STANSILOUS K MTIZIRA
versus
EPWORTH LOCAL BOARD
and
MAPANZURE
and
ELPHAS UTETE
and
ZACHARIOUS GODI

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 19 May 2010 & 9 February 2011

Opposed Matter

J Koto, for the applicant
C Mavhondo, for the third respondent

CHATUKUTA J: The applicant filed an urgent chamber application and sought the following relief:

"**TERMS OF FINAL ORDER SOUGHT**

1. That the reallocation of stand number 32, Muguta Shopping Centre, Epworth to the second, third, fourth respondent or any other person be and is hereby reversed.
2. That the first respondent is ordered to expedite the process of approving the applicant's building plans.
3. Alternatively that first respondent allocates the applicant another commercial stand of the same size.
4. That first applicant to pay costs of this application on the legal practitioner –client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter the Applicant is granted the following relief:

1. That all respondents are ordered to stop any further developments at number 32 Muguta, Shopping Centre, Epworth and first respondent is ordered to ensure that no other person will do any work at the stand."

The background to the application is that in September 2006, the applicant entered into an agreement with the first respondent for the lease of a certain property known as stand number 32, Muguta Shopping Centre, Epworth (the property). The lease agreement was valid for four years, from August 2006 up to September 2010. The applicant was required under clause 5 of the agreement to commence constructing a building not later than twelve months after the commencement of the agreement. Clause 20 of the lease agreement provided for an option to purchase the property upon completion of the building. However, in terms of clause 17, the applicant could exercise the option before the completion of the building if he satisfied the first respondent that he had been granted a loan secured by a mortgage bond over the property, had entered a contract for the construction of the building and had paid the full purchase price of the property.

The applicant contended that on 12 December 2007 he submitted, in compliance with the lease agreement, building plans for the development of the property. The plans had not been approved at the time of hearing this application despite numerous inquiries with the first respondent. He had also paid the full purchase price of the property.

On 18 April 2008 he was surprised to learn that someone, whom he later discovered to be the third respondent, had commenced developing the property. The third respondent was in the process of digging a foundation on the property. Upon inquiry with the first respondent's offices, he was advised that the first responded had summarily terminated the lease agreement and had repossessed the property because he had failed to commence developing it within the time specified in the agreement. The property had then been subdivided and allocated to the second, third and fourth respondents. On 30 April 2009, the applicant obtained an interim order restraining the third respondent from continuing with his developments pending the determination of this matter.

Only the third respondent opposed the application. He submitted that the first respondent had properly terminated the lease agreement with the applicant because applicant was in breach of the lease agreement by not commencing construction within the time stipulated in the lease agreement. He further contended that at the time he entered into the lease agreement and purchased his subdivision of the property, he was

not aware of the applicant's lease agreement. He was therefore an innocent purchaser and therefore the applicant was not entitled to the relief he sought. He had commenced constructing a building in terms of his lease agreement. The granting of the order sought by the applicant would therefore prejudice him.

It appears to me that there are three issues for determination. The first issue is whether or not the first respondent acted fairly and therefore lawfully in summarily cancelling the lease agreement without affording the applicant a chance to respond to the allegations that he was in breach of the agreement. The applicant submitted that the first respondent was obliged at law to give him an opportunity to respond to the allegation.

Although the first respondent did not file any opposing papers the third respondent advanced the argument that the applicant was in breach of the lease agreement and hence the first respondent had been entitled to cancel the agreement. In fact he went to great lengths in arguing the point.

The rules of natural justice as embodied in the *audi alteram partem* rule require that a person be given reasonable notice to make representations where another takes action which adversely affects his/her interests or rights. The rule as espoused in the Administrative Justice Act [*Chapter 10:28*] (the Act) require that an administrative authority such as the first respondent, with the responsibility to take an administrative action which may adversely affect the rights or interest of any person, to give that person an opportunity to make adequate representations. (See *U-Tow Trailers (Private Limited v City of Harare & Anor* HH 103/09).

It appears that the first respondent did not give the applicant the opportunity to make any representations before it unilaterally and summarily terminated the lease agreement. The first respondent did not oppose the application. Therefore the applicant's averments and contentions were not disputed. The third respondent could not advance the argument that the cancellation of the applicant's lease agreement was justified because he was not privy to the agreement between the applicant and the first respondent. In the absence of any opposition from the first respondent, it is my view that first respondent did not act fairly by not giving the applicant the opportunity to make representations. The lease agreement between the applicant and the first respondent therefore still subsists.

