KAN DUMBA TRUST
versus
DOHNE CONSTRUCTION (PVT) LTD
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 May 2022

Date of written judgment: 18 May 2022

Urgent chamber application

Mr *C.W. Gumiro*, for the applicant
Mr *Z. Chidyausiku,* for the first respondent
No appearance for the second respondent

MAFUSIRE J

[1] In this urgent chamber application, the applicant seeks, ostensibly on an interim basis, an order directing the first respondent to hand over forthwith to the conveyancer, the original title deed for a certain property. The order is sought pending the return day. On the return day, the applicant seeks a final order compelling the first respondent to sign all the documents necessary to effect transfer of the property to the applicant, failing which the Sherriff should sign. Costs are sought on the higher scale.

[2] The background is largely common cause. It is this. By a written agreement of sale dated 24 September 2021 the applicant bought an immovable property in Greendale, Harare, from the first respondent. All the necessary and usual terms were agreed upon: for example, the description of the parties; the description of the property; the purchase price; the mode of payment; transfer; risk and profit, and so on. The details are not important. The agreement was an archetypical sale of land contract.

[3] Clause 14.1 of the agreement provided that it was the seller's obligation to obtain a capital gains tax clearance certificate from the Zimbabwe Revenue Authority [ZIMRA] "… *and to pay any Capital Gains Tax* ***and or VAT whatsoever relating to the Sale***." The highlighted words are the epicentre of the main dispute. The applicant has paid the purchase

price in full. The agreement entitled the seller, the first respondent, to uplift the purchase price ahead of the transfer but on fulfilment of certain conditions. The first respondent did fulfil those conditions. The title deed was released to the conveyancer by the bank that was holding it in terms of the mortgage bond over the property. By 27 April 2022 everything was ready for transfer. But transfer did not happen. On this date the first respondent retrieved the title deed from the conveyancer, the applicant says, with no word of warning.

[4] According to the applicant, it is that conduct by the first respondent that has scuttled the transfer process. It is that which has forced the applicant to file these proceedings. Its desire is to ensure that the first respondent returns the title deed so that transfer can go ahead. It says the matter is extremely urgent because there is no telling what the first respondent may do with that document. Given that it was all along surrendered to a bank upon mortgage of the property, the applicant says it fears that the respondent may go on to encumber the property once again and complicate the situation. It says the first respondent has both the money and the property. It has nothing.

[5] The first respondent contests the suit on both technical and substantive grounds. On the technical grounds, it says the matter is not urgent because, even though it admits it retrieved the title deed from the conveyancer on 27 April 2022, it was not until 9 May 2022 that the urgent chamber application was filed. The delay of almost two weeks has not been explained. As the law says, the court will not treat a matter as urgent unless the applicant has himself or herself treated it as such by acting with reasonable dispatch once the need to act has arisen. The first respondent also points out that the founding affidavit was signed by the applicant's deponent on 6 April 2022 but that the application only got filed almost a month later. This delay has also not been explained.

[6] Another technical ground of objection by the first respondent is that the applicant has been so economic with the truth as to mislead. No reference to the real dispute between the parties has been made, which is that the parties have been haggling over who is obliged to pay to ZIMRA the value added tax [VAT] due on the transaction. The first respondent claims that it made it clear to both the applicant and the conveyancer that it wanted in its pocket the full purchase price, only less the capital gains tax. It claims the sale went ahead strictly on that basis. It says this dispute over VAT emerged as long ago as October 2021 when there was an exchange of correspondence between the parties over it, yet the applicant completely leaves it

out of its papers. To support this objection, the first respondent attaches some letters between itself and the conveyancer. Indeed, they show that there was a dispute over VAT.

[7] The next technical objection by the first respondent[1] is over the right of the applicant to come straight to this court in the face of an arbitration clause in the agreement. Clause 18 provides that any dispute arising from the transaction, directly or indirectly, shall be dealt with and resolved through arbitration in terms of the Arbitration Act. The manner of choosing the arbitrator is set out. The respondent says the applicant has jumped the gun. It should have referred the dispute for settlement through arbitration first before rushing to this court. It has not explained why it has done that.

