SIMBARASHE ADAMS
versus
GRACE MUZVIDZWA
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 9 March & 17 November 2023

Opposed Application

Mr *E Dondo,* for the applicant.
Mr *T G Mukwindidza*, for the 1st respondent.
Mr *C Chibidi*, for the 2nd respondent.

DEME J: The applicant approached this court seeking a declarator in terms of Section 14 of the High Court Act [*Chapter 7:*06]. In particular, the applicant's prayer before this court is as follows:

> "1. An application for a declaratory order be and is hereby granted in favour of the Applicant in the following terms;
>
> a. Applicant be and is hereby declared the lawful holder of rights, and interests in property known as number 6385 Retreat Waterfalls.
>
> b. 1st Respondent and all those in occupation through him at property known as No. 6385 Retreat Waterfalls be and hereby are (sic) ordered to forthwith vacate the property and give vacant possession to the Applicant within 10 days from the date of this order.
>
> c. 1st Respondent be and is hereby ordered to bear costs of this suit on a higher scale."

The applicant in this matter is Simbarashe Adams cited in his personal capacity while the first respondent is the now deceased Tonderai Machakaire who has been subsequently substituted by his wife Grace Muzvidzwa. The second respondent is the Minister of Local Government, Public Works and National Housing cited in his official capacity.

According to the applicant, sometime in 2009, he joined the Chimoyo Housing Cooperative Society in order to secure a residential property. Prior to the applicant joining the Chimoyo Housing Co-operative, the applicant averred that in 2008 Chimoyo Housing Cooperative was given a block of stands ranging from Stand Number 6380-6391 Retreat Waterfalls by the then Harare Metropolitan province Resident Minister. The applicant further stated that Chimoyo Housing Co-operative then distributed these block of stands to its various paid up members.

The applicant claimed to have been allocated Stand No. 6385 Retreat Farm Waterfalls, (hereinafter called "the property") in 2014, by Chimoyo Housing Co-operative. After this allocation, the applicant entered into a lease agreement with the second respondent over the property. According to the applicant, the material terms and conditions of the lease agreement were that buildings were to be constructed within a period of 6 years and thereafter the lease agreement will be activated into a rent to buy agreement. The applicant maintained that he had failed to develop the property as per the agreed position, because of the first respondent purported competing rights. More particularly, the applicant alleged that the first respondent's occupation of the disputed property made it impossible for him to fulfil the terms and conditions of the lease agreement.

The applicant alleged that he then confronted the first respondent who had already taken occupation of the property in dispute. The first respondent claimed that she had been allocated the same property by her housing co-operative namely Samora Machel Housing Co-operative.

The applicant averred that he is aware of the fact that the first respondent will be tempted to claim that his housing co-operative (Samora Machel Housing Co-operative) was allocated the block of stands that includes the property in question by Harare South Housing Co-operative Association also known as the Apex Board sometime in October 2012. The applicant vehemently denied such purported allegation based on three reasons. Firstly, the applicant dismissed the alleged allocation to the first respondent on the basis that the purported allocation of the block of stands which includes the property by the Apex Board led by Tonderai Nkomo done after the 7th of August 2012 was ruled by this court as a nullity. Secondly, the applicant argued that the Apex Board could not allocate the block of stands which includes the property in dispute to Samora Machel Housing Co-operative because during that period the alleged housing co-operative for the first respondent was non-existent,

there was no entity called Samora Machel Housing Co-operative. Thirdly, the applicant contended that there was no certificate of provisional registration of Samora Machel Housing Co-operative prior to January 2016 nor was there any registration certificate of Samora Machel Housing Co-operative prior to January 2016. According to the applicant's averments, Samora Machel Housing Co-operative only came into existence in January 2016 upon registration.

Additionally, the applicant alleged that there is no letter or proof placed before this court, to the effect that the second respondent alienated the property in question to the Apex Board or Samora Machel Housing Co-operative, which later on alienated the same to the first respondent. Further, the applicant alleged that the document which the first respondent relies on does not have any logo from the Ministry and as such the applicant is of the view that the letter is not an authentic copy.

The present application is being opposed by the first respondent from various fronts. The first respondent averred that the applicant was not a member of Chimoyo Housing Co-operative as early as 2009 and therefore he has no capacity to comment on the events which occurred prior to him becoming a member of the Chimoyo Housing Co-operative. The first respondent further alleged that the former Chairperson of Chimoyo Housing Co-operative, Gideon Dzitiro disputed the applicant's membership in respect of Chimoyo Housing Co-operative prior to 2013 when he resigned from the position of the Chairperson of Chimoyo Housing Co-operative.

The first respondent averred that the block of stands allocated to Chimoyo Housing Co-operative in 2008 did not include the property in dispute. According to the first respondent, this allocation of stands to Chimoyo Housing Co-operative was based on Plan Number SL 746 which excluded the property in question a position which was also averred by the former chairperson of Chimoyo Housing Co-operative in his affidavit filed of record. It is the first respondent's belief that Chimoyo Housing Co-operative could not allocate a non-existent Stand to the applicant.

