MARVELOUS MASIYA
versus
SIMON CHIKUNGUWO
and
REGISTRAR OF DEEDS (N.O)
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 7 and 12 October 2022

Opposed Application

T Mutukwa, for applicant
S N Bwanya, for 1st respondent

TAGU J: This is an application for a compelling order of the transfer of property namely a certain piece of land situate in the District of Salisbury called Stand 4008 Prospect Township of Stand 104 of Prospect measuring 1 848 square meters (One Thousand Eight Hundred and Forty – Eight square metres), the applicant bought from the first respondent. In short this is an application for the first respondent to be compelled to give the applicant vacant possession of the above – mentioned property.

The circumstances of the matter as stated by the applicant in his founding affidavit are that the applicant and the first respondent entered into an agreement on 28 July 2021 for the sale of the above-mentioned property for US$50 000.00 (Fifty Thousand United States Dollars) which has since been paid in full. Cardinal to the agreement is clause 4 which says that the money would be paid upon signing of the Agreement of sale and the signing of the same would act as an acknowledgment of receipt by the seller. The money was paid upon the signing of the agreement of sale. After payment of the purchase price the first respondent signed a declaration by the seller to enable transfer of the same. The purchaser also signed a declaration by the Purchaser to transfer the property to enable the transfer of the same. Further, the seller deposed a power of attorney to transfer the property in question. Clause 4 of the agreement of sale stipulates that occupation will

be given to the purchaser after three months from the signing of an agreement. Clause 6 stipulates that the first respondent was supposed to transfer title within 14 days of payment of full purchase price. This was not done due to Covid -19 restrictions.

Trouble started early September 2021 when applicant called first respondent to go to ZIMRA for interviews. First respondent became evasive. A letter of demand was sent to the first respondent by his legal practitioners, having refused or neglected to have the property transferred to the applicant, subsequently, the applicant filed the present application.

In his notice of opposition the first respondent painted a different story. His version is that he never sold his property to applicant at all. He said he borrowed Fourteen Thousand United States Dollars (USD 14 000.00) on twenty percent (20%) per month interest. That he has since repaid the entire amount. He attached a receipt being Annexure SCI issued by applicant confirming that as at 28th August 2021 he had repaid the amount save for One Thousand, Two Hundred and Seventy Five United States dollars (USD 1 275.00). In exchange for that loan, applicant demanded that he execute various documents which applicant required as surety for the debt. These are the documents applicant attached as Annexure A, A1, A2, B and D to this application. He said the purpose for which these documents were executed was never a sale, no agreement was ever reached for the sell or purchase of a property. Accordingly no rights or obligations of a sell/purchase ever arose, not least from the documents applicant relies on. Accordingly, the agreement between himself and the applicant was unlawful, no rights arise from it, as the court cannot assist applicant to enforce an unlawful agreement. To that end the first respondent raised two points *in limine* that courts do not enforce unlawful contracts entered into in *fradulem leges.* He said the Supreme Court has ruled that loan agreements such as the one entered into by himself and the applicant (as a loan shark) is unlawful. He denied ever receiving a sum of USD 50 000.00 from the applicant. the second point *in limine* raised in he heads of argument by the first respondent is that there are material disputes of fact emanating from the fact that the applicant entered into an Agreement of sale of immovable property for USD 50 000.00, while the first respondent said it was a loan agreement for the sum of USD 14 000.00.

In his answering affidavit the applicant disputed that the contract was entered into in *fradulem leges.* He maintained that the present application is emanating from an Agreement of sale that was entered into by the applicant and the first respondent. To show that the sale was

above board Annexure A is the Agreement of sale. Also, the first respondent surrendered his title deeds, attached his national identity card (Annexure A2), signed a declaration by the seller (Annexure B), deposed Power of Attorney to make Transfer (Annexure D). If indeed this was a loan agreement why would he sign all these specially the power of attorney to transfer property? applicant also denied that there material disputes of fact. It argued that the agreement is clear and enforceable.

At the hearing of the matter the court directed, for expedience's sake that the applicant addresses the court on the merits of the matter, and in the process comment on the points *in limine* taken by the first respondent. Likewise, the first respondent was directed to deal with the application and in the process elaborate on his points *in limine*.

SUBMISSIONS BY APPLICANT

In his submissions the applicant maintained that the present application emanates from an Agreement of sale that was entered into and on 28 July 2021, Annexure A. Pursuant to the signing of the Agreement of Sale, the first respondent surrendered his original deed of transfer, Annexure A1. He further signed a declaration by the seller, Annexure B and more pertinent he used an Affidavit to give the conveyancer power of attorney to transfer the property, Annexure D. The purchaser also on the same date signed a declaration by the Purchaser, marked Annexure C. He submitted that in terms of clause 6 of the Agreement of Sale the transfer of the property should have been done in 14 days. This was not done. That in terms of clause 4 of the same Agreement vacant possession of the House was supposed to be given in 3 months. This was not done despite remainders to do so. The applicant asked the court to look and interpret the Agreement of sale and not to look outside the agreement or to call for evidence. He urged the Court to use the Golden Rule of interpretation of contracts, and that the ordinary grammatical meaning of the used words. The rationale behind this principle being that a contract must speak for itself through ordinary grammatical meaning of its words. See Total *SA (PTY) LTD* v *Bekker* 1992 (SA) 617, at 625, where the court said:

> "… [t]underlying reason for this approach is that where words in a contract agreed upon by the parties thereto and therefore common to them speak with sufficient clarity, they must be taken as expressing their common intention."