[8] The last technical objection by the first respondent is that the interim relief being sought is final in nature. As such it is incompetent.

[9] On the substantive grounds of opposition, the first respondent sticks to the issue of the dispute over VAT. It says it cannot be compelled to cause transfer when it has wrongly been saddled with a VAT obligation. It also relies on the jurisdictional issue saying unless there are good reasons for skirting arbitration, this court should refuse to entertain the case. It denies that it has any intention to encumber the property. It says it retrieved the title deed from the conveyancer simply to prevent transfer from being registered before a resolution of that dispute was reached. For this reason, the applicant cannot be said to have any apprehension of an irreparable harm because the basis of that fear is non-existent.

[10] Here now is my judgment. I must state that even before reading the opposing papers, I had serious misgivings about the applicant's approach. It was just out of an abundance of caution that I caused the matter to be set down for determination on an urgent basis. What weighed with me initially was my understanding that after getting paid the purchase price in full, the respondent had gone on to not only uplift the money, albeit in terms of the agreement, but also to take away the title deed, thereby scuttling the transfer. That seemed irrational and spiteful. But after hearing both sides, the applicant loses the plot. It is a trite position of the law in this jurisdiction requiring no citation of cases that one who refrains from taking action once the need to act has arisen cannot come to court afterwards on an urgent basis. In this regard, the court takes the cue from the applicant. He or she must first treat his or her cause with the

[1] Not necessarily in the order in which they were raised.

urgency that he or she says it deserves, before asking the court to do so. There is a glut of cases on the point.

[11] So in this case, it emerges from the respondent's papers that the dispute over VAT manifested as early as October 2021. Clause 10.1 of the agreement provided that in the event of either of the parties failing to observe or perform fully any of the obligations or stipulations contained in it, and failing to rectify such within thirty days of a written demand by the aggrieved party, then the aggrieved party would be entitled, among other things, to take legal action. This clause should be read together with clause 8 which provided for the transfer of the property. In paraphrase, clause 8 required the first respondent, as the seller, as soon as possible, but in any event by not later than 30 September 2021[2], to submit the title deed to the conveyancer for transfer to be registered. Before that, the applicant itself, as the purchaser, would have had five days from the conveyancer's call to attend the usual ZIMRA interview which would enable the first respondent to obtain the necessary capital gains tax clearance certificate, one of the prerequisites to any transfer of an immovable property.

[12] The point about these stipulations as to time is that in terms of the agreement of sale, the parties plainly considered time to be of the essence. Coupled with this, is the fact that from the execution of the agreement of sale on 24 September 2021, things seemed to be moving smoothly according to plan. At least there is no disagreement in this regard. Thus, among other things, the applicant paid the purchase price timeously. It caused the removal of the encumbrances on the title deed. The conveyancer received the clean title deed. The first respondent got the capital gains tax clearance certificate. It uplifted the purchase price. But by October 2021 the dispute over VAT emerged. Strangely, the applicant did not take action, at least according to the documents on record. Instead, it was the first respondent that on 8 November 2021 sent a bitter compliant and an ominous threat to the conveyancer, accusing him of negligence for having wanted the first respondent to pay the disputed VAT when, according to it, that was the responsibility of the applicant. Again, the applicant took no action.

[13] The first respondent points out that the founding affidavit was signed on 6 April 2022. This may well have been a typing error because that affidavit speaks to events on 27 April 2022. But the applicant had a duty to explain, especially after the first respondent had raised the point. The applicant has not explained. This is strange. At the hearing, I specifically and

[2] The agreement of sale was on 24 September 2021

repeatedly stressed, particularly to the applicant's counsel, that given the glitches being experienced with the new system over virtual hearings, the parties were free to file whatever further documents they would wish, including the applicant's answering affidavit, provided that any such further documents would reach me by not later than close of business on Tuesday, 17 May 2022, after which none would be considered. The parties had agreed that the matter would be determined on the papers. But no answering affidavit has been filed. Furthermore, despite filing heads of argument, the applicant does not deal with this point.

