REPORTABLE (100)

(1) CHRISTOPHER MURIMBA (2) LYNETTE MURIMBA
v
(1) DOMINIC SAUROMBE (2) THE SHERIFF OF THE HIGH COURT (3) MESSRS MAMBOSASA LEGAL PRACTITIONERS

SUPREME COURT OF ZIMBABWE
MATHONSI JA, CHATUKUTA JA & MWAYERA JA
HARARE: 17 JUNE 2022 & 3 OCTOBER 2023

B. Magogo, for the appellants

T. Tanyanyiwa, for the first respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) handed down on 26 January 2022 wherein it dismissed the appellants' application with costs on a party and party scale.

FACTUAL BACKGROUND

The following facts are common cause: The appellants and the first respondent (jointly referred to as "parties") purchased adjacent pieces of land, being stands 322 and 321 respectively, in Gletwyn Township, Harare. The appellants' stand measured 2 100 m^2. The first respondent erroneously erected a structure on the appellants' stand covering 1 972 m^2 in the belief that he was the owner of the property. Only 128 m^2 of the appellants' stand remained

undeveloped. When the parties realised the mistake, they sought to resolve the issue by negotiation.

On 20 December 2013 the parties entered into an agreement headed 'COMMITMENT TO RECTIFY ERROR THAT OCCURRED IN THE CONSTRUCTION OF A HOUSE ON STAND 322 OF STAND 1 OF GLETWYN TOWNSHIP'. They acknowledged that the first respondent had acted in error. They also acknowledged that, since the first respondent's construction distorted the original plan of the stand, there was a need to regularize the plan or process through the engagement and involvement of the relevant town planning and surveying authorities. Lastly, the parties agreed that in order to facilitate the necessary changes, both parties were to contribute agreed fees towards the payments to the relevant offices with the first respondent spearheading the regularization. Both parties failed to pay the requisite fees.

On 17 October 2014, the appellants issued summons in case number HC 9207/14 seeking an order compelling the first respondent to remove the structures encroaching into the appellants' property. They sought, in the alternative, an order that the first respondent takes transfer of the 1972 m^2 of Stand Number 322 Gletwyn Township Harare against payment to the appellants of a sum of US$ 39 440.00, being the value of the 1972 m^2. The first respondent defended the matter up until the pre-trial conference stage when the parties agreed to another settlement. On 17 September 2015, the parties signed a deed of settlement incorporating the provisions in the agreement of 20 December 2013. The deed of settlement provided that the appellants would be entitled to file an application seeking the relief set out in the summons in

the event that the first respondent did not comply with the terms in the deed of settlement. It further provided that the first respondent would make a payment in the sum of US$39 440 to the appellants as compensation for the said encroachment. The completion of the regularization process and payment to the appellants were supposed to be done on or before 15 January 2016.

The first respondent did not, again, comply with the terms of the deed of settlement. On 11 February 2016, and pursuant to the deed of settlement, the appellants sought and on 9 May 2016 were granted the following relief:

> "1. The respondent removes his structure encroaching 1 972 square metres into stand number 322 Gletwyn Township, Harare.
>
> 2. And failing compliance by the respondent to execute the order in paragraph 1 above, the Sheriff of the court is authorized to procure the demolition and removal of the encroaching 1972 square metres into stand number 322 Gletwyn Township Harare (*sic*).
>
> 3. Alternatively, that the respondent takes transfer of the 1 972 square metres of stand number 322 Gletwyn Township Harare against payment of the sum of US$39 440.00 to applicants being the value of the encroached 1972 square metres.
>
> 4. Respondent pays costs of suit."

The first respondent failed to comply with the order. A writ of execution was issued on 26 June 2016 for the demolition of the improvements made by the first respondent on the disputed piece of land. The writ was served on the first respondent sometime in December 2017. On or about 28 February 2018, the first respondent paid a sum of US$ 39 440.00 into the third respondents' trust account in compliance with para 3. The third respondents were the appellants' erstwhile attorneys. Upon payment of the said amount, the second respondent did not execute the writ and refunded execution fees paid to him by the appellants. On 9 April 2018 and on 26 June 2018, the third respondents requested the banking details of the first respondent's attorneys

after having been instructed by the appellants to refund the money paid into their trust account. On both occasions, the first respondent's erstwhile attorneys responded that they did not have instructions to receive the money and as a result they did not furnish the banking details.

On 9 September 2020, the appellants approached the *court a quo* in terms of Order 49 r 449 (1) (c) of the High Court Rules, 1971 seeking, *inter alia*, the deletion of para 3 of the order granted in case number HC 9207/14.

