REPORTABLE (16)

(1) SHADRECK MUNATSI (2) FAITH MUNATSI
v
(1) JOHN TRANOS MATUKUTIRE (2) RATIDZAI MATUKUTIRE

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHITAKUNYE JA & KUDYA JA
HARARE: 23 OCTOBER 2023

T. Magwaliba, for the appellants

F. Mahere, for the first respondent

No appearance for the second respondent

UCHENA JA:

1. This is an appeal against the whole judgment of the High Court handed down on 31 July 2023, in which it confirmed the cancellation of an agreement of sale between the first respondent and the appellants.

2. After hearing the appeal on 23 October 23 the Court gave an *ex tempore* judgment and issued the following order:

> "**IT IS ORDERED THAT**:
>
> 1. The appeal be and is hereby allowed with costs.
>
> 2. The judgment of the court *a quo* is set aside and substituted with the following:
>
> a. The application be and is hereby referred to trial.
> b. The applicant's founding affidavit shall stand as the summons.
> c. The first and second respondent's opposing papers shall stand as their appearance to defend.
> d. Thereafter pleadings shall be in terms of the rules.
> e. Costs shall be in the cause."

Thereafter on 30 September 2024 counsel for the appellants wrote a letter to the Registrar requesting for written reasons for the order we granted. These are they.

FACTUAL BACKGROUND

3. On 10 May 2018, the appellants and the first respondent entered into a sale agreement. The agreement was for the sale of stand No 1239 Stand 1239 Good Hope Township of Lot 16 Good Hope, Harare, by the first respondent to the appellants for US$50 875-00. A deposit of US$ 25000-00 was to be paid on the signing of the agreement in cash to the first respondent. The balance of US$25 875-00 was to be paid as cash in monthly installments of US$718-00 per month to the first respondent, over a period of 13 months commencing on 1 August 2022 until it was paid in full.

4. In terms of clauses 1 and 2 all payments were to be made directly to the first respondent in cash. The first respondent cancelled the agreement of sale four years later, on 4 May 2022 alleging that the appellants had not paid the deposit and instalments in terms of clauses 1 and 2 of the agreement of sale. At the time of cancellation the appellants had completed the construction of the ground floor of the house they were building on the property.

5. In their opposing affidavit deposed to by SHUWISO BANDIKA their agent on the authority of a Power of Attorney issued to him by the first appellant he stated that he paid the deposit to the first respondent in cash, in the presence of his wife the second respondent. He further stated that at the signing of the agreement and payment of the deposit his principals the appellants who stay outside the country, were participating through phone calls. He further stated that the first respondent received the deposit and asked his wife (the second respondent) to issue a receipt to the appellants. He stated that the second respondent issued the receipt on 1 June 2018. In respect of installments he stated that he would approach the first respondent to make payments who, would on each occasion, instruct him to make the

payments to his wife who would give him, receipts for the payments. He further stated that the first respondent allowed the second respondent his wife to market the property and receive payments of instalments on his behalf. He stated that all the installments were paid to the second respondent on the instructions of the first respondent.

6. After the first respondent cancelled the agreement on 4 May 2022 he applied to the court *a quo* for the confirmation of the cancellation.

7. The deponent to the appellants' opposing affidavit further stated that the first respondent was duping purchasers of stands in his development scheme using the same *modus operandi.* He averred in paras 6 to 8 of the appellant's opposing affidavit that:

> "6. A resolution of the dispute cannot be objectively attained without the calling of further evidence. Which evidence can be tested through cross-examination. The events as alluded to by the applicant and the respondents are irreconcilable. The Applicant states that the first and second respondents have never paid to him any money towards the purchase of the property, which is at variance with the evidence of the respondents who state that they paid the purchase price in full. A point which can be confirmed by the third respondent who was and still is the agent of the Applicant whom he had authorised to receive payments on his behalf. A fact which he now denies in bad faith so as to contemplate huge financial prejudice on the first and second respondents. I hereby attach the proof of payment and globally mark them as Annexure "B".
>
> 7. The Court should also take judicial notice of the fact that the Applicant is using the same modus *operandi* to prejudice home seekers who would have paid to him the full purchase prices for homes and he now disowns them. An example of similar cases that are before the honourable court are a Court Application for the confirmation of the cancellation of an agreement of sale filed under reference HCH 5557/22 between the Applicant and Ronald Sithole and two others. Another Court Application for the confirmation of the cancellation of an agreement sale filed under reference HCH 3646/22 between the Applicant and Fillet Madenga and another **and many others that contains similar facts to the present case.**
>
> 8. This ought to encourage the Court to lean in favour of having all issues canvassed through the leading of evidence and have the witnesses cross examined. This will give the court the benefit of determining the issues of credibility of the witnesses while having an opportunity to deal with the core of the dispute."

8. It is clear that the dispute between the parties is that the first respondent deliberately caused the appellants to pay instalments to the second respondent his wife after he had personally accepted the deposit after which he instructed his wife to issue the receipt.

DETERMINATION OF THE COURT *A QUO*

9. In granting the first respondent's application the court *a quo* on the issue of whether or not the appellants had paid the purchase price in the manner stated by their deponent said:

> "Manifestly, the applicant's cause of action does not hinge on the fact that the respondents did not pay the purchase price. It hinges on the fact that the payment was not made strictly in accordance with the agreement of sale that required payments to be made directly to him in cash. The applicant denies ever receiving the purchase price at all. But the respondents have produced incontrovertible proof that they did pay, albeit via the third respondent. The applicant says he never authorised the third respondent to receive the purchase price for him. Yet the third respondent is not a distant and an unrelated third party. To begin with, she was at all material times the wife of the applicant. But more importantly, she was very much an integral player in the sale deal. On the agreement of sale, not only did she sign as the applicant's witness, but also whilst the applicant is captioned as the "seller", below her own signature is the caption: "SOLD BY MRS RATIDZAI MATUKUTIRE"

10. In arriving at its decision the court *a quo* in para 13 of its judgment said:

> "[13] However, in the light of the Supreme Court decision in *Matukutire* v *Makwasha & Ors* above, and the doctrine of *stare decisis*, the dispute in this matter is practically issue estoppel. The respondents are estopped from raising the grounds of defence that they have raised in this matter. The superior court has already ruled against such a defence, namely that they paid the purchase price via the third respondent. The law on issue estoppel, a species of *res judicata*, is settled: see *Galante* v *Galante (2)* 2002 (1) ZLR 144 (H). In paraphrase, it is this: in the interest of finality in litigation as a tenet of public policy, **a party is precluded from raising in subsequent proceedings an issue, whether of fact or of law, that was previously determined to finality by a competent court between the same parties or their privies:** see *Willowvale Mazda Motor Industries* v *Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S)". (Emphasis added)

11. The court *a quo* eventually granted the first respondent's application for confirmation of the cancellation of the agreement of sale.

SUBMISSIONS BEFORE THIS COURT

12. Mr *Magwaliba* for the appellants submitted that there are disputes of facts which cannot be resolved without leading *viva voce* evidence. He referred us to the appellants' opposing affidavit which states that the first respondent received the deposit and instructed his wife to issue the receipt. He also referred to payments of instalments after the first respondent on being approached for payments instructed the appellants to make the payments to the second respondent his wife. He referred us to the receipts issued by the second respondent as proof of payment of the purchase price.

13. Ms *Mahere* for the first respondent argued that the appellants breached the contract by failing to pay in terms of the contract.

THE ISSUE

14. The issue which arises for determination is whether or not there were disputes of facts which warranted a remittal of the case for the hearing of evidence.

APPLICATION OF THE LAW TO THE FACTS

15. The law on disputes of facts was clarified by MAKARAU JP (as she then was) in the case of *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi*, 2009 (2) ZLR 132 at 136F, where she said:

> "A material dispute of fact arises when such material facts put 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."

16. In this case we are of the view that, the issue is on whether the first respondent used deception to cancel the agreement of sale. The appellants' allegation is that the first respondent personally received the deposit but did not personally issue the receipt having instructed his wife to issue the receipt to the appellants. On installments the appellants said the first respondent was approached for purposes of payment but he would divert the

appellant's agent to his wife to whom payments were eventually made. The appellants further alleged there are other purchasers under the first respondent's Housing Scheme, who were duped in this manner. They gave details of cases in the court *a quo* of persons who were subjected to the same *modus operandi*.

These in our view are disputes which do not leave the court with a ready answer. They warrant the hearing of *viva voce* evidence. The issue goes beyond what the law says. It calls for the determination of whether or not the first respondent personally received the deposit and instructed his wife to issue the receipt. It further calls for a determination on whether or not the appellant's agent approached the first respondent to pay installments but was deliberately instructed to go and pay to the second respondent.

17. In respect of the case heard and determined by this Court in *Mutukutire* v *Makwasha* SC 92/21, in which the first respondent successfully appealed against the High Court's refusal to confirm his application for confirmation of the cancellation of the agreement of sale, we took the view that though it dealt with an agreement of purchase of land in the same scheme the parties are different and the details of what happened differ.

18. We are of the view that the hearing of evidence will establish whether or not the first respondent duped or induced the appellants to pay in the manner they did. If he did the issue of whether he can benefit from his wrong doing would arise.

19. It was for these reasons that the court issued the order referred to in para 1 of this judgment.

CHITAKUNYE JA : I agree

KUDYA JA : I agree

Mangwana & Partners, 1st & 2nd appellants' legal practitioners.

Mugiya & Muvhami Law Chambers, 1st respondent's legal practitioners.