EDWARD BEN MHAMBI Applicant

versus

NOEL DUBE 1st Respondent

and

MOREJI TSHUMA 2nd Respondent

HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 FEBRUARY & 7 MARCH 2002

L. Nkomo for applicant
J. Sibanda for 1st and 2nd respondents

Eviction

CHEDA J: This is an application for eviction order brought by applicant against both 1st and 2nd respondents. The brief history of the matter is that applicant was a member of Mhlahlandlela Development Group which operates under Mhlahlandlela Welfare Society Trust. Its aims and objectives amongst others was to build and develop houses for a certain group of people in Filabusi.

Applicant acquired a stand in Filabusi which was allocated to him by the said group. He constructed two structures, whether these were houses or huts is not clear but for the purpose of this application is irrelevant.

Sometime in 1977 applicant encountered financial problems and decided to sell the said stand. Molly Mpofu who was the co-ordinator of the scheme was advised of the problems being faced by applicant and introduced 2nd respondent to applicant.

The introduction resulted in an oral agreement being entered into between applicant and 2nd respondent. Applicant stated that the purchase price was $25 000. Applicant asserts that he spent $13 391,60 in improving this stand and is therefore entitled to

compensation. After respondents had been in occupation for 2 years a dispute between the parties arose which resulted in respondent approaching the courts for a peace order which was granted binding both parties.

Second respondent contends on the other hand that indeed there was an oral agreement to purchase the said stand but not for $25 000. There are several and material disputes of facts raised by 2nd respondent namely that:-

1. the figure of $25 000 was not mentioned as a purchase price or at all
2. the sale agreement appeared to have been between himself and Molly Mpofu
3. applicant did not build two houses but rather put up two huts
4. applicant did not spend an amount of $13 391,60
5. applicant has instead built a four roomed house valued at $40 000
6. Molly Mpofu whom applicant states appeared to be the prime mover in this matter did not advise respondent that there was any money required for the stand as it was state land. If anything, compensation only would have been necessary, but in this instance there was no need for it as she had used her own resources to put up the homestead for $2 000
7. 1st respondent states that he first heard of the figure of $25 000 after 2nd respondent had had a fall-out with Molly Mpofu on a business transaction.

Applicant's argument is that there was a verbal agreement between himself and 1st respondent. The terms and conditions of the said agreement are in dispute. The court is being asked to enforce that agreement. The difficulty in this matter is that Molly Mpofu's supporting affidavit does not adequately deal with the issues raised by respondents, save only to state the obvious, being that the disputed stand was lawfully granted to Mhlahlandlela Development Group by Gwanda District Council.

Mr Sibanda for the applicant argued that there is a dispute of material facts which can not be resolved on the papers. The courts' approach in dealing with court applications is to resolve matters on the basis of affidavits where it is practicable to do

so. Such approach should be tackled with open mindedness as opposed to an arm

chair approach. In da Matta v Otto N.O. 1972(3) SA 858 (A) WESSELS JA at 882 F-H

stated;

"The crucial question is, therefore, whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. If such a dispute does arise, it is ordinarily undesirable to settle the issue solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of viva voce evidence. Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155(T).

In the preliminary enquiry, i.e. as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on material on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bear denials of applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondents' affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided only after viva voce evidence has been heard."

This approach by the SA courts seems to have found home in our courts as is

shown in the following cases: Joosab & Ors v Shah 1972(1) RLR 137(G) at 138G-H,

Lalla v Spafford NO & Ors 1973(2) ZLR 241(G) at 243; Masakusa v National Foods

Ltd & Anor 1983(1) ZLR 232(HC) and in Zimbabwe Bonded Fiberglass (Pvt) Ltd v

Peech 1987(2) ZLR 338 (SC at 339C-D where the learned GUBBAY JA(as he then

was) stated:

"It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to ther other party concerned.

Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without calling evidence, where there is a bona fide and not merely an illusionary dispute of fact."

Firstly in adopting a robust and common sense approach I am inclined to the

resolution of this dispute before me on papers - but I am no doubt constrained by the

material dispute which are so glaringly clear on the papers. The applicant has been

unable to discharge the heavy onus on him in papers as there is a dispute of material

facts. The dispute of facts relate to the terms and conditions of the verbal agreement

and these in my view call for viva voce evidence if justice is to be done between the

parties.

The presence of such dispute in my view militates against the endeavour to

determine the matter on the papers and I therefore agree with Mr Sibanda that the

proceedings should be referred to trial.

The matter is accordingly referred to trial and parties may file their pleadings if

they so wish. Costs should be costs in the cause.

Webb, Low & Barry applicant's legal practitioners
Job Sibanda & Associates respondents' legal practitioners