MARGARET MAVURUDZA
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 28 March 2013 and 8 May 2013

Opposed Application

P Chiutsi, for the applicant
C Kwaramba, for the respondent

MATHONSI J: On 15 June 2012 the applicant filed a court application out of this court seeking an order compelling the respondent to transfer to herself stand 19247 Harare of Harare Township Lands. Alternatively she sought payment of the sum of US$18 862-00 being damages in the form of US$9 862-00 as the value of a kiosk demolished by the respondent, US$5000-00 for loss of business and US$4000-00 as goodwill in respect of the kiosk business. In her founding affidavit, the applicant stated that on 16 August 1995 she had entered into a lease agreement with the respondent in terms of which she hired stand 18142 Salisbury Township on which she constructed a kiosk. She attached a copy of the lease agreement and a copy of another document showing that the lease was extended at its expiration for a further period of ten years from 1 September 1998. It therefore expired on 31 August 2008.

The applicant stated that her kiosk was unlawfully demolished by the respondent in February 2010 thereby entitling her to damages for loss of the kiosk, loss of business and goodwill. She went on to state that the parties engaged in negotiations which resulted in the respondent undertaking to compensate her for her loss in the form of another stand being stand 19247 Harare of Harare Township Lands. It is that agreement she seeks to enforce by application procedure.

The application is opposed and in its opposing affidavit deposed to by Josephine Ncube, the Acting Town Clerk, the respondent denied the existence of an agreement to compensate the applicant aforesaid. Ncube stated that the lease agreement between the parties expired on 3 August 2008 and was not renewed but the applicant refused to vacate the

premises resulting in her kiosk being destroyed on 10 February 2010. She conceded that the destruction of the kiosk was unlawful in that the respondent had not complied with the procedure for such destruction provided for in s 32 and s34 of the Regional, Town and Country Planning Act [*Cap 29*:*12*].

It was in recognition of that failure to comply with the law that the respondent entered into negotiations with the applicant to settle the dispute. The applicant was engaged in discussion by the respondent's City Treasurer and Director of Urban Planning Services who undertook to make recommendations to the Council. In the respondent's view those were merely recommendations which did not give rise to any agreement as those officials do not have authority to bind the respondent which acts through resolutions of council.

The respondent denied entering into an agreement to transfer stand 19247 Harare Township to the applicant. It contested the quantum of the applicant's damages in the sum of $18 862-00 insisting that such damages have not been proved.

At the hearing of the matter Mr *Kwaramba* for the respondent took a point in *limine*, namely that there are serious disputes of fact as cannot be resolved on affidavits which disputes the applicant was already aware of before embarking on the application. For that reason the application should be dismissed with costs. He identified the disputes as the existence or otherwise of an agreement to compensate the applicant through a stand and the quantum of damages being claimed by the applicant.

Despite the condition of the papers Mr *Chiutsi* for the applicant moved for an order aforesaid and did not even suggest that the matter be referred to trial on the disputed facts. In his view an agreement was reached by the parties in respect of the quantum of damages as well as the transfer of the stand in lieu of those damages. He located that agreement in the various correspondence between the parties in particular the letter of the respondent dated 17 May 2010.

Indeed in the course of negotiations the parties exchanged written proposals. On 17 May 2010 the respondent's Director of Urban Planning Services addressed a letter to the applicant's legal practitioners in the following:

> "RE COMPENSATION IN RESPECT OF STAND 18142 SALISBURY TOWNSHIP LANDS : STAND 19247 HARARE TOWNSHIP LANDS
>
> Your letter in respect of the above matter refers.

Please be advised that I have agreed in principle with your client that I shall be recommending to Council that she be allocated Stand 19247 Harare Township Lands as compensation. I shall recommend that the stand be sold outright and hence it is necessary for your client to quantify her claim for damages and attach a dollar value thereto to facilitate the determination of any differences that may arise against the value of the stand.

I therefore await your response to enable me to report to Council accordingly.

Yours faithfully

DIRECTOR OF URBAN PLANNING SERVICES"

If the contents of this letter are given their simple and grammatical meaning they simply mean that the author was to recommend to the Council that the applicant be compensated with a stand. This was a clear realisation that the decision did not lie with the author but with Council.

In response to that letter the applicant's legal practitioners wrote a letter dated 27 May 2010 in which they set out the damages claimed by the applicant totalling $18 862-45. They also indicated that their "client accepts the offer to purchase the above adjoining stands." Apart from the fact that the respondent's letter of 17 May 2010 I have cited above only related to stand 19247 Harare Township and not stand 1644 Harare which was now being mentioned by the applicant's legal practitioners, there was no offer on the table to accept. The applicant could not accept a recommendation by an official with no authority to bind the respondent.

On 4 November 2010, the respondent's City Treasurer also wrote a letter reiterating that only a recommendation would be made to Council. The letter states:

"RE: COMPENSATION IN RESPECT OF STAND 18142 SALISBURY TOWNSHIP LANDS : STAND 19247 HARARE TOWNSHIP LANDS

Your letter in respect of the above matter refers.

Please be advised that I have prepared and will be submitting a report to the relevant Committee of Council recommending that your claim for compensation be settled in full by the allocation of the above commercial stand. I shall revert to you shortly with Council's decision in due course.

Yours faithfully

CITY TREASURER."

