MISHECK MAKAMBA
versus
GRAIN MARKETING BOARD STAFF HOUSING FUND
and
GRAIN MARKETING BOARD
and
SHAPPENEX (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 24 March 2022 & 30 June 2022

Opposed Matter

Mr Kadare, for the applicant
Mr P Makuwaza, for the 1st and 2nd respondent
Ms J Mushunje, for the 3rd respondent

MANYANGADZE J: The applicant seeks an order for the transfer of rights, title and interest in stand No. 11320 Timire Pork, Ruwa, from the respondents to himself. His draft order is couched in the following terms:

"IT IS ORDERED THAT:
1. The 1st and or 2nd Respondents cede their rights, title and interest in Stand No. 11320 Timire Park Ruwa to the Applicant.
2. Alternatively, 3rd Respondent cede its rights, title and interest in Stand No. 11320 Timire Park Ruwa to the Applicant.
3. The Respondents shall pay the costs jointly and severally the one paying the other to be absolved."

The facts that have given rise to the application can be summarised as follows:
The applicant was employed by the second respondent from November 2006 to October 2013. During the period of his employment he was a member of the first respondent. The first respondent is a housing fund established as a trust in January 2006, and is known as the Grain Marketing Board Staff Housing Trust. Its members or beneficiaries are employees of the second respondent who pay monthly subscriptions deducted from their salaries by the second respondent.

The third respondent is in the business of land development. It owns the stands in Timire Park, Ruwa, form which allocation is done to first respondent's members. It appears the first respondent facilitated the purchase and allocation of stands from the third respondent for the benefit of its members. It is from this arrangement that the applicant was allocated stand No. 11320 Timire Park, Ruwa.

From the applicant's founding affidavit, he was allocated, by the first respondent, the said stand at a cost of USD 8900.00. When he left employment in October 2013, his payments, through salary deductions, added up to USD 3385.00. The applicant avers that the first respondent advised him, after he left employment, to continue paying his instalments. To this end, he paid a total of USD 6410.00 into first respondent's CBZ Account No. 02121183790035. This was paid during the period 2015 to 2020, well after the applicant had left employment.

The applicant's payments totalled USD 9795.00, which was more than the stipulated purchase price of USD 8900.00.

On this basis, applicant sought transfer of the property from the first respondent. The latter then advised him to communicate directly with the third respondent. The third respondent demanded a staggering $294786.00, 33 times more than what was originally agreed upon. The applicant is not clear how this amount was computed, as this was now in 2020, when the country had gone through some currency changes.

The applicant avers that his understanding, all along, was that the first respondent was the owner of the Timire stands. The first respondent was therefore obliged to pass title to the beneficiaries, of whom applicant was one. This the first respondent was obliged to do, upon payment of the agreed purchase price of USD 8900.00, which the applicant had paid in full.

The first respondent, in its opposing affidavit, vehemently disputes the applicant's averment that it should pass title to him. It avers that it has no such obligation, as title and interest in the stand in question vests in the third respondent.

The first respondent accepts that the applicant, up to the time he left employment in 2013, had deposited a total of US $3385.00 from salary deductions. This was paid to the third respondent. The first respondent then advised the applicant that all payments for the stand should be made directly to the third respondent, with effect from August 2016. It is not first respondent's fault that the applicant did not heed this advice.

The second respondent's position is the same as that of the first respondent. In fact, their opposing affidavits are almost *verbatim.*

As for the third respondent, its stance is that it has no contract with the applicant. It owns the stand in question. It avers that there is no basis on which it should be ordered to transfer its rights, title and interest in the said stand to the applicant, with whom it has no contractual relationship.

It seems to me this is a matter that will be resolved by reference to the basic principles of the law of contract. What needs to be determined is the contractual relationship, if any, that exists between the applicant on the one hand, and each of the respondents, on the other hand. The relationship must be such that it creates rights and obligations in relation to stand 11320 Timire Park, Ruwa between and/or among the parties. In particular, having regard to the relief sought by the applicant, the relationship must impose on any of the cited respondents, the obligation to transfer or cede rights, title and interest in stand 11320 Timire Park, Ruwa, to the applicant.

Before delving into this issue, there is need to dispose of points *in limine* raised on the citation of the respondents.

The first respondent avers that it has been wrongly cited as the Grain Marketing Board Staff Housing Fund when it is a registered Trust, known as the Grain Marketing Board Staff Housing Trust. The first respondent avers that the Trust should be sued in the name of the Trustees for the time being of the Trust.

However, as shown on the papers filed of record, the first respondent consented to an amendment of its citation, thus accepting applicant's contention that this was merely an error in the description of the respondent. It was not a case of citing a non-existent respondent.

The first respondent's citation is accordingly amended to read "Grain Marketing Board Staff Housing Fund."

The third respondent has maintained its point *in limine*. It insists that a wrong or non-existence respondent has been cited. It avers that Shappenex (Private) Limited is different from Shappenex Trading Company (Private) Limited. The latter name is the name under which it is incorporated. In light of this, the application, as against it, is fatally defective and must be dismissed on that basis.

The third respondent further avers that the defect cannot be cured by an amendment. In this regard, reference has been made to the cases of *Veritas* v *Zimbabwe Electoral Commission and 2 Others* SC 563/18, *Gariya Safaris (Pvt) Ltd* v *Van Wyk* 1996(2) ZLR 246(H), *Jenson* v *Acavalos* 1993 (1) ZLR 216(S).

Indeed, it seems to me the case of the third respondent goes beyond a mere misdescription. It involves an incorporated entity, which must be cited in its registered name. Thus, citation of an entity other than the incorporated entity amounts to citing a non-existent party. It renders the application fatally detective. This was the approach taken in *Fadzai John* v *Delta Beverages Limited* SC 40/17. It was held that the respondent should have been cited

as *Delta Beverages (Private) Limited*, as opposed *Delta Beverages Limited*. A non-existent entity was cited, making the application fatally and incurably defective.

The instant case is similarly affected. The proper course of action would be to order that the application against the third respondent be struck off the roll.

However, in case I am wrong in adopting this approach, I am of the view that the application will still not succeed on the merits.

Turning to the merits, as I have already indicated, the dispute is resolved by an application of the fundamental principles of contract law.

I will begin by examining the relationship between the applicant, on the one hand, and the first and second respondent, on the other hand. This is so because the first and second respondents have taken a joint position on the matter. They have filed opposing affidavits that read exactly the same. So do their heads of argument. Their position basically is that they do not own the property in question. They cannot therefore pass title or cede rights and interest in a property they do not own.

The first and second respondent aver that *there is no agreement of sale between the applicant and the first respondent*. The first respondent is incapable of entering in such an agreement as it does not own the merx in respect of which the agreement can be concluded. The merx in question being stand 11320, an immovable property for which it is not the registered owner.

To the contrary, the applicant asserts that there was a sale agreement between him and the first respondent in respect of the property for which first respondent accepted instalment payments. This is reflected in para 6.2 of applicant's heads of argument, wherein is stated:

> "1st Respondent allocated me stand No. 11320 Timire Park Ruwa at a cost of USD 8900.00. The agreement was that 2nd Respondent would deduct $206.00 per month from my salary and pay to the 1st Respondent."

The applicant goes on to state, in para 6.3, that the instalment payments to the first respondent continued well after his employment. By 2020, he managed to pay more than the agreed amount. Thus, as between him and the first respondent, he had paid the full purchase price for the stand. The first respondent was therefore duty bound to deliver, as far as applicant was concerned.

The applicant contends that the basic principles of contract must apply. He elaborates on this contention in para(s) 1, 2 and 4 of his heads of argument in the following terms:

1. "1st Respondent failed to avail a written contract with the Applicant. The assumption then is that the two parties had a verbal contract.

2. *Delta Beverages (Private) Limited v Pyvate investments (Private) Limited & Another (HH 135-18, HC 1619/14) [2018] ZWHHC 135 (14 March 2018)* it was held that the essentials of a verbal contract are the same as those of a written contract. There must be offer and acceptance of the contract, existence of consideration, the parties must have the capacity to enter into the contract and the parties must intent to enter into the contract and create a binding legal relationship. *In casu* all these requirements exists. There is thus a legally binding contract…….

4. In this case Applicant was offered and accepted the property being stand number 11320 Timire Park Ruwa at a price of USD 8900.00. applicant paid the price and he is therefore entitled to the property. There was therefore external manifestations."

