ISAAC MAPIRA
versus
DIVINE HOMES (PVT) LTD
and
JUDITH HLATYWAYO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 10, 23 November, 2021 and 16 March, 2022

OPPOSED APPLICATION

N. Madya, for applicant
T.M. Kanengoni, for 1st respondent
T. Zhuwarara, for 2nd respondent

TAGU J: This is a court application for a mandatory interdict compelling first Respondent to implement the provisions of the cession agreement.

The facts are that on 23 December 2020 the Applicant and the second Respondent executed an agreement of sale in which the second Respondent agreed to sale an immovable property known as Stand 274 of Stand 1 Gletwyn Township measuring 6010 square metres to which she is cession holder for the price of US$60 000, which amount the Applicant paid on the date of signature. The first Respondent held a developer cession permit in respect of the immovable property which was the subject of the agreement of sale. On the same day the parties executed a cession agreement in terms of which the second Respondent ceded all her rights, interest, and obligations in the property. The agreement was accepted by the first Respondent. Second Respondent further deposed to an affidavit in terms of which she authorized the first Respondent to effect change of ownership to Applicant. On the strength of that cession agreement and the affidavit the Applicant approached the first Respondent. To his shock he was advised by a Mr. Eliot James from first Respondent's offices that they were unable to implement the cession agreement and the second Respondent's instructions in the affidavit.

Three reasons were advanced. Firstly, that there was a verbal loan agreement between second Respondent and Applicant. That the property in issue was pledged as security to that debt

and that parties opted to record this arrangement as agreement of sale instead. Secondly, that the agreement was a *pactum commissortium* and therefore unenforceable. Thirdly, that they advised the property developer that the purported agreement of sale was subject of pending litigation and the contemplated changes could not be carried out. Negotiations followed but the issue could not be resolved hence the present application.

The gist of the first Respondent's defence is that it is neither party nor privy to the agreement of sale entered between the applicant and the second respondent nor the circumstances under which the second Respondent deposed to an affidavit. It said these were done without its involvement. It said it only came into the picture at the stage where the parties wished to advise it of the fact of the alienation of the second respondent's rights and interests in stand 274 of stand 1 Gletwyn Township to the applicant and of the consequent cession of those rights and interests through a formal written cession agreement. It further said its role in that process is not constitutive of the alienation and cession of the rights and interests but simply acknowledgment of same for its records. It said what it did upon being asked to pass cession in favour of the applicant's unnamed third party was to highlight that there was correspondence from the legal practitioners representing the seeming erstwhile repository of rights and interest in stand 274 of stand 1 Gletwyn Township, challenging the sale to the applicant. It therefore said none of the requisites of a mandatory interdict have been met by the applicant in this matter.

On the other hand the second respondent's defence is that sometime in December 2020 she was introduced to the Applicant to facilitate a loan to fund her business. Negotiations culminated in Applicant and herself agreeing on terms of the loan whose material terms were that Applicant was to advance her the sum of US20 000.00, on an interest of 35% per month. That she was expected to pay back the full capital plus interests by April 2021. As security for her indebtedness to Applicant she was to conclude an agreement of sale in respect of an immovable property in favour of Applicant. She said she was led to believe that the agreement of sale was to facilitate recovery of the sums due to the Applicant should she defaulted on making any repayments due in terms of the agreement, hence the Applicant caused her to depose to an affidavit stating that she had sold the immovable property to him.

The second Respondent raised a point *in limine* to the effect that this matter is incapable of being resolved in an application proceedings as there are material disputes of fact. She said while

the Applicant said there was an agreement of facts the true position is that the agreement was that of a debtor and creditor where the property in question was employed as makeweight for the due performance of the terms of the loan agreement.
The parties agreed that the point *in limine* be dealt with when dealing the merits.

This is an application for a mandatory interdict. An application for a mandatory interdict stands on the following requirements stated in *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S).

a. Clear or definite right – this is a matter of substantive law.
b. An injury committed or reasonably apprehended- an infringement of the right established and resultant prejudice.
c. The absence of a similar protection by any other ordinary remedy- The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable, (c) be a legal remedy, and (d) grant similar protection.

I will decide whether the above requirements were satisfied in this case.

I heard the parties in their oral submissions through their respective legal practitioners. I also read the papers filed of record. The unescapable conclusions I reached after a careful assessment of the submissions and the papers before me are that the Applicant and the second Respondent entered into an agreement of sale of the property in question which is on p 8 of the record for an amount stated therein as US$60 000.00. Nowhere is an amount of US$20 000 recorded. This amount of US$60 000.00 was paid in full at the time of the signing of the agreement which was executed on 23 December 2020. Having signed the sale agreement parties went to first Respondent and executed cession agreement which is on p 12 of the record. The second Respondent further deposed to an affidavit on p 15 wherein she said she sold her property to Applicant.

The first respondent says it was not party to the agreement. That is obviously not true. Respondent cannot renege from that agreement. The first Respondent participated on the ceding and cannot deny that. By refusing to accept Applicant as holder of rights the first Respondent is unnecessarily interfering with rights of the Applicant. It is the conduct of the first Respondent that prompted this application for a mandamus interdict. The agreement must be enforced against the first Respondent. The agreement of sale and the cession establish clear rights for the order being sought.

The Respondents did not challenge that they signed the agreements, hence Applicant's rights are extant. They said this was a simulated agreement. There is no information on agreement being signed as security of the loan. This is intertwined with the point *in limine* raised by the first Respondent. The argument that it was a loan agreement and not what is before the court cannot be sustained. A party that alleges simulated agreement must prove it. See *Zander* v *van zil* 1910 AD 302 at 314. What is averred is without evidence before me pointing to a loan transaction. There is also no evidence on which dispute of fact can be alleged. The second Respondent simply failed to discharge the onus on her. On p 17 is a letter showing there is no dispute. That letter was never forwarded to the Applicant. The second Respondent was legally represented and could not confront Applicant. There is no case to set aside that transaction.

Applicant only became aware after confronting the second Respondent. Second Respondent did not tender repayment. It is clear that the purchase price is what parties agreed.

While the first Respondent argued that the first Respondent need not do anything as the issue is between second Respondent and Applicant I do not agree with that submission. I further do not agree with the submission that agreement was a fraud.

The legal position on what constitutes cession cannot be disputed. First Respondent was approached by the parties and made to sign document on p(s) 12 to 13 of the record. The signature on p 14 cannot be without legal significance. First Respondent simply refused to give rights to the Applicant. Order on p 52 is warranted basing on the conduct of the first Respondent. However, I noted that there is no order sought against the second Respondent save for costs. Second Respondent cannot be compelled to do anything. The relief is against the first Respondent. However, counsel for the Applicant submitted that clause 5 was overtaken by events. In my view the Applicant has made a case for the relief sought on p 52 as all requirements have been met in this case.

IT IS ORDERED THAT

1. The application to compel first Respondent to implement the provisions of the cession agreement signed on 23 December 2020, be and is hereby granted.
2. The first Respondent be and is hereby ordered to register the cession agreement and thereupon recognize the Applicant as the lawful cessionary for all intents and purposes.

3. Respondents to pay costs of suit, jointly and severally, with one paying the other to be absolved, on the higher scale of legal practitioner and client.

Wintertons, applicant's legal practitioners
Nyika Kanengoni & partners, first respondent's legal practitioners
Mambosasa, second respondent's legal practitioners