PROCEEDINGS IN THE *COURT A QUO*

The appellants argued that para 3 of the court order in case number HC 9207/14 was granted through a mistake common to both parties. The mistake being that the paragraph contravened s 39 (1) of the Regional Town, Country and Planning Act [*Chapter 29:12*] (the Act) which sets out in mandatory terms that no person shall subdivide any property or alienate any of his rights in the same except in accordance with a subdivision permit granted in terms of s 40 of the Act. It was submitted that the paragraph was therefore incapable of fulfilment in the absence of compliance with s 39 (1) of the Act. The appellants argued that the payment made by the first respondent was unlawful as it was made in compliance of an illegal provision in the said order. They refused to accept the amount which has remained in the third respondent's trust account. They have since tendered a refund of the money. The first respondent has refused to provide the third respondent with banking details in which it can refund the amount held in trust.

Per contra, the first respondent submitted that the order was granted with the consent of both parties and that there was no common mistake between the parties. The application was therefore incompetent as it did not fall under r 449 (1) (c). He also argued that

s 39 (1) of the Act did not apply as the appellants did not have title deeds for Stand Number 322. He submitted that he had complied with the order when he elected to pay and therefore the payment was lawful.

COURT *A QUO'S* DETERMINATION

The court *a quo* made the following findings: The appellants had failed to demonstrate that their application fell within the ambit of r 449 (1) (c) of the High Court Rules, 1971 as there was no mistake common to the parties in the inclusion of para 3 in the order granted in case number HC 9207/14. The order emanated from a deed of settlement agreed upon by both parties and was granted at the specific instance of the appellants who sought to execute including the allegedly offensive paragraph. The deed of settlement was legally binding. The application was intended to frustrate the payment made by the first respondent. The payment by the first respondent was in satisfaction of a lawful order.

In the result, the court *a quo* dismissed the application.

Disgruntled by the findings of the court *a quo*, the appellants filed the present appeal on the following grounds:

GROUNDS OF APPEAL

"1. The court *a quo* erred in abstaining from deciding the question of whether a part of the order in HC 9207/14 contravened the law; and, in so doing, it upheld a patently illegal order.

2. The court *a quo* erred in failing to find that by agreeing to compensation and transfer of an un-subdivided piece of land before regularization, the parties were laboring under a common mistake.

3. The court *a quo* grossly misdirected itself in finding, contrary to the evidence and submissions tendered, that;

    a. Both parties had defaulted in paying the requisite fees to facilitate the process of regularization.

    b. Appellants had approached the court in HC 9207/14 under the guise of registering the whole of the 2015 deed of settlement albeit severing the provisions of the 2015 Deed of Settlement;

    c. All provisions of the 2015 Deed of Settlement should have been presented for registration as a court order;

    d. The US$39 440 paid by first respondent was still with Appellants."

SUBMISSIONS BEFORE THIS COURT

Counsel, for the appellants, argued as follows. The court *a quo* erred in holding that there was no common mistake between the parties to be corrected in terms of r 449 (1) (c). The parties were in agreement at all times that they could not enter into an agreement for subdivision of land without first obtaining a subdivision permit first issued in terms of s 40 of the Act. The order of the court *a quo* flowed from the deed of settlement of the parties which included a provision which contravened s 39 (1) of the Act. The provision was illegal and ought not to have been in the deed of settlement and in the order granted in case number HC 9207/14. The inclusion of the illegal provision in the order would therefore only have been a mistake common to the parties. Further, the question of the illegality of the said provision was argued by the parties in the court *a quo*. The court therefore erred in not dealing with that issue and resultantly upholding an illegal order. The appellants persisted with their submissions that the payment by

the first respondent was unlawful as it was made in compliance with an unlawful provision of the order.

Per contra, counsel for the first respondent, submitted as follows: There was no common mistake between the parties. Section 39 (1) of the Act presupposes that a party entering an agreement in which he/she is relinquishing ownership of a property has title in the property. The section was therefore not applicable on the basis that the appellants were not the registered owners of Stand 322. The order granted in case number HC 9207/14 was therefore lawful. The order gave him the option to pay compensation to avoid demolition of the improvements he had made. He made the payment in compliance with a lawful court order. The tender by the appellants was an attempt to frustrate the compensation process. The court *a quo* therefore correctly dismissed the application.

APPLYING THE LAW TO THE FACTS

The application *a quo* was made in terms of r 449 (1) (c) of the High Court Rules, 1971 which read:

> "**449. Correction, variation and rescission of judgments and orders**
>
> (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, **correct, rescind, or vary any judgment or order**—
>
> (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby,
> (b) In which there is an ambiguity or a patent error or omission, or
> (c) **That was granted as the result of a mistake common to the parties."** (own emphasis)

The appellants were seeking *a quo* the variation of the order granted in HC 9207/14 by the deletion of para 3 thereof. The above rule in clear and unambiguous terms allows a court

to "**correct, rescind, or vary any judgment or order"**. It would be competent for the appellants to seek a deletion of part of the order while the rest remained extant. The appellants were therefore required to satisfy the court that the parties were operating under a common mistake when the offending part of the order was granted. They submitted that the common mistake was the consensual inclusion of para 3 thereof which was illegal for the reason that it recognized a transaction proscribed by s 39 (1) of the Act.