The applicant's averments raise important questions of both fact and law. Firstly, there is the existence or otherwise of an agreement of sale between the applicant and the first respondent. That is a question of fact. Did the two parties in fact enter into such an agreement? What evidence is available that such an agreement was concluded?

The onus is obviously on the applicant who is alleging the existence of a sale agreement, to avail evidence establishing the existence thereof. The trite position of the law is that he who alleges a fact must prove it. See *ZUPCO Limited* v *Parkhorse Services (Pvt) Ltd SC* 13/17, *Bonnyview Estate (Private) Limited* v *Zimbabwe Platinum Mine (Private) Limited & Another* CCZ 6/19.

This should have been a simple task for the applicant. All he needed to do was to attach a signed copy of the agreement of sale to his founding affidavit. Invariably, or almost invariably, sale agreements are easily proved by such an exhibit. Questions might arise as to its authenticity, but a crucial basis would have been laid out, showing the nature of the legal relationship between the parties.

In casu, applicant avers there was no written agreement of sale. He implores the court to assume that there was a verbal agreement; *vide* para 1 of his heads of argument, where he makes the bald submission that "*The assumption then is that the two parties had a verbal contract.*" In this regard, he referred the court to the case of *Delta Beverages (Pvt) Ltd* v *Pyvate Investments (Pvt) Ltd & Anor* HH 135/18. It was held in that case, that an oral agreement that meets all the essential requirements of a valid contract creates a contractually binding relationship between the parties.

While a verbal agreement can indeed constitute a valid contract, proving it in some cases, can be a tall order. DUBE J (as she then was) pointed out this challenge in verbal contracts in *Delta Beverages (Pvt) Ltd* v *Pyvate (Pvt) Ltd supra*. The learned judge stated at pp 4-5 of the cyclostyled judgment:

> "Generally, oral contracts are enforceable and do give rise to valid contractual relationships. The oral contract, sometimes referred to as the invisible contract, is one of the most difficult to prove. What makes this so is the lack of hard evidence of the existence of the contract. The essentials of a verbal contract are the same as those of a written contract. There must be offer and acceptance of the contract, existence of consideration, the parties must have the capacity to enter into the contract and the parties must intent to enter into the contract and create a binding legal relationship. The courts will not endorse an oral agreement where any of the essential elements of a valid contract have not been proved. The terms of the oral contract must be proved and there must be agreement and understanding of the terms of the contract by the parties. An oral contract that meets all the requirements of a contract is binding on the parties and gives rise to a legally enforceable relationship. There must be a meeting of the minds or a reasonable belief by the parties that there is consensus. A party who alleges the existence of an oral contract has the onus to prove the existence of the contract on a balance of probabilities."

It is clear the onus is on the applicant to prove that there was a valid agreement of sale that entitles him to transfer title in the stand from the first respondent to himself. He must place before the court satisfactory evidence to that effect. In the absence of a written contract, that is a heavy onus.

In the case of *Bonnyview Estate Private Limited* v *Zimbabwe Platinum Mine (Pvt) Ltd & Anor, supra* MALABA CJ considered, *inter alia,* the question of whether the applicant placed before the court sufficient evidence that a farm that had been compulsorily acquired was subsequently delisted. The learned Chief Justice remarked as follows, at p 7of the cyclostyled judgment:

> "What the applicant pleaded before the court was that the farm had been compulsorily acquired and was subsequently delisted by a Government Notice after it had objected to the acquisition. It then had to produce proof of the delisting but failed to do so. The basic principle at law is that he who alleges must prove. The applicant made an affirmative assertion of a fact which was not self-evident and thus had an obligation, to prove the same. See *Liberal Demo Crats & Ors* v *President of the Republic of Zimbabwe E.D, Mnangagwa N.O & Ors CCZ* 7/18. It failed to prove the facts it alleged." (underlining added)

In casu, what the applicant has attested to are instalment payments he made to the first respondent. These were firstly in the form of salary deductions and subsequently in the form of direct deposits after he left employment. But the question remains whether these constitute proof of an agreement of sale between the applicant and the first respondent. It does not appear to be the case.

