GABROC ENTERPRISES (PVT) LTD
and
NATIONAL SOCIAL SECURITY AUTHORITY
versus
MUNICIPALITY OF CHEGUTU
and
THE TOWN CLERK (CHEGUTU) N.O.

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 14 September 2018 & 30 June 2021

Opposed Application

T Mpofu, for the 1st & 2nd applicants
C Warara, for the 1st & 2nd respondents

HUNGWE J: This is an application in which the two applicants, a land developer and a social security fund, seek a declaration in the following terms:

IT IS HEREBY ORDERED THAT:

"1. The agreement of sale entered into between the 1st applicant and the 1st respondent on 29 October 2001 is valid and enforceable.

2. The cession of rights and interests by 1st respondent in Huntonville is valid and enforceable.

3. Respondent to pay the costs of suit."

Background to the Application

The basis of this application is set out in detail in the affidavit deposed by one Phillip Chiyangwa. He is the director and alter ego of the first applicant. He avers that on first applicant's behalf, he applied to first respondent for the purchase and development of 526 hectares of virgin land in Chegutu. It was intended to develop the land into residential stands.

In September 2001 first respondent's council deliberated on the subject matter of the sale of 526 hectares. It approved the application by first applicant and notified it accordingly. He was, as chairman of first applicant, invited to a meeting of council officials where the finer details of the proposed project were to be discussed.

In the following month, October 2001, an agreement of sale was drawn up and signed by both the Executive Mayor of the first respondent as well as the second respondent.

Phillip Chiyangwa, for the first applicant, avers in paragraph 1.3 of the founding affidavit that in terms of the agreement, first respondent agreed "to sell to the first applicant 526ha of virgin land for the purposes of planning, surveying, servicing and/or building and allocating the stands or houses at a total price of $10 520 000.00." It was further agreed that the sum of $1 052 000.00 was to be paid upon signing of the agreement. The balance was to be paid within a period of thirty-six months.

Afterwards, first applicant decided to cede its rights arising from the sale agreement to a third party, the second applicant. The second respondent indicated that the Municipality, first respondent, was not opposed to the cession of rights if full payment of the balance of the purchase price was first made to it. The balance was paid. The second respondent indicated in correspondence with the first applicant that he would proceed to process the cession of rights.

Phillip Chiyangwa, deponent to first applicant's founding affidavit, attached documentation in support of the events stated above. He however does not explain what occurred between 2003 and 2017 relevant to this application. He states that in 2017 first respondent indicated to him that the cession of rights to him would be illegal since the land subject to the cession did not in fact exist. Faced with this attitude from the respondents, the applicants filed the present application.

Respondent's case

Both respondents vehemently oppose the grant of the relief sought on several grounds. First, they point out that the subject matter of the 2001 agreement was never a sale but something completely different. Deponent to the opposing affidavit, one Mandigo, the current holder of the office of the second respondent, makes the following averments.

First, the applicants refer to "a thorough investigation" following which the agreement forming the basis of this application being adjudged null and void. Clearly, the applicants acknowledged and, therefore, ought to have anticipated the existence of a dispute of fact in the matter. The applicants adopted a wrong procedure by bringing the matter by way of a court application.

Second, second respondent avers that the applicants have not taken the court into their confidence in that they did not disclose everything that they know about their interactions with first respondent specifically regarding the nature of the agreement of 2001.

Third, respondents aver that a perusal of the "agreement of sale" will reveal that it is certainly not an agreement of sale. The respondents point to the legal requirements for the disposal of public or State land, to which the "agreement of sale" makes no refence.

Fourth, the addendum to the "agreement of sale" was not properly placed before Council for its consideration and approval. The addendum altered the principal agreement in such a material way that had it been placed before Council; it would not have been approved. This is the reason why it was not procedurally approved by Council as required. Consequently, whatever rights the agreement purported to transfer to the applicants were never transferred as the legal requirements for such a process were never complied with.

Respondents aver that the absence of a full property description is indicative of the many factors militating against an interpretation of the agreement as one for the sale of land. Instead, the active participation in the development of the land by first respondent is further evidence of the existence of a partnership between first applicant and first respondent. Being a land developer, first applicant would have been aware of the statutory requirements for the sale of public land administered by a local authority as opposed to privately held land.

The remaining part of the opposing affidavit disputes the factual averments made by the applicants.

The Issue for determination

This application raises the issue whether, on the papers, applicants have shown that an enforceable "agreement of sale" exists between the parties. Put differently, does the agreement between the parties constitute a valid agreement for the sale of land in terms of the laws of Zimbabwe?

The Law on sale of Municipal or State land

The land subject matter of the agreement between the parties is State land, and as such, public land in which public interest exists. First respondent administered the land subject of the dispute in terms of the Urban Councils Act, [*Chapter 29:15*] ("the Act"). Therefore, over and above the usual requirements in terms of the law of contract, a sale or disposal of this category of land required that the formalities stipulated under the said Act be complied with.

The Act regulates in detail how state land under the administration of a municipal authority may be sold, leased or otherwise disposed of. It specifically states that a council may donate, sell, exchange, lease or otherwise dispose of or permit the use of any land owned

by council **after it has complied with the provisions of the Act**. (My own emphasis). Section 152 (1).

