MUFAKOSE HOUSING COOPERATIVE SOCIETY
versus
TAURAYI MAGOZORE

HIGH COURT OF ZIMBABWE
MAKARAU JP.
HARARE, 2 November 2006 and 28 March 2007

UNOPPOSED APPLICATION.

Mr *F Katsande*, for the applicant
Respondent in default

MAKARAU JP: As its name implies, the applicant is a housing cooperative society set up with the noble objective of providing accommodation to its members. The respondent is a member of the applicant. Stand 7296 Budiriro 4, is a property developed by the applicant and allocated to the respondent for his occupation.

In February 2004, the applicant issued an instruction to the respondent that he shares the housing unit with one whose names are simply given in the application as Mr Kanda. The respondent did not accede to the request and is alleged to have dumped Mr Kanda's belongings into a drain, vowing that he would not share the property with him.

In my view, part of the contents of the letters that were exchanged between the parties before the court application was filed and which were attached to the application are instructive.

In a letter to the applicant, the respondent's legal practitioners wrote in part as follows on 4 March 2004:

> "We however categorically state that:
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> - There is no provision in your Constitution that compels our client or any member for that matter, to provide accommodation for (*sic*) fellow members.
> - Whilst it is a noble idea for members with accommodation to share it with members who have not been allocated houses yet, it is not for the cooperative society to impose a tenant on any member.
> - Our client is not the only one who can provide accommodation to Mr Kanda as he is not the only member of the cooperative society.
> - If for divers reasons, our client is not able and willing to let Mr Kanda, or anyone else for that matter, into the house that was allocated to him, his decision and reasons should be respected."

In response to that letter, the applicant's legal practitioners wrote on 27 April 2004:

> "1. The above matter refers. The letter you addressed to the Cooperative Society has been referred to us.
> 2. Stripped to its bare essentials, it is our understanding, with respect, that due to shortage of accommodation the Cooperative Society felt on a balance of convenience that Mr Kanda be permitted to share the quarters occupied by Mr Magozore until such time when the situation stabilized.
> 3. Mr. Magozore seems to think that he has exclusive rights of occupation. If that assessment is correct then Mr Magozore violates the common law principles of the relationship of members in a cooperative society which are among others, to share rights and responsibilities proportionately.
> 4. Mr Magozore should be advised to get tolerant and offer what accommodation is available in the unit he occupies."

It would appear that the respondent remained adamant that he would not share the housing unit he was in occupation of for on 15 March 2005, the applicant filed this court application seeking an order that within 4 days of being served with the court order, the respondent opens his accommodation to Mr Kanda failing which, within a further 4 days, he be served with a notice terminating his membership of the applicant and expelling him from the applicant. Finally, it was sought that the respondent vacates the property upon receiving notice terminating his membership failing which the deputy sheriff be empowered to evict him. The draft order ended with the usual prayer for costs.

The application was duly served upon a subtenant of the respondent by the applicant's legal practitioner who filed a certificate of service to that effect. The matter was enrolled on the unopposed roll and after a myriad of procedural queries raised by the judges presiding over motion court were attended to, the applicant was requested to file heads of argument addressing the issue whether or not the court could competently issue an order compelling the respondent to share his accommodation with a stranger and against his will. This has since been done.

In my view, although the applicant is a cooperative society registered in terms of the Cooperative Society Act [*Chapter 24.05*], it is essentially a voluntary association and in terms of legal relationships, the applicant and the respondent are bound to each other in terms of a contract, a contract *sui generis*.[1] It is the applicant's contention, and one that is correctly held in my view, that one of the terms of the contract is that the applicant shall make rules for its members and the respondent as a member shall abide by those rules. While this term is a term to be expected as between the applicant and its members for the

[1] Lewis & Co (Pvt) Ltd v Pietsburg Co-op BV and others 1936 AD 344.

proper administration of the applicant, in my view, it is the rule made by the applicant to compel its members to share accommodation against their will and with persons selected by the applicant which may not be enforceable or compellable as I shall indicate below.

In my view, sharing a house is a personal matter and calls for some intimacy between the housemates. Certain amenities have to be shared and the means of gaining access into and out of the house is the same and will have to be shared.

It is a settled principle of contract law that the court has a discretion in compelling the performance of a personal obligation under a contract.

In *Santos Professional Football Club (Pvt) Ltd v Igesund & Anothe*r[2], FOXCROFT J, in a detailed judgment, reviewed the law of contract as it relates to the remedy of specific performance on a contract for personal services. While making a distinction between Roman Dutch law and English law on the matter, the learned judge concluded that the court retains a discretion in the matter. In coming to this conclusion, he relied on the Author Christie, in his Law of Contract where the author reminds that the tendency to regard it as a rule of law that such contracts would never be enforced was corrected in *National Union of Textile Workers and Others v Stag F Packings (Pty) Ltd and Another*[3], and concludes as follows at page 613:

> "The reasons why the courts have not granted such orders remain as valid as ever, provided that it is remembered that in every case the Court has a discretion."'

While the facts in the matter before the Cape Provincial Division in the *Santos Professional Football Club* case and the other cases reviewed in the judgment were labour related and sought to distinguish between the wrongfully dismissed servant and an employee unlawfully resiling from a contract, in my view, the principle remains that in compelling personal performance under a contract, the court has a discretion in whether to order specific performance or not.

While under contracts of employment to render personal service, the original justification against compelling performance was the alleged inability of the court to supervise performance, this justification has been brought under attack as being "much exaggerated".[4]

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[2] 2003 (5) SA 73 (C).
[3] 1982 (4) SA 151 (T)
[4] *Santos Professional Football Club (Pvt) Ltd v Igesund & Anothe*r

If I am correct that I have a discretion in this matter, then in exercising that discretion, I take into account that the rule by the applicant and binding on the respondent in contract imports a personal obligation on the part of the respondent, to enter into a close relationship with a stranger and against his will. I am of the view that a court should not compel a citizen to associate with another against his will even if he is so bound in contract. The right to freely associate in my view should be upheld in these circumstances and the applicant should seek alternative remedies for the alleged breach of its rules. This would be my justification for not compelling specific performance in this matter.

It is on the basis of the foregoing that I felt reluctant to issue the order in terms of the draft attached to the application, compelling the respondent to share his accommodation. In my view, the applicant should pursue alternative remedies for the alleged breach of the contractual relationship.

In the result, the application is dismissed.

FM Katsande & Partners, applicant's legal practitioners.