What the applicant's founding papers have established is the existence of an employer assisted housing scheme. It is in the form of a Housing Fund into which the employee deposits monthly subscriptions facilitated by the employer through salary deductions. That arrangement in my view, does not constitute an agreement of sale between the applicant and the administrators of the Housing Fund, in this case the first respondent. Nothing shows that the

first respondent purchased stands which it then sold to the applicant and other beneficiaries of the Housing Fund. Nothing shows that the first respondent holds title in these stands, such that it can be compelled, by an order of court, to transfer title and interest therein to the beneficiaries of the housing scheme.

Going to the third respondent, again, no conclusion of an agreement of sale has been proved, or even alleged by the applicant. In fact, by the applicant's own admission, there is no contractual relationship between him and the third respondent. In this regard, he avers as follows, is para 6.5 of his founding affidavit:

> "In the first place I never had a contract with the 3rd Respondent. 1st Respondent never communicated to me on the new development until I approached it in 2020. All along I was in occupation of the property and I was never told anything about the involvement of the 3rd respondent. My understanding as had been advised by 1st Respondent in the first place has always been that 1st Respondent is the owner of the stands. I constructed a four roomed house on the stand in 2015." (underlining added)

On its part, the third respondent avers in para 4.3 of its heads of argument:

> "As already established by the 3rd Respondent in its Opposing Affidavit to the Main Application, the Applicant never had a contractual relationship with the 3rd respondent. The contract which the Applicant allegedly had with the 1st Respondent and/or the 2nd Respondent, did not include the 3rd Respondent as a party. The Applicant himself aptly states in paragraph 6.5 of his Founding Affidavit that *"In the first place I never had a contract with the 3rd Respondent."*

The third respondent further invokes the principle of Privity of contract. It contends that it is not a party to the contract between the applicant and the first and/or the second respondent. It is not privy to the terms of such a contract, whatever these are. It makes reference to Innocent Maja's book, the *Law of Contract in Zimbabwe,* p 27 para 1, 5, 3, were the doctrine is explained in the following terms:

> "The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posits that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it."

Thus, in the absence of a contractually binding agreement between the applicant and the third respondent, the relief sought by the applicant cannot validly be obtained from the third respondent. The consequence of this is to vitiate the relief that the applicant seeks in the

alternative. He has sought this relief merely as a precaution. It appears his suit is primarily against the first and second respondents.

In the circumstances, the applicant has not laid out a valid basis for ordering transfer or cession of rights, title and interest in stand 11320 Timire Park Ruwa from either the first and second respondents or third respondent. Consequently, the relief he seeks, in the main or alternative, cannot competently be granted by the court.

The legal hurdle the applicant faces is that the terms of his agreement with the first and second respondent, with the first respondent in particular, are not clearly spelt out. It is astounding that he relies on a verbal agreement where the subject matter of such an agreement is of substantial value, being immovable property. All the parties' rights and obligations should have been spelt out in a Deed of Sale or Deed of Cession, whatever the case might have been, duly signed by all of them.

The court however, observes that the applicant's averments tend to show that he paid his instalments on the strength of representations made by the first respondent. The letter referred to by the first respondent, dated 15 August 2016, advising applicant to deal directly with the third respondent, has a portion at the bottom, where applicant is supposed to acknowledge receipt.

This portion is unsigned and undated, casting doubt whether the applicant received the communication. Thus, applicant might well have been made to believe that the first respondent had responsibility not only to allocate stand 11320, but also transfer rights, title and interest to him. That may possibly be a basis for a claim of damages against the first respondent, should applicant be able to prove that. I must however, point out that this is not an issue before the court. The court is merely noting its observations. Such a claim will have different evidentiary requirements from the instant case.

It seems it is also open to the applicant to conclude an agreement of a sale with the third respondent, on terms the two parties negotiate and agree on. It is not for the court to create or impose such a contract. The court can only enforce, if called upon to do so, a contract that has been proved to exist.

As far as the order sought by the applicant is concerned, it has already been indicated that no valid basis has been established for its granting.

I note that the third respondent seeks costs on the punitive scale of legal practitioner and client. I have not gone so far as to find that the applicant has misconducted himself or has been reckless in the litigation to justify such costs.

In the result, it is ordered that;

1. **The application be and is hereby dismissed, both in the main or alternative relief.**
2. **The applicant bears the respondents' costs.**

Kadare Legal Practice, applicant's legal practitioners
Makuwaza & Magogo Attorneys, first and second respondent's legal practitioners
Bera Masamba, third respondent's legal practitioners