[14] Then of course, the delay from 27 April 2022 when the cause of action allegedly arose, to 9 May 2022, when the application was filed, has not been explained. All this goes to show that the applicant has not treated its own cause with urgency. Therefore, the court cannot accept the matter as one of urgency. This conclusion is reached in light of the fact that given the manifestation of the VAT dispute as far back as October 2021, and the existence of the arbitration clause in the agreement of sale, it would have made sense if the applicant had referred the dispute to arbitration and perhaps, seek an interim order from this court to prevent the first respondent from doing anything that would encumber the property before the arbitration was concluded. But applicant does no such thing. He wants a final order directing the applicant to return the title deed to the conveyancer. But what about the VAT issue which is the real dispute? Is the applicant wishing it away? By this, I am not in the least deciding the issue whether or not this court has jurisdiction to determine the matter in the face of the arbitration clause. I do not have to go there in light of my conclusion that the matter is not urgent. I am merely showing the impropriety of the application and how it cannot be dealt with on an urgent basis.

[15] In closing, even if I have concluded that the matter is not urgent and would therefore feel relieved of the duty of having to deal with the rest of the other objections, there is one I must stress because I have repeatedly raised it over the years, and it is somewhat related to the aspect of urgency. It is about the failure of a litigant to take the court into his or her confidence by disclosing all the material information known to him, especially in applications of this nature where, among other things, the court could well decide the matter on the version presented by the applicant: see *Nehanda Housing Co-operative Society & Ors v Moyo & Ors*[3]; *Tenke Fungurume Mining SA v Bruno Enterprises*[4]; *Dube v Minister of Local Government, Public*

[3] HH 469-15
[4] 2016 (1) ZLR 206 (H)

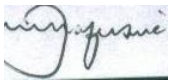
Works and National Housing & Ors[5]; *Sadiqi v Muteswa & Ors*[6]; *Timveos & Anor v Mwonzora & Ors*[7]; *Nyoni & Anor v Officer in Charge*[8] and *Katsimberis & Anor v Sharpe & Ors*[9]. This kind of application is one of utmost good faith. Failure to disclose all known relevant information is fatal.

[16] The information relating to the manifestation of the VAT dispute in October 2021 is plainly relevant and manifestly material. It is the sole reason the first respondent refuses to cooperate regarding transfer. In its heads of argument, the applicant dismisses the issue as a non-dispute but merely a creation by the first respondent. It is argued that clause 14.1 of the agreement is very clear on whom the obligation to pay the VAT lies, the applicant. But that is not the point. The point is, the applicant should have disclosed the existence of this dispute in its papers. It is not one for determination at this stage. The first respondent is not raising it for the first time now. It raised it in October 2021. There is correspondence to that effect. According to the time stipulations in the agreement of sale, transfer should have happened in October 2021, or thereabouts. Whatever strong feelings the applicant may have over the issue, it was incumbent upon it to disclose, rather than conceal, the information. It is relevant not only because it explains the first respondent's behaviour in scuttling transfer, but also because it shows that the matter cannot be urgent. The applicant had from October 2021 to have the dispute dealt with. It sat back. Then all of a sudden it swings into action, many months later, wanting everybody else, particularly the court, to drop all their other business and to attend to its case. It is not done that way.

[17] It is for the above reasons that I have refused to entertain the application. Costs shall follow the result. Both parties have sought them against each other on the higher scale. However, much as I have penalized the applicant for coming to court on an urgent basis, I find nothing warranting a penal order of costs. Therefore, the following order is hereby made:

The application is hereby removed from the roll of urgent matters with costs.

[5] HMA 34-17
[6] HH 281-20
[7] HH 370-20
[8] HH 663-20
[9] HH 771-20



Moyo Chikono & Gumiro, applicant's legal practitioners
Madzima Chidyausiku Museta, first respondent's legal practitioners