1. CATHERINE MHIYANGWA **HC 3031/18**

And

HITH MATASHU

Versus

HAROLD SOWA

And

CHRISTINE SOWA

And

CITY OF BULAWAYO

And

SHERIFF OF THE HIGH COURT N.O

2. HAROLD SOWA **HC 1901/19**

And

CHRISTINE SOWA

Versus

CATHERINE MHIYANGWA

And

HITH MATASHU

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 4 NOVEMBER 2020 AND 28 OCTOBER 2021

Civil Trial

U Nare, for the plaintiff
Z.C Ncube, for the 1st and 2nd defendants
No appearance for the 3rd and 4th defendants

MABHIKWA J: The plaintiffs instituted proceedings by way of a court application to compel transfer under cover of HC 3031/18 seeking the confirmation of a verbal agreement between the plaintiffs and the 1st and 2nd defendants, as well as the transfer of stand No. J4 Mzilikazi Township, Bulawayo into the plaintiff's names.

The defendants instituted proceedings on 15 November 2015 under cover of HC 1901/19 Xref 3031/18.

In the Court application under cover of HC 3031/18 the plaintiff sought an order in the following terms that;

"1. The verbal Agreement of Sale entered into between the applicants and the 1st and 2nd respondents be and is hereby confirmed.

2. The respondents be and are hereby directed to transfer and/or cede stand No. J4 Mzilikazi, Bulawayo to the applicants.

3. The 1st and 2nd respondents be and are hereby ordered to sign all the necessary transfer documents within 5 days of the granting of this order, failing which the 4th respondent be and is hereby authorised and directed to sign any/or all documents necessary to effect the above mentioned transfer.

4. The 1st and 2nd respondents shall pay the costs of suit at an attorney and client scale."

On their part in case No. HC 1901/19, the then 1st and 2nd plaintiffs issued summons against the then first and second defendants on 8 August 2019 claiming the following.

"1. An order that pending the determination of the matter under cover HC 3031/18, involving the same parties, the defendants continue to pay rentals at the rate of RTGS200.00 (two hundred dollars) per month as per the lease agreement between the parties.

2. An order that the defendants pay the plaintiffs the sum of RTGS 1 200-00 (one thousand and two hundred dollars) being the current arrear rental for the months of March 2019, April 2019, May 2019, June 2019, July 2019 and August 2019.

3. An order that if the defendants fail to pay the rentals, they be found in breach of contract and be ordered to vacate the premises, failing which the Sheriff of Zimbabwe or his lawful assistant be and is hereby authorised to evict the defendants.

4. An order that the defendants pay costs of suit on an attorney and client's scale."

At a hearing of case No. HC 3031/18, before Honourable Justice MAKONESE on 19 July 2019, an order was made by consent of the parties that;

a) The matter be removed from the roll.

b) The matter be referred to trial in view of the existence of material disputes of fact.

c) The papers already filed of record stand as pleadings.

d) The parties file a pre-trial conference minute and apply for pre-trial conference dates.

Accordingly and by consent of the parties, the two matters were subsequently consolidated into one case for trial. At the commencement of trial the following issues were identified for determination by the court;

1. Whether or not there is a valid agreement of sale between the parties.
2. If so, whether or not the plaintiffs complied with the terms of the agreement.
3. Whether or not there should be an order for specific performance granted.
4. Whether or not the plaintiffs are liable to pay rentals, including arrear rentals from March 2019.
5. Whether or not the defendants are liable to evict the plaintiffs from the said property.

I must say from the onset that in the final analysis, the evidence of what transpired in this case became common cause, though said in different words. I will therefore nonetheless endeavour to summarise the said evidence.

Catherine Mhiyangwa

Being the 1st plaintiff, she told the court that she and her husband, Hith Matashu were tenants at house No. J4 Mzilikazi Bulawayo owned by the 1st and 2nd respondents, the Sowas. It was in 2017 when the Sowas told them that they had decided to sell the house for $14 000-00. They bought the house. She does not state the currency. She however goes on to say she and her husband responded that they had only US$3 000-00 which they had saved. They were told that it was too little and should rather be increased to $6 000-00 which the Sowas were prepared to accept as deposit. Again she does not state the specific currency. They deposited $6 000 in the Sowas' P.O.S.B account. Again she does not state exactly what form of currency was deposited. She says after the deposit, they met the Sowas at the house. She and her husband wanted to have the agreement reduced to writing which they say had been originally agreed that it would be done after payment of the deposit. They even called neighbours to sign as witnesses. She says however, the Sowas said the calling of witnesses was premature at that time. They looked unhappy and unsettled. They changed and said the agreement would be reduced to writing and be signed after payment of $10 000-00. There was to be an additional

