PATIENCE NOTHANDO MAKONI
and
LESLEY BONIFACE MAKONI
versus
CITY OF HARARE
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 March 2023

Date of written judgment: 21 April 2023

Opposed application

B. Ngwenya, for the applicant
A. Moyo, for the first respondent
No appearance for the second respondent

MAFUSIRE J

[1] The applicants seek an order compelling the first respondent to transfer to them within three months of the order, ownership of a certain piece of land situate in Harare called Stand 3225 Bluffhill Township. The claim is based on an alleged agreement of sale between the applicants and the first respondent dated 23 June 2016. The applicants allege the first respondent has evinced an intention to cancel that agreement, or to breach it.

[2] Abridged, the applicants' claim is this. On 15 May 2012 the first respondent offered to sell them the property for $75 000, with VAT at 15%, amounting to $2 500. The amounts had to be paid by August 2016. On 23 June 2016 the parties signed a formal agreement of sale for the property. The applicants allege they paid the purchase price in full and complied with the other terms of the agreement. Among other things, they started receiving rates bills for the property and paying them. The drawings submitted by them for the development of the property were approved. They started to build. Water was connected in the applicants' name. Above all, on 16 July 2016 the first respondent issued them with a certificate of

compliance. It certified that services pertaining to water, sewer and roads for the property had satisfactorily been complied with, and among other things, that the transfer of the property could now be registered.

[3] The applicants allege that against the flow of such progress, the first respondent, in November 2022, instructed them to halt any further development on the property as it was intended to cancel the agreement of sale. They aver that his development followed a visit to the construction site by one of the first respondent's officials. The applicants believe this conduct by the first respondent amounts to a breach of contract. They now seek an order in the following terms:

- That the [first] respondent passes transfer of title to the applicants of the property called Stand 3225 Bluffhill Township measuring 1592 m^2 within three months of the granting this order;
- That in the event that the first respondent fails to pass transfer within the given timelines above, the second respondent be and is hereby authorised to act in the first respondent's stead and pass transfer to the applicants;
- That the costs of this application on an attorney and client scale shall be borne by the first respondent.

[4] The first respondent opposes the claim. It has raised multiple issues, including some that it calls points *in limine*. In substance, it objects to the order being sought on the basis of fraud and/or forgery. It alleges that the signatures appearing on the offer letter and the agreement of sale purporting to be those of one of its officials, Ms J. Ncube, are forgeries. As proof, the first respondent produces an extract of some undated communication to some unnamed recipient in respect of some piece of property in some unrelated area and purportedly signed by the same Ms J. Ncube. The first respondent alleges that Ms J. Ncube's signature on that communication is markedly different from her purported signatures on the offer letter and the agreement of sale.

[5] The first respondent alleges some irreconcilable dispute of facts warranting a referral of the matter to trial for *viva voce* evidence. It draws scrupulous focus on the alleged offer letter and the agreement of sale. It challenges their authenticity. In regards to the offer letter, the first respondent alleges that it is addressed only to the first applicant and not to both of them. As such, it is argued, the offer was incapable of being accepted by both the first

applicant and the second. The first respondent also alleges that the offer letter lacks an official date-stamp from any of its departments. In regards the agreement of sale, the first respondent alleges that it is one of those generic, fill-in documents that anyone could have just picked and signed. It points out that the purchase price for the property is not stated in the body of the agreement. As such, such a purported agreement is null and void because in a proper agreement of sale, the price, or *pretium*, is such an essential term without which there can be no agreement.

[6] The first respondent further alleges that although the agreement of sale purports to have been signed on the last page by Ms J. Ncube, none of the other pages were initialled by anyone representing the first respondent. With regards to the payment of the purchase price and the rates by the applicants, the first respondent alleges that the applicants have not produced any proof of payment of the purchase price and that the rates were receipted by its officials in a department that had not been aware of the fraud and which had merely prepared a duplicate or "dummy" record in the absence of the original that has never been located to date. The first respondent goes to some length to highlight some alleged inconsistencies in the whole deal, such as the fact that in terms of the agreement of sale, the property had to be developed within a specified period of time but that in the case of the applicants, by November 2022 they were still building. The first respondents also argues that the offer letter invited the first applicant to make payment to a district office in Sunningdaale which had nothing to do with properties in Bluffhill.

