EZERA MUSHANDIKWA
versus
NATIONAL RAILWAYS OF ZIMBABWE
and
THE DISTRICT CIVIL ENGINEER N.O. FOR
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 7 October 2009 & 11 November 2009

Mr *Mugadza*, for applicant
Mr *Bhamu*, for the respondent

MTSHIYA J: On 23 August 2009 the applicant filed this application seeking the following relief:-

"It is hereby ordered that:-

1. First and second respondents be and are hereby ordered to sign an agreement of sale for Stand No.492, Bautina Road, Chiredzi in favour of applicant within 10 days of the granting of this order.

2. First and second respondents be and are hereby ordered to take all necessary steps to ensure transfer is effected to the applicant upon applicant making all necessary payments

3. Should the respondents fail to comply with para 1 and 2 of this order then leave be and is hereby granted for the applicant to lodge a copy of this order as an caveat with the Registrar of Deeds, Harare against the property.

4. The applicant be and is hereby granted right of occupation of the said premises until such a time the first and second respondents comply with the provisions of the order".

The background to the relief sought can briefly be given as follows:

The first respondent is the owner of the property known as Stand No. 492, Bautina Road, Chiredzi (the property). On or before 14 May 1991 the respondent leased the property to RMS, a section or branch of the first respondent. On 23 April 1991 the property was inspected for occupation and on 14 May the applicant, an employee of RMS, took occupation. On 14 January 1999, following a collective bargaining agreement between itself and its employees, the first respondent issued special notice 2313 relating to the disposal of houses. The relevant parts of the notice, which was intended for the first respondent's employees only, read as follows:-

1. "It is notified for the information of staff and all concerned that National Railways of Zimbabwe (N.R.Z.), the three Unions, namely Railway Association of

Engineman (R.A.E.), Railway Artisan's Union (R.A.U.) and the Zimbabwe Amalgamated Railwaymen's Union (Z.A.R.U.) recently completed negotiations on the terms and conditions of the disposal of Railway Houses in the major and smaller Urban centres.

DISPOSAL OF HOUSES

1. The Railways agrees to dispose of houses which it holds under freehold title in major and smaller urban centres to Railway sitting tenants in Grades 4 – 10 and to non-Railway sitting tenants in the following order of priority,

2.1.1. Sitting tenants

2.1.2. Married emergent staff on the waiting list.

2.1.3. In the event that the aforementioned categories of buyers do not exercise their option to purchase Railway housing on offer, the option to purchase the houses shall be given to the rest of the Railway employees who are not sitting tenants at prices shown in clause 2.2.2.

2.1.4. Should there be houses remaining unsold, these shall be offered to members of the public, who may or may not be sitting tenants at market prices.

2.2. Selling Price

2.2.1. ……

2.2.2. ……

2.2.3. Non-Railway Employees : Sitting Tenants

Selling Price shall be prevailing market prices at date of sale.

2.3. ……

2.3.1. ……

2.3.2. ……

2.3.3. ……

2.3.4. ……

3. ……

4. ……

5. ……..

5.1. …...

5.2 .....

6. EFFECTIVE DATE

The agreement shall be effective from 1 October, 1998 and shall apply to serving employees and those who were in service as at 30 September, 1998.

7. MODALITIES OF IMPLEMENTING THE ABOVE AGREEMENT

7.1. Applications

Staff wishing to purchase houses will be asked to indicate in writing and within 14 days from the date of publication of this Special Notice, their intention to buy the houses on offer. The applications should be submitted to Manager, Supplies and Stores, c/o Secretary, Tender Board, Room 807, Africa House. An agreement of sale will be entered into between the purchaser and the Administration and the relevant forms will also be available in the office of the Chief Civil Engineer, Estates Section.

7.2. …..

8. ……"

On 11 January 2002 the first respondent entered into a direct formal lease agreement with the applicant. The effective date of the lease was 1 December 2001.

On 20 January 1999, on the basis of Special Notice 2313, the applicant addressed the following letter to the first respondent's Manager Supplies & Stores.

"PURCHASE OF N.R.Z. DISPOSED HOUSES – RE JL77

Sir

I MUSHANDIKWA EZERA (R1568) Ex NRZ 311870 residing at 492 Bautina Road, Chiredzi (J L77) wish to purchase the above mentioned property on the conditions stated in Weekly Notice 2313 dated 14/1/99.

I look forward to your considerations.

Thank you.

E. MUSHANDIKWA"

The first respondent never responded to the applicant's letter and on 24 May 2002 the applicant again wrote to the first respondent inquiring on progress. The applicant's letter, addressed to the District Civil Engineer and indicating that an earlier inquiry had been made, read as follows:-

"RE-DISPOSAL OF RAILWAY HOUSES J.L. 77 (D 492)

Sir

I write this letter as a follow up to my letter dated 02/01/02 of the same reference. Please may I know the progress to the matter.

Yours faithful

Ezera Mushandikwa
(Sitting Tenant)"

The applicant did not receive any response from the respondent and on 13 August 2002 he filed this application seeking the relief spelt out on page 1 of this judgment.

In his submissions, Mr *Mugadza*, for the applicant, stated that in terms of clause 1 of Special Notice 2313 the applicant qualified as a sitting tenant. The said clause provides as follows:-

> "1. The Railways agrees to dispose of houses which it holds under freehold title in major and smaller urban centres to Railway sitting tenants in Grades 4-10 and to non-Railway sitting tenants in the following order of priority".