$4 000-00. Again she does not specify exactly in what currency. It was then agreed that the plaintiffs continue to pay rentals as well as the balance of the purchase price until they had paid for the house in full. In December 2017, they only managed to deposit $1 000-00, to make it $7 000.00. The defendants complained that the amount they had paid was too little and insulted them very badly. In March 2018, they managed to deposit $3 000-00. They would phone the defendants when they managed to raise an amount. The $3 000-00 brought the total to $10 000.

Catherine says that after payment of the $10 000-00 the defendants were urged by their relatives to demand that an agreement be signed. She says the Sowas instead demanded first to be paid the remainder in United States Dollars. (USD). She says in fact it was as if the Sowas were charging afresh as they demanded a balance of US$8 000-00 instead of simply $4 000-00. She says she and her husband decided to go and seek legal assistance from the Court at Tredgold. They were advised there to look for a lawyer. Their engagement of a lawyer allegedly angered the Sowas even more. Their lawyer advised them to pay "as initially agreed in RTGS. As a result of that advise, they deposited $4 000 in RTGS to make it $14 000-00 in full by November 2018. She says she believed that there was a valid agreement between them as they were given a Bank ABC account to deposit the purchase price. From her evidence in-chief, she said they deposited $14 000-00 in the Bank because as far as they were concerned, the official rate at the time was one Zimbabwean dollar to one United States dollar (ZW$1 to US$1).

On the issue of the rentals, she said she believed that they did not owe any rentals from March 2019 because they had already paid for the house. Further, they could not be evicted from a house they had paid for. However, under cross-examination by *Mr Z. Ncube* for the defendants, the 1st plaintiff admitted the following;

a) That the parties entered into negotiations to purchase the house for the sum of US$14 000-00. The deposit was US$6 000-00.

b) That there was no agreement on how they would pay the remaining US$8 000-00 pertaining to the times and amounts of instalments. She claims that they would pay as and when they got money or upon any demand by the defendants.

c) That initially, upon payment of US$6 000 the agreement was to be reduced to writing. Thereafter there was a change by the defendants that the written

agreement would be signed after payment of US$10 000 but on both occasions, there was no written agreement signed.

d) That ultimately, inspite of the fact that the plaintiffs and their relatives had demanded a written agreement, none was done or signed.

e) That the parties continuously failed to agree on the issue of the currency to be paid, especially the balance of $8 000 hence no agreement was reduced to writing.

f) That at some stage, the plaintiffs offered to move out of the house and accept a refund of what they had paid into the defendants' bank account.

g) That their erstwhile lawyers, (not Mr Nare of Messrs Mcijo & Associates who were representing them at the trial) had received the refund into their bank account. Somehow, she believes that these erstwhile lawyers should only have received the refund after being ordered by the court to do so.

h) That the plaintiffs had made the payments as follows;

h(i) August 2017 - $6 000 – paid into account

(ii) 15 December 2017 - $1 000-00 – paid into account

(iii) 21 March 2019 - $3 000-00 – paid into account

(iv) 12 November 2018 - $4 000-00 – paid into account

TOTAL **$14 000,00**

(i) That the defendants had refunded the money as follows;

(i) 21 November 2018 - $8 000,00 into account

(ii) 26 January 2019 - $5 200,00 into account

TOTAL **$13 200,00**

(l) That from March 2019, to the date of trial on 4 November 2020 the plaintiffs had not paid any rent although she added that they believed they had already bought the house.

(m) That there was no other agreement apart from the above aborted one and the house remains in the names of the Sowas.

Hith Matashu

Nothing much came from this witness. His evidence was essentially the same as that of his wife. Crucially, he stated that the parties agreed on $14 000,00 as the purchase price but there were no specific terms agreed as to how it would be paid. They (plaintiffs) were allowed to pay into the defendants' bank account whatever they had saved at the time which happened to be $6 000,00. They would pay the balance of $8 000,00 in instalments as and when they got money. There was also no specific agreed amount to be paid as an instalment. He also stated that the defendants then demanded the balance "in cash" but they (the plaintiffs) continued to deposit the remainder into the bank account.

