LLYOD NGWERUME
versus
RYDALE RIDGE PARK (PVT) LTD
and
SAMSON TEGUDU

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 09 February & 18 May 2022

Application for a Compelling Order

A Chambati, for the applicant
K Goma, for the respondent
No appearance for the 2nd respondent

NDLOVU J: At the hearing of this matter, the Applicant sought to amend the Draft Order. That application was opposed by the respondent. After hearing arguments on that point, I allowed the amendment of the Draft Order and indicated that the reasons would follow in the main judgment. The following are the reasons thereto.

It is trite that an application to amend a Draft Order may be made during the course of the hearing as long as it is backed by the evidence as contained in the Founding Affidavit and the sought amendment is not prejudicial to the opposing party. *Kennedy Godwin Mangenje* v *TBIC Investments (Private) Ltd & Anor* SC 16/18.

Having been satisfied that the amendment sought by the Applicant did not depart from the evidence contained in the Founding Affidavit and that it was not at all prejudicial to the first respondent's case, I allowed the amendment sought.

FACTUAL BACKGROUND OF THE MATTER

This is an application for a compelling order. Its genesis is that:

The first Respondent is a body corporate involved in the business of land development and related transactions. Sometime in 2013 the Applicant purchased a piece of land from the second Respondent and reduced that purchase into writing on 24 July 2013. The piece of land in question is situate in an area which was/is being developed by the first Responded. It is common cause that

pursuant to the sale agreement between the Applicant and the second Respondent the applicant approached the first Respondent for the purposes of the cession of rights in the property from the second Respondent to the applicant. For the sought services in that regard, the first Respondent charged the applicant US$2 200. During that time, Zimbabwe was in a multi-currency regime.

Applicant did not have the whole US$2 200 and as such only paid a deposit of US$600 leaving a balance of US$1 600 on 28 June 2013. He did not make any further payments until 12 May 2021 when he paid Rtgs$1 600 purportedly in settlement of the balance and purportedly on the strength of section 22 (1)(d) of the Finance (No. 2) Act, 2019. The first Respondent refused to accept the Rtgs$1 600 payment and demanded that the payment be made in US$ and further stated that their current fees for the said service is now US$1 000, making the necessary payment US$400 in order to receive the services he is seeking.

POINTS *In Limine*

At the hearing the first Respondent took two points *in limine*.

(i) That the relief sought is incompetent.

(ii) That there are material disputes of fact incapable of resolution on the papers.

(1) **Relief Sought**

At the centre of the controversy between the Applicant and the first Respondent in simple terms is payment of what the parties call the cession fees payable by the land purchaser (Applicant) to the land developer (first Respondent) 2 for the facilitation of the cession of rights in the property in question in favour of the Applicant from the second Respondent by the first Respondent. Judging from the contents of paragraph 2, Annexure C2 of the Applicant's application, being a letter written by first Respondent's lawyers on 8 June 2021 one may be forgiven for concluding that first Respondent occupies a position akin to that of a municipality in relation to the land in question. Paragraph 2 in question reads as follows:

> "Please find attached our client's self-explanatory letter setting out the requirements which your client must meet before cession of rights is effected"

That the order sought makes reference to registration and approval of the cession cannot be said to be making the sought relief incompetent in the circumstances of this case. First Respondent knows and understands as also does the court what the Applicant is talking about and

seeking as relief. See *Gava* v *Mawere & 5 Ors* HMA 18/19 and *Gomba* v *Makwarimba* 1992 (2) ZLR 26 (SC).

I conclude that the point *in limine* is not well taken and is duly dismissed.

(2) **Material Dispute of Fact**

First Respondent has in essence argued that, because the agreement between the parties was oral there is therefore need for *viva voce* evidence setting the terms of that agreement so that the Court is enabled to decide whether or not the Applicant is entitled to specific performance relief or in the alternative the Applicant breached the terms of the agreement between the parties and as such is not entitled to specific performance.

First Respondent has so argued that, the dispute over the terms of the oral agreement is material and incapable of resolution on the papers. The Applicant retorted by arguing that the first Respondent is creating imaginery material dispute of facts, and that bare averments do not create a material dispute of fact.

It is trite that not every dispute of fact is material. Neither is every material dispute of fact relevant. What matters at the end of the day is whether or not on the pleadings before a Court, the Court is fully appreciative of the controversy between the parties and can resolve them sufficiently on what is contained in the papers. In this matter I am to the degree necessary appreciative of the dispute between the parties and I am of the view that on the pleadings before me, I can easily resolve that dispute without any further evidence. I thus dismiss the second point *in limine* taken by the first Respondent for want of merit.

MERITS

The parties have devoted a lot of energy arguing on the issue of whether or not there was a breach of contract by the Applicant. Attractive as the argument might be, I do not for the reasons that hereunder appear, find that argument relevant to the resolution of this dispute.

It admits to no argument that, at the heart of the controversy between the parties, is the applicability or otherwise of the provisions of section 22 (1)(d) of the Finance (No. 2) Act of 2019 to this matter. In this regard, it is pertinent that the commercial relationship between the parties created on 28 June 2013 be put in its proper context and then be reviewed within the purview of section 22 (1)(d) of the Finance (No. 2) Act 2019.

I find it appropriate to restate the pertinent provisions of section 22(1)(d) of the Finance (No. 2) Act 2019 and they reads as follows:

> "*that for accounting and other purposes all assets and liabilities that were, immediately before the effective date, valued and expressed in United States Dollars……shall on and after the effective date be deemed to be values in RTGs dollars at a rate of one-to-one to the United States dollar……*"

A liability maybe defined as something that is owed to someone else that needs to be paid as a result of past transactions. On the other hand an asset is an account receivable, that is money owed to a company by its debtors for goods or services delivered or used but not yet paid for by customers.

In the present matter, the applicant paid US$600 as a deposit towards fees to effect a cession of rights in a property. The cession was not effected, thus the service the deposit was paid for was not rendered. For close to eight years the Applicant went silent. He knew that he could not expect or demand performance without him fully paying for that service. The first Respondent did not in the intervening period demand payment from the Applicant because it knew it had not rendered the service as the service had not been fully paid for and therefore was not owed anything by the Applicant. No right or obligation accrued on either party. This puts to rest the argument about breach.

There was no liability on the part of the Applicant towards the first Respondent in the sum of US$1 600 and neither was there an account receivable (asset) on the part of the first Respondent from the Applicant because no service had been rendered in favour of the Applicant. First Responded contrary to applicant's argument could not demand anything from the Applicant at law.

Without an asset and/or liability between the parties the provisions of section 22(1)(d) of the Finance (No. 2) Act 2019 do not apply in this case and the first Respondent is not obliged to accept the Rtgs$1 600 as settling the fees the Applicant has to pay to receive the services he wants from the first Respondent. The application stands to fail.

DISPOSITION

The application be and is hereby dismissed with costs.

Chambati Mataka and Makonese Attorneys at Law, applicant's legal practitioners
Gama and Partners, respondent's legal practitioners