MOREBLESSING MASARIRAMBI APPLICANT
versus
GABRIEL MUKAMBACHAZA 1ST RESPONDENT
and
ALOIS MUGUZA 2ND RESPONDENT
and
CITY OF MUTARE 3RD RESPONDENT
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 20 January and 3 February 2022

Opposed Application

H. B. R. Tanaya, for the Applicants.
1st Respondent in person.

MUZENDA J: This is an application for a ***Declaratur*** sought in terms of s14 of the High Court Act, [*Chapter 7:06*] where the applicant seeks the following order:

"IT IS HEREBY ORDERED THAT:

1. ***First respondent's rights, title and interest in certain piece of land situated in the District of Umtali called stand 1815 Chikanga Township of Umtali Township Lands measuring 300 square metres be and are hereby declared executable in satisfaction of the judgment, in favour of the Applicant, in case No. HC 145/20.***
2. ***The first, second and third respondents be and are hereby ordered to sign the necessary cession forms (City Of Mutare Memorandum of Assignment) in respect of the immovable property within seven working days of payment of cession fees and rates clearance, if any by applicant, to enable the fourth respondent to proceed with the sale in execution under case number HC 145/20, failing which the fourth respondent shall sign the cession forms on behalf and in the stead of the first and second respondents.***
3. ***The third respondent shall furnish fourth respondent with copies of duly executed cession documents together with all documents relating to the immovable property and may be required by the fourth respondent to enable the sale in execution and session of the first respondent's rights, title and interest in the property, within seven days after execution of the cession documents in terms of paragraph 2 above.***
4. ***Any payment by applicant to the third respondent in terms of paragraph 2 above shall be deducted from the proceeds of the sale of the immovable property in execution in Case Number HC 145/20, and refunded to the applicant in higher rank to the judgment debt amounts in the main matter.***
5. ***Respondents shall, if the matter is opposed, pay costs of suit on attorney client scale."***

The application is opposed by the first respondent.

Background Facts.

This application's cause of action emanates from a conviction of robbery involving three suspects, first respondent being one of them. Mutare Regional Magistrate's Court sentenced first respondent and his two accomplices to a total of 12 years imprisonment, 3 years imprisonment was suspended on condition of future good behaviour, a further 2 years imprisonment was suspended on condition each of the three convicts was to restitute complainant US$3 601. The amount of prejudice in the criminal matter for robbery was US$ 10 803.

The applicant went on to issue summons against all the three convicts under HC 145/20 and on 3 September 2020 he obtained a default judgment for US$ 36 700. Applicant also got a writ of execution and tried to attach house number 1815 Chikanga, Mutare registered under Alois Muguza, second respondent. The property has no title and cession papers were not completed at the city of Mutare housing department. Only a Zimbabwe Revenue Authority ("Zimra") cession clearance certificate intending to cede rights of the house from second respondent to the first respondent was processed. No Agreement of sale entered between first and second respondent to the first respondent was attached by the applicant. In principle the court is not privy to the terms and conditions of sale and it is not clear whether first respondent fully paid the purchase price.

Applicant in his papers contends that second respondent has sold his rights to the first respondent. To the applicant what is outstanding is payment of cession fees ad rates clearance certificate, applicant offers to effect those payments, subject to him being reimbursed out of the proceeds of the sale of the house by the Sheriff. The Sheriff tried to place a caveat on the property and informed the applicant's lawyers of the complexity of disposing of the house registered in a third party's name. The challenge prompted applicant to file the current application.

The first respondent filed a document which he purports to be an opposing affidavit. In that document first respondent among other grounds criticises proceedings under HC 145/20 alleging that he was not properly served. He acknowledges the Regional Court's order for restitution for US$3601 and queries why applicant now claims US$ 36 700 against him. First applicant insists that he is going to pay part of his restitution as ordered by the Regional Court. It should be noted that first respondent is still in prison. He reiterates that he has no title over

1815 Chikanga, Mutare and that cession is still work in progress and he is "still wishing to purchase" the house.

The question for decision by the court is whether applicant has placed facts before the court to establish fertile grounds for a *declaratur* as per the draft order?

The Law

Herbstein and Van Winsen[1] defines a declaratory order as follows:

"*A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can be existing, prospective or contingent and no specific consequential relief need be claimed*."

The learned authors further clarified the matter as follows[2]

" *It has been consistently been held that there is a two-stage approach to the question whether a declaratory order should be made in terms of this section. During the first leg of the enquiry the court must be satisfied that the application has an interest in an 'existing future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of enquiry*".

On p 1434 the learned authors went further to explain the rights:

"In the *Family Benefit Friendly Society Matter,* Van Gijkhorst J also stated that:

'There must be a right which becomes the object of enquiry. It may be existing, future or contingent but it must be more tangible than the mere hope of a right or mere anxiety about a possible obligation. The word "contingent is not used in a broad and vague sense but in the narrow sense of "conditional". The word "contingent" is used as opposed to "vested". The rights and obligations to be enquired into are either vested (present and future) or conditional (contingent)"

The rights in issue must attach to the applicant or the plaintiff not someone else. In the matter of *Ross* v *Siberman*[3] the court referring to a statement in an earlier case to the effect that "if and when the contingency happens, the right will be created", dismissed the application with costs, holding that the petitioners' equally had no such right at present which can be determined.

In *the* matter of *Johnsent* v *Agricultural Finance Corporation*[4] the court held that

"*A declaratory order under s 14 of the High Court of Zimbabwe Act required a two-stage enquiry:*
(a) is applicant an interested party?

