either version of events, the dispute is resolved on the doctrine of vicarious liability. As such I find that applicants have managed to satisfy the requirements for an order of this nature to succeed.

In the circumstances, it is ordered that.

1. The signed offer letter in respect of stand No 1211, Medium Density, Woodbroke North, Bindura in favour of the applicant be and is hereby declared to be valid and legally binding and enforceable against the respondent.

2. The payments made by the applicants to the respondent's employee constitute full payment for stand No 1211, Medium Density, Woodbrook North Bindura.
3. The respondent be and is hereby compelled to allocate a Medium Density stand namely stand No. 1211, Medium Density, Woodbroke North, Bindura or an alternative Stand measuring 327 square metres within the same locality to the applicants.
4. The respondent shall pay costs of suit.

TAKUVA J:.....

Tsara and Associates, applicants' legal practitioners
Mangwana and Partners, respondents' legal practitioners