Before engaging in any manner or form of disposal council land, the Act peremptorily requires that such an intention be published in two issues of a newspaper and that such article be posted at all council offices. Section 152 (2). The same subsection goes on to enumerate the specific contents of the notice to be published by council. These include the terms and conditions of the proposed sale, the description of the land in question; the requirement that the copy of the proposal to dispose of the be open for inspection for twenty-one days at council offices and the period within which anyone wishing to object to the proposal may lodge such objection. Council is also required, by law, to submit to the Minister of Local Government the copy of the notice of intention to dispose before the first day of its publication. Section 152 (3).

Further, Council may not sell, exchange, lease, donate or dispose or permit the use of any land owned by it which lies within an area for which there is no approved town planning scheme, a town planning scheme proposal. Section 152 (4) (a) (i). In addition, there must be in existence a notice to sell or dispose of the which had been submitted to the Minister who had given his consent to the proposed sale or disposal of the land. Section 152 (4) (a)(ii).

Applicants' case was that a valid agreement of sale was concluded between the parties and that the respondents ought to be held to it. Applicants rejected the respondents' argument that the agreement was void and unenforceable as it was illegal. Mr *Mpofu,* for the applicants, stridently argued that the sanctity of the freedom to contract must be respected if it should mean anything in the world of commerce. Although Mr *Mpofu* makes good points in respect of the applicants' case, his failure to meet the defence set up by the respondents is conspicuous by its absence. I make this observation on the basis that the respondents raised the unenforceability on the grounds of failure to comply with peremptory provisions of the Urban Councils Act in the opposing papers as well as heads of argument. There was no direct answer on this point by the applicants. The point made by the respondents is well taken.

In *Chiradza & Another* v *Ruwa Local Board & Others* HH- 24-06 this court had occasion to comment on the provisions of Section 152 of the Urban Councils Act [*Chapter 29:15*] in the following terms:

> "The sale of immovable property by a local authority is governed by Part X of the Urban Councils Act [*Chapter 29:15*]. Any local authority is sanctioned by law to publish notice of its intention to dispose of any immovable property in two separate editions of a local newspaper. The notice should call for objections, if any, to the

> proposed sale and any objections should be filed with the local authority within 21 days from the date of the last publication of the notice. It is quite clear to me that 1st respondent duly complied with this legal requirement, as two notices were published……..Counsel for the 3rd respondent, Mr *Biti,* correctly submitted that in any event there could never have been a sale without the final process of advertising. Whatever undertaking or oral representations were made; they were invalid as a result of the need to follow statutory requirements."

Applicants argue that the addendum spelt out the true nature of the agreement as one of sale. The fact of the matter, as shown on the papers, is that this addendum was concluded irregularly specifically for the purpose of avoiding the requirements of the law. It could well be argued that it was executed i*n fraudum legis.* As such, the courts cannot turn a blind eye to such abject illegality and enforce an illegality.

As was stated by MAFUSIRE J in *Honeycomb Hill (Pvt) Ltd* v *Herentals College (Pvt) Ltd* HH-265-16:

> "…courts do not enforce illegal agreements….The law says an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced…."

It is a trite principle of our law that the court will not grant relief to a party who approaches it for relief flowing from their deliberately induced illegality. This approach flows from the *ex turpi causa* rule. Discussing this rule in *Mega Park Zimbabwe (Pvt) Ltd* v *Global Technologies Central Africa (Pvt) Ltd* 2008 (2) ZLR 195 MAKARAU J (as she then was) expressed herself on this point thus:

> "In my view, the general principle expressed in the maxim does not permit litigants to bring their 'dirty' transaction into the clean halls of justice. Justice will not soil its hands by touching such transactions. "Dirty" in this regard not only refers to immoral transactions, contracts specifically prohibited by law but also includes that seek to defeat the law."

Clearly, for this court to grant the relief sought would be to condone an illegality. The transaction between first applicant and the respondents contravenes the clear provisions in the Urban Councils Act. The rationale behind s 152 of that Act is to promote transparency in the administration of public assets. The agreement executed by the parties in 2001 did not comply with this public policy thrust as set out in the Act. The courts cannot sanitize a transaction that is abjectly illegal. It is surprising that second applicant put its money into such a transaction when simple and cost-effective due diligence could have saved it a fortune. Second applicant administers public funds. It is expected to execute this mandate diligently. It is strange that second applicant found this transaction attractive. Whilst it may however have recourse at law, it cannot succeed on the present papers. Having arrived at the

conclusion that I have, it is not necessary to determine the rest of the points raised by the respondents. Suffice to say that the applicants stand to fail on this application.

It is a principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. As such, what is done contrary to the express prohibition of the law is not only of no force or effect but must also be regarded as not having been done. Whether the legislature has so decreed or not, the mere prohibition operates to nullify the act.

Consequently, I find that the agreement between first applicant and the respondents is null and void *ab initio* and is of no force or effect.

I make the following order.

The application be and is hereby dismissed with costs.

Mutangamira & Associates, applicants' legal practitioners
Warara & Associates, 1st respondent's legal practitioners