[1] The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed Volume 2 at 1428
[2] L bed, on p 1430
[3] 1963 (2) SA 296 (w) at 297 G-H
[4] SC 17/95 per GUBBAY CJ

(b) *Is this a proper case for the exercise of the courts discretion*".

On p 14 of the cyclostyled judgment the learned CHIEF JUSTICE added the following:

"*The authorities emphasize the conception of a cession as a bilateral agreement to transfer rights from one person to another. It cannot be a unilateral act. IN LTA Engineering co. LTD v Seacat Investment (Poly) LTD*[5]

> *'A cession is now considered to be a bilateral juristic act (agreement) whereby the cedent transfers his right of action to the cessionary the latter taking the place of the former as creditor'*"

In Hippo Quarries (TVL) (Pty) LTD v Eardley[6] NIENABER JA said:

> *"Cession it is trite, is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of a concurrence between the cedent's animus transferendi of the right and the cessionary's corresponding anumus acquerandi. If a complete surrender of the right is not intended the transaction, however it is dressed up, is not an out and out cession."*

Applying Law to the Facts

Applicant was a complainant in a criminal matter where he obtained an order for restitution. The Regional Magistrates Court exercised its jurisdictional rights in terms of Part XIX of the Criminal Procedure and Evidence Act. The applicant did not abandon the restitution order, it is still extant. The order specifically provided that first respondent should restitute applicant an amount of US$3 601. First respondent in his response to appellant's application is willing to compensate or restitute applicant the amount so ordered.

Section 374 of the Criminal Procedure and Evidence Act [7] provides as follows:

"*A convicted against whom an award or order has been made in terms of this Part shall not be liable at the suit of the injured party in whose favour the award or order was made to any other civil proceedings other than proceedings for the enforcement of the award or order in respect of:*

a) the loss or diminution of the right or the personal injury in respect of which the award of compensation was made, or
b) the restitution of the property in respect of which the order was made as the case may be."

It necessarily follows therefore that the judgment under HC 145/20 was not properly sought for by the applicant. His recourse lies in the restitution order awarded to him by the Regional Court. Applicant was legally barred from instituting a civil action in the High Court and in my view took advantage of first respondent's incarceration. The cause of action of the

[5] 1974 (1) SA 747 (a) at 762 A Per JANSEN JA
[6] 1992 (1) SA 867(a)at 873 E-F
[7] Cap 9:07 p 108

applicant lies in the Criminal Court where first respondent was convicted and applicant's relief equally lies in s 372 of the Criminal Procedure and Evidence Act which deals with enforcement of awards and orders.

Applicant suffers another insurmountable harbinger. He is seeking an order seeking literally, first for this court to declare validity nor enforceability of a contract of sale between first and second applicant. The terms of that agreement are not before the court. First respondent speaks of "wishing" to buy second respondent's house. Put it differently applicant wants second respondent to cede his right to first respondent and then seek an order of the court to declare those ceded rights executable. Second respondent has no contract with applicant. Second respondent still holds rights over the property. Before cession is effected second respondent may opt out for any reason unbeknown to this court. Maybe there are some outstanding payments and the second respondent owes no legal obligation towards applicant. In my view no declaration of rights arise from an incomplete sale. No rights are legally invested in first respondent as yet. No party can seek a declaration in regard to rights and duties flowing from a contract to which he was not a party. In any case the issue of restitution has already been decided by a competent court. Applicant by issuing summons claiming US$36 700 was declaring that he was not happy with the award of $10 803 and yet no appeal against that award was made by the prosecution. It is common cause that the applicant obtained a default judgment under HC 145/20. I am not privy to the pleadings filed in that matter but I cannot ignore at all the provisions of s 374 of the Criminal Procedure and Evidence Act as discussed hereinabove. That default judgment was sought by the applicant totally oblivious of s 374 and for the purpose of the current application for a *declaratur* the judgment is of no use to the applicant. Applicant is obliged to place facts before the court to bolster his case and motivate the court to grant the relief sought. Public policy should favour the issuance of the *declaratur* sought. Where the *declaratur* sought is in pursuance of a judgment obtained against statutory provision my interpretation of the law would be that such a *declaratur* will be contrary and averse to public policy. In essence the judgment under HC 145/20 obtained by applicant was a result of non-disclosure of law to the court, had applicant dutifully appraised the court of the provisions of s 374 cited above, the default judgment would not have been granted. Any attempt by applicant to cling to the default judgment granted in error remains a futile attempt.

A litigant in an application for a *declaratur* must meet both the statutory and legal requirements for such a relief. These prerequisites must be met and accepted by the court before even looking at the opposing papers filed by the affected party. In his answering affidavit as

well as heads of argument the applicant urged the court to treat the opposing papers as short of meeting the threshold of opposing papers. Indeed it is apparent from the perusal of first respondent's papers that he is a self-actor not armed with the expertise of one accustomed to rules of procedure in superior courts. However the court cannot treat the application as opposed and ignore the shortcomings of applicant's own papers. I will use my discretion to condone first respondent's non-compliance with rules purely on the fundamental tenets of natural justice. I must be satisfied that applicant has met the requests expected of him for a relief for a *declaratur*. He has come short of that. He could not comprehensively and satisfactorily justify the nature of rights he seeks to get a *declatatur* and more importantly the legal basis for his default judgment under HC 145/20. The putative agreement of sale between first and second respondents may or may not be fulfilled in the future given its current docile state. I am therefore contented that applicant failed to pass the first hurdle and I withhold my discretion to grant the *declaratur.*

Disposition

In the premises, it is ordered that:

The application is dismissed with costs.

Tanaya Law Firm, applicant's legal practitioners