The court *a quo* was therefore faced with a two-pronged question, firstly whether the inclusion of para 3 of the order in case number HC 9270/14 was a mistake. Secondly, whether that mistake was common to both parties. The court *a quo* however considered the second leg of the question first and found that, as the parties were at all times aware of what would be contained in the order, para 3 was therefore legal. The court *a quo* remarked at p 5 that:

> "In analysis, the court is being asked to rescind a portion of the judgment which is the alternative clause. **It is clear that in assessing both the facts and oral and written submissions of the parties the court is of the view that there was no error let alone a mistake common to the parties.** Tracing the history of the alternative order from the facts and submission made in this case reveals that it was a clause agreed to by the parties. Initially, the clause was the brain child of the applicants as evidenced by their summons, meant to be a penalty clause after they realized that the 2013 agreement lacked the same. It was later on out of lengthy discussions between the parties and their legal representatives agreed that both clauses the impugned clause and the 2013 agreement lacked the same. It was later on out of lengthy discussions between the parties and their legal representatives when it was then agreed that both clauses, the impugned clause and the 2013 provisions be juxtaposed and concretized into a mutual deed of settlement lodged with this court in 2015. It leaves no doubt that when the applicants sought the same order they now seek to rescind, they did deliberately exclude the clauses reflecting the true intentions of the parties in their draft order addressing the provisions of s 39 (1) of the Regional Town and County Planning Act [*Chapter 29:01*] and retained the now impugned clause cum alternative order." (own emphasis).

The court *a quo* therefore, contrary to the submissions by the appellants considered the import of s 39 (1) of the Act but did so without analyzing the section. There lies the misdirection of the court *a quo*. The correctness of the appellants' assertions did not lie with the question whether they knew that they were required to comply with s 39 (1) of the Act. It lay with the question whether it was lawful to transact contrary to s 39 (1) of the Act. The answer to the question is in the negative.

Section 39 (1) (c) reads as follows:

"39 (1) Subject to subsection (2), no person shall—
(a) Subdivide any property; or
(*b*) Enter into any agreement—
(i) For the change of ownership of any portion of a property; or
(ii) …
(iii) …
(iv) …
(*c*) Consolidate two or more properties into one property; except in accordance with a permit granted in terms of s forty.

It is common cause that the parties entered into an agreement wherein they agreed that the appellants would transfer 1972 m^2 of land out of 2100 m^2 to the first respondent in exchange for compensation in the sum of $39 400.00. The parties were further agreed that they were required at law to obtain a subdivision permit in order to realise their intentions. The effect of that agreement was that parties entered into an agreement for the sale of an unsub divided portion of a stand following which the appellants would be divested of their rights and interest in the portion. The agreement was clearly illegal and unenforceable at law. See *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000(2) ZLR 348 (SC) where it was stated in the headnote as follows:

> "Section 39 forbids an agreement for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."

It follows from the above that para 3 of the order in case number HC 9207/14 and the dismissal of the appellant's application *a quo* amount to an enforcement of the illegal contract. In the case of *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128 it was said:

> "The Court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. See *Matthews v Rabinowitz* 1948 (2) SALR 876 (W). In fact, the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties."

In *casu*, the court *a quo* had no jurisdiction to grant relief which enforced an illegal deed of settlement. No court should allow a judgment which enforces an illegality to stand.

The payment of the compensation by the first respondent was also ineffectual as it was based on a nullity. As stated in *McFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) nothing stands on nothing.

The appellants sought in the court *a quo* an order directing the third respondent to refund the amount deposited by the first respondent with it in United State dollars or its Zimbabwean dollars equivalent at the official bank rate prevailing on the date of payment. It is common cause that the amount was deposited in United States dollars. The amount ought to have been held by the third respondent in its trust account in the currency as at the date of deposit. The refund must therefore be in the currency as at the date of deposit. This Court is

empowered in terms of s 22 (1) (a) of the Supreme Court Act [*Chapter 7:13*] to give "such judgment as the case may require." The dictates of the case require that the relief sought be amended accordingly.

The appeal has merit and must succeed.

As a general rule, costs follow the result. There are no grounds for deviating from that rule.

DISPOSITION

It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

"(a) The application be and is hereby granted.

(b) The order of this court in case number HC 9270/14 handed down on 3 March 2016 be and is hereby amended by the deletion of paragraph 3 thereof.

(c) The first respondent shall provide the 3rd respondent with its banking details within seven (7) days of this order.

(d) The third respondent shall, within seven (7) days of receipt of the first respondent's banking details, transfer into the first respondent's nominated account the sum of US$39 440.

(e) There shall be no order as to costs."

MATHONSI JA : I agree

MWAYERA JA : I agree

Ruzvidzo & Mahlangu Attorneys, appellant's legal practitioners

Tanyanyiwa & Associates, first respondent's legal practitioners