That being the case, he argued, Special Notice 2313 constituted an offer to the applicant, which offer the applicant accepted on 20 January 1999. The applicant, having taken occupation on 14 May 19991, had also concluded a valid lease agreement which granted him the right to occupy the property. That lease agreement, he said, was affirmation of the fact that the applicant was indeed a sitting tenant.

Mr *Mugadza* went further to submit that although the applicant was not an employee of the first respondent, Special Notice 2313 covered non-railway sitting tenants. He said in terms of clauses 2.2.3. of Special Notice 2313, a market price for the property would have been easily established by Messrs Richard Ellis and the applicant would have been prepared to accept such a price. He said clauses 7.1. of Special Notice 2313, which set out procedures for taking advantage of the first respondent's offer of houses for sale, was a mere formality to enable transfers.

In his written submissions Mr *Bhamu*, for the first respondent, submitted that there were several material disputes of fact in the case and accordingly the matter should have been brought to court by way of action as opposed to application. He submitted that for that reason alone the matter should be dismissed. Mr *Bhamu* listed some of the serious disputes of fact as follows:-

"1.3(a) There is a dispute whether as at 14 January 1999, applicant was a tenant of first respondent or of RMS (Pvt) Ltd

1.3(b) There is a dispute as to when the applicant became first respondent's tenant.

1.3(c) There is a dispute whether Chiredzi was one of the centres where houses were to be disposed of.

1.3(d) There is a dispute as to whether or not applicant was offered the property by first respondent

1.3(e) There is a dispute as to whether applicant fell into the category of persons to whom the houses could be disposed and if so his priority or ranking thereof.

1.3(f) There is a dispute as to the genuinesses of the letters allegedly addressed to first applicant and emanating from the applicant.

1.3(f)(i) As averred by respondent, the alleged letters were never received and there is no proof that they were ever posted or delivered.

1.3(f)(ii) ……"

Mr *Bhamu*, argued that when the applicant took occupation in May 1991 the recognised tenant was RMS, the applicant's employer. He said as a non-employee of the first respondent, the applicant was not covered under Special Notice 2313. He said the applicant could only be covered by Special Notice 2313 as a member of the public whereby houses not sold to respondent's employees could be sold to the public upon application. He said no offer was ever made to the applicant and consequently there was never any agreement of sale. The first respondent could not therefore be compelled to enter into such an agreement.

In dealing with this matter, I find myself not in agreement with Mr *Bhamu* that there are many material disputes of fact which disable the court from making a determination. I say this because of the following unchallenged positions.

1. Special Notice 2313 was directed to the first respondent's employees <u>only</u>
2. The applicant was an employee of RMS and not the first respondent.
3. As at 30 September 1998, the applicant, as an employee of RMS, was not a serving employee of the first respondent and was therefore not covered by the agreement (i.e. collective bargaining Agreement which took effect from 1 October 1998)
4. As at 14 January 1999 applicant was a tenant of RMS and only became tenant of the first respondent on 1 December 2001 as per the lease agreement.

5. Special Notice 2313 did not cover Chiredzi. There is nothing in the papers to indicate that Chiredzi was covered and that the first respondent held freehold title in properties in Chiredzi.
6. There is no agreement of sale between the applicant and the first respondent, as envisaged by clause 7.1. of Special Notice 2313, and
7. The first respondent never made an offer to or accepted an offer from the applicant in terms of Clauses 2.1.4. of Special Notice 2313 and accordingly the purported correspondence from the applicant is of no consequence.

In view of the above positions I do not see any reason why this court cannot determine the matter on the papers.

The above facts clearly show that there was never any agreement of sale, whether oral or written, between the applicant and the first respondent. There is no agreement which this court can confirm and/or on the basis of which it can order specific performance on the part of the first respondent. It is not denied that the applicant was not an employee of the first respondent and it is also not denied that prior to the lease agreement signed by the applicant on 3 December 2001 the sitting tenant was RMS who had allocated the property to its employee (the applicant).

It is also interesting to note that whereas the applicant claims to have accepted the offer in Special Notice 2313 on 20 January 1999, he went on to sign a lease agreement on 3 December 2001 without raising the issue of his offer. According to the papers before me, he only makes an inquiry in January 2002 (i.e. as per his letter of 24 May 2002 which appears on p 5 of this judgment).

The foregoing leads me to the conclusion that the applicant's claim indeed lacks merit. The first respondent, who was not his employer never made an offer to him as a member of the public. Furthermore the applicant did not as at 1 October 1998, qualify to be a sitting tenant of the first respondent. It is common cause that the tenancy was held by RMS. The applicant only became the first respondent's tenant on 1 December 2001.

The absence of an agreement of sale does not help the applicant's case at all. That fact alone clearly demonstrates the absence of agreement between the parties. The first respondent never offered to sell the property to the applicant for any price in terms of Special Notice 2313 (Clauses 2.1.4) and the applicant, as a member of the public, never made an offer which was accepted by the first respondent. There was therefore no contract between the parties and this court cannot force a contract on them. That, as submitted by the first respondent's counsel, would be contrary to the freedom of contract. Courts cannot

create contracts for litigants. Courts can only interpret, enforce or decline to enforce litigants' contacts in terms of law.

In the main therefore the facts of this case do not at all disclose the existence of a clear offer and acceptance as required in the law of contract. There was therefore never any agreement of sale between the applicant and first respondent. The court cannot create one for the parties and in the circumstances the court is disabled from granting the relief sought.

The application is dismissed with costs.

Madanhi & Associates, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, respondents' legal practitioners