In casu, it was submitted that using the Golden Rule of interpretation basically, Annexure A in its ordinary sense depicts a contract of sale for the following reasons:

a. The heading is bold and clear "AGREEMENT OF SALE" meaning that the agreement was for a sale of a res which in this case was an immovable property.
b. The respondent is described as the seller and in terms of his name, his date of birth, Id number and his address which was sited his *domicilum citandi et executandi*. On the same vein the applicant is described as the purchaser, his date of birth, ID number and address.
c. The property that is subject for sell is described in clause 1 and 1(a) namely stand 4008 Prospect Township of stand 104 measuring 1848 square meters.
d. The Purchase price is set at US50 000 and the terms of payment as cash. These aspects appear on clause 2 and 3. What is more pertinent on para 3 is the inscription "the signing of the agreement of sale will serve as confirmation of receipt of purchase price." The seller signed the agreement meaning the sell was complete, he received his money.
e. Clause 4 give the time frame of the giving of vacant possession which is 3 months.
f. Clause 6 is the transfer clause and the seller have done that within 14 days.
g. The good thing is that there are supporting secondary documents, the deed, the declaration by the seller, declaration by the purchaser, power to make transfer which is in an affidavit form.

According to the applicant all these points above point to a legitimate contract of sale and any other evidence to the contrary smacks malice in the face of justice. He therefore denied that this was *fraudulem leges*. He further denied that the first respondent ever paid any money to the applicant and said Annexure SCI was a payment first respondent paid to WENDY ROSSO PRIVATE LIMITED trading as Good Name Technologies (WENDY ROSSO" for payment of some cellphones and laptops that first respondent bought from WENDY ROSSO.

SUBMISSIONS BY FIRST RESPONDENT

The first respondent did not deny that he entered into an agreement with applicant. He denied that it was an agreement of sale of land as asserted by the applicant but it was a loan agreement. First respondent averred that he only owes the applicant the balance due on the loan repayments under the agreement entered into in breach of Section 5 of the Banking Act and was therefore *void ab initio*. Further, the applicant failed to adduce evidence that he indeed had the money and paid to the first respondent.

The law is very clear. Contracts entered in violation of the law are void ab initio. No rights and obligations arise from same. The position is settled in the famous case of *Schierhaut* v *Minister* of Justice 1926 AD 99, per INNES CJ where the court said;

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: *Ea quae lege fie prohibentux, si fuerint facta, non solum inutilia, sed pro nfectis ha beantur licet legislator fiery prohibuent tantum, nec*

> *speccialiter dixerit inutile esse debere quad factum est. Code 1.14.5*. So that what is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done and that whether the lawgiver has expressly so decreed or not: the mere prohibition operates to nullify the act….and the disregard of peremptory provisions in a statute is fatal to the validity of the proceedings affected…."See also *Munyikwa* v *Mapenzauswa & Anor* SC 91/05.
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> Section 5 of the Banking Act *[Chapter 24.20*] prohibits applicant from conducting any "banking business" and criminalizes the same. It provides that; Banking business and banking activities not to be conducted except by registered banking institutions-
>
> "(1) No person, other than a registered banking institution, shall conduct banking business in Zimbabwe.
>
> (2) …….
>
> (3) Any person who contravenes subsection (1) (2) shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

The term "banking business" is defined under S 7 of the Act. The relevant portion thereof for the purposes of the present matter is s 7 (1) (b) which proscribes "extending credit."

It is trite that a court of law faced with allegations of breach of a statutory provision has no discretion in the matter. See *Church of the Province of Central Africa* v *Kunonga & Anor* 2008 (1) ZLR 413 (S) at 418 where the Supreme Court found that non-compliance with the provisions of an Act of Parliament renders the thing done incurable and that the court has no discretion. In the present case the first respondent commends to the court a course of action in which the court first makes a finding of fact as to the true nature of the contract between the parties. Should first respondent's version of facts is found to be true, cadit question. The applicant's case falls. Should the court find the applicant's version to be true, the first respondent loses the case. In short the court is therefore required to make a finding of fact on whether or not the contract before it (which applicant seeks to enforce) is indeed the rue agreement between the parties or "the court would strip off its form and disclose its real nature, and the law would operate. In carrying out the factual enquiry the court has to take into account *Zandberg* v *Van Zyl* 1910 AD 302 at 309, where it was said-

> "The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstance, that the same object might have been attained in another way will not necessarily make the arrangement other than what it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."