This brings me to the second issue for determination which is whether or not the third respondent is an innocent purchaser. The third respondent pleaded that he is an innocent purchaser and is therefore entitled to remain on the property. The applicant submitted that the respondent was not an innocent purchaser. He alleged that the third respondent had fraudulently entered into the agreement in order to defeat his claim over the property.

Both parties appear to have been operating under the same misapprehension that upon paying the purchase price stipulated in their respective agreements they had concluded valid sale agreements with the first respondent. I do not believe that they had. Clause 17 of the agreements, which are identical, provided that in addition to the payment of the purchase price, they were required to provide the first respondent with the proof that they had respectively entered into contracts for the development of the property. None of them produced the proof that they had entered into such contracts, neither did they plead that they had complied with all the terms of the lease agreements. The parties, and particularly the third respondent, appear in their pleadings to have been aware that the relationship between them and the first respondent was that of a lessee and a lessor. The third respondent used the terms "*bona fide* purchaser" and "*bona fide* lessee" interchangeably.

In any event, there is a distinction between the lease agreements the applicant and the third respondent entered with the first respondent respectively. The agreements were primarily lease agreements with an option to purchase the property. The agreements were not agreements of sale. Therefore the question of an innocent purchaser does not arise. I have therefore not considered it necessary to determine the allegations of fraud raised by the applicant.

It therefore appears to me that both the applicant and the third respondent were lessees. In view of my finding that the lease between the applicant and the first respondent still subsists, I do not believe that the lease between first respondent and the third respondent can stand. The first respondent could not have been able to lease the same property to the third respondent. Therefore no rights flowed from the third respondent's lease.

The last issue for determination as raised by the applicant is whether or not the first respondent falls under the ambit of section 39 of the Regional, Town and Country Planning Act, [*Chapter 29:12*] (the Act). Section 39(1)(a) prohibits the subdivision of any property without a permit from local planning authority.

The applicant contended that the first respondent allocated the property to the second to fourth respondents in breach of section 39 (1)(a) as read with section 40 of the Act in that there was no record that a permit had been issued for the subdivision of the property. The applicant contended that the respondents had not produced such a permit to show that the subdivision of the property had been approved entitling the first respondent to allocate the subdivisions to the second, third and fourth respondents. The applicant however, overlooked the provision of section 39 (2). Section 39(2) provides as follows :

> "(2) Subsection (1) shall not apply to—
> (*a*) land within the area under the jurisdiction of a municipal council or town council which is owned by the municipality or town concerned; or
> (*b*) land within a local government area administered and controlled by a local authority which is owned by that local authority or by the State;"

The property in issue belongs to or falls under the administration or control of the first respondent who is a local authority. Therefore the first respondent was not required to comply with the provisions of section 39 (1)(a) of the Act.

Turning to the relief sought, it appears that the draft order was not elegantly drafted. It is however clear from the pleadings that the applicant was seeking the nullification of the summary cancellation of the lease agreement with the first respondent. It will therefore be necessary for me to first order the setting aside of the summary termination of the applicant's lease. The other relief sought will thereafter follow.

The applicant is also, in my view, entitled to the expeditious processing of the approval of his building plans. The lease agreement requires that he commences constructing a building not later than twelve months after the commencement of the agreement. The agreement commenced running from August 2007. The applicant

submitted his plan timeoulsy on 12 December 2007. Four years later the plan has not yet been processed one way or the other. The third respondent's plan was processed and approved on the very same day that it was submitted. The applicant therefore has a legitimate expectation that the first respondent should expedite the processing of his plan if he is to comply with the terms of the lease agreement.

In the result it is ordered that:

1. The decision of the first respondent to summarily cancel the applicant's lease agreement be and is hereby set aside.
2. The allocation of stand number 32, Muguta Shopping Centre, Epworth to the second, third, fourth respondents be and is hereby reversed.
3. The first respondent be and is hereby ordered to expedite the consideration of the applicant's building plans.
4. The first respondent be and is hereby ordered to pay costs of this application.

Thondhlanga & Associates, applicant's legal practitioners
Sawyer & Mkushi, third respondent's legal practitioners