The first respondent further asserted that the property in dispute was allocated based on the Layout plan which was approved on 12 August 2011. The same position was also affirmed by the former chairperson of Chimoyo Housing Co-operative, Gideon Dzitiro. The first respondent further maintained that on this basis it is clear that Chimoyo Housing Co-

operative could not have been allocated a non-existent stand by the then Resident Minister in 2008.

The applicant, in response to this, maintained that Chimoyo Housing Co-operative was, in 2008, allocated unsurveyed block of stands which was subsequently approved.

The first respondent maintained that the property in dispute that was allocated to Chimoyo Housing Co-operative was also allocated to her co-operative, (Samora Machel Housing Co-operative) by the second respondent through its office of the District Administrator in 2012 and the same allocation remains extant to date.

The first respondent further affirmed that the property in question was allocated to her by Samora Machel Housing Co-operative. She also asserted that she is in possession of the card issued by UDCORP an entity which falls under the second respondent confirming her ownership of the property in question. She further disputed the validity of the applicant's lease agreement. The first respondent alleged that the lease agreement has since expired and has not been renewed by the applicant hence the applicant cannot claim ownership of the stand in question basing his claim on the expired lease agreement.

Further, the first respondent disputed that there was any dissolution of the Apex Board prior to August 2012 as alleged by the applicant and vigorously denied the non-existence of Samora Machel Housing Co-operative at the material time as alleged by the applicant. According to the first respondent's knowledge, Samora Machel Housing Co-operative was provisionally registered in October 2011.

The applicant's averments that the Apex Board had no authority to allocate a block of stands to Samora Machel Housing Co-operative in the Retreat Farm are opposed by the first respondent. The first respondent alleged that the Apex Board had authority to allocate the block of stands to co-operatives in Retreat Farm which includes the property in dispute.

The first respondent averred that the second respondent did not lease the vacant property to the applicant, as she was already in occupation of the property in question prior to 1 October 2015 when the applicant's lease was issued and became effective. She further maintained that when the applicant was issued with a lease agreement, he was not in occupation of the property and did not subsequently take occupation of the same. The first respondent further averred that the applicant was aware of the fact that the property in question was already occupied prior to the signing of the lease agreement.

The first respondent further alleged that there are a plethora of allocations done in the Retreat Farm. These allocations include allocations done by the regularising committee in 2008, allocations by the DA, allocations by the Apex Board, allocation by the Harare South Housing Union and allocations by the second respondent, a position which is also confirmed by the former chairperson of Chimoyo Housing Co-operative in his affidavit filed of record. The first respondent consequently prayed for the dismissal of the application.

The issue that exercises the mind of this court is whether the Applicant is entitled to the relief as sought.

The first respondent alleged that there are material disputes of fact arising from the present application while the applicant is opposing this. The first respondent alleged that the applicant is not a member of Chimoyo Housing Co-operative. This was raised in the opposing affidavit. Paragraph 7 of the opposing affidavit provides as follows:

> "This is disputed. Applicant has failed to prove that he was a member of the co-operative in 2009 as alleged. He could have attached the receipt of his joining fee or at the very least explain why he has not attached the receipt. Applicant was not a member of Chimoyo Housing Co-operative as early as 2009. I refer to the affidavit of the former Chairperson of Chimoyo Housing Co-operative at the material time in question. Applicant has conveniently lied upon oath to clothe his application with some legality."

Mr *Dzitiro's* supporting affidavit referred to in para 7 of the opposing affidavit also stated that the applicant was not a member of Chimoyo Housing Co-operative at the material time. Paragraph 7 of the supporting affidavit is as follows:

> "I can also confirm that the Applicants in the matters referred to were not members of Chimoyo Housing Co-operative since 2009 as alleged. They were also not co-operative members of Chimoyo Housing Co-operative in 2013 when I relinquished the chairmanship role of Chimoyo Housing Co-operative."

In responding to the allegations raised in the opposing affidavit, the applicant, in para 4 of the answering affidavit, stated that:

> "This is not material. The fact that remains is that I am a member of Chimoyo Housing Co-operative. I attach evidence to that effect. As to whether I joined in 2009 or not, that does not matter. What matters is that I am their member and they acknowledged me. I have attached enough documents in this regards (sic). It was through that housing co-operative that I eventually obtained the lease. If I was not a member of Chimoyo Housing Co-operative, I would not have been a lease holder."

In responding to para 7 of Mr *Dzitiro's* supporting affidavit, the applicant averred in the following way:

> "This is denied. There is no substance in this allegation. In any event, this is immaterial. What matters is whether or not there is a lease that was issued to me through Chimoyo Housing Co-operative."