Although he qualified that they believed they had already bought the house, he admitted that their former lawyer had received a letter from defendants' lawyers in early 2019 indicating that rent arrears as at 4 April stood at US$400,00. A subsequent letter also showed that as at 22 July 2019, the arrears stood at US$1000,00. He also admitted that if it is accepted that the $13 200,00 refund as at 26 January 2019 plus the $800,00 being arrear rentals as at February 2019 totals $14 000,00 then the refund due to the plaintiffs had been paid in full.

Harold Sowa

Only the husband, Harold Sowa testified for the 1st and 2nd defendants. His testimony was that he and his wife Christine jointly own house No. J4 Mzilikazi, Bulawayo. The plaintiffs were their tenants with whom they had very cordial relations. They offered to sell the house to them The purchase price was US$14 000,00. He admits that the plaintiffs were allowed to pay at the time, RTGS$6 000,00 through the bank as deposit. However, the remainder of US$8 000,00 would be paid in cash. He states that although at that time US$1 was officially equivalent to ZW$1 it was agreed that the balance was to be paid in cash to avoid sudden and unforeseen fluctuations in the currency values, especially because the balance was not going to be paid at once. The plaintiffs had been given up to December to pay it. He says the "wheels fell off" when the plaintiffs failed to fulfil what the parties had agreed and there was ultimately no binding agreement, hence the defendants refused to reduce anything to a written agreement. He says that instead of giving the defendants US$8 000,00 in cash, the plaintiffs in December went to the bank, used an old account number given to them much earlier when they deposited RTGS 6 000,00 and then "shoved" ("bafuqela") bond notes or RTGS therein. I must say that from the evidence, it appears that this must have been the time that the plaintiffs went to Tredgold and then were refered to their former lawyer who then

advised them to just deposit or transfer the RTGS4 000,00 into the account number they had. This was despite them well knowing that the defendants wanted US$8 000,00 in cash.

In cross examination he admitted allowing the plaintiffs to deposit RTGS 6000,00 in the bank and therefore receiving it. He disputed receiving the balance (RTGS $4 000,00 deposited by the plaintiffs against their knowledge and consent into an account that they considered an old unused account at the time. I would agree with the 1st defendant that in those circumstances, they could not be accused of having "accepted" or "received" the "balance". Sowa remained adamant that the parties failed to reach a proper agreement hence whatever the plaintiffs had deposited into their old account was refunded through the account of their lawyers at the time.

It is clear from the evidence that there was no valid and legally binding agreement in this case.

Firstly, the plaintiff claim that as far as they were concerned the ZW$1 in 2017 was equivalent to the US$1, therefore US$14 000,00 was equivalent to RTGS 14 000,00. To them therefore, the purchase price was equivalent to RTGS 14 000,00. According to the 1st and second defendants, the purchase was $14 000,00 in United States dollars (USD14 000) although they allowed the plaintiffs to put down a deposit of $6 000,00 which was in RTGS. Ultimately the plaintiffs argue that there was no specific currency agreed for the purchase price.

Secondly, although the parties had wished to have a written agreement, this failed on about three (3) occasions until none was written. One of the reasons, according to the plaintiffs was the parties' failure to agree on the currency to be used in payments.

Thirdly the parties failed to agree on the balance, the currency to be paid and the other terms and conditions of payment. Again there was no meeting of minds of the parties.

Fourthly, because of the continuous failure to agree, the applicants opted to move out and be refunded the RTGS 14 000,00 paid into the 1st and 2nd defendants' account. $8 000,00 of that amount had been deposited without the knowledge and consent of the 1st and 2nd defendants. Further, the said plaintiffs agreed that it was supposed to have been paid in cash in the first place and in United States dollars not RTGS. However, the plaintiffs later decided not to move out but the refund was done.

In 1. *Antonio* v *Ashanti Goldfields Zimbabwe Ltd & Anor*; 2. *Mujati* v *Ashanti Goldfields Zimbabwe Ltd & Anor*; 3. *Ashanti Goldfields Zimbabwe Ltd* v *Bonde* – 2009 (2)

ZLR 372 (HH 135-09) in a matter in which 3 trials with the consent of the parties were consolidated into one trial (because the points at issue between them were essentially the same), two of the parties sought the transfer of immovable property owned by Ashanti Goldfields into their names. Bonde in the 3rd case resisted a claim foe eviction by Ashanti Goldfields from the house which he occupied. A committee of Ashanti Goldfields had drafted a memorandum of agreement. The operative part read;

> "Ashanti Goldfields agrees to dispose of its housing units to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached."