Having considered the papers filed of record and the submissions by the parties, I am of the view that the present application fails the "commercial sense" test set out in *SARS* v *NWK LTD* 2011 (2) SA 67 (SCA). The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation. In this case while the contract purports to be one of sale, I found the following anomalies-

a. No evidence of transfer of any money (USD 50 000.00) is before the court. It is simply improbable that a party who as a matter business practice claims to have documentation (invoices and receipts) of a transaction of USD 4 200.00 would not demand some sort of proof of payments (a proof of payment from the bank or a receipt from the seller of the same). Payment of a purported purchase price being the cornerstone of the Applicant's case, the court ought to satisfy itself that in the circumstances before it, such an amount changed hands this brings an "air of unreality" to the transaction. See also *Strauss & Anor* v *Labuschagne* [2012] NASC 6. In that case it was said-

> "In determining as a matter of fact, whether a particular contractual arrangement is simulated or not, the courts have considered whether the arrangement has an 'air of uncertainty', "accords with reality or contains anomalies or is "starling". Where an arrangement seems anomalous or unreal, it is more likely that a court will conclude that it is simulated arrangement disguising a different but tacit agreement."

b. the transaction involved other parties who introduced the parties to each other for the purpose of first respondent borrowing money from the applicant. The purpose of the introductions speak directly to what it is exactly the parties reached "consensus ad idem" about. These parties were not asked for affidavits to confirm the nature of the transaction.
c. The third parties were paid a commission relative to the amount exchanged between the parties. Applicant does not dispute that the commission paid was not relative to a figure of USD 50 000.00. In common business practice, agents involved in sale of property are paid as commission 4-5% of the value of the property sold. The evidence of the witnesses to the agreement which Applicant himself has attached to his founding affidavit fits the class of evidence found by TSANGA J in *Madzar*a v *STANBIC Bank* HH 546-15;

> "…….evidence is also conspicuous by its absence….."

d. The purported agreement of sale makes no reference at all to agent's commission which is customary in commercial agreements of sale for immovable property. This is unusual. The

true position is that the court examined the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated.

e. The parties and the third parties have extrinsic telephonic communications relating to true transaction between the parties demonstrating the "unexpressed agreement or tacit understanding between the parties."
f. Applicant has not expressly denied first respondent's version that he is in the business of extending loans to persons other than the first respondent and is known to do so as a "loan shark".
g. The purported purchase price of USD 50 000.00 is nowhere near the commercial value of a comparable piece of land of that size in that area. It simply does not make any commercial sense that first respondent would sell for a giveaway price to a stranger.
h. Further, it is improbable that first respondent would refrain from soliciting other purchaser (by advertising the land) in the traditional or social media which he was entitled to do.
i. It is clearly improbable that applicant would purchase a piece of land that he never viewed/inspected and related to only through documents. The meeting between the parties took place in applicant's office in the Central Business District of Harare.
j. Annexure SCI clearly show that it was issued to the first respondent on 28 August 2021, and the receipt is from Good Name Technology. The receipt shows that an amount of USD 2 925.00 was paid by the first respondent leaving a balance of USD 1275.00. The Applicant wrote his names as "M. Masiya" and he acknowledged having received the money personally. He did not bother to state what position he holds in Good Name Technology other than to say it's a separate persona.
k. Lastly, I noted that the alleged agreement of sale was entered into on 28 July 2021. On 28 August 2021 applicant was receiving cash from first respondent. He has not explained satisfactorily why a purchaser in a transaction is receiving cash from the purported seller. In the course of ordinary sells, the purchaser does not accept cash from a seller. The court also noted that 28 August 2021 is exactly a month after 28 July 2021. The loan repayments and interest were calculated on a monthly basis. Of further interest is that all the documents applicant relies upon were executed on the same day being 28 July 2021, the date on which the first respondent collected the loan cash from applicant. A month later on 28 August 2021 the Applicant admitted through Annexure SCI that first respondent repaid the amount save for an insignificant balance.

It is clear, therefore, that the contract relied upon by the applicant was never intended to be complied with in that format. The charade of signing the accompanying documents was intended only to "give credence to the simulation" to circumvent the provisions of the Banking Act. I am therefore convinced that the version of the first respondent is the truth. The applicant being a loan shack advanced some cash to the first respondent, and in order to circumvent the provisions of the

Banking Act made first respondent to sign what seemed to be a contract of sale, yet it was an illegal agreement for the exchange of money in contravention of the Banking Act. Since it has been proved that this was an illegal transaction, it was void ab initio and no rights can flow from since illegality. The court's hands are tied. Had it been that the court found that there are material dispute of facts, then the court would have ordered that this matter be referred to trial so that viva voce evidence would be led. However, having been convinced that the transaction was void ab initio for it contravened a statute, the court has no discretion other than to dismiss the application with costs.

IT IS ORDERED THAT:

1. Application is dismissed
2. Applicant to pay costs of suit

Zimudzi & Associates, applicant's legal practitioners
Mutuso, Taruvinga & Mhiribidi, first respondent's legal practitioners