The applicant's basis for acquiring the property in dispute is his membership of Chimoyo Housing Co-operative. Upon being challenged to produce proof of his membership, the applicant ought to have produced such evidence of his membership at the time alleged. Failure to respond to this question will leave this court with no ready answer as to whether the subsequent processes of allocation were regular. Thus, this area creates material disputes which cannot be resolved by way of affidavits. A trial is the only procedure that will unravel this material dispute of fact.

It is the first respondent's case that the Applicant failed to produce evidence that the lease agreement issued in his favour was subsequently renewed after its expiry in 2021. The first respondent referred the court to the letter on p 95 authored by the second respondent's officials, which, in part, provides as follows:

> "Please be advised that the Ministry suspended the issuance of leases for Retreat area due to rampant double allocations and numerous court cases that resulted from double allocations. The process of verifying the double allocations is under way and until this issue is resolved by the co-operatives, no new leases will be issued or renewed."

Without the testimony from the second respondent's office, this court will be unable to know whether the lease agreement issued in favour of the applicant was renewed or otherwise. The lease agreement was due to expire in 2021. The present application was instituted after the date of expiry of the lease agreement. According to para 2 of the lease agreement attached to the founding affidavit, the lease became effective with effect from 1 October 2015 and would run for six years. The life of the lease would come to its logical conclusion by 30 September 2021. Thus, the author of the letter on page 95 referred to by the first respondent was alive to the fact that lease agreements do expire and would require to be resuscitated through renewals for them to remain of force or effect. The applicant disputed that the lease agreement does not necessarily need renewal. This is another area requiring trial procedure to be resolved. This question has a bearing on the dispute which is before the court. The court is unable to establish a direct answer of whether or not the lease agreement

was subsequently renewed after its expiry. This answer can only be settled by the tools of the trial procedure.

After assessing the case with material disputes of fact, the court in the case of *Muzanenhamo* v *Officer in Charge CID Law and Order and Others*[1], superlatively remarked in the following manner:

> "In the final analysis, I am of the considered view that the conflicting positions of the parties *in casu* are irreconcilable on the papers in several critical respects. The affidavit evidence does not clearly establish the veracity of all of the applicant's complaints to the extent that it can be said that there is a "ready answer to the dispute between the parties in the absence of further evidence". As was properly conceded by counsel for the applicant, all of the relief sought herein involves having to make findings of fact, and only a few of the relevant facts are resoluble on the papers. I accordingly conclude that there are material and significant disputes of fact that can only be resolved by the calling of oral evidence in trial proceedings."

Clearly, the two issues which I highlighted are a signal that the applicant's case and the first respondent's case are irreconcilable. This court is unable to make a factual finding with respect to such issues in the absence of leading of oral evidence.

The test to be employed in analysing whether conflict of fact arises was superbly defined in the case of *Supa Plant Investments (Pvt) Ltd v Chidavaenzi*[2], in the following comments:

> "It is my view that it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by MCNALLY J (as he then was) in *Masukusa v National Foods Ltd and Another* 1983 (1) ZLR 232 (H) and in all the other cases that have followed. A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

Further, a material dispute of fact also erupts where the court entertains a reasonable doubt as to the appropriate course of action to be taken in order to resolve the matter before it without hearing further evidence. In the case of *Riozim (Pvt) Ltd* v *Falcon Resources (Pvt) Ltd and Another*[3], the Supreme Court splendidly remarked as follows:

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[1] CCZ3/13.

[2] 2009 (2) ZLR 132 (H).

[3] SC28/22.

> "In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. From the decided cases, it is evident that a dispute of fact arises where the court is left in a state of reasonable doubt as to which course to take in resolving the matter without further evidence being led."

In casu, no court, acting reasonably may be able to make factual findings of the two issues highlighted before without hearing of further evidence. No supplementary evidence has been tendered by the applicant upon being challenged to prove that he is a member of Chimoyo Housing Co-operative. The issue of whether or not the lease agreement issued in favour of the applicant was renewed remains unanswered.

In the circumstances, it is prudent that the matter be referred to trial for the determination of the issues between the parties. The pleadings filed by the parties shall assume the respective shape and form as outlined in the case of Muzanenhamo (*supra*). In order to clearly define the issues between the parties, there is need for parties to file additional pleadings in accordance with the manner prescribed by the case of Muzanenhamo (*supra). At this point, an order that costs be in the cause is just and fair in the circumstances.* Consequently, it is ordered as follows:

The matter be referred to trial for determination on the basis of viva voce evidence under the following conditions:

(a) The founding papers shall stand as summons commencing action for the applicant or plaintiff.
(b) The opposing papers shall stand as notice of appearance to defend for the first respondent / first defendant.
(c) The applicant or plaintiff is directed to file his declaration within ten days from the date of this order.
(d) The matter shall proceed thereafter in accordance with the rules.
(e) The costs of this application to date shall be in the cause.

Messrs Saunyama Dondo, applicant's legal practitioners.
Messrs Bere Brothers, first respondent's legal practitioners.
Civil Division, second respondent's legal practitioners.