This was "the first agreement". There was then a second agreement wherein the parties agreed to sign a lease agreement in terms of which the rentals would offset the purchase price. A and M had signed the lease agreement. B said whilst he did not sign this second agreement, he had paid off the entire purchase price of the house he occupied by means of regular monthly instalments and thereafter, by a lumpsum payment of the balance. The court held that there was a binding agreement in all 3 cases.

In *Associated Printing & Packaging (Pvt) Ltd & Ors* v *Lavin & Anor* 196 (1) ZLR 82 (S) MCNALLY JA (as he then was) held that in a case where the details to be determined later were ancillary matters and the principles upon which those details were to be determined had been agreed, the agreement would not be void for vagueness and therefore a valid binding agreement of sale.

The learned Judge however, went on to quote, with acknowledgement an observation by GRINDLEY-FERRIS J in *Margate Estates Ltd* v *Moore* 1943 TPD 54 at 58-59 that:-

> **"I do not think it can be disputed that before an agreement can be held to bind the parties thereto, all the material terms must have been agreed upon. It is also clear that in the absence of express stipulation in a contract of purchase and sale the purchase price is to be a cash payment.**
>
> **But when the question of when or how payment is to be made is part of the discussion between the parties, and is left over for determination at a future date, can it be said that all the material terms have been agreed upon.**
>
> **I think not."** (the emphasis is mine).
>
> *In casu*, it is clear that not all the material terms of the agreement had been agreed upon.

See also *Eastview Residents Association* v *Zimbabwe Reinsurance Corp Ltd & Ors* 2002 (2) ZLR 543 (H) per MALABA JA (as he then was).

In *P.G. Industries (Zim) Ltd* v *Machavira* 2012 (1) ZLR 552 (H) @ page 552 E-F. It was held that;

> "**for a contract to come into being, the parties must be of the same mind, and a co-incidence of will or a consenus *ad idem* must exist ….. It is also trite that for a contract to exist, there must be an offer made by one party which is accepted by the other,"**

And in *Victoria Falls Municipality* v *Nyathi & Ors* 2012 (1) ZLR 132 (H) @ page 132 where the court pointed out that;

> **"An agreement by consent is the foundation of contract …. The most helpful way of determining whether there has been an agreement, true or based on *quasi* mutual assent, is to look for an offer and acceptance of that offer. A binding contract is a rule constituted by acceptance of an offer."**

See also (i) *Nenyasha Housing Co-op* v *Violine Sibanda* HH 456-19.

(ii) *Telecontract (Pvt) Ltd t/a Telco* v *Sporrow Haulier (Pvt) Ltd t/a J and J Transport* SC 41-17.

I am convinced that there was no binding agreement of sale at all concluded in this case. It was even much less of a "gentlemen's agreement." One party decided to pay as and when they got money, or just wait for the other party to come back and make demands and tell them what to do next. Also, the purchaser ignored what currency the seller required and the mode of payment but instead asked for advice from 3rd parties and then deposited in the bank, without the sellers' knowledge and consent, what according to them was the legal prevailing bank rate equivalent. In short, both parties were deciding separately, what to do next each time money was paid or had to be paid. This was worsened by the ever changing rates and monetary policies hence the plaintiffs found it difficult to say exactly what currency had been agreed upon. For a valid contract to stand, there must be a meeting of the minds. The parties must have the same mental conception of what they are agreeing to do, which is called consensus *ad idem*. In the absence of a consensus *ad idem*, there can be no valid contract.

I am therefore inclined to agree with *Mr Z. Ncube* for the 1st and 2nd defendants that the parties' minds were far apart. There was no meeting of minds and legally, no consensus *ad idem*.

Consequently, I make the following order that;

1. The plaintiffs' claim is dismissed.

2. The plaintiffs are ordered to pay to the 1st and 2nd defendants arrear rent and rentals at the rate of RTGS 1 200,00 (one thousand and two hundred dollars) for the months of March 2019, April 2019, May 2019, June 2019, July 2019 and August 2019.

3. If the plaintiffs fail to pay the said rentals within 10 days of this order being made, they should vacate house No. J4 Mzilikazi, Bulawayo, failing which the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to evict them.

4. The plaintiffs pay costs of suit on an attorney and client's scale.

Liberty Mcijo And Associates, plaintiffs' legal practitioners
Messrs Ncube And Partners, defendants' legal practitioners