[7] In my judgment, I hold that the applicants have proved their case on a balance of probabilities. The first respondent's grounds of objection are bogus. It has resorted to mere nit picking. There are no genuine points *in limine*. All of its objections are on the merits. To the untrained eye, there is no manifest difference between the signatures ascribed to Ms J. Ncube appearing on the offer letter and the agreement of sale, on the one hand, and the one appearing on the dubious communication presented by the first respondent, on the other. No affidavit has been procured from the said Ms J. Ncube or any of the officials who dealt, or are dealing with this property to support the allegations of forgery.

[8] The dispute of fact alleged by the first respondent is fanciful. It lacks substance. That the offer letter might have been addressed to the first applicant only would not preclude both

the first and the second applicants entering into the agreement of sale jointly with the first respondent. What the applicants seek to enforce is the agreement, not the offer. That the offer letter lacked an official date-stamp is inconsequential. It was on an official letter-head of the first respondent, properly signed by someone representing the first respondent and, among other things, identifying the name of the first respondent's official, a Mr Tayerera, who the applicants could call or telephone. It has not been shown by the first respondent that in all cases in general, or in this instance in particular, such letters derive validity from a date-stamp.

[9] That Ms J. Ncube's initials did not appear on the pages of the agreement of sale other than her signature on the last page cannot, by itself, invalidate the agreement. It has not been shown that such agreements in general, or this agreement in particular, derived validity from the signatories' initials on every page. It may be mercantile practice for signatories to initial every page of an agreement but it is no general legal requirement unless the parties themselves covenant it to be so. That the space meant for the insertion of the purchase price in the agreement of sale was left blank is of no moment. The purchase price was in the offer letter. Evidence *aliunde* to the agreement of sale shows that the purchase price had been agreed upon. It had been paid. That would have been the reason why, among other things, the first applicant would have issued that certificate of compliance and invited the applicants to take transfer.

[10] To all intents and purposes, the first respondent had already transferred the risk and profit in the property to the applicants. That would explain, among other things, the water connection and rates bills in the applicants' name. The applicants have all along been in occupation of the property. Regarding the failure by the applicants to produce the receipts as proof of payment of the purchase price, I am satisfied that they have provided sufficient information to show that they paid. Their explanation that due to the passage of time, some documents have become misplaced is reasonable and satisfactory.

[11] Clauses 7, 8, 9 and 13 of the standard word agreement dealt with the requirement of a purchaser to construct a dwelling house up to a certain minimum standard within a specified period failing which some adverse consequences would follow. However, this cannot be a valid ground for the first respondent to resist the order being sought. Among other things, the

consequences that might befall a defaulting purchaser in this regard would include an increase in the rate, or the repossession of the property by the first respondent. None of such consequences goes to the root of the validity of the agreement itself. At any rate, the applicants allege that they had been granted an extension of time in terms of the agreement.

[12] Other than raising the point, it has not been shown by the first respondent how and why an offer letter from one district office would be invalid if it dealt with a property in another district. At any rate, in the face of the agreement of sale, this would be all water under the bridge. The first respondent's purported explanation that the office or offices billing the applicants for the rates and water charges, and receipting payments made by them, did so under some mistaken belief that the applicants had a valid contract in respect of the property is incredible given the length of time involved. Such an explanation is unreasonable and unworthy of belief. At any rate, coming from the deponent who has no other claim to personal knowledge of the facts or of the information apart from the mere fact that he is the Acting Town Clerk, such allegations are plainly hearsay which is inadmissible.

[13] The applicants are entitled to the relief sought. However, there is no justification for their claiming costs of suit on an attorney and client scale. There has been no abuse of the court process by the first respondent or any other errant behaviour on its part such as to warrant a penal order of costs. Therefore, the following orders are made:

i/ Within three months of this order, the first respondent shall transfer to the applicants, or take all such other steps as are necessary to pass title to the applicants in the property situate in Harare called Stand 3225 Bluffhill Township, measuring 1592 m^2, failing which the Sheriff shall be authorised and empowered to act in the first respondent's stead and give effect to this order.

ii/ The costs of this application shall be borne by the first respondent.

21 April 2023

B. Ngwenya Legal Practice, applicants' legal practitioners
Gambe Law Group, first respondent's legal practitioners