The City Treasurer did in fact revert to the applicant with the Council's decision. He wrote on 20 March 2012 in the following:

> "RE: MRS T M MAVHURUDZA CLAIM FOR COMPENSATION IN RESPECT OF STAND 18142 SALISBURY TOWNSHIP LANDS: STAND 19247 HARARE TOWNSHIP LANDS
>
> Your letter in respect of the above matter refers.
>
> Please be advised that your client was not offered Stand 19247 Harare Township as indicated in your letter. I have been very clear in my correspondence with her direct and your office that I only recommend to Council (letters dated 4 November 2010, 11 November 2010 and 19 February 2011 copies enclosed) that the above stand be offered as compensation but unfortunately that recommendation has been turned down. I am therefore at a loss as to which 'relevant Committees of Council' you refer to as having granted 'approval to transfer the property.'
>
> Accordingly, be further advised that I am not in a position to transfer the stand to your client as Council is now deliberating on compensating your client in cash based on her various claims. I shall revert to you in due course.
>
> Yours faithfully
>
> CITY TRASURER."

The remarks of TREDGOLD CJ in *Levy* v *Banket Holdings* (*Pvt*) *Ltd* 1956 R & N 98 (S) at 104-5 are very instructive in determining the existence or otherwise of a contract. He stated:

> "In considering whether a contract is concluded between two parties a court is not interested in the state of mind of the parties considered in abstract. It must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said or done."

A contract can only exist where there is an offer made by one party which is accepted by the other. Both the offer and the acceptance must be clear and unequivocal and made by a

person who has authority to make it. See generally RH Christie, *Business Law in Zimbabwe,* 2nd ed., at p 39.

The correspondence placed before me did not conclude an agreement to transfer the disputed stand to the applicant. The existence of such agreement still has to be proved by other means.

In her answering affidavit the applicant suggested the offer of the stand was made when she was taken to the site by one Peter Dube from the Valuations and Estate Managers department who showed her the stand. These allegations are only contained in an answering affidavit and the respondent has been deprived the opportunity to respond to them. It is also trite that an applicant's case stands or falls on the founding affidavit.

In any event, no supporting affidavits from the individuals mentioned in the answering affidavit have been attached. This means that the veracity of those claims can only be tested at trial.

Regarding the quantum of damages, these have not been proved at all. It would appear that the applicant relies on the assertion that the damages were accepted by the respondent's officials and that the acceptance is binding. I have already stated that these officials were making recommendations and the acceptance of the quantum of damages has been denied.

Clearly therefore disputes of fact exist in this matter. In contemporary practice any dispute, save for matrimonial causes and claims for damages may be decided by application procedure in appropriate cases. The court should reserve to itself the discretion where the respondent objects to the procedure and it is possible that the respondent may suffer prejudice in one form or the other, to deny the applicant the use of application procedure where action procedure would have been appropriate; *Williams* v *Tunstall* 1949 (3) SA 835 (T).

Legal practitioners should not resort to use of application procedure for matters which should proceed by way of trial. I am in agreement with the remarks of MAKARAU J (as she then was) in *Ex-Combatants Security Co* v *Midlands State University* 2006 (1) ZLR 531 (H) 534 G – H 535 A – C that:

> "The resolution of the dispute without doing an injustice to the other party appears to me to be one of the prime considerations in allowing or disallowing the use of application procedures.
>
> It thus presents itself clearly to me that a claim based on an alleged oral agreement whose terms are disputed cannot be resolved on the basis of affidavits without doing an injustice to one of the parties. A disputed oral agreement by its very nature,

> existing as it does in the memories of the contracting parties, cannot be proved other than by a comparison of the credibility of those in whose memories the agreement resides. Such an agreement can only be established by the word of those witnesses whose words the court believe.
>
> It further presents itself clearly to me that application procedure is inappropriate to allege and prove a disputed oral agreement as a resolution of the matter on the basis of the affidavits will lead to an injustice as the advantages inherent in a trial will be lost to the court.
>
> Further, a claim for damages arising from an alleged breach of contract, unless the damages are pre-set and agreed to between the parties, should not be brought on application procedure. A claim for damages by its very nature always puts in dispute the quantum of damages that are due to the applicant even where the defendant has not defended the matter.
>
> While a claimant may quantify his damages, the assessment of such damages is done by the court on evidence adduced and on principles of law applicable for that claim and on a comparative basis with decided cases."

The applicant seeks in the alternative damages in the sum of $18 862-00. Nowhere in the papers is there an agreement by the respondent to pay that quantum of damages. Therefore the applicant has to prove these damages. In her application, she does not even begin to prove how the various categories of damages are arrived at.

A claim for loss of business by its nature must be arrived at by showing the daily takings of the business from which should be deducted the expenses of that business. This has not been shown. Goodwill also requires proof by the applicant as to how that has been lost and how it equates to the monetary value being claimed. The value of the kiosk must also be proved by showing how it is arrived at.

These are issues that must be dealt with at a trial through the leading of evidence supported, where possible, by documentation and/or quotations. They cannot be resolved on affidavits.

The respondent's letter to the applicant dated 20 March 2012 made it clear that the respondent was not accepting her claim. In addition, the applicant was in possession of a legal opinion given to the respondent by its chamber secretary (which she has attached to her answering affidavit), in which all her claims were put in issue.

For that reason, when she launched this application, the applicant ought to have known of the existence of disputes of fact. She however proceeded, almost headlong, with this application when she should have proceeded by summons action. The court will dismiss

the application where the applicant should have realised that a serious dispute of fact was inevitable.

In the result, this application is hereby dismissed with costs.

P Chiutsi Legal Practitioners, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners